THAWING A FROZEN CONFLICT

The Separatist Crisis in Moldova
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TWO OUTSTANDING LAW STUDENTS HAVE BEEN AWARDED THURGOOD Marshall Fellowships for the 2006-2007 academic year. The program provides two exceptional minority students from New York area law schools the opportunity to work with the Association to advance the goals of civil rights and equal justice. Fellowships have been awarded to LaTanya Harry of Rutgers University School of Law and Klara Ng of Brooklyn Law School.

Ms. Harry will assist the Association’s Civil Rights Committee and Ms. Ng will work with the City Bar Justice Center.

The fellowships are funded by the Orison S. Marden Lecture Fund. Fellows were nominated by their schools and selected by the Association’s Committee on the Thurgood Marshall Fellowship Program, chaired by Ira M. Feinberg.

THE ANNUAL PRESENTATION OF THE HENRY L. STIMSON MEDAL TO outstanding Assistant United States Attorneys in the Southern District and in the Eastern District of New York, was held on June 6 at the Association. Mark Hellerer, Chair, Committee on the the Stimson Medal, presented the medals.

This year’s recipients are: John M. McEnany (Criminal Division) and Andrew W. Schilling (Civil Division) of the Southern District, and Mark E. Feldman (Criminal Division) and Richard K. Hayes (Civil Division) of the Eastern District.

The Stimson Medal, made possible by the firm of Pillsbury Winthrop Shaw Pittman LLP, honors Mr. Stimson, who served as United States Attorney for the Southern District from 1906-1909 during a career of distinguished public service.

The awards are sponsored by the Committee on the Stimson Medal and the Committee on Federal Courts (Molly S. Boast, Chair). Pillsbury Winthrop Shaw Pittman LLP co-sponsored the event.
THE ANNUAL MUNICIPAL AFFAIRS AWARDS, GIVEN TO OUTSTANDING Assistant Corporation Counsels, were presented June 27 at the Association. This year’s recipients and their bureaus are: Carlos Cruz-Abrams, legal Counsel; Krishna Jayaram, Economic Development; Lavanya Pisupati, Torts, Bronx; Stephanie Schwartz, Family Court, Queens; and Tracy Triplett, Environmental Law.

The awards are sponsored by the Committee on New York City Affairs (Peter Kiernan, Chair).

THE SIXTEENTH ANNUAL LEGAL SERVICES AWARDS WERE PRESENTED to honor attorneys and nonlawyers who provide outstanding civil legal assistance to New York’s poor. Hon. Victor Marrero, United States District Judge, Southern District of New York, presented the awards, May 16, at the Association.

This year’s recipients are: Tara Foster, Senior Attorney, Education Rights Project, Queens Legal Services; Andrew Goldberg, Supervising Attorney, MFY Legal Services, Inc.; Joyce Heller, Director of Government Benefits Unit & New Initiatives, South Brooklyn Legal Services, Inc.; Cary LaCheen, Senior Staff Attorney, Welfare Law Center; and Ellen Friedland, Accredited Representative, Safe Horizon Immigration Law Project.

The awards are administered by the Special Committee on the Legal Services Awards, chaired by James H. R. Windels, and sponsored by the Committee on Pro Bono and Legal Services, chaired by William T. Russell, Jr. The awards have been endowed by a generous contribution from the Horace W. Goldsmith Foundation.

THE ANNUAL KATHRYN A. MCDONALD AWARD HONORING JUDGES OF the Family Court and the vital services of those who work in the Family Court in New York City were presented May 8 at the Association.

Hon. Judith S. Kaye, Chief Judge, New York State Court Of Appeals, presented this year’s award to: Frand D. Argano, Former First Deputy Chief Clerk, NYC Family Court, and Gary S. Solomon, Director of Legal Support, Juvenile Rights Division, The Legal Aid Society.

The Kathryn A. McDonald Award is named in honor of the former
Presiding Judge of the New York City Family Court, and is sponsored by the Association’s Committees on Children and the Law, Family Court and Family Law, and Juvenile Justice and its Council on Children.

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THE NEW YORK CITY BAR’S ENHANCED DIVERSITY COMMITTEE PRESENTED the inaugural Diversity Champion Award at the Third Annual Diversity Conference, May 16, at the Association. The award recognizes the critical role individuals have played in initiating and sustaining change within their organizations and the overall New York legal community.

The 2006 Diversity Champion Award winners are: Hon. Daniel M. Donovan, Jr., District Attorney, Richmond County; William Malpica, Associate, Mayer, Brown, Rowe & Maw LLP; and Elizabeth D. Moore, Partner, Nixon Peabody LLP.

The Award is sponsored by the Committee to Enhance Diversity in the Profession (Susan Kohlmann and Elipidio Villarreal, co-chairs.)

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THE FOLLOWING ARE THE NEWLY APPOINTED CHAIRS OF ASSOCIATION Committees for the 2006-07 year:

Ronald S. Goldbrenner (Administrative Law); Raymond J. Burke, Jr. (Admiralty); Daniel M. Weitz (Alternative Dispute Resolution); Nancy Nelson (Arbitration); Kathleen A. Scott (Banking Law); Joyce Raskin (Bioethical Issues); Tanya Gill (Career Advancement and Management); John William Spollen (Citybar Public Service Network); Valerie L. Fitch (CLE); Willa I. Lewis (Condemnation & Tax Certiorari); Frederick Cohen (Construction Law); Robert A. Martin (Consumer Affairs); Daniel James Horwitz (Criminal Advocacy); Robert S. Dean (Criminal Justice Operations & Budget); Daniel R. Alonso (Criminal Justice); Noah Ben Potter (Drugs & the Law); Paul T. O’Neill (Education & the Law); Marjorie M. Glover (Employee Benefits); Edna Rubin Sussman (Energy); Peter William Dizozza (Entertainment); Joan Morgan McGivern (Entertainment Law); Karen Fisher Gutheil (Family Court & Family Law); Ona T. Wang (Federal Legislation); Norman D. Slonaker (Financial Reporting); Michael S. Sackheim (Futures Regulation); Miriam M. Breier (Housing Court); Jaya K. Madhavan (Housing Court Public Service Projects); Linda Marie Kenepaske (Immigration & Nationality Law); Michael H. Byowitz (International Affairs); John Rousakis (International Environmental Law); Mark R. Shulman (International Human
Rights); Philip L. Kirstein (Investment Management Regulation); Debra L. Raskin (Labor & Employment Law); Carol L. Ziegler (Legal Education and Admission to the Bar); John P. Herrion (Legal Issues Affecting People with Disabilities); Jane Ellen Hoffman (Legal Issues Pertaining to Animals); Thomas P. Valet (Medical Malpractice); Michael W. Oshima (Minorities in the Profession); Babcock MacLean (Personal Income Taxation); George J. Mazin (Private Investment Funds); Madeleine Schachter (Pro Bono and Legal Services); Stephanie R. Mann (Science & Law); Adele Hogan (Securities Regulation); Christina E. Daigneault (State Affairs); Eileen E. Huggard (Telecommunications Law); Amanda C. Samuel (Trademarks & Unfair Competition); Andrew W. Hayes (Transportation); David W. Dykhouse (Uniform State Laws); Christopher J. Borgen (United Nations); Pui C. Cheng (Women in the Courts); and Harry A. Valetk (Young Lawyers).
Recent Committee Reports

African Affairs
Letter to the Prime Minister of Ethiopia expressing concern over the arrest and detention of human rights attorney Daniel Bekele. The letter argues that the arrest and detention of Mr. Bekele may constitute a grave violation of his right to a fair trial, and that Ethiopia may be in violation of its international legal commitments.

Alternative Dispute Resolution
Report on mediator quality in New York State. The report examines the current systems now in place that address the mediator quality issue in New York and recommends that membership organizations for New York State mediators develop voluntary accreditation systems and that a registration system be established for the filing of publicly accessible statements of qualifications by mediators, on a mandatory basis for compensated mediators and optionally for others.

Banking Law
Letter to the Federal Reserve Board urging that it finish the process of issuing a final version of its proposed interpretation and supervisory guidance on the Anti-Tying Restrictions of Section 106 of the Bank Holding Company Act Amendments of 1970. The letter argues that an interpretation that brings Section 106 in line with the general federal antitrust laws is to be preferred over an approach of implementing a number of exemptions, and that there is substantial legal support that proves that such an interpretation is required and permissible.

Bioethical Issues/Health Law
Report supporting A.5406-A which would amend the Public Health Law to establish procedures for selecting and empowering a surrogate to make health care decisions for persons who lack capacity to do so on their own behalf and who have not otherwise appointed an agent to make such decisions under Article 29-C of the Public Health Law. The report argues that the proposed legislation is greatly needed as it would establish a sys-
tem sensitive to the clinical reality in which decisions are being made; balance the vesting of decision making authority with several safeguard provisions; is a patient centered bill which will provide for the best interests of the patient; and blocks the intervention of third parties unknown to the patient in such decisions.

Civil Rights
Report supporting the Voting Rights Act Reauthorization and Amendments Act of 2006 (VRARA) (H.R.9/S.2703). The report supports the VRARA as its provisions would: (1) renew the preclearance requirements; (2) assure minorities the right to elect candidates of their choice and to prohibit any voting changes that deny the right to vote on the basis of race or color; (3) renew the Act’s language assistance requirements; (4) facilitate the use of federal observers; and (5) allow recovery of expert fees by successful plaintiffs in voting rights suits.


Amicus Brief: ACLU v. National Security Agency (NSA) filed in the US District Court, Eastern District of Michigan. The briefs contend that NSA’s admitted practice of wiretapping privileged communications in the name of national security—without a court warrant and pursuant to undisclosed standards that are never subjected to judicial scrutiny—chills a broad spectrum of constitutionally-protected speech, including communications between attorneys and their clients. The brief argues that the NSA Surveillance Program should be enjoined because it fails to comply with Foreign Intelligence Surveillance Act of 1978 (FISA) which is the exclusive means by which electronic surveillance may be conducted within the United States, and does not comply with the Fourth and First Amendments.

Civil Rights/Election Law
Legal Issues Affecting People With Disabilities Statement regarding New York’s failure to comply with sections 301 and 303(a) of the Help America Vote Act (HAVA), which call for the creation of a computerized statewide voter registration list and the development of and implementation of voting systems standards including standards for accessibility for voters with disabilities, and the Justice Department’s pending lawsuit against the state. The statement notes specific concerns with the systems under consideration by the State Board of Elections for interim implementation.
in 2006 as the “accessible” option for voters with disabilities at polling places and urges that any interim system not create impediments to voters with particular disabilities, preserve the anonymity of voters, and that any votes cast on such system be treated equally with all other votes. In addition, the statement urges the State of New York and the Justice Department to resolve this lawsuit in a way that provides a statewide registration list that avoids fraud but preserves the right of all eligible voters to vote, allows for adequate public input, preserves the federal money provided for HAVA implementation, and ensures access to the voting systems by all voters, including those with disabilities, so that the important goals of HAVA are achieved.

Drugs and the Law
Letter to the Drug Enforcement Administration (DEA) expressing support for the registration of a bulk manufacturer of marijuana as it is consistent with “the public interest” as that term is used in 21 USC 823(a) because (1) the statutory scheme established by Congress, in the Controlled Substances Act, contemplates that controlled substances may be, through research, shown to have medicinal uses and (2) such registration is necessary to break an impasse in the application of the regulatory system that thwarts the development of marijuana as a pharmacotherapy for various adverse medical conditions and potentially undermines public trust in the integrity of the government agencies entrusted with supervising the regulatory system.

Education and the Law
Amicus Brief: Bronx Household of Faith v. Board of Education of the City of New York filed in the US Court of Appeals for the Second Circuit. The brief argues that District Court’s decision should be reversed and that the Department of Education should be allowed to enforce Standard Operating Procedure Sec. 5.11 which precludes parties from conducting worship services in the New York City public schools.

Energy
Letter to Governor Pataki and legislative leaders expressing opposition to proposed amendments to the New York State Finance Law (S.6459-C/A.9559-B) which would subject funds generated through the Systems Benefit Charge Program and the Renewable Portfolio Standard to the annual state appropriations process. The proposed amendments, the letter argues, would undermine the New York State Energy Research and Development Authority’s
energy efficiency, energy conservation, energy management and renewable energy initiatives, and risk impairing New York’s favorable investment environment for energy efficiency and renewable energy projects.

Environmental Law/Land Use Planning and Zoning
Letter to the New York State Department of Environmental Conservation (NYSDEC) commenting on the recently proposed brownfield regulations. Although the proposed regulations will in fact clarify the State’s requirements under the current proliferation of remediation programs, and reduce confusion within the brownfield community, the letter urges that the proposed regulations should also promote consistency among NYSDEC regions, improve public awareness of what is required for each brownfield site’s cleanup and lower the transaction costs for both the agency and the user community.

European Affairs
Thawing a Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova. In May 2005 the City Bar sent a legal assessment team to the Republic of Moldova, including the breakaway region of Transnistria. The report, based on the team’s assessment, examines the key legal issues of this “frozen” conflict, and concludes that: effective control of the of the Transnistrian part of Moldova is that of a de facto regime and may be viewed as analogous to control by an occupying power; under the rules governing de facto regimes and the law of occupation, the privatization program can leave investors with no confidence that these transactions would be enforced if the Transnistria is reintegrated into Moldova; and Russia’s activities concerning the Transnistrian situation lead to credible claims of responsibility on the part of Russia for the continuing separatist crisis.

Family Court and Family Law
The Report on Family Court Services provides current information about the types of services provided in New York City’s family courthouses and how to access the assistance they offer. The report also includes a participant/observer study undertaken by law students which chronicles the students’ experiences during visits to each of the City’s family court courthouses.

Report supporting the passage of S.8096/A.10447 which would amend the Judiciary Law to allow for the assignment of counsel to the indigent by
Supreme Court in proceedings over which family court has a jurisdiction. This legislation would eliminate the current gap where an indigent person involved in a custody dispute in Family Court is entitled to court-appointed legal counsel, but not if the same dispute is in, or moved to, Supreme Court.

**Federal Courts**

A Guide to Mediation in the Southern and Eastern Districts of New York. The Guide provides best practices tips to attorneys engaged in mediation or alternative dispute resolution; highlights the local rules in each District; and provides relevant sources and contact information.

Letter to the Administrative Office of the United States Courts discussing whether or not problems in practice exist under Federal Rule of Civil Procedure 30(b)(6) that would best be addressed through an amendment to the Rule or whether continued development of case law would suffice. The letter argues that Rule 30(b)(6) serves an important purpose in streamlining the pretrial search for information held by organizational litigants and that any potential for abuse is suitably managed by the district court’s supervision of the process. In addition, existing case law surrounding the Rule provides sufficient guidance about which practices are unlikely to meet with the court approval in the event disputes arise. The letter concludes that any proposed amendment would not improve the effectiveness of Rule 30(b)(6) or provide any greater protection against attempted abuse.

**Government Ethics**

A Proposal to Apply Ethics Agreements on the State and Local Government Level. The report concludes that ethics agreements, an oral or written promise by a reporting individual, typically a candidate or nominee for public office or employment, to undertake specific actions in order to remedy an actual or apparent conflict of interest, could add significant value to state and local government appointment processes and should be implemented.

**Immigration and Nationality Law**

Letter to the US Citizenship and Immigration Services commenting on the proposed changes to the affirmation asylum application procedures. The changes, the letter argues, would have a negative impact on asylum seekers, the asylum adjudication process and the over-burdened immigra-
tion court system. The letter further notes that the changes are based on scant or no research or statistical support and fail to adequately analyze the consequences of such changes.

Letter to Congress expressing opposition to legislation currently under consideration by the Senate Judiciary Committee, S.2611, which would negatively affect immigrant communities in the United States in several significant regards including, criminalizing millions of non-citizens solely on the basis of their immigration status; placing judicial review of all federal immigration cases before the Federal Circuit Court of Appeals which traditionally handles patent cases and is neither equipped nor experienced in the area of immigration law; implementing new penalties that will make it more difficult for deserving asylum seekers to obtain the protection they deserve under the law; and putting into place a hastily-conceived and flawed guest worker program without adequate input from immigrant representatives or the business community.

Information Technology Law
Letter to the Free Software Foundation urging that, given the increased use of open software in business and commercial use, the rules governing such software should be clarified. The letter provides comments as to how best to amend the current version of the General Public License to make it both clear and fair to both licensors and licensees.

International Human Rights
Letter to the President of Colombia expressing concern about recent statements he made which could be perceived as threatening and which are inconsistent with international standards that safeguard the independence of lawyers and judges.

Insurance Law
Letter to the New York State Legislature commenting on S.8166, The Viatical Settlements Act (the “Bill”) which would amend the New York Insurance Law to expand the current regulation of sales of life insurance policies insuring terminally or critically ill insureds prior to death to cover “life settlements”, which are sales of life insurance policies insuring persons who are not critically ill. The letter supports the consumer protections which the Bill provides. However, there are a number of critical provisions in the bill regarding restrictions on viators’ rights to transfer their policies, which the Committee finds troublesome and should be modified.
Judicial Selection, Task Force
Amicus Brief: *Torres v. New York State Board of Elections* (US Court of Appeals for the Second Circuit). The brief argues that the district court did not abuse its discretion in enjoining operation of New York’s judicial nominating convention system and ordering direct primary elections as a temporary remedy. The brief goes on to urge that the district court and the legislature should consider thoroughly all available options, including improving the judicial convention system and, in what the City Bar would consider a more preferable option, moving to a merit-based appointment system.

Legal Issues Affecting People with Disabilities
Report supporting S.7469/A.10071 (“P.J.’s law”) which would require schoolbus drivers and attendants transporting children with disabilities to complete training at least twice a year on the special needs of any students for which they may be responsible.

Legal Issues Pertaining to Animals
Report supporting S.663/A.9266 which would amend the Penal Law to provide that a person is guilty of grand larceny in the 4th degree (a class E felony) when he/she steals property and when the property, regardless of its value, consists of a pet which is taken from: the person of the owner or the lawful custodian of the pet; the dwelling of the owner or lawful custodian of the pet; or any enclosure of yard within 500 feet of such dwelling.

Report supporting S.7691/A.10767 which would amend the Family Court Act and Criminal Procedure Law, in relation to animals being protected under the provisions of a court order of protection. The proposed legislation would amend current law to provide that a court order of protection may require that the respondent refrain from attacking or otherwise abusing or threatening abuse to any animal owned, possessed, leased, kept or held by the petitioner or a minor child residing in the household.

Mental Health Law
Report supporting the passage of “The Children’s Mental Health Act of 2006” (A.9649/S.6672), which would provide for the establishment of a children’s mental health plan; and to amend the education law to require the incorporation of social and emotional development standards in the development of elementary and secondary school educational guidelines. The report also offers several suggestions which would make the Act more effective.
Letter expressing support of S.2207-C which would address the inhumane and unjust treatment of prisoners with psychiatric disabilities by outlawing their placement into solitary confinement, by creating alternative therapeutic housing areas for them and by providing training for correctional staff who work in mental health housing areas.

Letter to the New York State Office of Mental Health expressing concerns regarding Part 550 of 14 NYCRR, the Fingerprinting Regulations. The purpose of the existing regulations is to allow providers of direct mental health services to investigate the criminal history of prospective employees and volunteers. However, the letter argues these rules are being applied in an over-inclusive manner and that individuals are being disqualified even though their past criminal offense does not fall within the law’s sphere of disqualifying crimes. The letter recommends a set of adjustments regarding the promulgation and implementation of the Fingerprinting Regulations to assure that qualified “professionals, including peer specialists” are not unnecessarily prevented from joining the mental health workforce.

Mergers Acquisitions and Corporate Control Contests

Letter to the SEC commenting on the proposal regarding disclosure of compensation of directors serving on special committees of boards of directors. The letter urges that the SEC clarify the rule and specifically exempt such compensation arrangements from the disclosure requirement unless and until the public disclosure would be required in any related filing or in the first periodic report filed by the registrant post-announcement.

Letter to the SEC commenting on the proposed NASD Rule 2290 Regarding Fairness Opinions in Corporate Control Transactions (May 2006). In follow-up to a letter sent earlier to the SEC, the Committee, though generally supportive of the proposed rule, reiterates its concern with proposed Rule 2290(b)(3), noting that it is inappropriate and should be removed or at least recast more narrowly.

Military Affairs and Justice

Letter to Congress urging opposition to the Administration’s issuance of a revised Army Field Manual on Intelligence Interrogation as it would undercut the McCain Amendment by rewriting the document which the amendment sought to preserve as the standard for prisoner treatment.

New York City Affairs

Testimony delivered before the New York City Council supporting Intro.
260 which would amend New York City Law to enhance the legal protections for persons that testify before hearings of the Council.

Private Investment Funds
Letter to Governor Pataki expressing opposition to S.6831/A.10399 which would amend the proposed sanction for failure to comply with the publication requirements under the New York Limited Liability Company Law and the Partnership Law, by imposing joint and several liability for the owners of limited liability companies or limited partnerships.

Professional Responsibility

Science and Law
Letter to Congress expressing support for the passage of H.R.1227, the Genetic Information Nondiscrimination Act of 2005. The bill provides national uniform protection that would allow individuals to take advantage of genetic testing, research and their benefits without fear of compromising or being denied health care coverage or employment opportunities.

Securities Regulation
Letter to the SEC commenting on its proposed amendments to the disclosure requirements for executive and director compensation, related party transactions, director independence and other corporate governance matters and security ownership of officers and directors.

Letter to the SEC commenting on its proposed recommendations for changes in the current regulatory system for smaller companies under the securities laws of the United States.

Senior Lawyers
Report on retired lawyers and pro bono activities which recommends that law firms adopt the practice of utilizing senior lawyers, who would otherwise be subject to mandatory retirement, by offering them major roles in their firm’s pro bono practices, in return for the lawyers commitment to devote all or substantially all of their working time to such pro bono efforts.
State Courts of Superior Jurisdiction
Letter to Hon. Jonathan Lippman, Chief Administrative Judge of the Courts, expressing concerns about Section 202.8(h) of the Uniform Civil Rules for the Supreme and County Courts which mandates that lawyers remind judges in writing when a submitted motion has not been decided within 60 days (“Rule 23”).

Taxation of Business Entities
Letter to the IRS offering comments on the application of the proposed regulations under Internal Revenue Code Section 409A, service arrangements between partnerships and partners

Tort Litigation
Report supporting S. 5555/A.8114 which would amend the Civil Practice Law and Rules to exempt all settlements from collateral source offsets in tort claims for personal injury, property damage or wrongful death, and in related subrogation claims.

Copies of the above reports are available to members at the Association’s website, www.nycbar.org, by calling (212) 382-6624, or by e-mail, at gbrown@nycbar.org.
Farewell Address

Annual Meeting
of the Association

Bettina B. Plevan

This address was delivered at the Annual Meeting of the Association, held on May 23, 2006.

It has been a privilege to serve as President of this Association for the last two years and I know, like others before me, that I am going to miss the excitement and stimulation that I have experienced every day. The New York City Bar plays an important role in the city, the state, the country and increasingly in the world. While the President has the platform and access to express and shape opinions in many situations, it is the membership of the Association, in particular our committees and their chairs, who make the greatest contribution. It is their work on behalf of the Association that makes this a great institution and enables us to have an impact on elected and appointed government officials, regulators and the courts. So, my greatest thanks tonight go to the members, not only for giving me this wonderful opportunity to serve, but also for the spectacular work you have done during the last two years.

We undertook many institutional initiatives in the past two years. My right hand in those endeavors was our Executive Director, Barbara Opotowsky. She is deserving of enormous praise and thanks from me and all of you. She is always cheerful, always willing to take on a challenge and enthusiastic about almost every idea I had. She keeps the place run-
ning in an effortless way and somehow finds time to maintain a leadership role in our diversity initiatives, the CBJC and many other projects. We started with a rebranding of the City Bar Justice Center, then changed the logo and public name of the Association, changed the format of The 44th Street Notes and ended with the CBJC gala. Barbara did not hesitate to throw herself into each one of these projects and bring the ideas to reality. And now how about that espresso bar, Barbara?

In this organization the President actually has two right hands. The second is the very steady hand of Alan Rothstein, whose in-depth knowledge on hundreds of subject areas is awesome. He helped the committees realize their efforts and counseled me daily on how best to proceed. He personally made a significant contribution to our reports relating to the war on terrorism. When combined with his even temperament, there is no better person to have by your side.

I also want to thank the other senior members of the staff who have served with dedication, loyalty and enthusiasm throughout my tenure, including our CFO—Carol Rosenbaum; our Director of Communications—Jayne Biegelsen; our Director of Marketing and Membership—Adele Lemlek; Nick Marricco—Head of Catering; our Director of the Office of Diversity—Meredith Moore; our CLE Director—Michelle Schwartz Clement; Al Charne—Director of our Legal Referral Service; Richard Tuske, Director of our Library; and Maria Imperial, Executive Director of the City Bar Justice Center.

Other key members of the team here are the chairs of the Executive Committee and I was fortunate to have two fantastic chairs during my presidency—Barry Kamins, our next President, and Bill Kuntz. Both were easy to work with, helpful and creative, as well as supportive. A President could not ask for anything more.

I have also had the benefit of working with James Lipscomb as our treasurer for most of the last two years. His pragmatic, careful and thoughtful advice has been invaluable. We are fortunate that he will serve at least one more year.

I also want to thank my family, especially those that suffered the most by my being totally occupied for the last two years—my mother and my husband, both of whom remain enthusiastic about our work here, as have my sons, Bill, Jeff, daughter-in-law Sara, and grandson Ariel.

Let me turn now to the work of the Association, in particular in the areas where I think we made the greatest contribution to the public good in the past year. Examples of our contributions are numerous and we don’t have time for me to recount them all this evening, but I would like to mention a representative group.
First, enhancement of Diversity of the Profession continued to be an important priority and with your help we have devoted resources and time to this challenge. I am very proud of what we as an Association have done, what our staff has accomplished and what our committees have initiated to focus attention and offer help to employers, to individual lawyers, to bar groups and special interest groups who are looking for help. We now have 117 signatories to our statement of diversity principles, up from about 85 in May 2004. I believe now our diversity initiatives are so institutionalized in our office of diversity and the work of our committees is so intense in this area that we will continue to be in the forefront of bar associations around the country. This year, for example, the Los Angeles County Bar Association, giving us full credit for our initiative, adopted much the same approach that we did in our diversity principles three years ago. The saying “imitation is the sincerest form of flattery” certainly comes to mind. Nothing could be more flattering than this new initiative by the Los Angeles County Bar. We hope that others copy us too and share their experiences with us.

This year our committee on Women in the Profession chaired by Carrie Cohen has been in overdrive with initiatives that will keep us moving in the right direction for years to come, including a wonderful celebration of pioneering women (including our Chief Judge); roundtable mentoring discussions; a survey to be completed soon on parental leave and part-time work policies; an impressive document of best practices for the retention of women lawyers and a sell-out program on rainmaking for women lawyers.

Some of the most difficult and most important work we have done in the past year has been through two task forces I appointed to undertake some herculean projects. The Task Force on the Role of Lawyers in Corporate Governance, chaired by Tom Moreland, with a stellar group of experienced lawyers from all corners of the profession has worked unbelievably hard and very thoughtfully for over a year. They have developed recommendations that were vetted at a recent program and are now under final consideration, to be followed by a report, addressing the role that lawyers should play when corporate management strays, including best practices guidelines for lawyers, law firms and corporate legal departments to follow. When completed, I believe we will be the only bar association in the post-Enron era to grapple with these very difficult issues in a meaningful way.

A new Task Force on Judicial Selection, the second one to be chaired by Bob Joffe, is helping the Association articulate its position on judicial
selection in the wake of many recent developments, in particular the decision by Judge Gleeson in the Lopez/Torres case, invalidating judicial conventions, including filing of an amicus brief just last week. Here too, we are an important voice and making an enormous contribution to judicial reform in an effort that will continue under Barry’s leadership.

This year we also continued to focus on the need to preserve individual rights and the rule of law in the age of terrorism. Many of our committees, in particular, the Civil Rights Committee chaired by Sidney Rosdeitcher, the International Law Committee chaired by Scott Horton and International Human Rights chaired by Martin Flaherty have refocused their energies from their traditional agendas to ensure that the Association’s voice was heard in Washington and elsewhere in opposition to legislation restricting habeas corpus, permitting unauthorized surveillance, and in other ways restricting our civil liberties. They have been ably assisted by the Criminal Law Committee chaired by Margie Peerce, the Committee on Military Law and Justice chaired by Michael Mernin, and the Federal Courts Committee chaired by Molly Boast.

Other important work was done this past year by our Immigration Committee Chaired by Claudia Slovinsky, including assisting the second circuit with new procedures for handling the unbelievable workload of that court due to the onslaught of immigration appeals and expressing our opinion in Washington on proposed immigration legislation with detailed comment letters.

In the international arena, another important effort was our mission to Transnistria, a section of Moldova, near the Ukraine. The mission was conceived and organized by Mark Meyer, chair of the Committee on European affairs, who led the mission. A report of over 100 pages addressing the frozen states conflict issue, the role of the Russian government and separatism has just been released and has already generated praise from many experts in the field.

Finally, I want to speak about our work on access to justice issues and, in particular, our initiatives in the area of pro bono legal services. As I am sure many of you know all too well, at least 80 percent of the civil legal needs of the poor in this City are not met. I would like to take this opportunity to encourage all of you once again to support increased funding of legal services for the poor. This year, thanks to the Committee on Pro Bono and Legal Services chaired by Bill Russell, we launched a new initiative through the statement of pro bono principles approved by our Executive Committee and signed now by over 30 law firms. We are pleased to have made that progress. The principles provide a road-map for any law
firm or corporate legal department that wants to enhance its pro bono initiatives. But we have more work to do and we need to reach out to more firms to join this group that is committed not only to 50 hours of pro bono work per lawyer/per year, but to many other important programmatic activities designed to encourage pro bono legal service.

I also want to thank the committees that have participated in pro bono efforts, in particular, the Bankruptcy and Corporate Reorganization Committee that worked very hard over the last two years under two of its chairs, Mark Abrams and Alan Kornberg, to develop a Pro Bono Project with the City Bar Justice Center and in conjunction with the bankruptcy court. Our Project on the Homeless chaired by Catherine O’Hagen Wolfe has also worked hard for many years to encourage pro bono efforts for the homeless.

We also launched some collaborative efforts between the City Bar Justice Center and our committees in the wake of the hurricanes in the gulf region. We wanted to help and, largely due to the success of programs initiated here after 9/11, we were able to do so quickly and effectively.

In closing, I want to express my deepest thanks and affection to my colleagues at Proskauer who gave me the wonderful gift of their complete support over the last two years. Our firm has a long tradition of public service in the bar and other community organizations. I am enormously proud of that tradition and the culture we have fostered at our firm and hope that it will continue for many years to come.

And now it is my pleasure to introduce the next President, Barry Kamins. Barry has extensive experience in leadership roles as the President of the Brooklyn Bar Association, as Chair of the City Bar’s Judiciary Committee and as a member and then Chair of our Executive Committee. I have been fortunate to work with Barry for the last two years, and I know he will be a great President. But, of course, he can’t start tomorrow unless he can get in the office, so as my last act as President I present him with the key and let me be the first to congratulate him.
Inaugural Address

Annual Meeting of the Association

Barry M. Kamins

This address was delivered at the Annual Meeting of the Association, held on May 23, 2006.

Thank you Betsy for that gracious introduction and thank you for your inspiring leadership over the past two years. The 22,000 members of the Association owe you a tremendous debt for the goals you have achieved and for preserving the core mission of this great Bar Association—excellence in the service of the public and the profession.

Before I outline some of the goals I have set for my Presidency, I want to thank all the members of the judiciary who are in attendance tonight including numerous appellate judges, administrative and supervising judges as well as a number of New York City Commissioners, and Deputy Mayors, dean of laws schools and presidents of various bar groups. Forgive me for not personally acknowledging each and every one of you but I learned a long time ago that once you go down that path you inadvertently omit someone. Please know, however, that I am honored by your presence and sincerely appreciate your support.

I do want to acknowledge the presence of the Chief Judge of the State of New York, Hon. Judith Kaye whose contribution to our court system and profession have been immeasurable. I also want to acknowledge:
In setting an agenda one cannot help but be influenced, to some extent by the rich and impressive history of this unique Association which was formed in 1870 in large measure to confront a crisis of confidence in the judiciary. Two years earlier in 1868, the New York Times wrote an editorial in which the paper called upon the bar for help. The Times said: “If it be the guilty silence of the lawyers which have brought us to our present situation, it is their reawakened public spirit which must help us back to a better state of things. The bar must lead the way.”

The bar must lead the way. Over the next 136 years the Association of the Bar has led the way by speaking out on issues that others were too intimidated to address and by taking positions that have led to significant reform. No President could hope to assume leadership without making a commitment to continue the efforts made in certain signature areas of the Association. I pledge to continue the efforts made by Betsy and other past presidents to enhance diversity in our profession, to provide legal services in this city for those who do not have adequate resources to obtain them, and to pursue pro bono initiatives.

And I will continue to have this Association speak out about civil rights that may be threatened by policies of our Government that do not meet constitutional standards. We must continue to advocate for a proper balance between issues of national security and civil rights. In the end the rule of law must prevail. Whether the issue is one of surveillance by wiretapping without a warrant or court-stripping by legislation, our Association will forcefully remind others of what John Adams said over 200 years ago, “we are a Government of laws and not of men.”
And as we go forward in the next two years, I have set some new goals for this Association that are consistent with our overall mission: improving the quality, delivery and access to justice and adhering to our responsibilities to our clients.

Having spent my career as both a prosecutor and criminal defense attorney, I learned very quickly that a criminal conviction has direct and transparent consequences as well as indirect or collateral consequences. The court system imposes the direct consequences by sentencing defendants to periods of incarceration, periods of probation, fines, etc. However, it is the collateral and often hidden consequences that can be more devastating to a defendant and his or her family.

It is surprising to learn that many members of our legal community, including some judges, prosecutors and even defense attorneys do not fully appreciate the possible repercussions of a conviction for a felony, misdemeanor or even a non-criminal offense. Such convictions can have consequences in any of the following areas:

- Immigration
- Employment
- Housing (including private, public and federally-subsidized housing)
- Public benefits and welfare
- Family law (including custody, visitation and family offense proceedings)
- Driver’s licenses
- Forfeitures
- Voting and jury service
- Federal student loans
- Military service
- Government contracting
- Insurance coverage
- International travel

The problem can be more acute in New York City where a high percentage of defendants plead guilty at arraignment and defense counsel spend relatively little time with their clients before a plea is entered.

It is ironic that it is when dealing with some of the most benign offenses that the consequences can be the most devastating—for example,
two convictions for turnstile jumping (theft of services) make a lawful permanent resident deportable. A possession of one marijuana cigarette will cut off federal student loans for a year.

During my presidency, I pledge that the Association will use its resources, through our Justice Center, to accomplish a number of goals in this area. First, we can educate practitioners who lack sufficient knowledge and training in this area. Before an attorney has a client plead guilty, the attorney must be able to advise that client about the hidden consequences of that conviction. An attorney cannot give that advice if he or she does not know what the consequences are. After understanding the consequences, the client may still wish to plead guilty but at least it will truly be an informed and knowing plea.

Second, the Association can serve as a resource center for individuals who need to locate the appropriate agency that can deal with the adverse consequences of a conviction. In this way, I hope to build on the effort begun by Chief Judge Kaye last year when she organized the Partners in Justice Colloquium that brought judges, practitioners and academics to a forum at the Judicial Institute to begin a dialogue on this topic. Through her efforts, a website was subsequently developed by Professor Conrad Johnson and his students at a Columbia Law School clinic. The website provides an invaluable and much needed on-line resource.

Moving on to other priorities, the Association cannot be effective unless we work with the judiciary to improve the quality of justice. I pledge to advocate for a strong and independent judiciary and to address unwarranted attacks on jurists who are then prevented from publicly responding to those accusations. I will also have the Association speak out on at least one issue that renders the judiciary a less than equal branch of government. That issue is mandatory retirement. The executive and legislative branches of our state government are not saddled with term limits. And yet, there is a mandatory retirement age of 70 for judges. While some of our judges can be certified for three additional periods of two years each, why is there any mandatory age limitation at all? Term limits were imposed almost 50 years ago by our state constitution when life expectancy was lower and society’s view on retirement was vastly different. And today, citizens above the age of 76 are qualified to serve as jurors in trials before the New York State Supreme Court, but judges above the age of 76 are not qualified to preside where such jurors are seated. Something is wrong with that picture.

I will have the Association use its resources to seek reform. Reform could be a legislative amendment to expand the category of judges eli-
gible for certification. Reform could be a constitutional amendment to permit judges to serve beyond 70 years of age, or with certification, beyond 76 years of age. Reform could be an amendment to remove any mandatory age limit. The point is, reform is needed. We will seek it.

Of course the hot topic relating to the judiciary is not age limits, but the manner in which judges are selected in New York following Judge Gleason’s decision in the Eastern District of New York. As Betsy mentioned, our Task Force is busy working on its recommendations. The issue is quite complex because each solution to the problem has its own merits and drawbacks. Our position in favor of merit selection is clear. However, in lieu of that goal which cannot be achieved without a constitutional amendment, the Task Force will focus on other alternatives; legislation requiring candidates to run in open primaries; or legislation revising the judicial convention process to remedy the constitutional issues highlighted by Judge Gleason’s decision. Our goal is to recommend a system that provides a higher caliber bench independent of that influence.

The Association also needs to address a growing concern about the parole system in New York State. The issue has been raised by an increasing number of court decisions around the state, a series of articles in the New York Law Journal, proposed legislation by three members of the Assembly and Senate and a class action lawsuit in the Southern District of New York. With increased frequency, courts have found that the Parole Board has not applied appropriate statutory criteria to release inmates.

Thirteen years ago the Parole Board released 62 percent of inmates who appeared before it. Last year the Board released only 38 percent. I will ask one of our criminal justice Committees to review this subject and make recommendations.

Another priority is the status of our profession and professionalism. Part of my practice involves representing attorneys who are accused of unprofessional conduct and violation of our disciplinary rules. I have seen an alarming increase in the number of younger attorneys who are receiving complaints from Grievance Committees. And yet the two law schools at which I teach as well as all other in New York provide courses in professional responsibility that educate students about the ethical pitfalls in the practice of law.

And there is the conundrum. There seems to be a disconnect between what is taught in law school and the predicament young attorneys find themselves in soon after they are admitted to practice. We must find a better way to reach students while in school in order to reduce the likelihood that they will face grievances as young attorneys. There is some-
thing we are not doing and I will take this up with our Committees on Professional Discipline, Professional Responsibility and Professional and Judicial Ethics. At some point I hope to enter a dialogue with the Deans of our law schools.

On the issue of professional responsibility, I will also ask our Committees to review the lack of uniformity among the four departments in sanctions imposed by our eight State Grievance Committees and the manner in which they are imposed. The legal profession is the only profession in New York State that is not regulated uniformly throughout the state. And New York is the only state in the country in which attorneys are disciplined in a less than uniform manner. Our Grievance Committees do not use the same sanctions throughout the state and they also use sanctions with the same names but which are different in nature and effect. It has been argued that this creates an appearance of unfairness and disparate treatment of attorneys that does not serve to enhance the image of the disciplinary process.

One priority will focus on the role of young attorneys in the life of this Association. Quite often young attorneys feel removed from the mainstream of the Association and even though we have 160 Committees, it is often difficult for this group to feel involved and relevant. I want to try to change that. One goal is to create a program in which young attorneys can second seat experienced lawyers at trials and pre-trial proceedings. In addition, it is no secret that young men and women graduate with law school with substantial indebtedness. I want to explore the concept of a loan forgiveness program in which selected attorneys would be able to reduce their debts.

In moving forward over the next two years, I will tap into the energy of the engine that drives this Association—our 160 Committees. The men and women who serve on these Committees speak out on an extraordinary variety of issues that impact on the legal community and on the lives of New Yorkers. I have begun to read their reports and have been stunned by the clarity, intellect and depth with which these Committees speak. The reports they generate are not abstract documents that sit on a shelf. Committee reports are read carefully by governmental leaders and have had a direct impact on legislation that has been enacted in this city, in this state and even at a national level.

Finally the Association of the Bar is an Association of the City of New York. The last time I checked, the City of New York was comprised of five counties. Without losing its identity, this Association can make a better effort to recruit members from other counties and can be more
inclusive in a variety of ways. My first directive as President will be to ban the phrase “outer borough.”

I would like to close on a personal note. There are some special people to whom I owe a great deal and my Presidency could not possibly be accomplished without their support. First is my wonderful family. Present tonight are my mother, my sister Irene and her husband, my daughter Ally and her husband and most important my wife, Fern who has selflessly encouraged me to pursue these goals.

Second, I owe a special thanks to my partners, Stephen Flamhaft, Harold Levy, Marvin Hirsch and Andrew Rendeiro and our learned counsel Edward Rappaport. Without their support I would not have been able to assume the leadership of this Association.

Third, I want to thank my new partners at the Association—Alan Rothstein and Barbara Opotowsky. Barbara and Alan are, to use a criminal justice term, the DNA of this Association. They and their incredibly talented staff have spent the last two months preparing me for this new role and I look forward to working with all of them over the next two years as well as the incredibly dedicated members of the Executive Committee. If I have learned one thing so far, it is that the strength of the Association derives from both the commitment of its members and the skill and dedication of its staff.

Finally I want to thank the members of the Association who have elected me your President. It is a humbling experience to accept the Presidency of an association whose list of Past Presidents include names such as Elihu Root, Charles Evan Hughes and Cyrus Vance. You have entrusted me with the leadership of this unique institution and I pledge to follow the words in that New York Times editorial from long ago. I pledge to lead the way.
The Benjamin N. Cardozo Lecture

Introduction

Bettina B. Plevan

Welcome to the 2006 Benjamin N. Cardozo Lecture. The Association established this lecture in 1941 to honor the memory of Justice Cardozo in the hope that his life “may be revered and forever shared by the members of this Association and of our profession generally.”

As I am sure all of you who remember your first-year torts class will recall, Benjamin Cardozo made his mark on the Court of Appeals in New York with some groundbreaking decisions in the field of tort law, including the Palzgraf case. It is therefore particularly fitting that we have as our lecturer tonight someone who has achieved greatness in this field, not just in New York but around the country and, no doubt, the world, as the leading expert in the field of mass torts and the related field of products liability, toxic torts and insurance coverage litigation.

Sheila Birnbaum has also distinguished herself in the academic community, as a member of the faculties of two law schools. She has also given thousands of hours of her time to many important public service endeavors. It is difficult to select just a few of the varied and important contributions that she has made, usually in positions of leadership, but I will try to do that. She was President of the New York Womens’ Bar Association; she is a member of the Council of the American Law Institute; she chaired the New York State Advisory Committee on Civil Practice; she was a member of the ABA House of Delegates; she served as the Executive
Director of the Second Circuit Task Force for Racial, Ethnic and Gender Fairness; and recently she has served as Chair of the Commission for Fiduciary Appointments by appointment of Chief Judge Judith Kaye.

Considering her many accomplishments, it is no surprise that she has been named by Fortune Magazine as one of the fifty most powerful women in American business. She has also been honored by her peers on numerous occasions as a recipient of many coveted awards, including the Margaret Brent Women Lawyers of Achievement Award from the American Bar Association.

Sheila has had many important professional accomplishments as a partner at the law firm of Skadden, Arps, Slate, Meagher & Flom, where she has practiced more than twenty years. Most recently, she argued two important tort damages cases in the United States Supreme Court. One of them—the State Farm case—was the impetus for our lecture tonight: “Punitive Damages and Due Process—How Much Is Too Much?”

It is my pleasure to introduce to you the 2006 Cardozo Lecture, my friend, Sheila Birnbaum.
The Benjamin N. Cardozo Lecture

Punitive Damages and Due Process: How Much Is Too Much?

Sheila L. Birnbaum

INTRODUCTION

Punitive damages have been part of American jurisprudence since this country’s beginnings. The United States Supreme Court has noted that “[c]ompensatory damages ‘are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct.’ By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution.” Courts have long recognized the risk of un-
predictable and unconstrained punitive damages awards imposed at a jury’s "passionate impulse"—as the New York Court of Appeals once described it. As the United States Supreme Court stated in 1852, “[i]t is a well-established principle of the common law, that in actions of trespass and all actions on the case for torts, a jury may inflict what are called exemplary, punitive, or vindictive damages upon a defendant, having in view the enormity of his offence rather than the measure of compensation to the plaintiff,” but “the propriety of this doctrine has been questioned.”

Questioning the propriety of punitive damages has intensified in recent decades, as punitive damage awards of increasing size and severity have raised increasingly urgent constitutional concerns. The United States Supreme Court has now addressed the constitutionality of excessive punitive damages awards in six major opinions. Most recently, in its 2003 landmark decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, the Court reversed on due process grounds a $145 million punitive damage award in an insurance bad faith failure to settle action. The Court in *Campbell* reiterated the principle that, “[w]hile States possess discretion over the imposition of punitive damages, it is well established that there are procedural and substantive constitutional limitations on these awards. The Due Process clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishment on a tortfeasor.” *Campbell* set forth new and stronger limitations on punitive damage awards and gave additional guidance to the bar and bench on the punitive damages analysis the Supreme Court first set forth in *BMW of North America v. Gore* in 1996. I had the privilege of representing State Farm before the Supreme Court in the *Campbell* case.

In *Campbell*, the Supreme Court made important pronouncements on the punitive damages guideposts of reprehensibility, ratio, and comparable civil penalties that it first enumerated in *Gore*. The Court held that it is impermissible to impose punitive damages based upon conduct that is dissimilar to the conduct at issue in the case. The Court also made clear that a State has no legitimate interest in punishing conduct that occurs in other States whether lawful or unlawful. The Court noted that the wealth of a defendant cannot justify an otherwise unconstitutional

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6. *Id* at 416 (citations omitted)
punitive damages award. These pronouncements were a major step forward in defining the due process constraints on excessive punitive damage awards.

Since *Campbell*, state and federal courts have applied the *Campbell* analysis to varied factual circumstances and claims, and on the whole (although there are some notable exceptions), the analysis has proved a flexible and effective tool and has brought a greater measure of predictability and uniformity to punitive damages awards. In addition, a number of important issues remain to be resolved by the courts, including a reasoned approach to punitive damages in the mass tort and class action context. Although *Campbell* involved a single plaintiff, the *Campbell* decision, read carefully and in light of the Supreme Court’s evolving punitive damages jurisprudence, provides some important guidance as to how the Supreme Court is likely to view some of these issues.

**OVERVIEW OF SUPREME COURT’S PUNITIVE DAMAGES JURISPRUDENCE**

From the Supreme Court’s first signal that it might recognize a due process limitation on punitive damage awards, it took nearly a decade and a half to arrive at *Campbell*.

In 1989, the Supreme Court decided *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*\(^8\) In that case, the jury awarded approximately $6 million in punitive damages as a result of antitrust violations and tortious interference claims. The defendant appealed, and argued that such a large punitive award violated the Eighth Amendment’s prohibition on excessive fines. The Supreme Court rejected this argument, holding that the Excessive Fines Clause “does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.”\(^9\)

Nevertheless, in an important signal, the Court recognized that “[t]here is some authority in our opinions for the view that the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme.”\(^10\) The Court, however, had never addressed the question of “whether due process acts as a check on undue jury discretion to award punitive damages in the absence of any express statutory limit.”\(^11\)

\(^{8}\) 492 U.S. 257 (1989).
\(^{9}\) Id. at 263-64.
\(^{10}\) Id. at 276.
\(^{11}\) Id. at 276-77.
But because the defendant had not raised this argument, the Court held that the question “must await another day.” 12

Justice O’Connor, who has played an extremely influential role in the development of the Court’s punitive damages jurisprudence, concurred in part and dissented in part in Browning-Ferris, sounding the alarm over “skyrocketing” punitive damages awards and the “trend toward multimillion dollar awards.” 13 In particular, Justice O’Connor observed that “[t]he threat of such enormous awards has a detrimental effect on the research and development of new products. Some manufacturers of prescription drugs, for example, have decided that it is better to avoid uncertain liability than to introduce a new pill or vaccine into the market.” 14 In Browning-Ferris, Justice O’Connor also laid the initial groundwork for what would later develop into the three guideposts in the constitutional punitive damages excessiveness analysis adopted by the Court in Gore and Campbell. Conceding that “[d]etermining whether a particular award of punitive damages is excessive is not an easy task,” Justice O’Connor suggested that the court should adopt a “proportionality framework” that would “accord ‘substantial deference’ to legislative judgments concerning appropriate sanctions for the conduct at issue,” and examine the gravity of the defendant’s conduct and the harshness of the award of punitive damages.” 15

Just two years later, the Court squarely addressed a due process challenge to a punitive damages award. In Pacific Mutual Life Insurance Co. v. Haslip, 16 the Court considered a punitive damage award of over $1 million against an insurance company whose agent had misappropriated the plaintiffs’ health insurance premiums instead of remitting them to the company, resulting in the cancellation of the plaintiffs’ health insurance. Although the Court ultimately upheld the exemplary damages in that case, it expressed “concern about punitive damages that ‘run wild’” and stated that “unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities.” 17 In Haslip, the Court concluded that the punitive damages awarded were constitutional, primarily focusing on the procedural protections such as instructions that

12. Id. at 277.
13. Id. at 282 (O’Connor, J., concurring in part, dissenting in part).
14. Id.
15. Id. at 300-01.
17. Id. at 18.
“enlightened the jury as to the punitive damages’ nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.”18 The Court noted, however, that the punitive damage award—which stood at more than four times the compensatory award—was “close to the line.”19

In a strong dissent, Justice O’Connor again expressed her concerns with punitive damage awards. She wrote: “Punitive damages are a powerful weapon. Imposed wisely and with restraint, they have the potential to advance legitimate state interests. Imposed indiscriminately, however, they have a devastating potential for harm. Regrettably, common-law procedures for awarding punitive damages fall into the latter category. States routinely authorize civil juries to impose punitive damages without providing them any meaningful instructions on how to do so. Rarely is a jury told anything more specific than ‘do what you think best.’ . . . Juries are permitted to target unpopular defendants, penalize unorthodox or controversial views, and redistribute wealth. Multimillion dollar losses are inflicted on a whim.”20 Justice O’Connor opined that the Alabama jury instructions in Haslip gave the jury “complete, unfettered, and unchanneled discretion” in determining whether to impose punitive damages and the amount of punitive damages.21

Two years later, the issue of punitive damages was once again before the Court in TXO Production Corp. v. Alliance Resources Corp.,22 which centered around slander of title claims based upon the defendant’s attempt to use a worthless quitclaim deed to force a renegotiation of the terms of oil and gas leases with the plaintiff. In the plurality opinion authored by Justice Stevens, the Court upheld a $10 million punitive damage award for slander of title. That award stood at a 526-to-1 ratio to the $19,000 in actual damages awarded. In arguing for a reduction of the award, the defendant focused primarily on the dramatic discrepancy between actual and punitive damages.23 The Court, however, noted that it has “eschewed an approach that concentrates entirely on the relationship between punitive and actual damages”24 and again refused to “draw a mathematical

18. Id. at 19.
19. Id. at 23.
20. Id. at 42–42 (O’Connor, J. dissenting) (citation omitted).
21. Id. at 46; see generally id. at 44–52
23. 509 U.S. at 453, 459.
24. Id. at 460.
bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."25 In addressing the relationship between punitive and actual damages and the 526-to-1 ratio, the Court found that it was “appropriate to consider the magnitude of the potential harm that the defendant’s conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred.”26 Noting that the “jury could well have believed that TXO was seeking a multimillion dollar reduction in its potential royalty obligation,” the Court stated that the disparity between the punitive award and the potential harm did not “jar one’s constitutional sensibilities.”

Justice O’Connor delivered another strong dissent in TXO, attacking the punitive damage system as “arbitrary and oppressive” and criticizing the procedures that converted a “commercial dispute into a $10 million punitive verdict” – an award Justice O’Connor termed “monstrous.”27 Grossly disproportionate jury awards, Justice O’Connor wrote, “evidence caprice, passion, or bias” and are indicative of procedural infirmity.28 Terming the $10 million punitive award in a case involving only $19,000 in compensatory damages “a dramatically irregular, if not shocking, verdict,” which bore no “understandable relationship to compensatory damages,”29 Justice O’Connor criticized the plurality for choosing “no course at all” by erecting “not a single guidepost to help other courts find their way through this area.”30

In 1995, the Court for the first time reversed a punitive damage award as unconstitutionally excessive, fashioning the three-prong analysis for determining excessiveness that it reaffirmed in Campbell. In BMW of North America, Inc. v. Gore,31 the plaintiff alleged that the paint on his new luxury automobile had been damaged in transit, and that BMW had re-painted the car, concealing the fact of the corrosion and repair. Under some states’ disclosure statutes, BMW did not have to disclose such repair, if repair costs were less than a defined percentage of suggested retail price or a certain monetary amount. The plaintiff was awarded $4,000 in compensatory damages and $4 million in punitive damages, which was reduced

25. Id. at 458 (quoting Haslip, 499 U.S. at 18).
26. Id at 460 (emphasis in original).
27. Id. at 472-73 (O’Connor, J., dissenting).
28. Id. at 476 (O’Connor, J., dissenting).
29. Id. at 481 (O’Connor, J., dissenting).
30. Id. at 480 (O’Connor, J., dissenting).
to $2 million by the Alabama Supreme Court. As a preliminary matter, the Court made clear that the Alabama Supreme Court had been correct in remitting the jury's original award to the extent that the award was based upon lawful conduct in other jurisdictions. As the Court held, to avoid encroaching on the policy choices of other states, “the economic penal ties that a State such as Alabama inflicts on those who transgress its laws, whether the penalties take the form of legislatively authorized fines or judicially imposed punitive damages, must be supported by the State's interest in protecting its own consumers and its own economy. . . . Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents.” The Court explicitly left undecided the question of “whether one State may properly attempt to change a tortfeasor's unlawful conduct in another State.”

The Court then turned its attention to evaluating the constitutionality of the remitted $2 million punitive award, making the requirement of fair notice a lynch pin of its analysis. The Court stated that “[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.” Whether a defendant had fair notice of the amount of a punitive award, the Court held, should be ascertained through analysis of three guideposts: (i) the degree of reprehensibility of the conduct; (ii) the disparity between the harm or potential harm suffered by the plaintiff and the punitive damages award; and (iii) the difference between the punitive damages award and the civil penalties authorized or imposed in comparable cases.

The Court stated that reprehensibility is “[p]erhaps the most important indicium of the reasonableness of a punitive damages award.” In determining that the conduct at issue in Gore was not particularly reprehensible, the Court noted that the harm was entirely economic, and that the re-finishing of the car had no effect on its performance or safety. Thus, “BMW's conduct evinced no indifference to or reckless disregard for the health and safety of others.” For purposes of reprehensibility,
the Court also declined to view BMW as a “recidivist,” finding that BMW had reasonably relied on state disclosure statutes and that there was no evidence that BMW had persisted in a course of conduct after it had been adjudged unlawful. 38

As for ratio, the Court once again declined to impose a mathematical bright-line rule, noting that “low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages.” 39 However, the Court did stress that the ratio approved in Haslip had been approximately 4 to 1 and that the ratio approved in TXO had been approximately 10 to 1, taking into account the potential harm to the victim that would have ensued if the tortuous plan had succeeded. 40 The 500 to 1 ratio of the punitive damages award in Gore was dramatically greater and there was no suggestion of additional potential harm as there had been in TXO. Quoting Justice O’Connor’s dissent in TXO, the Court noted that “[w]hen the ratio is a breathtaking 500 to 1 . . . the award must surely ‘raise a suspicious judicial eyebrow.’” 41 Thus, the Court in Gore left a large grey area between 4-to-1 or 10-to-1 ratios on the one hand and the unacceptable 500-to-1 ratio on the other.

The disparity between the punitive award and the comparable civil and criminal penalties, the third Gore factor, also weighed in favor of remittur in that case. Indeed, the Court noted that Alabama law provided for penalties of only $2,000 for this type of conduct. Other states’ penalties reached only as high as $10,000. “None of these statutes would provide an out-of-state distributor with fair notice that the first violation—or, indeed the first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty.” 42

**STATE FARM MUTUAL AUTOMOBILE INSURANCE CO. V. CAMPBELL**

In 2003, seven years after Gore, the Court delivered its landmark opinion in State Farm Mutual Automobile Insurance Co. v. Campbell. 43 In that case,
the plaintiffs alleged that State Farm, their automobile insurance company, had improperly declined to settle the lawsuit filed against them after an automobile accident. After the verdict against the Campbells in excess of Mr. Campbell's $50,000 automobile policy, the plaintiffs in the underlying case settled in exchange for the Campbells' agreement to pursue a bad faith lawsuit against State Farm and assign most of the proceeds to the original plaintiffs and their lawyers. In the trial of the bad faith action, the jury returned a verdict of $2.6 million in compensatory damages—largely for emotional distress—and a $145 million in punitive damages. The trial court reduced these awards to $1 million and $25 million, respectively. The Utah Supreme Court, however, reinstated the jury's $145 million punitive award.44

In overturning that $145 million punitive award, the United States Supreme Court gave new and expanded analysis and explanation of all three of the Gore guideposts. In analyzing the reprehensibility of the conduct at issue, the Court held that that "reprehensibility" should be analyzed under a series of factors gleaned from the Gore decision: (i) whether the harm caused was physical as opposed to economic; (ii) whether the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (iii) whether the target of the conduct had financial vulnerability; (iv) whether the conduct involved repeated actions or was an isolated incident; and (v) whether the harm was the result of intentional malice, trickery, or deceit, or mere accident.45 The Court elaborated on the reprehensibility analysis, explaining that the "existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect."46

The Court was particularly concerned with the fact that the Campbell litigation had been "used as a platform to expose, and punish, the perceived deficiencies of State Farm's operations throughout the country. The Utah Supreme Court's opinion makes explicit that State Farm was being condemned for its nationwide claims policies and practices rather than for the conduct directed toward the Campbells."47 In fact, the Utah courts had relied upon evidence of practices as diverse as State Farm's handling of hail damage claims in Colorado, its treatment of employees

44. Id. at 415.
45. Id. at 419.
46. Id.
47. Id. at 420.
in California, its purported discrimination against the young, the old, minorities and newlyweds, and a host of other practices that had nothing to do with the Campbells’ claims that State Farm had improperly failed to settle the personal injury claims brought against them. As a result, the Supreme Court not only reiterated its holding in Gore that punitive damages may not be used to punish a defendant for action that was lawful in the jurisdiction in which it occurred, but also opined that “[n]or, as a general rule, does a State have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction.” Even more significantly, the Court held that the Utah courts had unconstitutionally “awarded punitive damages to punish and deter conduct that bore no relation to the Campbells’ harm.” The Court stated:

A defendant’s dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business. Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties’ hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . .

Accordingly, the Court clarified that the reprehensibility analysis must focus on the reprehensibility of the specific conduct that harmed the plaintiff. And in determining if a defendant is a “recidivist” (and therefore more reprehensible) a court must look to “the existence and frequency of similar past conduct.” Thus, conduct that is dissimilar to that which harmed the plaintiff is not relevant to the reprehensibility analysis and cannot provide a basis for punitive damages.

The Court also significantly strengthened the ratio guidepost and substantially clarified the Court’s prior holdings with regard to ratio. While the Court once again refused to fashion a bright-line mathematical formula, it did articulate a detailed analysis upon which lower courts must rely in determining whether the ratio guidepost has been violated. The Court explained that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy

48. Id. at 421 (emphasis added).
49. Id. at 422.
50. Id. at 422-23.
51. Id. at 423 (emphasis added).
due process.”52 The Court reiterated that “an award of more than four
times the amount of compensatory damages might be close to the line of
constitutional impropriety.”53 Moreover, the Court noted “[w]hen
compensatory damages are substantial, then a lesser ratio, perhaps only
equal to compensatory damages, can reach the outermost limit of the due
process guarantee.”54 The Court did not provide guidance on what dollar
value constitutes a “substantial” compensatory award. Nevertheless, the
Court concluded that the $1 million in compensatory damages in this
case was “substantial,” and “likely would justify a punitive damages award
at or near the amount of compensatory damages.”55 This endorsement of
a one-to-one ratio where compensatory damages are substantial is one of the
most important of the Court’s pronouncements on punitive damages,
because, in the vast majority of cases in which the plaintiff has suffered
significant damages, a compelling argument can now be made that puni-
tive damages should be limited to the amount of the compensatory award.

In Campbell, the Court emphasized the constraining force of ratio as
a guidepost for evaluating the constitutional propriety of a punitive damages
award. It made clear that awards exceeding a single-digit ratio of punitive
to compensatory damages are presumptively unconstitutional. The Court
did not limit that principle to cases of economic loss. Rather, that proposi-
tion was expressed as a general broad principle of constitutional law,
demonstrated, in Justice Kennedy’s opinion, by the court’s “jurisprudence
and the principles it has now established.”56 The Court identified only
one exception to that rule—the long standing judicial practice of approv-
ing higher ratios in cases in which a defendant’s conduct is particularly
egregious and compensatory damages are small.” 57

In Campbell, in regard to the third guidepost the Court emphasized
the limited utility of criminal penalties in determining whether a puni-
tive award exceeded constitutional bounds.58 The Court stressed that the
“remote possibility” of a criminal sanction does not automatically sus-
tain a punitive damages award.59 The Court also made clear that in look-

52. Id. at 425.
53. Id. (citing Haslip, 499 U.S. at 23-24).
54. Id. at 425.
55. Id. at 428.
56. Id. at 425.
57. See id.
58. Id. at 429.
59. See id.
ing to the most relevant civil sanction, courts should consider the relevant sanction for the wrong done to the plaintiff, and that the relevant civil penalties should not be inflated by speculation regarding penalties for out-of-state and dissimilar conduct.

Additionally, the Court in *Campbell* held that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.” 60 This is an important pronouncement for corporate defendants, who routinely face huge punitive verdicts simply because of their wealth, even when a lesser award would achieve the goals of punishment and deterrence.

**CAMPBELL’S APPLICATION**

In the nearly three years since *Campbell* was decided, it has had an enormous impact on how courts, both state and federal, analyze questions concerning due process implications of punitive damages awards. Many courts have followed the Court’s precept that where compensatory damages are substantial, a 1-to-1 ratio may be constitutionally appropriate. Other courts have reduced awards to 9-to-1 or 4-to-1.

In many decisions, courts across this nation have acknowledged and implemented *Campbell*’s teaching that punitive damages must be tethered to the individual circumstances of the specific plaintiff and his or her harm. This holding has had significant impact on class action litigation, where plaintiffs have attempted to resolve punitive damages issues on a mass basis in class proceedings disconnected from the individual claims and circumstances of the putative class members.

A federal district court in Minnesota relied on *Campbell* in refusing to certify a class of plaintiffs who ingested the prescription drug Baycol where the plaintiffs’ trial plan called for a class-wide trial on punishable misconduct followed by individual class members’ trials for compensatory damages. 61 The court held that *Campbell*’s enunciation of the due process standard precluded such a proceeding.

Because the conduct upon which Plaintiffs would base their punitive damages claim is not specific to a particular plaintiffs’ [sic] claims. Rather, Plaintiffs propose that the jury make findings as to punitive conduct with respect to all actions taken up to the date Baycol was taken off the market. However, where

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60. Id. at 427.

liability is based on the Defendants’ knowledge and conduct as of the date a particular plaintiff was prescribed Baycol, evidence supporting a punitive damages award must be similarly limited.62

A similar result occurred in the intermediate appellate court in Liggett Group Inc. v. Engle,63 which is now pending appeal to the Florida Supreme Court. In Liggett, the plaintiffs were seeking to try numerous cases alleging injury due to cigarette smoking, en masse, against a group of tobacco defendants. The trial plan in the case provided for a determination of the defendants’ liability for punitive damages to a class of Florida smokers in the first phase of the trial, in which the jury considered purportedly common issues relating to the defendants’ conduct and the general health effects of smoking.64 In that first phase, the jury “found that unspecified conduct by the defendants ‘rose to a level that would permit a potential award or entitlement of punitive damages.’”65 In the second phase the jury determined that the three individual class representatives were entitled to compensatory damages in varying amounts which were offset by their comparative fault, resulting in a total compensatory award of $12.7 million.66 Thereafter, the jury awarded a lump-sum amount of punitive damages for the entire class of a staggering $145 billion, without allocation of that amount to any class member.67 That punitive award was rendered as a final judgment “regardless of how many of the assumed 700,000 or more class members actually proceed[ed] to try their claims in Phase 3 and ultimately establish[ed] liability and compensatory damages.”68 The Liggett trial court completed the first two phases of this trial plan by the time the United States Supreme Court rendered its ruling in Campbell.

On appeal, the Florida District Court of Appeal stated that the trial court’s trial plan had put “the proverbial ‘cart before the horse.’”69 The appellate court reasoned that under Campbell due process requires that

62. Id. at 215 (emphasis added).
63. 853 So.2d 434 (Fla. Dist. Ct. App. 2003), review granted, 873 So.2d 1222 (Fla. 2004).
64. Id. at 441.
65. Id. at 450.
66. Id. at 441.
67. Id.
68. Id. at 450-51.
69. Id. at 450, 456.
compensatory damages be assessed prior to any assessment of punitive damages because, “[w]ithout this prior assessment it is impossible to determine whether punitive damages bear a ‘reasonable’ relationship to the actual harm inflicted on the plaintiff, as required by . . . federal law.”

The court also concluded that the mass punitive damages trial had unconstitutionally failed to allow for an individual assessment of punitive damages, based upon the individual class members’ varying circumstances.

The court held that all defendants, regardless of whether their cases have been consolidated for trial, “are entitled to a jury determination, on an individualized basis,” as to whether and to what extent punitive damages are appropriate.

Citing Campbell, the Florida appellate court explained that “[a] claim for punitive damages is not a separate and distinct cause of action.” “[R]ather it is auxiliary to, and dependant upon the existence of an underlying claim,” and cannot be entered unless it is individually determined and “proportionate to the amount of harm to the plaintiff.”

Thus, as the court in Liggett held, the mass trial plan proposed by the trial court was unconstitutional and required a new trial that calculated any possible punitive damages on an individualized basis.

Last year, in In re Simon II Litigation, another tobacco case, the Second Circuit also concluded that a mass trial format is incompatible with the individualized assessment of punitive damages required by Campbell. In that case, the Second Circuit rejected a non-opt-out nationwide punitive damages “limited fund” class. Although the Second Circuit based its holding upon the failure of the limited fund class to comply with class certification requirements, the court also canvassed the constitutional punitive damages issues raised by such a class under the Supreme Court’s decision in Campbell. The Second Circuit pointed out the impossibility of assuring

70. Id. at 451.
71. See id. at 451-55.
72. Id. at 453-54.
73. Id. at 456.
74. Id. (quoting Campbell, 538 U.S. at 426).
75. Id.; see also Corley v. Entergy Corp., 222 F.R.D. 316, 323 (E.D. Tex. 2004) (holding that, in the context of mass litigation, courts cannot calculate punitive damages on a class-wide basis because each plaintiff’s entitlement to punitive damages depends on “the subjective and intangible differences of each class member’s individual circumstances”), aff’d sub nom. Corley v. Orangefield Indep. Sch. Dist., 152 Fed. App’x 350 (5th Cir. 2005).
76. 407 F.3d 125 (2d Cir. 2005).
some proportionality between compensatory and punitive damages when
the class members had as yet not litigated their underlying claims for
compensatory damages. As the Second Circuit stated, “[i]n certifying a
class that seeks an assessment of punitive damages prior to an actual de-
termination and award of compensatory damages, the district court’s
Certification Order would fail to ensure that a jury will be able to assess
an award that, in the first instance, will bear a sufficient nexus to the
actual and potential harm to the plaintiff class, and that will be reason-
able and proportionate to those harms.”

In In re Tobacco Litigation, the West Virginia Supreme Court of Ap-
peals reached a more questionable conclusion. The West Virginia court
held that the due process principles articulated in Campbell did not pre-
clude the use of a so-called “punitive damages multiplier” in the consoli-
dated trial of personal injury claims brought by approximately 1000 indi-
vidual smokers against tobacco company defendants. The proposed trial
plan in that case contemplated a consolidated trial that would take place
in two phases. In the first phase, the jury would determine “general liabil-
ity issues common to all defendants” and entitlement to punitive dam-
ages and a punitive damages multiplier. In the second phase, compensa-
tory damages would be determined for each individual plaintiff. Then,
the trial court would multiply each individual plaintiff’s compensatory
damages award by the punitive damages multiplier to determine the amount
of punitive damages for each plaintiff.

Although the trial court had initially approved this proposed trial
plan, the trial court vacated the plan after Campbell was issued. The trial
court found that this proposed trial plan violated the principle articu-
lated in Campbell that punitive damages must be based on an evaluation
of the defendant’s conduct with respect to a specific plaintiff. The West
Virginia Supreme Court of Appeals reversed, reinstating the trial plan and
the proposed use of a punitive damages multiplier. The court stated that
“we find nothing in Campbell that per se precludes a bifurcated trial plan
in which a punitive damages multiplier is established prior to the deter-
mination of individual compensatory damages.” The court also asserted
that it found “nothing in Campbell that mandates a reexamination of
our existing system of mass tort litigation.”

77. Id. at 138.
78. 624 S.E.2d 738 (W. Va. 2005)
79. In re Tobacco Litig., 624 S.E.2d at 741.
80. Id.
I believe that the West Virginia Supreme Court of Appeals’ ruling is problematic in light of the individualized assessment of punitive damages contemplated by *Campbell*. Having a jury set a single, abstract punitive damages multiplier deprives the jury of the opportunity to consider the facts and circumstances of each individual plaintiff’s case and to determine what amount of punitive damages, if any, is appropriate for each plaintiff. No subsequent court or jury could ever deconstruct the multiplier or take into consideration the specific circumstances of each individual plaintiff’s case. After *Campbell*, the propriety of such a procedure seems constitutionally suspect.

In individual litigations, the *Campbell* Court’s holdings on ratio have had some beneficial effect, although there continue to be some disparities in ratios and in the amounts of punitive damages awards that have been upheld. For example, in August of last year, the Eighth Circuit considered a punitive damages award levied against a tobacco company.81 The plaintiff’s spouse had died from lung cancer after smoking the defendant’s products for 36 years. Plaintiff sued, claiming that the cigarettes’ defective design caused his spouse’s death. The jury found for the Plaintiff, and awarded $4,025,000 in compensatory damages and $15 million in punitive damages, which stood at a 3.7:1 ratio. Heeding the Court’s pronouncement in *Campbell* that a one-to-one ratio may be the outermost due process limit where “substantial” compensatory damages are awarded, the Eighth Circuit concluded that “a ratio of approximately 1:1 would comport with the requirements of due process,” and reduced the punitive damage award to $5 million.82

In a California tobacco case, *Boeken v. Phillip Morris, Inc.*,83 the jury awarded the plaintiff smoker $5.5 million in compensatory damages and $3 billion in punitive damages, a ratio of 540 to 1. The California trial court reduced the punitive award to $100 million, a ratio of approximately 20 to 1. The California appellate court further reduced the award of $50 million, a ratio of approximately 9 to 1. In reducing the award, the California court acknowledged the relevance of punitive awards previously imposed for the same conduct and also determined that the 1998 Master Settlement Agreement, requiring Phillip Morris to pay large sums to the State of California would have some deterrent effect on certain aspects of

82. Id. at 603.
Philip Morris’s conduct. Both parties filed petitions for certiorari, which the United States Supreme Court very recently denied. Although the punitive awards were substantially reduced in these two individual cases, the cases remain troubling given the mass tort context, the large compensatory award, and the potential for further large compensatory and punitive awards in future tobacco cases.

In February of this year, in another wrongful death case against a tobacco company, the Oregon Supreme Court approved a punitive damage award of $79.5 million. The punitive award amounted to nearly 100 times the compensatory damages. The Oregon Supreme Court determined that the guideposts of reprehensibility and comparable civil and criminal penalties warranted a “very significant” punitive award. The Court justified the extremely high ratio by reasoning that the “low [compensatory] figure occurred only because [the plaintiff] died shortly after being diagnosed with cancer. If [the plaintiff] had lived long enough to incur substantial medical bills, for example, economic damages could easily have been 10 or more times the amount awarded here. Only chance saved Philip Morris from a much higher compensatory damage award.”

The Oregon Supreme Court’s decision raises other significant due process issues, including the Court’s reliance upon potential criminal penalties under the comparable penalties guidepost. The Oregon court recognized the need under Campbell to “exercise care” in relying on criminal sanctions, quoting Campbell’s statements that criminal penalties have “less utility” in determining the dollar amount of punitive awards and that “[g]reat care must be taken to avoid use of civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed.” Nonetheless, the Oregon court found that it was neither “speculative or remote” to compare Philip Morris’s actions, from the beginning of its “scheme” in 1954, to manslaughter. Thus, the Court concluded that Oregon’s criminal sanctions for man-

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84. See Boeken, 127 Cal. App. 4th at 1701-04.
87. Id. at 1179-80.
88. Id. at 1180.
89. Id. at 1179 (quoting Campbell, 538 U.S. at 428).
90. Id.
slaughter “put Philip Morris on notice that Oregon would take such conduct very seriously.”

The invocation of the criminal sanctions for manslaughter has not been limited to tobacco cases, but has been discussed in automobile and other product liability cases, most notably in *Romo v. Ford Motor Co.* In *Romo*, in a decision issued before the United States Supreme Court’s decision in *Campbell*, the California Court of Appeal initially upheld a $290 million punitive damages award against Ford. The punitive damages were in an approximately 58 to 1 ratio to the compensatory award of just under $5 million. The California Court of Appeal acknowledged the “great disparity between the compensatory and punitive damages award,” but upheld the award based upon the reprehensibility and comparable penalties guideposts. In particular, the court found that Ford was put on notice of the severity of the penalty that California might impose by the California Penal Code’s definition of manslaughter. After the United States Supreme Court granted certiorari and remanded the case for consideration in light of *Campbell*, the California Court of Appeal reduced the punitive award from $290 million to $13,723,287, approximately three times the total compensatory damages. Significantly, in its discussion of the comparable penalties guidepost, the court retreated from its invocation of the penalties for manslaughter, citing *Campbell* and conceding that “the failure of prosecutors to seek criminal convictions in cases of the present sort does not permit an enhancement of the punitive damages award in a civil case.”

The Sixth Circuit also had occasion to revisit a punitive damages award in light of *Campbell*. *Clark v. Chrysler Corp.* was one of the many cases in which the United States Supreme Court granted certiorari and remanded for reconsideration in light of *Campbell*. In its post-*Campbell* decision, the Sixth Circuit significantly reduced a $3 million punitive award that it had previously upheld against Chrysler. *Clark* was a wrongful death case stemming from an automobile accident, in which the driver’s door latch failed and the driver was thrown from the vehicle and killed. The $3 mil-

91. Id.
93. Id. at 1151.
95. Id. at 762.
lion punitive award stood at a 13-to-1 ratio to the compensatory damages. The district court, in its post-\textit{Campbell} decision, had again upheld the award, noting that it did not “stray far from the single digit ratio recommended” in \textit{Campbell} and was not the type of “breathtaking” award at issue in \textit{Gore} and \textit{Campbell}.\textsuperscript{97} The Court of Appeals rejected this analysis, explaining that the ratio . . . guidepost “involves more than a simple comparison to other ratios,” and instead requires an analysis of the facts and circumstances surrounding the defendant’s conduct and the harm caused to the plaintiff.\textsuperscript{98} In reducing the award, the Court of Appeals noted the absence of a number of the reprehensibility factors, including intentional malice, trickery, or deceit. The court concluded that “[i]n fact, Chrysler’s conduct is not sufficiently egregious to justify even a ratio of 4:1, which in many cases may be the limit of constitutional propriety.”\textsuperscript{99} On the other hand, the court determined that the compensatory award was “not overly large” in view of the “severe noneconomic harm” suffered by the Clarks, and that thus a 1 to 1 ratio was not constitutionally appropriate.\textsuperscript{100} Nevertheless, stating that the fact of the plaintiff’s death “does not outweigh all,” the Court made clear that the presence of severe physical injuries and death does not necessarily justify a departure from the \textit{Campbell} Court’s guidance on ratio.\textsuperscript{101} Based upon its consideration of all factors, the court determined a 2-to-1 ratio would comport with due process, reducing the award from $3 million to $471,258.26.

CONCLUSION

In conclusion, it is clear that \textit{Campbell} has changed the punitive damages landscape and has altered the way in which courts decide how much is too much. However, fundamental issues still remain, particularly in mass tort and products liability cases. Tobacco cases especially continue to present difficult issues of the possibility of repetitive punitive damage awards, and drug cases may be likely to present similar issues. Controversial decisions, such as the recent decision of the Oregon Supreme Court, continue to issue. In addition, although the courts have found \textit{Campbell} directly relevant to certain of the constitutional concerns that arise in determin-

\textsuperscript{97} Id. at 606 (ellipses in original; citation omitted).
\textsuperscript{98} Id. (citing \textit{Campbell}, 538 U.S. at 425).
\textsuperscript{99} \textit{Clark}, 436 F.3d at 606.
\textsuperscript{100} Id. at 606-07.
\textsuperscript{101} Id. at 608.
ing punitive damages in class actions, the case law is not uniform on those questions, and we may well eventually see such issues reach the Supreme Court. Certainly, punitive damages, and the question of how much is too much, remain a crucial area of interest in American litigation and the United States Supreme Court will likely have to provide further guidance in the near term as to what is a constitutionally permissible punitive damages award.
Orison S. Marden Lecture

Keepers of the Rule of Law

Louis A. Craco


Mr. Craco practiced for 47 years with Willkie Farr & Gallagher in New York City, where his practice centered on business litigation and arbitration; he headed the Litigation Department for 25 years. Upon his retirement he became Of Counsel to Craco & Ellsworth.

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One hundred years ago this year, Roscoe Pound delivered to the American Bar Association his landmark address on “The Causes of Popular Dissatisfaction with the Administration of Justice.” It was a formidable tour of the horizon of American law and lawyering as it appeared at the dawn of the last century, and it launched a conversation about professional values that has continued, with greater or lesser intensity, for the ensuing century.

Reading it now, one is impressed both with the scope and ambition of Pound’s treatment, and the remarkable endurance of his audience—
the speech must have lasted two hours. Luckily for you, I have no illusions about ending on a triumphant note the debate he began. Rather, I would like to suggest some ideas about the terms upon which that conversation might profitably continue in the years ahead.

Before going on, I’m bound to honor a custom Pound established—and from which his successors have scarcely ever departed—to set ruminations like this one in context with a reminder of just how ancient the complaints about lawyers seem to be. His chronicle starts with Plato, and includes probably the most famous battle-cry of lawyer-bashers, the moment in Henry VI, Part 2, when Shakespeare has Dick the Butcher sidle up to the rebel leader Jack Cade, and famously advise him, “The first thing we do, let’s kill all the lawyers!”

Enough bad has been said about lawyers in modern days that there is not much need to dwell on old screeds, even to satisfy Roscoe’s ghost. One should be enough, and I’m sure Pound would have used it if he’d found it, as both Norman Vesey and Deborah Rhode have done. In 1770, Grafton County, New Hampshire provided the following census report to King George III:

Your Royal Majesty, Grafton County...contains 6,489 souls, most of whom are engaged in agriculture, but included in that number are 69 wheelwrights, 8 doctors, 29 blacksmiths, 87 preachers, 20 slaves and 90 students at the new college. There is not one lawyer, for which fact we take no personal credit, but thank an Almighty and Merciful God.

Grafton County, New Hampshire, as it happens, is across the river from the Vermont home of a friend of mine with whom, in the early 1970s, a group of us did some work in our community on issues of racial justice based on the Kerner Commission Report. Our friend comes to mind just now because he constantly used to urge us to attack a policy issue “at the scale of the problem.”

That is a pertinent reminder tonight. The true scale of the problem of lawyer professionalism has, I think, been trivialized in recent years. One respected senior lawyer told me a while back that the only point of the “professionalism enterprise,” as he called it, was “to get lawyers to stop shouting at each other.” Well, that would be a good thing, but it is not the point; it is not the scale of the issue at all.

Rather, to continue usefully the discussion Pound began at the start of the last century, we have to take into account some realities of this
century. There have been dramatic changes in the demographics and economics of the practicing bar since Pound spoke. Those changes have, in turn, rendered obsolete some of the rationales offered in yesteryear for a sense of identity in the legal profession. At the same time, lawyers have been beset by centrifugal pressures like those generated by new technology, increasing specialization, and more avid competition. A scholarship of disillusionment has become fashionable in the legal academy, and old structures of initiation, acculturation and mutual support—from collegial law firms to thriving bar associations—have struggled to avoid erosion.

All these phenomena and others have combined to stress to the breaking point the notion that American lawyers share a common ethos that defines them as a profession. For Pound's discussion now to proceed constructively—at its true scale—we need to take a moment to consider whether the game is worth the candle, to answer the questions: Does there survive, can there be nourished, a common understanding of what it means today to be a lawyer? Is there a coherent basis for a fresh, contemporary sense of professional identity and worth?

The invitation to give this lecture was an offer I couldn't refuse because I so profoundly believe that the answers to both of those questions is, “Yes.” And because I also believe that a failure of our collective imagination that leaves large numbers of lawyers in doubt of that answer imperils our continuation as an autonomous profession, the quality of our service to clients, and, in the end, a very fundamental value of American democracy. That value is an enduring and consistent respect for the Rule of Law. That value and its implications shape a modern notion of what American legal professionalism is—and asks of us.

My thesis in short is this: The Rule of Law is essential to the distinctive American social contract; lawyers, in their everyday private practice, are essential to the Rule of Law in America; and our whole professional value system is only as relevant—as alive—as is our appreciation of this understanding. Let me expand on that for a few minutes.

Let's start with my first proposition—one that I think should be an axiom, but may take a moment’s reflection to appreciate fully. The Rule of Law is indispensable to the American experiment in liberal democracy. I'm not talking here about the network of positive law and the profusion of regulations about which reasonable people can differ and regularly do. I'm talking about something much more fundamental: the necessity in our culture that people in general respect and obey the law. It is a value that, like gravity, we generally ignore but that conditions virtually everything we do and how we do it.
The American enterprise, when you reflect on it for a moment, is full of deliberately designed tensions. We are a nation built on proudly pro-claimed oxymorons. There are many, but lest I test your endurance like Pound, consider just two:

We pledge allegiance to a land with “liberty and justice for all” no matter how disparate and conflicting the claims and aspirations of our people may be.

And, as for those people, we pledge allegiance to one nation, which our Great Seal proclaims to be “E pluribus unum”—“One from many.”

At the start of our nation’s life—almost up to the point Pound spoke—the pledge of “liberty and justice for all” could be redeemed by the lure of the frontier. The oppressed, the misfit, the opportunist, could “go west” to find a new chance or a safe haven. But no more. Justice Potter Stewart made the point, and described its significance for us, some years ago: “In my lifetime,” he said, “The courts have replaced the frontier. When this country was new, a nonconformist or someone who just wasn’t making it could always go west. There was always space. Now there is no more space, and the courts have been called upon to protect the rights of these individuals. The courts are trying to provide that space.”

The pledge of allegiance renders in poetic language what political theorists call a scheme of “ordered liberty.” But whether stated in poetry or prose, managing and continuously resolving the tensions inherent in that self-competing aspiration is the job of law. As Pound put it, “Justice, which is the end of law, is the ideal compromise between the activities of each and the activities of all in a crowded world.”

Put only slightly differently, the Rule of Law is a necessary precondi-tion to the functioning of a democracy in conditions of freedom. Fareed Zakaria has made this point convincingly in his wonderful little book, The Future of Freedom. Zakaria reminds us that, despite our American tendency to conflate them, democracy and freedom are not the same thing, that creating each of them is a somewhat different endeavor, and that managing their inherent tension over time requires a robust and sustained adherence to a set of generally accepted limiting principles and the means of enforcing them—that is, the Rule of Law. That we Americans tend to blur the distinction between democracy and freedom in our prescriptions for other societies, like Iraq, is, in Zakaria’s view, a testament to how much we have become used to the existence of a functioning Rule of Law regularly providing its mediating function in our society.

Not that the tensions have disappeared, or that the sovereign claim of the Rule of Law goes unchallenged here, of course. The fraught issues
of recent months and years over the authority to make pre-emptive war, to detain and render prisoners in the war on terror without legal process, to intercept domestic communications without warrants, are vivid clashes of the claims of order with the claims of liberty. And the Senate’s recent reconnaissances of the border between judicial authority and presidential power is fundamentally about whether such vivid clashes, and others less dramatic, will be resolved by law or prerogative.

The thesis holds, I submit. To balance the equally proclaimed values of liberty and justice, freedom and democracy, in short to sustain the social order to which we pledge our allegiance, requires an equally sturdy allegiance to the Rule of Law.

That is even more so in a nation as diverse as ours, attempting continually to forge “one from many.” Our diversity is now, as it has always been, a great strength. We are one of the few genuine polyglot democracies ever attempted in the history of the world. But our diversity is now, as it has always been, a great confusion, too; our melting pot has always been at the boil. The organizing ideal that provides the instrument to make one coherent nation across the manifold divisions of race and culture and moral perspective, custom, manners, ideology and ambition, is a common acceptance that the adjustments required from each of us to live with others, if not made voluntarily, will be provided by the Rule of Law.

To say that this is commonly accepted does not mean that this submission to law is easy or the outcomes are undisputed. Here’s Pound again, reminding us from a startlingly simpler era what we know in our bones today: in contrast to what he called “Periods of absolute or generally received moral systems” societal conflicts are “greatly intensified” “in periods of free individual thought in morals and ethics, and especially in an age of social and industrial transition.” Never mind globalization, one might add. Pound points out that “The law seeks to harmonize the activities [of society] and adjust the relations of every man with his fellows [well, it was a century ago] so as to accord with the moral sense of the community. When the community is at one in its ideas of justice, this is possible. When the community is divided and diversified, and groups and classes and interests, understanding each other none too well, have conflicting ideas of justice, the task is extremely difficult.”

To be sure, that is so. One only has to look at the contests over abortion, affirmative action, gay rights and a host of other “hot button” issues to know it’s so. But one only has to notice that all those issues are played out in the halls of legislatures and courts to know that, hard as it is, our society has remitted those clashes to the law for resolution.
Looking at just these two self-competing promises—that we have order and liberty, that we be one though many—shows, I think, how crucial a vibrant respect for the Rule of Law is to our society. You would find the same, I think, if you looked at our claim that “All persons are created equal” which is manifestly untrue in nature and nurture but is true in the eye of the law. Or at the strains imposed by our embrace of a free market system upon our ideal of equal opportunity for all.

The Rule of Law is the indispensable instrument by which we manage all these tensions—and others—inherent in our grand national experiment; by which—across all that divides us—we make the adjustments needed to live as one; by which we create the conditions in which a free economy can operate efficiently and fairly, where private plans can be reliably laid and carried out, where disputes can be resolved peacefully and order kept with a reasonable approach to justice. In our world of oxymorons, the Law is both the glue and the lubricant of our diverse society.

But what the law is not, as Oliver Wendell Holmes one observed, is “a brooding omnipresence in the sky.” It is the composite of thousands of cases and matters, laws made and used, advice given and received, day in and day out. If the Rule of Law is crucial to American society, then lawyers are crucial to that Rule of Law, since they deliver it every day in every case or transaction in which they act on a client’s behalf. It is not an exhortation, but a description, to say that lawyers in private practice are always engaged in a public calling.

There is no need to tell this group that this role is most obvious in the courtroom, where lawyers play their socially assigned part in asserting their clients’ rights and interests. These rituals of stylized combat are designed—however imperfectly—to resolve conflicts without strife. They are a social peacekeeping system in which lawyers, by ably representing their opposing clients, perform a public as well as private service.

But it may be worth a moment to remind ourselves that private practice is truly public, too, in the less obvious setting of transactional work. A few years ago, Stephen Carter of Yale spoke at a symposium in Minnesota ambitiously entitled, “The Future of Callings—An Interdisciplinary Summit on The Public Obligations of Professionals into the Next Millennium.” His remarks included an insight that illustrates my point. “The principal law-givers in America” he said, “are neither courts nor legislatures, nor administrative agencies, but rather lawyers” “This,” he continued, “is because most people’s principal experience with understanding their legal obligations, and their legal rights, is working with a lawyer. Whether it is a matter of buying a house, defending a lawsuit, or estab-
lishing a business, the lawyer becomes, in the life of that person, the law-
giver. It is the lawyer who comes forward to say these are the possibilities
of what you may do or not do.” So, in the daily counseling practice of
lawyers, the adjustments of interests made by the Rule of Law are deliv-
ered by the lawyer to the client, and become, for that client, the law.

And all the drafting that we do in our offices at the behest of clients
has this same public character. Think of it: when we draft an instrument
we are actually enlisting the power of the state to give effect to the rela-
tionship we are establishing by what we write. Remember, that is why the
racially discriminatory covenant in a private transaction was held to vio-
late the Fourteenth Amendment in Shelley v. Kramer; the requisite state
action was found to inhere in the fact that the covenant was backed and
enforced by “the full coercive power of government.” That public power
had been conscripted by private lawyers writing a private contract.

Mary Ann Glendon describes another public aspect of private trans-
actional practice this way:

Office lawyers frame agreements, bylaws, contracts, deeds, leases,
wills, and trusts, that…aid citizens to live together with a mini-
mum of friction, to make reliable plans for the future, and to
avoid unnecessary disputes….The authors of well-crafted cor-
porate charters and by-laws, collective bargaining agreements,
leases, trusts and estate plans, parliamentary procedures, con-
stitution-like regulatory schemes, and so on, have extraordinary
opportunities to affect for better or worse the quality of every-
day life in our large commercial republic. Theirs is the delicate
job of providing structure and order while leaving as much room
as possible for spontaneity and creativity.

All these are public goods. So it is the regular work of American law-
yers—however unconscious of the fact they may usually be—to manage
the myriad tensions peculiar to the American enterprise. We create and
maintain the conditions of order, stability, freedom and justice in which
it is at all possible for commerce and creativity, and for that matter,
ordinary lives, to flourish. We operate a system in which disputes can be
peacefully resolved and justice can be sought and often achieved. We do
all this incrementally, by providing counsel and advocacy to people and
institutions in need of them. We are, so far as the Rule of Law is con-
cerned, as my colleague Paul Saunders has put it, “where the rubber meets
the road.”

The American lawyer, then, belongs to a distinctively public and helping
profession. The notion is captured in the preamble of the Model Rules of Professional Conduct: “A lawyer is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.” The twin ideas of public character and private service are given this prominence in the Model Rules because they are the wellspring from which the profession’s claim to legitimate autonomy and its fundamental ethical principles flow. Ethics are supposed to be the authentic expression in behavior of a community’s ethos—its fundamental character and understanding of itself. For us that understanding must be that we advance a transcendent public purpose by doing well our particular private work.

If, as I believe, that is the core conception of what an American lawyer is, as this century moves along, then it defines what the “professionalism enterprise” is about, and does so at the appropriate scale. The first step in continuing Pound’s conversation, I think, is to consider and savor what such a self-conception of our profession means for us and our work. Some years ago, also in a speech to the American Bar Association, John Sexton twice used a dense, packed formulation of this idea. Speaking of legal education in terms that are equally relevant to legal practice, he said he believed “that reflection and vigilance will be necessary if we are to notice and maintain what we subconsciously cherish about what we now do.” We need to be alive to how important our work is in the American design of things, and then relate how we do our work to how well it uses the tools of the legal system to move the nation closer to that ideal of justice defined a hundred years ago by Pound as the compromise that harmonizes the competing interests always at play in our society.

The prescripts of our ethics codes, and the aspirations of professional behavior that go beyond them, all have life and command respect just so far as they create and preserve the conditions necessary in the real world to allow lawyers to function in accordance with this vision of who they are and what they do.

Take three quick examples of this from the many available:

We are called upon to keep secret what our client tells us, not because in and of itself it is a moral good or an intrinsic characteristic of the lawyer-client exchange. We are required to do it because society has agreed with us that it is useful to keep such information private so that we better can do our job of advising and advocating for our client. It is a purely utilitarian assessment of what is the best way to promote good legal advice and able advocacy. And the society has an interest in that, despite the cost of lost access to information, because both the Rule of Law, and
an approach to the ideal of justice, are thought to be served by facilitating the lawyer’s role. When it is thought widely enough that the social costs of providing legal advice on those terms are too high, and prejudice rather than advance the Rule of Law, we will, over time find that our clients’ opportunity privately to communicate facts to us, and ours privately to advise them, will begin to shred.

Or, again, it is only because we have the fundamental role I have described tonight that we have a legitimate claim to independence. Independence in both senses that we lawyers use the word: our autonomy from supervision by others, and our ability to give disinterested advice to our clients. We are allowed to be independent in the first sense because it is necessary for our independence in the second sense. Thus, we are called on, by the professional self-conception I have suggested tonight, to be able and willing to speak truth to power, whether the power is held by the President of the United States, or the CEO of Enron, or a valued and valuable client. It is truly a case of use it or lose it: our profession’s claim to collective autonomy depends, over time, on our individual willingness to use our freedom from outside interference to provide to our clients the advice we know they need to hear, whether we think they want to hear it or not.

And—in order not to disappoint my friend who thinks that professionalism is about shouting lawyers—I admit that it is about that too. The aspirational guidelines on the point are intended, as their introduction puts it, “to encourage lawyers and judges...to observe principles of civility and decorum.” But why? Not because—as used to be the unspoken rationale—white gentlemen of a certain class don’t behave badly; they quite often did and do. Not because it makes lawyers’ work more agreeable, though it assuredly does. Not because we thereby forbear from contributing to a general coarsening of manners in the culture, although it does that too. Rather, we adhere to civil behavior because not to do so betrays the values that give our contemporary profession meaning. Incivility hurts rather than helps clients, as study after study has shown; and it tears down respect for the law and undermines the public enterprise in which we are called to be engaged. We inveigh against incivility because it is both stupid and a civic sacrilege.

So, I propose that we continue Pound’s discussion with a renewed awareness of the centrality of the Rule of Law, and hence of lawyering, to the continued vitality of the American social contract in times of rising stress upon it. And also with a lively appreciation that our notions of professionalism are derived from and are informed by this understanding.
Let me, as if I were a good real estate draftsman (which I am not), come back to the point of beginning, where the thoughts I have offered tonight are, I think, confirmed by briefly revisiting those two diatribes of old I mentioned there.

Dick the Butcher’s homicidal ambitions about lawyers were stirred up not because any lawyer, or all lawyers, had disappointed his expectations. Quite the reverse: he understood—however crudely—that it was the essence of a lawyer’s role to stand for a balance of order and liberty, and to face down the forces of disorder and oppression. He could never achieve the Rule of the Mob he sought while there remained a Rule of Law serviced by lawyers.

And, while thanksgiving to an Almighty and Merciful God is always to be admired, in Grafton County’s case, I suspect it was misplaced. Living in a bucolic, homogeneous community with abundant open space and experiencing one of Pound’s “periods of absolute or generally received moral principals,” they had little need of lawyers to manage tensions they did not yet have. But the “new college” to which they refer—Dartmouth—was destined in not too long a time to produce one of the great formative disputes of our legal history, which would famously be argued by one of the greats, Daniel Webster. It wasn’t God’s mercy; Grafton’s time had not yet come. When it did come, its people sought relief, as Americans now regularly do, in the hands of the best lawyer they could find.

Speaking of great lawyers brings me to my concluding thought this evening. Close observers of this lecture series will think I have overlooked one of its most congenial conventions. I have not. A predecessor of yours, Chief Judge, wrote of bar associations that “professional associations justify their existence to the extent that they further the standards and the ideal” of the profession. It is small wonder then, that Orison Marden served as President of this Association, and New York State Bar Association, and the American Bar Association—the only person ever to have held all three posts. Orison was President here when I joined the Association and I remember with affection the great warmth with which he went out of his way to make us rookies feel welcome and valued. He was a man of some oxymorons himself: he was intensely committed to his profession, and wholly relaxed in demeanor. He was serious about what he did and the excellence with which it should be done, but he was unfailingly cheerful with an engagingly sly sense of humor. He was an achiever on a grand scale, but a man of innate modesty and unassuming courtesy. Even while he held positions of prestige, power and influence in his firm and at the wider bar, he made his way weekly to the Legal Aid Society office at
125th Street and Seventh Avenue, where he literally rolled up his sleeves and got to work with impoverished clients, who sought—and in him found—redemption of the promise of “justice for all.” Without any contradiction, he was a great encourager—he certainly encouraged me. And he was a walking, talking, living lesson of what it meant then, and means now, to be an American lawyer. It has been an honor and a genuine delight to share my few ideas with you tonight in his memory.
Mission to Moldova

Thawing A Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova

The Special Committee on European Affairs

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Mission to Moldova*

Thawing A Frozen Conflict: Legal Aspects of the Separatist Crisis in Moldova

The Special Committee on European Affairs

INTRODUCTION

Moldova is the poorest country in Europe and it is enmeshed in a seemingly intractable separatist conflict involving ethnic tensions, Russian troops, Soviet-era arms stockpiles, smuggling, money-laundering, and corruption. Bordering Romania and Ukraine, with a majority of ethnic Romanians, it is a country that has been largely overlooked by the West.¹

¹ The Soviets, however, labeled this population as ethnically “Moldovan,” and asserted that they were not ethnically Romanian. The USSR also called the Romanian language “Moldovan,” and underscored this by outlawing the use of the Latin alphabet and requiring the use of Cyrillic letters. Although the reason for this nomenclature was political, rather than ethno-linguistic, it was carried over by the current Moldovan government after independence.
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This report examines the key legal issues of this “frozen” conflict and assesses the legal or quasi-legal arguments made by the Government of Moldova and the separatists.

At issue is who should control a strip of land nestled between the Dniestr River and the border of Ukraine. Various names are used for this region: Transnistria, Trans-Dniester and, by Russian speakers, Pridnestrov’ia. This region is less than 30 kilometers wide, with 4,118 square kilometers in total area, making it roughly the size of Rhode Island. Transnistria has a population of approximately 580,000, while the rest of Moldova has 3.36 million inhabitants. Nonetheless, Transnistria contains Moldova’s key industrial infrastructure, power plants, and, importantly, a significant stockpile of Soviet-era arms. Since 1994, it has been under the effective control of a separatist regime that calls itself the Transnistrian Moldovan Republic (“TMR”).

In late May 2005 the Association of the Bar of the City of New York (the “NY City Bar”), through its Special Committee on European Affairs (the “Committee”) sent a legal assessment team (the “Mission”) to the Republic of Moldova, including Transnistria. The Mission consisted of Barrington D. Parker, Jr., a United States Circuit Court Judge in the Second Circuit; Robert Abrams, a partner at Stroock & Stroock & Lavan LLP and former Attorney General of the State of New York; Elizabeth Defeis, Professor of Law and former Dean of Seton Hall University Law School; and Christopher J. Borgen, Assistant Professor of Law at St. John’s University School of Law. It was led by Mark A. Meyer, a member of Herzfeld & Rubin, P.C., and the Chair of the Committee.

As will be described below, the Mission met with the key policy lead-

3. Id., at 178.
5. This report will use the “Transnistria” nomenclature although when we quote another author’s work we will preserve that author’s nomenclature within the quotation. For example, the TMR may variously be referred to as the Dniestr Republic, the Pridnestrovian Moldovan Republic (PMR), Transdniestria, or other such name based on the nomenclature adopted by the author being quoted. Similarly, this report’s spelling of other proper names normally spelled in the Cyrillic alphabet may differ from the spellings within the quotations of other authors.
ers in Moldova and in the breakaway region, including the President of Moldova and the leader of the Transnistrian separatists, and has completed the first independent analysis of the legal issues involved in the Transnistrian crisis. Beholden to none of the stakeholders, the NY City Bar is able to consider these issues from an objective standpoint. One should note that the NY City Bar’s work historically has not been confined to New York. In fact, the Transnistria mission is not the first foreign mission by a committee of the Association. Over the past twenty-five years, the Association has conducted a number of missions to places as diverse as Cuba, Singapore, Malaysia, Turkey, Hong Kong, Argentina, Uganda, Northern Ireland, and, most recently, India. In addition, the Association has worked with bar organizations in the Czech Republic and Kyrgyzstan to bolster the independence of the bar and judiciary. Perhaps due to this historical involvement in international law, the various interested parties, including the governments of Moldova, Russia, Romania, Ukraine, and the United States, as well as the leadership of Transnistria, assisted the Mission by making government representatives, policymakers and experts available for interview.

In preparation of this Report, the Mission met with the following individuals, as well as many others not listed here:

In Moldova
President Vladimir Voronin
Prime Minister Vasile Tarlev
Foreign Minister Andrei Stratan
Minister of Reintegration Vasilii Sova
Chairperson of the Supreme Court Valeria Sterbert
Chairperson of the Constitutional Court Victor Puscas
Justice Minister Victoria Iftodi
General Ion Ursu, Chief of the Information and Security Services
Leaders of all of the Parliamentary factions
Deputy Attorney General Valeriu Gurbulea
Deputy Speaker of the Parliament Maria Postoico
US Ambassador Heather Hodges
Russian Ambassador Nicolay Ryabov
Ukrainian Ambassador Petro Cealyi
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Romanian Ambassador Filip Teodorescu
OSCE Ambassador William Hill
ABA/CEELI Country Director Samantha Healy
Farmers and local municipal and county leaders from the Dubasari area

In Transnistria
President Igor Nikolaevich Smirnov
Chairman of the Supreme Soviet Grigoriy Stepanovich Marakutsa
Foreign Minister Valeriy Anatolevich Litskai
Minister of Justice Viktor Balala
Chairperson of the Constitutional Court Vladimir Grigoriev

In Romania
Foreign Minister Mihai Ungureanu
Experts from the Ministry of Foreign Affairs, the Ministry of Justice, and the Ministry of Trade and Economy,
US Deputy Chief of Mission Tom Delare

In New York
Ambassador Andrey Denisov, Permanent Representative of Russia to the United Nations
Ambassador Seva Grigore, Permanent Representative of the Republic of Moldova to the United Nations
Ambassador Mihnea Motoc, Permanent Representative of Romania to the United Nations
Senior representatives of the Mission of Ukraine to the United Nations

In Washington, D.C.
Ambassador Stephen Mann, Special Negotiator for Eurasian Conflicts
Elizabeth Rood, Deputy Director, Office of the Special Negotiator for Eurasian Conflicts

6. Marakutsa, who had been in office since the original separatist conflict, was replaced in December 2005 with the election of Yevgeny Shevchuck as the new Chairman of the Supreme Soviet.
The National Security Council’s Director for Europe, Damon Wilson
Various Department of State experts on Moldova and regional conflicts
Ambassador Sorin Ducaru, Romania’s Ambassador to the United States and his staff
Ambassador Mihai Manoli, Moldova’s Ambassador to the United States and his staff

The resulting report has five parts. In Part I we review the history of the conflict over Transnistria. Part II is an overview of the work of the Mission of the European Affairs Committee of the New York City Bar regarding the situation in Transnistria. Part III turns to the substantive question of determining the status of the so-called “Transnistrian Moldovan Republic” (TMR) under international law. This will include discussions of self-determination, secession, and the status of de facto regimes. Part IV considers what the TMR may or may not do regarding the conversion of property. Part V assesses the legal duties of third parties that become involved in secessionist conflicts. Finally, the Conclusion summarizes the main points of this report.

EXECUTIVE SUMMARY
This report considers three main legal issues: (a) whether the TMR has a right under international law to autonomy or possibly sovereignty; (b) what the legal concerns are regarding the transfer of property located in Transnistria by the TMR leadership; and, (c) what role “third-party” States have in the ongoing conflict and, in particular, the international legal implications of Russian economic pressure and military presence in the TMR.

The Status of the TMR under International Law
The central question to this report concerns the status of the TMR under international law and, in particular, the evaluation of claims by Transnistrian leaders that the TMR has a legal right either to autonomy within Moldova or to secede. We found neither claim persuasive and conclude that the TMR is best characterized as a “de facto regime.”

No Right to Autonomy
First, under international law there is no “right” to fiscal or governmental autonomy within a state. While the TMR leadership may make
political arguments that one may or may not find persuasive, we did not find a legal basis for a claim of autonomy. The two strongest quasi-legal arguments in favor of autonomy are: (a) that due to the denunciation by the USSR of the Molotov-Ribbentrop Pact, which had established the modern boundaries of Moldova, Transnistria should revert to an autonomous state; and, (b) self-determination as a basis for autonomy.

The denunciation argument is a chimera. Simply denouncing a treaty does not revert the political system to the *status quo ante*; it merely means that the treaty will not be in force going forward. This is especially true in treaties that include boundary delimitation provisions.

The second argument made by the Transnistrians, linking autonomy with the right of self-determination, opens up numerous complex issues in public international law. One thing is clear: rather than a right to autonomy—or even a specific set of characteristics that define this term—international law in the last century has focused on the elucidation of the norm of self-determination. Self-determination, and its relation to autonomy and secession, is discussed at greater length below.

In sum, we found that international law has little to say as to any supposed “right” to autonomy, and that grants of “autonomy” are largely issues of domestic law. In the Transnistrian case, the Government of Moldova has proposed various plans that are effectively grants of varying levels of policymaking and regulatory autonomy; all have been rejected by the TMR. We conclude that, based on their words and deeds, the TMR’s leaders seem less interested in autonomy than in full sovereignty.

**Self-Determination, Sovereignty, and Secession**

The norm of self-determination is not a general right of secession. It is the right of a people to decide on their culture, language, and government. It has evolved into the concepts of “internal self-determination,” the protection of minority rights within a state, and “external self-determination,” secession from a state. While self-determination is an internationally recognized principle, secession is considered a domestic issue that each state must assess itself.

Influential decisions and reports concerning self-determination, such as the report concerning the status of the Aaland Islands in 1921 and the Badinter Commission opinions concerning the former Yugoslavia in the 1990’s, and other examples of state practice have been consistent in the view that a successful claim for self-determination must at least show that: (a) the secessionists are a “people”; (b) the state from which they are seceding seriously violates their human rights; and (c) there are no other
effective remedies under either domestic law or international law. None of these prongs are satisfied in the case of Transnistria, with the possible exception of (a).

The term “people” has been generally used in recent state practice to refer to an ethnic group, or a “nation” in the classic, ethnographic, sense of the word. However there are some, such as the TMR’s leadership, who suggest the term should mean something else, perhaps a group with common goals and norms. While the norm of self-determination may evolve such that a people may be more readily identified as merely a like-minded group, we do not find that current state practice supports such a proposition. Regardless, deciding on a single definition of the term “people” is not dispositive in this case, as none of the other requirements for external self-determination are met.

Concerning the second prong, the existence of serious violations of human rights, the argument of the Transnistrians can be organized into three main groupings: (a) violations of linguistic, cultural, and political rights; (b) the brutality of the 1992 War; and (c) the denial of economic rights. Taking into account the significant changes in Moldova since 1992, none of these claims is convincing today.

The actual history of Moldova since the end of the 1992 War shows that the country has improved its respect of minority rights. In contrast, the TMR has had a poor human rights record including a lack of due process, persecution of religious minorities, and retaliation against political dissenters. The 1992 War itself caused 1,000 deaths, but we found that, in light of state practice, the events of the 1992 War in and of themselves do not make a persuasive claim of secession as a legal right. If they did, the world would be rife with secessionist conflicts. Similarly, the economic rights claim, which is essentially about allocation of tax revenues, does not lead to a legal right to dismember a state. This argument is really about policy, not the form of a polity.

Finally, we note that there is a general sense among commentators, opinions, and decisions, that the human rights violations that are cited in support of a claim of secession must be ongoing violations. Although Moldova still has many possible pitfalls on its road to becoming a fully modern democratic state, it is clear that it is nonetheless traveling the road in the right direction, albeit with some fits and starts. Thus, the second prong—ongoing serious violations of human rights—is not met.

The third prong asks whether there are any other options available besides secession. This conflict has been frozen not so much because there are no other options under domestic and international law besides seces-
sion, but because the separatists have chosen to make the conflict seem intractable by repeatedly refusing any options short of effective sovereignty for the TMR. For example, while Moldova has sought to decrease ethnic tensions, the TMR has attempted to exacerbate them and subsequently claim that separation is necessary in order to avoid ethnic conflict and possibly genocide. Such “gaming the system” is not persuasive.

We thus conclude that there is no solid basis for a claim of secession under external self-determination. The most basic requirements for a legal claim are not met.

The TMR as a De Facto Regime

If Transnistria is not a state, then what is it? We considered two issues: (a) the role of recognition in the process of state formation; and (b) whether the TMR is a de facto regime.

There is no obligation to recognize the TMR, even if it does have effective control of territory. Rather, it is likely that the forcible acquisition of territory, the ongoing objections by the pre-existing state, Moldova, and the evident reliance of the TMR on military, economic, and political support from Russia for its survival argue against recognition and for nonrecognition in this case. In similar cases the Security Council and/or the General Assembly call on UN member states not to recognize such seceding entities.

Inasmuch as the TMR has effective control over Transnistria but is not recognized, the TMR can best be understood by using the doctrine of de facto regimes. Such de facto regimes are treated as partial subjects of international law. Their unique status does give rise to certain rights and responsibilities, primarily related to acts required for the support and well-being of the population. It may conclude agreements that are held at a status below treaties. Besides the right to act in order to support its population, a de facto regime may also be held responsible for breaches of international law.

While the de facto regime thus has certain rights and responsibilities, the acts of de facto regimes have uncertain legal effect. Acts of such a regime may become invalid with the disappearance of the regime, for instance, if the territory is reabsorbed into the parent state. However, the reintegrated state after a failed de facto regime may be held liable for the acts of the de facto regime that were part of the normal administration of the territory based on the assumption that such acts were neutral and that the state would probably have undertaken similar such acts. If, on the other hand, the de facto regime becomes a state, then its acts will be binding on the new state.
The TMR and the Conversion of Property in Transnistria

At the heart of the dispute between the Government of Moldova and the TMR's leadership is the issue of the control of the economic assets of Transnistria. Does the TMR have the right to convert the property in its area of effective control? If the two parts of Moldova are reintegrated, must these decisions of the TMR be respected?

We used two theoretical frameworks to answer these questions. The first, the concept of *de facto* regime, was discussed above. The second is an analogy to the international law of the administration of occupied territories, the most complete statement of which is found in the Fourth Geneva Convention. We use these rules only by analogy as one might argue that the TMR actually is not bound by the Fourth Geneva Convention. Nonetheless, we find the rules concerning the administration of occupied territories and those concerning *de facto* regimes to be useful, especially as they are also remarkably consistent as they both draw from the same root concepts of property rights that tap all the way down to the Roman law of *usufruct*, use of property by one who does not own that asset.

Applying the international law of *de facto* regimes, the TMR does not have the right to sell-off Moldovan state assets or any private property. Any such sales face possible challenge and repudiation should Transnistria become reintegrated into Moldova.

By not only applying the conception of the TMR as a *de facto* regime, but also by analogizing to the international law of the administration of occupied territories, we find that an occupying power or its analog: (a) may confiscate state property, other than real property, if it is usable for military purposes or in the administration of the territory; (b) may only administer non-military state real property without destroying or otherwise converting the economic value of the property; and (c) may not confiscate private property unless it is war materiel.

Based on the foregoing, the TMR's privatization program is thus exceedingly difficult to justify. Any private party taking part in this program as a purchaser consequently does so at its own risk.

Third-Party States and Secessionist Movements

The third and final main legal issue we consider is the role of “third-party” states. States have a basic duty not to intervene or otherwise interfere with the resolution of an internal conflict within another state. Under circumstances where self-determination or, more clearly, external self-determination is implicated, or where the Security Council finds that a conflict has become a threat to international peace, then third-party states...
may have more freedom of action concerning the conflict. This fundamental norm of non-intervention is linked with concepts of sovereignty, self-determination, and peaceful coexistence.

The role of third-party states is especially important in this case as Russia and Ukraine have taken on the role of “guarantor” states, states that have a special interest in ensuring an end to the conflict and formally commit to devoting resources to conflict resolution. Being a guarantor puts a state into a position in which it becomes involved in an ongoing crisis in another country, but that state must nonetheless respect international law in its actions. The report considers the actions of Russia and Ukraine in light of these rules of conduct.

Russia

Russia, not least because it maintains troops in Transnistria, is not only a guarantor, but a key player in the conflict. We consider four main issues: (a) the activities of the Russian Army and other organs of the Russian Federation in Transnistria; (b) economic pressure by the Russian Federation on Moldova; (c) ties between the TMR leadership and Russian leadership; and (d) the general diplomatic stance of the Russian Federation.

The role of the Russian Army can be split into two phases: assistance during the 1992 War and ongoing activities, including maintenance of arms stockpiles in Transnistria. The Russian 14th Army played a decisive role in the 1992 War by intervening in the fighting on behalf of the separatists. Despite treaty promises to demobilize and repeated Moldovan requests that Russia remove its troops from Transnistria, the troops remain. Consequently, they prop up the viability of the TMR and make reintegration more difficult. They also provide materiel, expertise, and other support to the TMR on an ongoing basis.

Similarly, the Soviet-era arms stockpile under control of the 14th Army has been used to support the TMR both directly and as a source of revenue through joint Russian-TMR sales of army materiel on the world market. Moldova thus wants the immediate removal of the weapons stockpiles. Russia has so far refused to remove the stockpiles (or the troops) until there is a comprehensive political settlement and has also argued that the Transnistrians will not let them remove the arms.

Besides the use of the army to either hamper the Moldovans or assist the TMR, the second main issue is that Russia has also used economic pressure and economic assistance as a carrot and stick. Economic pressure is generally not barred by international law. However, such pressure on a state or assistance to separatists may make the third-party state liable un-
nder the law of state responsibility if its pressure would either frustrate Moldova's sovereign privileges or would breach one of the third-party state's pre-existing commitments to Moldova.

In considering the present situation, there are four areas of particular interest: (a) the use of energy prices as a carrot or a stick; (b) the increased use of tariff barriers against Moldovan goods; (c) economic assistance to the TMR; and (d) the shared economic interests of Russian and Transnistrian elites. Taken as a whole, there is a significant intervention on behalf of the TMR.

On the third issue, the ties between TMR and Russian leadership, there is ample circumstantial evidence. Smirnov, Minister of Justice Balala, and Chief of Internal Security Vladimir Antufeyev all arrived in Moldova at the start or since the start of the separatist crisis. The TMR's ruling elite is largely Russian and, to a lesser extent, Ukrainian, and have Russian citizenship. They have been granted Russian nationality. Certain members came to the TMR from senior positions in the Russian government, particularly the Russian parliament (the “Duma”) and the Russian Army.

Finally, the various activities described above—the economic pressure, the military assistance to the TMR, the energy politics—need to be understood in light of the constant Russian rhetoric in favor of the TMR and critical of Moldova. While we do not contend that any single activity described could lead to state responsibility (although the troop situation may rise to that level) we believe that these acts seen as a whole, combined with constant Russian statements supporting the TMR and criticizing Moldovan efforts at reintegration, form a compelling picture of inappropriate intervention by Russia into the domestic affairs of Moldova.

Ukraine

Due to its common border with Moldova—and particularly with Transnistria—as well as the significant ethnic Ukrainian population in Transnistria and throughout Moldova, Ukraine is a key stakeholder in the Transnistrian conflict. Ukraine has been critical of Transnistrian separatism and has advocated the complete withdrawal of Russian troops, but has also been perceived (rightly or wrongly) as allowing smuggling through its territory and possibly being open to relations with the TMR. Although Ukraine has acted in many ways as a counterbalance to Russian influence in Transnistria, its attentions have often been viewed by the Moldovans with a mixture of hope and suspicion.

Ukraine has made what may be a good faith effort at plotting a path towards a solution of the crisis; however an actual final plan needs to be
seen before its legal implications can be assessed. The stricter border controls that are currently being implemented are a necessary, though not conclusive, step in resolving the Transnistrian crisis. Now that Ukraine has become a more active participant in the Transnistrian crisis, its actions will need to be monitored, as have those of Russia and Moldova, by the various stakeholders.

CONCLUSIONS
The report thus concludes:

Concerning the Status of the TMR. Attempted secessions are largely viewed as domestic affairs that need to be resolved by the state itself. There is no right to secede as a general matter. At most, secessions may be accepted in cases where a people have been oppressed and there is no other option for the protection of their human rights. In light of these rules, the TMR has not made a legally sufficient case that it has a right to external self-determination or secession.

Consequently, the effective control of the TMR of the Transnistrian part of Moldova is that of a de facto regime and may be viewed as analogous to control by an occupying power. The TMR is thus limited as to what it may legally do with the territory it administers.

Concerning the Conversion of Property by the TMR. The law of occupation recognizes that the occupying power may, as a matter of fact, control the economic resources within a territory but, as a matter of law, the rightful owners are the previous owners. The final disposition of the property is not decided by the current effective control by the occupier and as such, the occupier has the legal duty not to destroy the economic value of the property. Any economic activities undertaken jointly with the separatists or insurgents by another party are at the peril of that party. There is no comfort that such activities will be sanctioned after the final resolution of the separatist conflict and they may, in fact, be “unwound.”

In light of the rules governing de facto regimes and also the law of occupation, the TMR’s privatization program can leave investors with no confidence that these transactions would be enforced if the TMR is reintegrated into Moldova.

Concerning the Responsibilities of Third-Party States. Interventions by third parties are not favored and are assessed in relation to the norms of non-intervention set out in numerous global and regional treaties and legal documents. Sovereignty requires that a state’s wishes concerning affairs within its own territory be respected up to the point that some other core
interest of the international system is implicated. Thus, for example, the garrisoning of troops on foreign soil is not allowed if the host state requests that the troops leave. Russia’s activities concerning the Transnistrian situation, particularly the intervention of the 14th Army on behalf of the separatists, the ongoing military assistance to the TMR, the economic support of the TMR, and effectively bargaining on behalf of the TMR using energy process and other levers of power against Moldova, leads to credible claims of state responsibility on the part of Russia for the continuing separatist crisis and its proximate results.

Similarly, in light of the experience with Russia, Ukraine’s increased participation in the conflict should be monitored.

I. HISTORICAL BACKGROUND
   A. Pre-Soviet and Soviet Era History
      What we now call Moldova is a classic crossroads of cultures. Bessarabia was historically the west bank of the Nistru (or Dniester) River and Transnistria was on the east bank. Prior to the Soviet period, Transnistria “was, at an even deeper level than in Bessarabia, a classic borderland where ethnic identities were fluid and situational, and where Russian, Ukrainian, Romanian, Jewish, and German influences combined to create a mixed culture.” 7 Transnistria was not part of traditional Romanian territory. From the ninth to the fourteenth centuries Transnistria was part of Kievan Rus’ and Galicia-Volhynia.8 Bessarabia was once a part of an independent Moldovan state that emerged briefly in the 15th century under Stefan the Great, but subsequently fell under Ottoman rule in the 16th century. After the Russo-Turkish War of 1806-12, Bessarabia was ceded to Russia, while Romanian Moldova (west of the Prut River) remained in Turkish hands. Transnistria was also part of Russia, but was in the districts of Podolia and Kherson.

      The upheaval of the Russian Revolution caused many of Russia’s former provinces to seek and, in some cases, declare independence. Bessarabia, with its overwhelming ethnic Romanian population, voted in a plebiscite to become part of Romania.

      By the mid-1920s Josef Stalin had been successful in recapturing for the Soviet Union most of the provinces that Russia had lost during the revolution. Bessarabia, however, remained part of Romania. In 1924, Stalin

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8. Id., at 179.
established the Moldovan Autonomous Soviet Socialist Republic (or “MASSR”) as an autonomous province within the Ukrainian Soviet Socialist Republic. This was spurred by Moscow’s desire to reclaim Bessarabia and attempt to have a colorable claim to this “Moldavian” territory. Transnistria became part of the MASSR. In 1940, the USSR and Germany signed the secret Molotov-Ribbentrop Pact, which, among other things, provided for the USSR’s annexation of Bessarabia, which had by then been part of Romania for more than twenty years. Stalin merged Bessarabia and the MASSR into the Moldavian Soviet Socialist Republic (or “MSSR”), which became the fifteenth republic within the USSR.

Transnistria became the economic and political center of the MSSR. Transnistria manufactured 33 percent of the industrial goods and 56 percent of the consumer goods produced in Moldova and it also produced 90% of the energy needed in the rest of the MSSR. As part of the USSR, the MSSR used Russian as its primary language and adopted the Cyrillic script for written Romanian and called the language “Moldavian.” Stalin also ordered the forced removal of approximately one third of the ethnic Romanian population of Bessarabia, and sent them to Siberia where most perished. Transnistria, having been part of the USSR for a longer period, had already been collectivized in the 1920s and 1930s. Thus, from the beginning of the MSSR there was a greater degree of “sovietization” in Transnistria than in other parts of the Republic. Leaders from the Bessarabian part of the MSSR were disfavored, such that it was not until 1989 that a first secretary of the MSSR’s Communist Party came from Bessarabia.

B. 1989 through 1992: Moldovan Sovereignty and Transnistrian Secession

While a sense of history is important in any discussion of Moldovan
politics, the current crisis can be traced to more recent events. While some can show the roots of the conflict in old hurts over the course of centuries, the proximate causes stem from relatively recent policies in the transition from the USSR into the post-Soviet era. For example, contemporaneously with the events leading to the fall of the Berlin Wall, from August to December 1989, the MSSR parliament passed a series of language laws that made the Moldovan language the official state language and that also began a transition from Cyrillic to Latin script. On April 27, 1990, the Supreme Soviet of Moldova adopted a new tricolor flag and a national anthem that was the same as that of Romania. Then, in the summer of 1990, the MSSR declared sovereignty, changing its status within the USSR.

A group of Russian speakers led by Igor Smirnov, a factory manager who came to Moldova in November 1987 to become a director of the Elektromash factory in Tiraspol, expressed concern that the newly sovereign MSSR would soon seek reunification with Romania and take Transnistria along with it. On August 11, 1989, several Transnistrian workers’ collectives united under the single banner of the Union of Workers Collectives (OSTK) and pursued a policy of secession from Moldova. Igor Smirnov was the first Chairman of the OSTK.

On September 2, 1990, Transnistria declared its separation from Moldova and its existence as a republic within the USSR. Soon after this announcement, separatists began taking over police stations and government institutions in Transnistria, culminating in a protracted fight between Moldovan police and armed forces and separatists outside the city of Dubasari on November 2, 1990.

These events were in the context of ongoing tensions between the MSSR and the USSR concerning what their relationship would be in the future. After the November 1990 engagement between Moldovan and Transnistrian forces, Moldovan President Mircea Snegur was willing to accept a “Union treaty,” as Mikhail Gorbachev had sought, if Gorbachev would help put an end to the secessionist movement. However, Gorbachev did not accept the offer and, in response, Moldova sought independence.
from the USSR.\textsuperscript{20} As a result of these tensions, the March 17, 1991 all-USSR referendum on the future of the Soviet Union was boycotted by Moldova’s leadership, although voting did occur in Transnistria, where the vote was supposedly 93 percent in favor of a unitary Soviet state.\textsuperscript{21}

On May 23, 1991, the Moldavian Soviet Socialist Republic changed its name to the Republic of Moldova.

On August 27, 1991, the Moldovan parliament, in the aftermath of the attempted putsch against Gorbachev, declared that Moldova was an independent republic. Its capital would be the city of Chisinau. By contrast, Igor Smirnov, the leader of the Transnisterian separatists, praised the putschists as saviors of the Soviet state.\textsuperscript{22} Smirnov, arguing that independence was necessary to protect the Russian minority in Transnistria from the possible reunification of Moldova with Romania, rallied the Transnisterian separatists in the creation of the TMR.

On September 6, 1991, the Supreme Soviet of the TMR “issued an order placing all establishments, enterprises, organizations, militia units, public prosecutors’ offices, judicial bodies, KGB units and other services in Transnistria, with the exception of military units belonging to the Soviet armed forces, under the jurisdiction of the ‘Republic of Transdniestria.’”\textsuperscript{24} The Government of Moldova, for its part, announced in Decree no. 234 on November 14, 1991, that all property of Soviet military units within the Republic of Moldova were now the property of Moldova.\textsuperscript{25}

During this period, the Moldovan authorities arrested Igor Smirnov. In response to the arrest of Smirnov and other Transnisterian leaders, the TMR “threatened to cut off gas and electricity supplies to the rest of Moldova.”\textsuperscript{26} Smirnov was released.

In early 1992, as the simmering conflict between the separatists and the government of Moldova continued, Smirnov began a “campaign of harassment” to oust pro-Chisinau police officers from Transnistria.\textsuperscript{27} Transnisterian forces were augmented in the spring of 1992 with the ar-

\textsuperscript{21} Kolstø, \textit{et al.}, \textit{supra} note 9, at 984.
\textsuperscript{22} \textit{King, The Moldovans}, \textit{supra} note 2, at 191.
\textsuperscript{23} The Supreme Soviet is the parliament.
\textsuperscript{24} \textit{Case of Ilascu}, \textit{supra} note 12, at para. 35.
\textsuperscript{25} Id., at para. 37.
\textsuperscript{26} \textit{King, The Moldovans}, \textit{supra} note 2, at 191.
\textsuperscript{27} Kaufman, \textit{supra} note 20, at 129.
rival of Cossacks and other volunteer fighters from other parts of the Soviet Union. 28 “The Cossacks and other volunteers were put on the state payroll, receiving 3000 rubles a month.” 29

On December 3, 1991, the 14th Army occupied Grigoriopol, Dubasari, Sobozia, Tiraspol, and Ribnita, all of which are in Transnistria. 30 Thus, if the Government of Moldova wanted to send troops into its cities to prevent any attempted separation, they could have faced opposition from Russian troops.

Tensions escalated until a large-scale outbreak in the summer of 1992. Much of the fighting took place in and around Bender. The 14th Army intervened on the side of the Transnistrians and, in part due to the 14th Army’s positions, the Moldovan Army was unable to take control of Bender or Dubasari. The fighting resulted in approximately 1,000 deaths and 130,000 people either internally displaced or seeking refuge in other countries. 31

On July 21, 1992, the fighting ended with Moldova signing a cease-fire agreement that was notably countersigned by Russia, as opposed to the Transnistrians. 32 That agreement contemplated, among other things, the establishment of a peacekeeping force including Moldovan, Russian, and TMR forces, the gradual withdrawal of the 14th Army, and the establishment of Bender as a free economic zone. 33

C. Events from 1993 to 2003

The result of the Russian intervention was that Transnistria became effectively partitioned from the rest of Moldova. The fighting cooled, and was replaced by a frozen conflict. 34

One ongoing issue was the status of the Russian 14th Army that re-

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28. The Union of Cossacks is an association recognized by the Government of Russia. Case of Ilascu, supra note 12, at para. 66.
29. Kolstø, et al., supra note 9, at 987.
30. Case of Ilascu, supra note 12, at para. 53.
32. Herd, supra note 10, at 3.
34. Dov Lynch of the European Union Institute argues that the term “frozen conflict” is somewhat misleading because the situation in Moldova (and in the other conflicts typically described as frozen conflicts) has actually been quite dynamic. Dov Lynch, Engaging Eurasia’s Separatist States: Unresolved Conflicts and De Facto States 42 (2004). We use the term here in recognition that, although the situation has evolved in significant ways, the overall result is no closer to substantial resolution as of this writing than it was in 1992.
mained garrisoned in Transnistria. Although in October 1994, an agreement was signed between Russia and Moldova guaranteeing that the 14th Army would leave Transnistria within three years, the agreement was never ratified by the Duma. However, between 1992 and 1999, the Russians decreased their troops in the TMR from 9,250 to 2,600 and destroyed a significant amount of munitions. Other armaments were shipped out of Transnistria by the Russians at the expense of the Organization for Security and Co-operation in Europe (the “OSCE”) and over the objections of Mr. Smirnov, who had previously decreed that no Russian Army property would be allowed to leave Transnistria. As of this writing, nearly 20,887 metric tons of ammunition plus ten train loads of Russian military equipment remain in Transnistria.

The pro-Romanian Popular Front was soundly defeated in the February 1994 Moldovan elections and over 90 percent of the population rejected unification with Romania. On November 24, 1994, the new Moldovan Constitution was ratified. The new Constitution gave autonomy to Transnistria and to Gagauzia, a region made up primarily of an Orthodox Turkic people.

These steps forward were followed by steps back by the Transnistrians. The 1994 Country Report on Moldova by the U.S. Department of State noted that:

Moldova remained divided, with mostly Slavic separatists still controlling the Transdniester region. This separatist movement, led by a pro-Soviet group, entered negotiations with the Government on the possibility of a special political status for the region. Progress was blocked, however, by the separatists’ demands for “statehood” and the creation of a confederation of two equal states.


Gagauzia is an autonomous territorial-unit having a special statute and representing a form of self-determination of the Gagauzian people, shall constitute an integrant and inalienable part of the Republic of Moldova and shall independently solve, within the limits of its competence, pursuant to the provisions of the Republic of Moldova Constitution, in the interest of the whole society, the political, economic, and cultural issues.

On May 8, 1997, after mediation by the Russian Federation, Ukraine, and the OSCE, Moldova’s then-President, Petru Lucinschi, and Igor Smirnov, as de facto leader of the TMR, signed a memorandum regarding the normalization of the relations between the Republic of Moldova and the TMR.\footnote{Memorandum for the Bases of Normalization between the Republic of Moldova and Transdniestra, 8 May 1997, available at http://www.osce.org/documents/mm/1997/05/456_en.pdf; see also Herd, supra note 10, at 3, referring to agreements “granting further autonomy and calling for more talks.”} In the accord, the TMR promised to establish a “common state” with Moldova, although that term was not defined. It has since led to divergent interpretations by the parties. To our knowledge, this memorandum was never submitted to the Moldovan Parliament for ratification and its status under Moldovan law is unclear.

As the years since the 1992 War passed, observers became increasingly concerned that Smirnov and his associates had no intention of allowing formal reintegration into Moldova as that might thwart increasingly profitable smuggling activities. For example, after the Trans-Dniester Republic and Moldova briefly set up a joint customs operation, 1998 figures uncovered by [Moldovan presidential advisor Oazu] Nantoi showed that Trans-Dniester, with but one-sixth of Moldova’s population, imported 6,000 times as many cigarettes as the rest of the country. Mr. Nantoi said he believed that most of the cigarettes were illegal knockoffs of Western brands, illicitly made in Ukraine and exported through the Trans-Dniester Republic as far as Germany. Experts say the region is also a major transit point for smuggled alcohol and up to 700,000 tons a year of petroleum products from Russia and Ukraine.\footnote{Michael Wines, Trans-Dniester ‘nation’ resents Shady Reputation, New York Times, March 5, 2002. Nantoi became the program director of the Institute for Public Policy in Chisinau. According to The New York Times, he had quit his job as a presidential adviser “after the government censored his efforts to expose corruption of the customs agreement with the Trans-Dniester Republic.” Id.}

Moreover, the head of customs for the TMR is Vladimir Smirnov, the son of Igor Smirnov, “who elevated the department to a cabinet ministry... to free it from constraining oversight.”\footnote{Id.}
The end of the 1990s saw another series of attempts to resolve the conflict. In July 1999 Chisinau and Tiraspol drafted the Kiev Joint Statement which agreed that their relations would go forward on the basis of common borders and common economic, legal, defense and social policies.41

In November 1999, at the OSCE summit in Istanbul, Russian President Yeltsin agreed that all Russian arms and equipment would be withdrawn or destroyed by the end of 2001, and all Russian troops would withdraw by the end of 2002. In June 2000, Russian President Vladimir Putin formed a special commission under the chairmanship of Russian Foreign Minister Evgeny Primakov, that sought to turn Moldova into a loose confederation that would have given the TMR extensive influence over Moldovan government policy, and guaranteed a continuing Russian influence, actually increasing its military presence in Moldova. This plan also failed.

However, according to various interlocutors, in November 2001, Moldova and Russia signed a treaty that was never made fully public. Often referred to as the “Base Treaty,” it is described as having provided guidance on bilateral relations, detailed that any Gazprom debts, including those incurred in Transnistria, would be accountable by the government of Moldova, and specified that Moldova agreed to take responsibility for $1 billion of Gazprom debt owed by Transnistria. This treaty was allegedly signed by representatives of the parties, but was never ratified. Russia, by its statements, appears to regard this treaty as in effect, inasmuch as it has not been repudiated by the parties.

A federal state was first proposed in July 2002 in the so-called “Kiev Document” presented by the mediators to the two sides. We understand that this document was actually largely drafted by Moldovan negotiators. In February 2003, as negotiations on the Kiev Document flagged, Moldovan President Vladimir Voronin established a Joint Constitutional Commission to draft a federal constitution for Moldova. A five-sided mediation including Moldova, the TMR, Russia, Ukraine and the OSCE was organized to assist the Commission. However, it also stalled. Eventually, the Russians secured some measure of agreement from the TMR and the government of Moldova on a plan dubbed the “Kozak Plan.” The Kozak Plan envisioned a “common state” of Moldova and Transnistria. Under the plan, Russia would maintain 2,000 troops in Moldova until 2020. The memorandum was due to be signed on November 25, 2003 in President Putin’s presence in Chisinau, the Moldovan capitol, but that

41. Transdniestria Case Review, supra note 17.
morning, President Voronin telephoned President Putin to cancel the ceremony. It has been reported that this was due to concerns by the OSCE, the EU and the US that the Kozak Plan would have formalized the status quo and endangered the possibility of Moldova ever becoming a viable European state. Subsequent attempts at five-sided negotiations have fallen apart. Moscow did not meet its December 2003 deadline for the withdrawal of its troops and munitions.

Valeriy Litskai, the so-called “foreign minister” of the TMR, has said that Tiraspol and Chisinau had agreed in 2002 to build a “federal state” and that the details were set out in the Kozak Memorandum. “‘We do not renounce the Kozak Memorandum and are ready to sign it even tomorrow,’ Litskai declared.”

On August 1, 2004, Moldovan customs stopped servicing TMR companies that did not pay Moldovan taxes and the Chamber of Commerce and Industry stopped issuing origin certificates for TMR-based companies. The Russian Foreign Ministry and Smirnov called this an economic blockade.

D. The Current Situation in Brief

The recent history of the Transnistrian crisis has had both signs of promise and diplomatic downturns.

President Voronin has proposed a Security and Stability Pact for Moldova to be signed by Russia, Ukraine, Romania, the EU and the US, but Russia seems to consider the Kozak Plan as the template for any solution. By contrast, the EU and the US are both suggesting the establishment of an international peacekeeping operation under OSCE supervision, to which the Russians object. For their part, NATO member states, including the United States, refuse to ratify a key arms reduction pact, the Adapted Conventional Forces in Europe Treaty (which they had signed at the November 1999 Istanbul summit), until Russia withdraws its troops and armaments from Moldova and Georgia.

President Yuschenko of Ukraine has presented a plan for settling the Transnistrian conflict. His plan contains certain provisions that offer the Transnistrian region autonomy, with the right to leave Moldova should

43. Herd, supra note 10, at 8.
44. Id., at 9.
Moldova seek any future union with Romania. The plan does not require the withdrawal of Russian troops and armaments from Transnistria. The US and the EU would be observers in negotiations. The plan does provide for strict border controls, and the involvement of the EU in observing their application.

As of August, 2004, approximately 20,887 metric tons of Russian ammunition and approximately ten trains of military equipment were still in Transnistria. According to the OSCE, at that time the TMR was blocking removal of the armaments for three reasons: (a) Moldova’s refusal to sign the Kozak Memorandum; (b) the so-called “economic blockade” by Moldova; and (c) Moldova’s alleged refusal to cooperate in writing-off Tiraspol’s debt to Gazprom.

Whether the Russians actually sought to remove the ammunition and other military hardware or whether this situation was simply used as a bargaining chip is an open question. In any case, at about this time the Smirnov regime seemed to deliberately exacerbate the conflict.

First, there was the crisis over the forced closing of Romanian language schools (non-Cyrillic script) in the TMR. The U.S. Department of State summarized the issue in its 2004 Report on Human Rights Practices in Moldova:

In July, Transnistrian authorities closed four Latin script schools that were registered with the Moldovan Ministry of Education and attempted to close two more. Police forcibly closed the Latin-script schools in Ribnita and Tiraspol, removing all furniture and school materials and sealing the premises. They also closed two schools in Dubasari and Corjova; students from these schools were transferred to Latin-script schools in villages under the control of the Moldovan authorities. Police were impeded from closing a Latin-script school and orphanage in Bender by parents, teachers and children who guarded the facilities throughout August and September. Authorities claimed the institutions violated Transnistrian law, which requires the schools to register locally and to use the Cyrillic alphabet for instruction. In September, the OSCE helped negotiate a formula to allow the Latin-script schools in Bender, Dubasari, and Corjova to register, although authorities continued to impose logistical and legal hurdles to prevent the schools from functioning normally. Later, the schools

46. Id.
in Ribnita and Tiraspol were also allowed to register for 1 year under the OSCE-negotiated formula. The Tiraspol school was scheduled to open in January 2005 after undergoing substantial repairs for damage in the summer by Transnistrian police. The Ribnita school was open but operating out of a different building after the Transnistrian authorities refused to let the school return to its original building.47

As this conflict was proceeding, another one started over the ability of farmers who lived in villages outside of the TMR's control from accessing their fields that were within the TMR's control or allowing them to bring produce from their fields back to their villages.48 In August 2004, Transnistrian “customs” officials seized several tractors from Moldovan farmers that were loaded with harvested corn.49 Then, in mid-August, TMR officials in Dubasari closed all small roads leading from the Moldovan villages to the farmers' fields, forcing the farmers to only use certain roads controlled by TMR “customs” officials.50 Depending on who was describing the situation, the TMR was variously asking the farmers to pay rent for or pay a tax on their fields. As of this writing there has been no comprehensive resolution of this problem and the 2004 and 2005 harvest seasons have largely been lost. Since farming is the main economic activity of the region, the hardship to the villagers has been substantial.

Following these events, relations between the government of Moldova and the TMR worsened. In September and October 2004 President Voronin stated that the government would no longer negotiate with the TMR.51 Voronin explained that “[t]he Dniester region can receive the broadest powers on the condition that the region remains an integral part of Moldova... we have grown cold to the federalization idea and there can be no return to it.”52

It is unclear exactly what Voronin meant by “federalization;” the terminology used by the Moldovan and TMR leadership is often imprecise by Western legal standards. Moreover, the differing plans of federalization, confederalization, autonomy, and the like were Byzantine and

47. Moldova 2004 Country Report, supra note 4 at sec. 5.
48. Id. at sec. 2.d.
49. OSCE Mission to Moldova Activity Report, supra note 45 at 4.
50. Id.
51. Herd, supra note 10, at 10.
52. Id., at 11.
arcane. For example, the reference to allowing “broadest possible powers” for the region but not “federalization” is unclear, to say the least. It may be that this statement, more than anything, marks the refusal to entertain a confederacy of two sovereign entities, similar to the May 1997 memorandum. If this interpretation is correct, then the government of Moldova would be unwilling to grant Transnistria anything beyond some version of autonomy within the parent state.

The EU, for its part, has become increasingly involved in the situation in Moldova. In February, 2005, it took an important step in signing an Action Plan on Moldova that would act as a guide for ongoing relations between Moldova and the EU and possible future Moldovan accession into the Union. The U.S. and the EU have both joined the Moldova-Transnistria mediation process as official observers. The new “5+2” talks include Chisinau, Tiraspol, Russia, Ukraine, and the OSCE as the main five stakeholders and the U.S. and the EU as the official observers. The first round of the expanded talks were held in October 2005, with subsequent rounds (as of this writing) in December 2005 and January, February and March 2006. The February round ended in an impasse. The March round also ended in a stalemate, focused on the as-yet unresolved issue concerning the farmers of the Dorotcaia area accessing their fields under TMR control.

The Moldovan Parliament had voted unanimously to demand a total Russian troop and munitions withdrawal from Transnistria by December 2005. Russia continues to argue that withdrawal must be part of a comprehensive political settlement of the Transnistrian situation, a policy which is generally referred to as “synchronization.” In December, 2005, with Russian troops still in Transnistria, the U.S. stated that it would not ratify a new Conventional Forces in Europe (CFE) treaty until Russia withdraws all troops and equipment from Moldova and from Georgia. The Moldovan Parliament has now sought Russian withdrawal by the end of

53. Id., at 12.
54. Refusal to Compromise Dragging Out Transnistria Talks, U.S. Says, Infotag (Chisinau, Feb. 3 2006); Moldova Demands from Mediators to Clearly Express Their Attitude to Transnistria’s Actors, Infotag (Chisinau, Feb. 3 2006) (noting that “[d]elegations from Moldova, European Union, United States, GUAM countries, Canada, and Norway expressed regret that last week’s 5+2 negotiations had not resulted in meaningful progress.”); EU Dislikes Slow Progress of Transnistria Settlement; Infotag (Chisinau, Feb. 23, 2006)
55. Moldovan Delegation Leaves Negotiations, Proposes to Convene Again in a Week...; Infotag (Chisinau, March 1, 2006).
2006. Russia has balked and also announced that it may denounce the CFE treaty.\textsuperscript{57}

On December 30, 2005, Ukraine and Moldova signed a joint declaration, which included provisions to start allowing goods produced by Transnistrian companies to be legally exported via Ukraine.\textsuperscript{58} In order to comply with WTO protocols for documents indicating the point of origin for goods in international trade, Moldova and Ukraine agreed that Transnistrian companies could register with the government of Moldova at which point they would receive WTO-compliant export documents that would be recognized by Ukraine. The TMR almost immediately denounced the plan, calling it another attempt at economic blockade, and thus against the provisions of the May 8, 1997 memorandum. Ukraine subsequently suspended the agreement.\textsuperscript{59} However, after certain adjustments, a revised version of the agreement went into force on March 3, 2006.\textsuperscript{60} The TMR has once again called this an economic blockade and the Russian Duma has denounced the plan.\textsuperscript{61} As of mid-March 2006, the TMR has said it may seek direct financial assistance from Russia and may suspend participation in the 5+2 negotiations during the period it believes it is being pressured economically.\textsuperscript{62}

At this point the TMR is playing a waiting game; as the then-Chairman of its so-called Supreme Soviet, Grigoriy Marakutsa said in 2003: “Every year we are getting closer to our international recognition.”\textsuperscript{63} As of November 2005, Marakutsa seemed to think that, in light of the decision by Kosovo’s parliament to seek recognition as an independent state, the TMR would soon abandon negotiations: “Parliament may decide to stop

\textsuperscript{57} Russian Army Group Commander Denies Rumours About Theft of Munitions in Transnistria, Infotag (Jan. 25, 2006).

\textsuperscript{58} Moldova reiterates New Border Regime is for Legalization of Transnistrian External Trade, Infotag (Chisinau, Feb. 3, 2006).

\textsuperscript{59} Transnistrian Leader Grateful to Ukraine for Pedaling Back, Infotag (Chisinau, Jan. 26, 2006); see, also, U.S. Puzzled Over Ukraine’s Suspension of Agreement, Infotag (Chisinau, Jan. 26, 2006).

\textsuperscript{60} Moldova Proposes to Launch New Rules for Transnistria from March 1, Infotag (Chisinau, Feb. 28, 2006); Ukraine Introduces New Border Regime, Infotag (Kiev, March 6, 2006).

\textsuperscript{61} Transnistria Quits Negotiation Process, Infotag (Tiraspol, March 7, 2006); Russian State Duma Condemns Moldova’s and Ukraine’s Actions on the Border, Infotag (Chisinau, March 10, 2006).

\textsuperscript{62} Transnistria Asks Russia’s Financial Help, Infotag (Tiraspol, March 10, 2006); Transnistria Quits Negotiation Process, supra note 61.

\textsuperscript{63} Herd, supra note 10, at 4.
II. THE WORK OF THE MISSION

It is in the context of the general worsening of the situation in 2004-2005 that the New York City Bar became involved in assessing the situation in Moldova.

Based on the Mission’s meetings and observations, we determined that at the heart of the Transnistrian crisis are a series of legal claims and concerns which can be grouped into three overall categories: (a) the claim of the TMR that it has a right under international law to autonomy or possibly sovereignty; (b) the legal issues concerning the transfer of property located in Transnistria by the TMR leadership; and, (c) the role of “third-party” states in the ongoing conflict, in particular the international legal implications of Russian economic pressure and military presence in the TMR.

This Report will consider each of these three issues in turn and will attempt to set out their relevant international legal aspects.

Two caveats are in order, though. First, the more we learned, the more we realized what we did not know, often because treaties, agreements, and other aspects of the relationships of the government of Moldova, the TMR, Ukraine and Russia, have been conducted in secret. Agreements between the parties went unpublished in any official register and, to the extent we were able to see texts of such agreements, they were often unsigned drafts which we could not be confident were the definitive texts. Consequently, our conclusions are based on the documents which we did see or which we have a reasonable confidence as to content. By some estimates, there have been approximately 97 separate agreements and memoranda signed among Moldova, Ukraine, Russia, and the TMR in the last decade concerning some aspect of this conflict. The parties treat these agreements as one would cards in a poker hand, discarding those that are not useful, keeping those that help their strategy. Moreover, many or perhaps even most of these agreements were never presented to the Moldovan parliament. While the Moldovans often argue that such agreements are not binding, the other parties argue that they are.

A second caveat is that we found little evidence to support some of the common assumptions in this crisis. We heard countless allegations,

64. Moldova’s Rebel Region May Proclaim Independence, Speaker Says, Interfax-Ukraine (Nov. 24, 2005).
for example, of arms factories in Transnistria being used to churn out high-end weaponry such as rocket launchers which are, in turn, smuggled to various destinations in Africa and the Middle East. We were routinely told that there are thirteen factories operating seven days a week, twenty four hours a day, to produce armaments in the TMR. At no time was there any proof offered for these allegations. Rather, each interlocutor would simply say that another person had the proof and, if we were to ask that person, he could provide it to us. This is not to say that, for instance, there are no arms plants in Transnistria. To the contrary the Transnistrrians admit they are producing arms. However, they simply say that they are producing a relatively small amount of machine guns and handguns, along with component parts for the Russian and Ukrainian military and air forces. However, it is irrelevant to our analysis whether the TMR is or is not producing weaponry. The point is that we found that the crisis may, in part, be difficult to resolve because so few people actually have a reliable picture of the situation. Rumor runs rampant, but accurate information is what is needed to address a crisis.65

Keeping this in mind, we turn first to the central question of the Transnistrian crisis: whether Transnistria has a right to autonomy or sovereignty under international law.

III. THE STATUS OF THE TRANSNISTRIAN MOLDOVAN REPUBLIC IN INTERNATIONAL LAW

A. Sovereignty and Autonomy

Sovereignty is the basic requirement for statehood. Territorial sovereignty can be described, in short, as full and exclusive authority over the territory in question.66 More broadly speaking, key elements of sovereignty include independence, autonomy, international “personhood,” territory.

65. The Team had originally intended to examine the legal status of commercial agreements entered into by the TMS with foreign companies. However, there is little evidence of any large contracts being signed between the TMR and western companies. While foreign companies do operate in some capacity in the TMR, we did not see evidence of much beyond sales outlets, such as a Mercedes-Benz dealership or advertising for Samsung consumer electronics. We did learn of the substantial involvement of Russian and Ukrainian companies in the purchase of assets through the TMR’s “privatization” program. The legality of the conversion of this property, that had previously been titled to Moldova, became an issue of greater importance. Similarly, this implied the role of “third-party” States, such as Russia and Ukraine, more generally.

rial authority and integrity and inviolability. In sum, there is no higher decision maker over a sovereign entity, unless if that sovereign entity willingly cedes decision-making capacity to another.

The modern conception of sovereignty is traced to the Treaty of Westphalia, signed in 1648. Westphalia codified the doctrine in the European state system that no entity—emperor, pope, or other decision-maker—was above the level of the state. The state became the main actor in the international system. No state was allowed to interfere in the domestic issues within another state. Sovereignty meant that each state was the ultimate monarch within its territory and had no right of action within another’s territory.

Although this concept has been modified somewhat, particularly in the defense of human rights, the basic idea that there is a “zone of privacy” within a state’s domestic system still exists.

While sovereignty, with all its complexities, can be readily defined by description, autonomy is not as easy a concept to pin down. While “autonomy” is itself used to describe an aspect of sovereignty, it does not have a single specific meaning under international law. It is generally viewed as allowing decision-making leeway. Within a state, an autonomous region would be able to make its own decisions in key policy areas without any or with only minimal interference from the national government. The precise definition of those policy areas and the extent of national oversight that is or is not allowed are two open issues that make autonomy such a difficult topic to pin down.

B. The Concept of Autonomy in International Law and in Moldovan Law

1. The Arguments of the TMR

The TMR leadership has used many terms to describe what they view as their right under international law: “self-determination,” “sovereignty,” and, most recently, “autonomy” are words often heard in this context. However, we are more concerned with the legal rights that are being claimed than with the vocabulary used at any given juncture.

In the early days of the conflict, Transnistria’s “elites claimed historical justification [for autonomy]: if the rest of Moldova reverted to its pre-1940 status outside the Soviet Union, they argued, then the Dniestr region should have the right to revert to its own pre-1940 status, as an ‘autonomous republic’ in the Soviet Union.”

68. Kaufman, supra note 20, at 127.
TMR’s leadership in May 2005, they supplemented their historical argument with an economic one: as Grigoriy Marakutsa, the leader of the Supreme Soviet, explained, prior to separation Transnistria comprised only 12 percent of Moldova and 17 percent of Moldova’s population but accounted for approximately 40 percent of Moldova’s GDP. What made this vexing to him was that “our riches went to Chisinau.”

Thus, Transnistrians want to be able to control the results of the fruits of their labor. They do not want the central government in Chisinau to be able to do so.

Igor Smirnov said much the same thing. He summarized the Transnistrian concept of autonomy as Moldova having control of external policy but the Transnistrians having “full powers” in the economic sphere.

Summarized as such, the Transnistrian claim for autonomy may be a relatively simple issue concerning fiscal decision-making. But further discussions show that this is not the case. Marakutsa went on to explain that the Transnistrians have grounds to claim an independent state but are ready to consider proposals for a common state, so long as in any future federation Transnistria would have a high level of independence. He explained that there could be common energy and defense policies as well as common policies in certain other areas. He also noted that the parliaments of Moldova and the Transnistrian entity in this conception would be equal, each able to block or effectively veto the other. He acknowledged that Moldova was unwilling to build a common state with such characteristics.

The further the Transnistrians explained their understanding of “autonomy” the more powers were accreted to the TMR. Fiscal autonomy gave way to a veto power over any act of the Moldovan parliament. Marakutsa concluded by explaining that if Moldova was not ready to agree on a formula—perhaps referring to this specific formula—then the Transnistrians were ready to continue building a separate state.

In responding to a query as to why autonomy was the solution in the view of the TMR, “foreign minister” Valeriy Litskai responded that Transnistrians want the guarantees of a federal state that are not available in a unitary state. Moreover, social and ethnic reasons also require

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69. Notes from meeting of May 19, 2005 with Grigoriy Marakutsa (hereafter “Marakutsa meeting notes”).

70. Notes from meeting of May 19, 2005 with Igor Smirnov (hereafter “Smirnov meeting notes”).

71. Marakutsa meeting notes, supra note 69.
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such autonomy as Moldova is comprised of one ethnic group but Transnistria has three ethnic groups. According to Litskai, this makes it impossible to have a single state. He points to the Russian Federation as an example of one federation comprised of different ethnic republics that follow different laws.

2. Analysis of the Claim of Right under International Law to be an Autonomous Region in the Republic of Moldova

Under international law there is no “right” to fiscal or governmental autonomy within a state. Rather than a right to autonomy—or even a specific set of characteristics that define this term—international law has focused instead on the elucidation of the norm of self-determination. This will be considered at length in Part III.C, below.

At issue here is whether the TMR’s leadership has any legal basis for its claim to economic or political autonomy. While, understandably, the TMR leadership may make political arguments that one may or may not find persuasive, we have been hard-pressed to find a legal argument that can animate this claim. We set out what we believe are the two strongest quasi-legal arguments (a) that due to the denunciation by the USSR of the Molotov-Ribbentrop Pact, which had established the modern boundaries of Moldova, Transnistria should revert to an autonomous state; and, (b) self-determination as a basis for autonomy. We will consider the first here and defer our discussion of self-determination until Part III.C, as it relates directly to our discussion of secession.

Transnistrian elites have argued that the supposed revival of the MASSR is a “natural corollary” to the denunciation of the Molotov-Ribbentrop pact. This follows the declaration by the Second Soviet Congress of People’s Deputies in Moscow in December 1989 that the Molotov-Ribbentrop pact was illegal. The illegality of the pact was alluded to at several points in our discussion with the TMR’s leadership.

At issue, then, is what the legal result would be of the nullification of the Molotov-Ribbentrop pact. While the legal effect of the treaty (in this case the transfer of Bessarabia to the USSR) may be undone, it does not revert the internal politics of the signatories to the status quo ante. In

72. This description is not supported by data. See Part III.C.4(a), below, concerning ethnographic issues.
73. Notes from meeting of May 19, 2005 with Valeriy Litskai (hereafter Litskai meeting notes).
74. Kolstø, et al., supra note 9, at 983.
75. Id., at 980.
other words, simply voiding the treaty only affects what the treaty itself attempted to do; it does not somehow summon the MASSR back into existence. Even though that does not occur as a matter of law, Pal Kolstø and other scholars have persuasively argued that as a matter of politics, this supposed revival of the MASSR is self-contradictory: “[t]he weak point in this line of argument is the fact that the MASSR was created precisely in order to facilitate a Soviet conquest of Bessarabia, and thus was an element in the same expansionist scheme as was the Molotov-Ribbentrop pact.”

If the Molotov-Ribbentrop pact is declared illegal because it was an act of aggressive expansion, then why should the construction of the MASSR, which was no more than a pretext for the expansion, be viewed as legitimate? The historical argument for autonomy is thus not persuasive.

3. Autonomy and the Moldovan Constitution

As international law has little to say as to any supposed “right” to autonomy, this becomes largely an issue of domestic law. Although not an identical situation, one can perhaps glean some guidance from the history of the government of Moldova to the Gagauz, a Turkic Christian minority that lives in Moldova, in particular in a Southern area called “Gagauzia.” The Gagauz actually declared independence one month prior to Transnistria, in August 1990.

The result, though, is that Gagauzia accepted a level of autonomy within the state of Moldova. Gagauzian autonomy became part of the Moldovan Constitution of July 1994 in the same section—Article 111—that also provided for Transnistrian autonomy. The Moldovan parliament subsequently passed a more extensive law giving Gagauzia special autonomous status on December 23, 1994.

Although the Transnistrian authorities balked at the form of power-sharing offered (and accepted by) the Gagauz, a project on complex power-sharing agreements chaired by Marc Weller of Cambridge University noted:

[i]t may be argued that the power-sharing arrangement in Gagauzia is the first case in Central-Eastern Europe and the Soviet Union that establishes territorial autonomy for an ethnic mi-

76. Id., at 983.
77. Herd, supra note 10, at 2.
78. The Law on the Special Legal Status of Gagauzia, art 18(2) (1994) states:

The mutual relationships of the budget of Gagauzia and of the state budget shall be established in conformity with the laws of the Republic of Moldova on budgetary system and on the state budget for the corresponding year in the form of fixed payments out of all forms of taxes and payments.
nority. The organic law grants the Gagauz region a special status, awarding it more autonomous rights.\textsuperscript{79}

The grant of autonomy, at least on paper, seems quite extensive. All economic decision-making, including property regulations, budgetary authority, and socio-economic policy, would be decided within Gagauzia, although, by article 18(2), the Gagauz budget must be in conformity with the overall laws of the Republic of Moldova.\textsuperscript{80}

In what may seem ironic in retrospect (particularly in comparison to the claims of the TMR), the Gagauz autonomy plan was originally criticized by the Council of Europe for giving too much power to the autonomous region. By 1996, though, it was reported that the Council of Europe was “extremely satisfied by how Moldova solved the Gagauz conflict.”\textsuperscript{81}

Yet, Moldova’s policy towards Gagauzia also highlights some of the concerns of the Transnistrians, particularly regarding whether the Moldovan government can be trusted to keep its promises. Some of our interlocutors have noted that, while the autonomy plan was extensive on paper, in reality the Gagauz did not receive significant powers. In 1995 the Moldovan government replaced Stepan Topol, the governor (or Bashkan) of Gagauzia. His replacement, Georgiy Tabunshik, served from 1995 to 1999 and focused on reintegrating Gagauzia to the rest of Moldova. Tabunshik was considered instrumental in securing a solid electoral victory for President Voronin among the Gagauz. Dmitry Croitor was elected Bashkan in 1999 on a reformist platform. He was removed under threat of arrest by the government of Moldova in 2002. Croitor was re-elected in 2002. The Council of Europe is involved in ongoing monitoring of the situation.

Despite shortfalls of Moldova’s Gagauzian policy, the Complex Power-Sharing Study Group has argued that “the ‘success story’ of Gagauzia may serve as an illustration of a practical power sharing arrangement and could possibly be paralleled with the experience of Transdniestria.”\textsuperscript{82} It is important to note the factors that made this story a relative success. First, there was no serious armed conflict between Moldova’s governmental authorities and the Gagauz. Additionally, the resolution of the Gagauz conflict was in part due to the responsible actions of stakeholder states; in particular the visit of the President of Turkey to Moldova in 1994 was

\textsuperscript{79} Gagauzia Case Review, supra note 35.
\textsuperscript{80} Id.
\textsuperscript{81} Id.
\textsuperscript{82} Id.
seen “as being of crucial importance to the resolution of the Gagauzia issue.” Thus, the role of stakeholders or guarantors must be in the active pursuit of resolution, rather than using delaying tactics or staying actions.

4. Is the TMR Actually Seeking Sovereignty?

One of the bedeviling aspects of analyzing the TMR’s autonomy claim is unraveling whether what they are really seeking is simply sovereignty by another name. By their own words and deeds, this seems to be the case. Smirnov reiterated earlier rhetoric when, in July 2005—two months after we met with him and he spoke of autonomy—he stated that Transnistria “won’t become part of Moldova, and such a variant is excluded.” Smirnov has also previously demanded that the TMR must maintain its own army and its own currency, two of the hallmarks of sovereignty.

Although the TMR’s leadership pays lip-service to the idea of a single Moldovan state, its logic and its rhetoric are increasingly convoluted. Consider the following excerpt from an essay by the first secretary of the TMR Communist Party’s central committee, Victor Gavrilcenco published on June 8, 2005 in the official newspaper of the TMR and note, in particular, the language we highlight:

The [Transnistrian] people has never entrusted to anybody the right to deprive it of its statehood. This question may only be solved through a referendum. The Transnistrian people shall never agree to living in a special-status zone. We have repeatedly voiced our vision of the problem settlement—through building a new federative state with a prior amendment of the Moldova Constitution in order to declare Russian as a second official language in the country, with denial of the unitarian principle of state structure, with a clear-cut fixing of the Eastern trend in the external policy, and with preservation of Russian troops in the region.

83. Id.
86. Transnistrian Communist Party for Referendum on Accession to Russia, Infotag (Tiraspol, June 8, 2005) (translation by Infotag).
How there can be “a new federative state” without denying the “statehood” of Transnistria but also denying “the unitarian principle of state structure” was never resolved. Rather, if we are to take the claims of Transnistrian statehood seriously, as well as the TMR leadership’s denial of a single Moldovan state, then the goal of the TMR’s leadership does not seem to be autonomy (we shall never agree to live in a special-status zone) but complete sovereignty.

Perhaps Marakutsa was saying the same thing as Smirnov and Gavrilcenco, though with circumspect language, when he stated that the TMR’s leadership planned to have one or more referenda under the aegis of the international community on the subject of Transnistria’s future relationship with the Republic of Moldova. In his view, if the inhabitants of Transnistria expressed a desire for sovereignty, the international community should respect that wish because the will of the people is the primary determinant of international law and, to support this, he cited the cases of Eritrea, East Timor, Bosnia and the Czech and Slovak republics.\(^87\) Elsewhere, Marakutsa has been more straightforward, saying “Pridnestrovye is a sovereign and independent state.”\(^88\)

The TMR’s leadership seems to reject plans that are most similar to grants of autonomy. In 1992, for example, Chisinau proposed a draft law which would have given Transnistria administrative autonomy but, in light of the recent conflict, the TMR’s leadership found that autonomy was insufficient.\(^89\)

In another example,

In May, 2000, the [TMR] rejected Moldova’s offer, conveyed by President Petru Lucinshi himself, to give the [TMR] a specified, guaranteed number of seats in the Moldovan Parliament and to make the [TMR] president a vice-prime-minister of the Moldovan Republic. Because this offer did not incorporate the notion of the [TMR] as the equal of the Moldovan Republic, it was rejected.\(^90\)

And, more recently, the Transnistrian Supreme Soviet stated that

the adoption by the Moldovan Parliament of the Declaration and Appeals on [the region’s] democratization and demilitari-

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87. Marakutsa meeting notes, supra note 69.
88. As quoted by Lynch, supra note 34, at 47.
89. Kolstø, et al, supra note 9, at 996.
zation means, in practice, a variant of forcing the Transnistrian population into an unconditional accession to the constitutional area of the unitarian Republic of Moldova. These documents lead to provoking a stand-off and run contrary to the OSCE fundamental principles of tackling regional conflicts.91

Marakutsa stated that he had serious doubts about federalism and argued that (a) Gagauzia had no real economic powers and that (b) Moldova’s economic and privatization policies are based on building economic groups with ties to whomever is then the Moldovan President. This skepticism is no doubt in part due to Moldova’s questionable handling of the situation in Gagauzia. Similarly, Litskai originally showed enthusiasm for American-styled federalism but, as U.S. federalism was described to him by Team members, he quickly retreated from this proposition and instead used analogies to Serbia and Montenegro and to Belgium: one state being in the process of separation and another where federal powers have all but collapsed.

In order to sort through these claims and counter-claims, one must get past vocabulary and focus on underlying concepts. It has become apparent that the parties—even individual representatives of the same party—often mean vastly different things with the same term. In particular the meanings of “federalism,” “confederacy,” and “autonomy” have led to much disagreement. For example, in discussions with the Mission of the New York City Bar, Valeriy Litskai spoke in favor of “federalism” as it exists in the U.S. Upon a description by members of the Mission of how U.S. federalism operates, including the relative rights and obligation of U.S. states and the U.S. federal government, Litskai retracted his statement, saying that that was not what the TMR leadership wanted. For the sake of clarity, in this report we will adopt a single nomenclature and define our terms as follows: a federal system is a “system of associated governments with a vertical division of governments into national and regional components having different responsibilities…”92 A confederation shall refer to “[a] league or union of states or nations, each of which retains its sovereignty but also delegates some rights and powers to a central authority.”93

91. Tiraspol Rejects Unconditional Surrender, Infotag (Tiraspol, June 17, 2005).
Autonomy will refer to a grant of decision-making powers from the national government to a region that allows for effective self-rule in most policy-areas, although formal sovereignty still resides with the national government.

The TMR's Supreme Soviet argued that Chisinau “has completely given up the federalization idea—in contravention to agreements signed earlier between the Republic of Moldova and Transnistria.”94 Voronin has in fact said that “The Dniester region can receive the broadest powers on the condition that the region remains an integral part of Moldova... We have grown cold towards the federalization idea and there can be no return to it.”95 But whether those earlier agreements actually envisioned Moldova as a loose confederation between the central government and the TMR is hotly contested by the parties.

The descriptions—if not the outright statements—of the TMR leadership all point to the TMR actually seeking sovereignty as opposed to autonomy within the Moldovan state. As Graeme Herd, an analyst for the Conflict Studies Research Centre, explained: “These proposed actions point to the emergence of a more concrete [TMR] strategy aimed at moving beyond the status quo of frozen conflict to outright independence.”96 Consequently we turn to the concept of self-determination and whether it provides any legal basis for the TMR’s attempted secession.

C. Self-Determination and Secession

1. The Law of Self-Determination

The norm of self-determination gained international prominence in Woodrow Wilson’s Fourteen Points. Since then it has had a tumultuous existence, ranging from post-World War decolonization to post-Cold War ethnic wars. Writing the concept of “self-determination” into the UN Charter caused the idea to evolve from a principle to a right without ever fully defining the underlying concept.97 According to Hurst Hannum of the Fletcher School of Law and Diplomacy, self-determination in the 1960's was simply another term for decolonization.98 However, even at this point

94. Tiraspol Rejects Unconditional Surrender, supra note 91.
95. Herd, supra note 10, at 11.
96. Id., at 9.
97. Patricia Carley, Self-Determination: Sovereignty, Territorial Integrity, and the Right to Secession, Report from a Roundtable Held in Conjunction with the U.S. Department of State’s Policy Planning Staff, United States Institute of Peace (Peaceworks paper no. 7; March 1996) at 3.
98. Id.
“self-determination did not allow for secession; instead, the territorial integrity of existing states and most colonial territories was assumed.”

Thus, as Hannum explained in a 1996 roundtable held by the U.S. Institute of Peace and the Policy Planning Staff of the Department of State, the idea of self-determination during this time was *not that all peoples* had a right to self-determination but rather that *all colonies* had a right to be independent. The rhetoric of self-determination then changed in the period from the late 1970’s until today, in which the Wilsonian discourse concerning the ethnic and cultural rights of minorities was mixed with the territorial concerns of the era of decolonization. While there is still controversy as to what this norm is and is not, there is a basic consensus from which we can draw conclusions in the present case.

The right to self-determination is “the right of cohesive national groups (‘peoples’) to choose for themselves a form of political organization and their relation to other groups.” Although self-determination was mentioned in the U.N. Charter, jurists even in the last decade have found that “international law as it currently stands does not spell out all the implications of the right to self-determination.” Nonetheless, ICJ’s *Western Sahara Advisory Opinion* confirms “the validity of the principle of self-determination” under international law.

The basic norm of self-determination is the right of a people of an existing State “to choose their own political system and to pursue their own economic, social, and cultural development.” The assumption is that such a pursuit of economic, social, and cultural development would occur under the auspices of an existing State, and would not require the establishment of a new State. This conception of internal self-determina-

100. Id.
101. Id.
103. See UN CHARTER, art. 1, para. 2 and also UN CHARTER, art. 55
105. Western Sahara, Advisory Opinion, 1975 ICJ Reports 12, 31-3 (oct. 16). See also Legal Consequences for States of the Continued Presence of South Africa in Namibia, Advisory Opinion, 1971 I.C.J 16, 31 (June 21) and Case Concerning East Timor (Port. V. Austl.), 1995 I.C.J. 90, 102 (June 30); BROWNLIE, supra note 102, at 554 n. 121.
tion makes self-determination closely related to the respect of minority rights. Furthermore, modern views of self-determination also recognize the “federalist” option of allowing a certain level of cultural or political autonomy as a means to satisfy the norm of self-determination. 107

This is what occurred in the famous Aaland Islands case from the interwar period. In the 17th century the Aaland Islands were administratively part of Finland, which in turn was part of the Kingdom of Sweden. In the 19th century Sweden ceded Finland, including the Islands, to Russia. In 1917, Finland declared independence from Russia during the course of the Russian Revolution. At this time the Aaland Islanders, who were nearly all Swedish, sought reunification with Sweden. Finland and Sweden brought the case to the League of Nations, who in turn referred the case to a Commission of Jurists to assess the legal issues. The two opinions issued by the Commission, one concerning applicable law and the other on substantive results, have become very influential in questions of self-determination and secession.

As summarized by one commentator, the Commission considered secession as only applicable in the most extreme of cases 

As an absolutely exceptional solution, [it may apply] when a state brutally violates or lacks the will or the power to protect human dignity and the most basic human rights; however, in such cases the assumption of a legal claim to self-determination only seems to be justified if a people conscious of its own identity and settling on a common territory is discriminated against as such and if no effective remedies exist in municipal and international law to adjust the situation (LoN Council Doc. B7/21/68/106 VII, pp. 22-23). 108

2. Secession
In sum, the norm of self-determination is not a general right of secession. 109 While self-determination is an internationally recognized prin-

108. See, e.g., Thurer, supra note 106, at 367 citing to the Findings of the Committee of Rapporteurs in the Aaland Islands Case of 1921 (emphasis added).
109. See, e.g., id. (stating “[t]he principle of self-determination does not seem to include a general right of groups to secede from their States of which they form a part.”) The US Institute for Peace/Department of State roundtable stated that the right to self-determination must be separated from right to secession and the establishment of independent statehood. Carley, supra note 97, at vi.
State practice in the cases of Tibet, Katanga, Biafra, and Bangladesh support the view that states have not recognized such a right under customary international law.\footnote{Thurer, supra note 106, at 367-68.}

Although these are political matters—if anything because these are contentious political matters—legal principles and right process are all the more important. The summary of the Roundtable stated that in general “the United States should be less concerned about outcomes in these struggles than about the means used; international political stability is more likely to be maintained by focusing on the process than by trying to manipulate events to arrange a predetermined outcome.”\footnote{Carley, supra, at vii.}

The United States should, however, make absolutely clear that secession has not been universally recognized as an international right. It may choose, on the basis of other interests, to support the secessionist claims of a self-determination movement, but not because the group is exercising its right to secession, since no such right exists in international law. At the same time, an absolute rejection of secession in every case is unsound, because the United States should not be willing to tolerate another state’s repression or genocide in the name of territorial integrity. Secession can be a legitimate aim of some self-determination movements, particularly in response to gross and systematic violations of human rights and when the entity is potentially politically and economically viable.\footnote{Id., at vii.}

Issues of self-determination and secession are normally within the purview of domestic law. Classic international law maintains that “[a]lthough a rebellion will involve a breach of the law of the state concerned, no breach of international law occurs through the mere fact of a rebel regime attempting to overthrow the government of the state or to secede from the state.”\footnote{OPPENHEIM’S INTERNATIONAL LAW (9th ed.1992) (Robert Jennings and Arthur Watts, eds), (hereafter “OPPENHEIM”), at §49, p. 161-62.} If such attempts to secede impinge upon the peace and security of the international system, the U.N. Security Council may declare it illegal, as in the cases of Rhodesia or the attempted secession of

\footnote{Carley, supra note 97 at 9.}

\footnote{Thurer, supra note 106, at 367-68.}

\footnote{Carley, supra note 97 at vi.}

\footnote{Id., at vii.}

\footnote{1 OPPENHEIM’S INTERNATIONAL LAW (9th ed.1992) (Robert Jennings and Arthur Watts, eds), (hereafter “OPPENHEIM”), at §49, p. 161-62.}
Katanga province from the Congo.\textsuperscript{115} Illegality thus refers to municipal illegality at the domestic level or, at the international level, to foreign intervention or a threat to international peace and security.\textsuperscript{116}

State practice has evolved, though, so that self-determination, properly understood, does not allow the redrawning of boundaries. During the Yugoslav War, the Conference on Yugoslavia Arbitration Commission, better known as the “Badinter Commission,” established by the European Community found that the exercise of self-determination “must not involve changes to existing frontiers at the time of independence (\textit{uti possidetis juris}) except where the states concerned agree otherwise.”\textsuperscript{117} This is reiterated in Opinion 3, which notes that \textit{uti possidetis} has become recognized as a “general principle” of international law.\textsuperscript{118} The Helsinki Final Act also provided for inviolability of borders, although it does allow for border changes if through peaceful means and based on an agreement.\textsuperscript{119}

Other treaties or declarations that include an explicit or implicit affirmation of \textit{uti possidetis} include:\textsuperscript{120} the Vienna Convention on Diplomatic Relations;\textsuperscript{121} the Vienna Convention on the Law of Treaties, (1969);\textsuperscript{122} the Vienna Convention on the Succession of States in Respect of Treaties (1978);\textsuperscript{123} the Constitutive Act of the African Union\textsuperscript{124} and the UN General

\begin{footnotes}
\item[116] Id., at 356.
\item[117] Conference on Yugoslavia Arbitration Commission Opinion No. 2, 31 I.L.M. 1497 (1992). (Hereafter, the “Badinter Commission.”) The Badinter Commission was organized by the E.C. to sort through the legal issues concerning the status of Yugoslavia and its possible successor States.
\item[120] List adapted from C. Lloyd Brown-John, \textit{Self Determination and Separation}, \textbf{Policy Options} 42 (September 1997).
\item[121] Vienna Convention on Diplomatic Relations, 500 UNTS 95; 23 UST 3227; 55 AJIL 1064 (1961), entry into force April 24, 1964.
\end{footnotes}
Assembly Resolution 1514 (XV);\(^{125}\) declaration of the UN World Conference on Human Rights in 1993.\(^{126}\)

The International Court of Justice had also written in *Burkina Faso v. Mali* that *uti possidetis*

is not a special rule which pertains solely to one specific system of international law. It is a general principle which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs.\(^ {127}\)

Even more recently, the Supreme Court of Canada grappled with questions of self-determination and secession in *re Secession of Quebec*. In assessing whether Quebec could secede, the Canadian court found that

The recognized sources of international law establish that the right to self-determination of a people is normally fulfilled through internal self-determination—a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state. A right to external self-determination (which in this case potentially takes the form of the assertion of a right to unilateral secession) arises only in the most extreme cases and, even then, under carefully defined circumstances...\(^ {128}\)

This result is consistent with the Friendly Relations Resolution of the UN General Assembly, a special resolution that was passed at the twenty-fifth anniversary of the founding of the United Nations to restate the basic principles of the organization. The resolution excludes secession as a means of forming a sovereign state when the existing state respects equal rights and the self-determination of peoples.\(^ {129}\)

\(^{125}\) UN General Assembly Resolution 1514 (XV) at para. 6.

\(^{126}\) Brown-John, *supra* note 120 at 43 (affirming that all peoples have a right to self-determination but limited this to free-exercise of democratic governance; secession is not part of the right)

\(^{127}\) Case Concerning the Frontier Dispute (Burkina Faso v. Mali), 1986 I.C.J. 554, 565 (Dec. 22).


\(^{129}\) Declaration on Principles of International Law Concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations, GA Res. 2625 (XXV); see also Haverland, *supra* note 115, at 355.
3. The Legal Requirements for Claims of External Self-Determination

Although, as the Badinter Commission noted, the norm of self-determination is not completely defined in any one place, we can infer the main points from Aaland Islands, the Badinter Opinions concerning the Yugoslav War, Secession of Quebec, and other cases. At the very least, an argument for external self-determination would need to prove that (a) the secessionists were a “people,” (b) the state in which they are currently part brutally violates human rights, and (c) there are no other effective remedies under either domestic law or international law.

In the phrase of the Canadian Supreme Court from the Secession of Quebec opinion, the meaning of “peoples” is “somewhat uncertain.” 130 At various points in international legal history, the term “people” has been used to signify citizens of a nation-state, the inhabitants in a specific territory that is being decolonized by a foreign power, or an ethnic group. The Aaland Islands report also added that, for the purposes of self-determination, one cannot treat a small fraction of people as one would a nation as a whole. 131 Thus, the Swedes on the Aaland Islands, who were only a small fraction of the totality of the Swedish “people” did not have a strong claim for secession in comparison to, for example, Finland, when it broke away from Russian rule since Finland contained the near totality of the Finnish people.

Today the term “people” is somewhat ambiguous. Most recently it has been used to mean an ethnic group, or a “nation” in the classic, ethnographic sense of the word. However there are some, such as the TMR’s leadership, who suggest the term should mean something else, perhaps a group with common goals and norms. As will be discussed in the next section, deciding on a single definition of the term “people” is not dispositive in this case, as none of the other requirements for external self-determination are met.

The second requirement, after showing that the claim is being made on behalf of a “people” is that the claimants can show serious violations of their human rights by the pre-existing state. The Aaland Islands report actually stated this principle in the negative; the Commission explained that its finding that there was not a right to secede did not include the case of “a manifest and continued abuse of sovereign power to the detri-

130. Secession of Quebec, supra note 128, at para 123.
It is an unfortunate fact that human rights abuses exist in every country and that in many countries such abuses are serious and pervasive. However, it is exceedingly rare for the international community to ratify a secession, regardless of the reason upon which it was based. Consequently, we must give a narrow reading to the idea of “serious violations of human rights” in the context of secession.

Third, those claiming secession as a legal right must show that there are no other options under either domestic or international law. The Aaland Islands Commission, for example, found that if secession and subsequent incorporation into Sweden was the only means of protecting the rights of the Islanders, then this would have been a solution, but there were, in fact, other means of protecting their rights. More recently, the Canadian Supreme Court wrote in Re Secession of Quebec that there may be a rule evolving in international law that “when a people is blocked from a meaningful exercise of its right of self-determination internally, it is entitled, as a last resort, to exercise it by secession.” There are two points worthy of emphasis: first, that the Canadian Supreme Court did not come to a conclusion that such a rule actually existed, it simply noted that some have argued that there is such a rule. Second, even if this rule did exist, secession would only be allowed as a last resort.

Based on these criteria, the TMR does not have a persuasive claim.

4. Analysis of the TMR’s Claim for External Self Determination
   a. Is there a Transnistrian “People?”

While it is not necessary for the purposes of this Report to define the term “people” in order to conclude that the claim is not persuasive, we can at least note that Transnistrians, as represented by the TMR, are not a “people” in the sense of being an ethnicity. According to Charles King:

There were far more Ukrainians and Russians west of the Dnestr River than in Transnistria, and in some northern raions and in the cities, the Slavic population were just as concentrated as in the raions east of the Dnestr. In Transnistria as a whole, Moldovans formed nearly 40 percent of the total population of just over


133. Aaland Islands 1921 Report, supra note 131.

134. Authors’ note: raions is a term for “counties” in Moldova.
600,000. Rather, although the Transnistrian dispute was generally portrayed as a revolt by Slavs against the nationalizing policies of Chisinau, the real source of the violence after 1990 lay in fact at the level of elite politics... The reaction to the national movement was not a revolt by minorities, but a revolt by displaced elite against those who threatened to unseat them.\textsuperscript{135} The theory that what is occurring is an ethnic conflict between Romanians and Slavs is shown to be empty rhetoric by the fact that most of the ethnic Russians in Moldova live outside Transnistria. Transnistria’s ethnic mix before the 1992 war was over 40% percent Moldovan, 28 percent Ukrainian, and only 25 percent Russian.\textsuperscript{136} What is happening in Transnistria is more complex, and possibly more difficult to solve than ethnic strife. According to Stuart Kaufman, the Russophones in Transnistria are not so much a single ethnicity as a “coalition of ethnic interests united in opposition to certain ethnic Moldovan interests.”\textsuperscript{137} As Pal Kolstø and his co-authors explain, the conflict was less ethnic than internecine: Orthodox Christians killed Orthodox Christians and ethnic Moldovans, Ukrainians, and Russians fought on both sides.\textsuperscript{138} They argue that it would be a “gross oversimplification” to call the conflict one between ethnic Moldovans (or Romanians) and Russophones.\textsuperscript{139} One must remember that “the history of Moldova is one of constant change and contestation of territory and so identities and loyalties.”\textsuperscript{140}

If not a “people” in the sense of a single ethnicity, the TMR’s leadership falls back on the argument that the Transnistrians form a tight cultural community seeking independence. Litskai argued that Transnistria is a social and cultural region. Rather than a single ethnicity, though, he argues that it is a community of three ethnic groups.\textsuperscript{141} There is some support for saying that Transnistrians have different political proclivities than “right bank Moldovans.” For example, Transnistria had already been collectivized in the 1920s and 1930s and thus was always more “Soviet” than the Bessarabian part of Moldova.

\textsuperscript{135} King, The Moldovans, supra note 2, at 187.
\textsuperscript{136} Kaufman, supra note 20, at 119.
\textsuperscript{137} Id.
\textsuperscript{138} Kolstø, et al., supra note 9, at 975.
\textsuperscript{139} Id.
\textsuperscript{140} Herd, supra note 10.,
\textsuperscript{141} Litskai meeting notes, supra note 73.
Defining the term “people” for the purpose of self-determination is an exceedingly complex question fraught with issues of political will and state practice for which there is no clear precedent. In the absence of a clear consensus of the states in the international system, our response is to be wary of novel interpretations, especially when argued by an entity that has not been recognized by a single state. In Secession of Quebec, the Supreme Court of Canada found that it was unnecessary to precisely define the term “peoples” because, “whatever the correct application of the definition of people(s) in this context, their right to self-determination cannot in the present circumstances be said to ground a right to unilateral secession.”

We have come to a similar conclusion in this case. Regardless how one chooses to define people, none of the other requirements for the suggested right to external self-determination are met.

Even assuming Litskai’s formulation, though, that political proclivities could make a “people,” the facts in this case would not support his claim. The TMR’s leadership points out that a January 1990 referendum in Transnistria reportedly had 96% of the voters favoring autonomy within the MSSR and, if necessary, the future creation of an independent state. But, while there is likely support in Transnistria for independence, the votes that occurred must be considered with a critical eye. In a visit to Tiraspol in September 1992, Kolsto and his co-authors were shown lists in which the votes of the residents had been recorded with their names, “[h]ence the anonymity of the voters had been compromised.” Moreover, the 1993 human rights country report issued by the U.S. Department of State stated that “while there is some question concerning the extent of local Slavic support for the current Transnistrian leadership, it is clear that most ethnic Romanians in the region do not support the Transnistrian authorities.”

Identity is, of course, socially constructed and the TMR has put effort into socializing Transnistrians into having a group identity. Transnistrian textbooks, for example, state the following concerning the 1992 Battle of Bender:

The traitorous, barbaric, and unprovoked invasion of Bender

142. Secession of Quebec, supra note 128, at para. 125.
143. KING, THE MOLDOVANS, supra note 2, at 189.
had a single goal: to frighten and bring to their knees the inhabitants of the Dniester republic... However the people’s bravery, steadfastness, and love of liberty saved the Dniester republic. The defense of Bender against the overwhelming forces of the enemy closed a heroic page in the history of our young republic. The best sons and daughters of the people sacrificed their lives for peace and liberty in our land.¹⁴⁵

Inasmuch as schoolchildren have been educated with such textbooks for the past fifteen years, it would not be surprising if there was a sense of “otherness” by some in Transnistria in comparison to the rest of Moldova. But this alone does not equate to a claim for secession.

It has been consistently held that, as the Commission of Jurists stated in Aaland Islands, there is no right of national groups to separate by the simple expression of a wish.¹⁴⁶ (Note that even here the assumption is the existence of a national group—usually meaning an ethnicity, rather than simply a like-minded group.) Moreover, the Aaland Islands Commission found that the ability to choose fate by plebiscite must be decided by the State itself (in this case the Republic of Moldova); otherwise such a formulation would infringe upon the sovereign right of states.¹⁴⁷

While the norm of self-determination may evolve such that a people may be more readily identified as merely a like-minded group, we do not find that current State practice supports such a proposition. Rather, as the Canadian Supreme Court concluded,

In summary, the international law right to self-determination only generates, at best, a right to external self-determination in situations of former colonies; where a people is oppressed, as for example under foreign military occupation; or where a definable group is denied meaningful access to government to pursue their political, economic, social and cultural development. In all three situations, the people in question are entitled to a right to external self-determination because they have been denied their ability to exert internally their right to self-determination.¹⁴⁸

¹⁴⁶. Aaland Islands, supra note 132.
¹⁴⁷. Id.
Moreover, regardless of the result of whether the Transnistrians are a “people,” the other prongs of the test are not met by the TMR.

b. Serious Violations of Human Rights

While serious violations of human rights can play a part in supporting a claim for secession, there is a general sense that such violations must be ongoing. The argument of the Transnistrians concerning human rights violations can be organized into three main groupings: (a) violations of linguistic and cultural, and political rights; (b) the brutality of the 1992 War; and (c) the denial of economic rights. Taking into account the significant changes in Moldova since 1992, none of these claims is convincing today.

Linguistic, cultural, and political rights. Although there may have been justifiable concerns due to the proposed language laws, concerns over unification with Romania, and the nationalistic rhetoric in general at the founding of the Republic of Moldova, these concerns turned out to be short-lived. By 1993 the fear of unification with Romania was unfounded, according to the U.S. State Department:

While some groups within Moldova continue to advocate unification with Romania, this idea has generally lost popularity over the past several years. This, in turn, has led to some improvements in the relations between Romanian speakers and Russian speakers. The latter express serious concern about the situation of Russian speakers if unification were to take place. The leadership of the separatist “Transdniester Moldovan Republic” sought to capitalize on fears of discrimination to gain support from the majority Russophone population of the region.

By 1994, the Moldovan government was working to undo the concerns regarding the use of Moldovan. In its annual review of human rights practices in Moldova, the State Department found that “Interethnic relations improved as the new Parliament delayed the implementation of the controversial testing for competence in the state language Romanian (Moldovan), which many members of the minorities do not speak.”

149. Professor C. Lloyd Brown-Jones of the University of Windsor has written that “self-determination and secession to achieve independence are not mutually compatible concepts in international law except under circumstances where oppression and persecution or a colonial relationship persists.” Brown-John, supra note 120 at 40. (emphases added).

150. Moldova 1993 Country Report, supra note 144 at Sec 5.

151. Id. at Introduction.
Moreover, the State Department also found that “[t]o date, no pattern of discrimination has emerged in the judicial system.” 152

While the Moldovan road to democracy has been a bumpy one, with occasional backsliding (in the areas of the freedom of the press in particular), there has been a general trend of progress. In the 2004 Human Rights Country Report for Moldova, the State Department wrote that “[t]he Government [of Moldova] generally respected the human rights of its citizens; however, there were problems in some areas, and the human rights record of the Transnistrian authorities was poor.” 153 Keeping in mind that the argument of the TMR is that it needs to secede from Moldova in order to have the human rights of Transnistrians respected, contrast Moldova’s ameliorating human rights record with the TMR’s poor history. One example is the provision of free and fair elections:

In 2001, citizens voted in multiparty parliamentary elections that the OSCE considered to be generally free and fair; however, election observers noted some shortcomings, such as inaccurate and incomplete voter lists and excessively restrictive media provisions in the Electoral Code. Transnistrian authorities interfered with residents’ ability to participate in the country’s elections. International observers were not present at either the Transnistria Supreme Council elections in 2000 nor the 2001 “presidential” elections, and the elections were not considered free and fair. 154

This poor showing of electoral rights not only undermines the argument that internal self-determination is not possible in Moldova, but it also undercuts the contention that the Transnistrian referenda are good indicators of the will of the Transnistrans.

152. Id. at Sec 1.e.
154. Id. at Sec. 3. The Parliamentary Assembly of the Council of Europe (PACE) adopted Resolution 1465 (2005) “Functioning of Democratic Institutions in Moldova,” on October 4, 2005 which stated, in part, that Moldova

has advanced significantly on the path of democratic reforms but a number of important commitments have not yet been fulfilled. The pace of reforms has been slowed by the fact that Moldova, in addition to its democratic institutions, has been simultaneously building its national identity and dealing with a separatist regime and foreign troops stationed in the Transnistrian region of Moldova.

Similarly, while Moldova attempted to decrease discrimination and tensions after the 1992 War, the TMR’s leadership actually increased discrimination within Transnistria on linguistic grounds. As the State Department found:

In the separatist region, however, discrimination against Romanian/Moldovan-speakers increased. The regime continued its insistence that all Moldovan schools in the region use the Cyrillic alphabet only.156

Marakutsa, by contrast, extolled the tolerance of the TMR in his meetings with the New York City Bar representatives. He explained that the TMR had three official languages, Moldovan, Ukrainian, and Russian, and that the TMR’s school regulations allowed for schools in other languages, although they must be privately funded.157

Consider, in this context, the crisis over the Romanian language schools. Two schools, one in Tiraspol, and one in Ribnita, were closed by TMR representatives in July 2004, leaving approximately 1200 students without a school. Two schools in Bender were guarded by parents and teachers to prevent a feared closing. One of the schools, a boarding school for orphans called the Internat, was surrounded by TMR militia who controlled access to the area. According to the OSCE, there were 70-80 students in one of the schools throughout the month of July, without access to running water, gas, or electricity. At one point, the TMR allowed a water tank to be moved onto the grounds, but then this “privilege” was later withdrawn and the tank was taken away. Students still had access to water, but had to carry it “several hundred meters” to their dorms or the kitchen.158

For a time, Moldovan police officials were allowed to deliver food to the orphans, then the TMR refused deliveries by the Moldovan police and the OSCE was allowed to deliver food; then the OSCE was no longer allowed to enter but the Moldovans were allowed back in. Finally on August 20, the TMR cordon simply withdrew.

The State Department’s summary of the situation in 2004 stated that:

Transnistrian authorities reportedly continued to use torture and arbitrary arrest and detention. Prison conditions in Transnistria

156. Id.
157. Marakutsa meeting notes, supra note 69.
158. OSCE Mission to Moldova Activity Report, supra note 45 at 5.
remained harsh, and two members of the Ilascu group remained in prison despite a July ruling in their favor by the European Court for Human Rights (ECHR). Human rights groups were permitted to visit prisoners in Transnistria, but obtaining permission from the Transnistrian authorities was difficult. Transnistrian authorities mistreated and arrested one journalist from the government-controlled area, harassed independent media and opposition lawmakers, restricted freedom of association and of religion, and discriminated against Romanian-speakers.159

Furthermore, “[i]t was common practice for Transnistrian authorities to detain persons suspected of being critical of the regime for periods of up to several months.”160 Transnistrian authorities refused to comply with the decision of the European Court of Human Rights (ECHR) in the Ilascu case concerning the detention of political dissidents. The Department of State noted that “[t]here were no reports of political prisoners [in Moldova] other than those in Transnistria.”161

In light of the comparative record of Moldova and the TMR regime, it becomes clear that not only is there no credible claim of extreme deprivation of social, cultural, and political rights in Moldova but, rather, that such a claim exists for ethnic and linguistic minorities living in the area under the TMR’s effective control.

The Brutality of the 1992 War. The heart of the Transnistrians claim concerning the 1992 War can be summarized as “We Transnistrians did not go into Moldova to fight, they brought the battle to us.”162 In particular, claims have centered around the fighting in and around Bender. The fighting was, for a time, quite fierce, with a total death toll of about 1,000. Litskai explained that the real issue, though, is that due to the bad feelings that still exist, there is no guarantee that the war could not flare up again in the future.

The Transnistrian argument is not persuasive. This is not to belittle the fact that one thousand people died, but rather to recognize that the international community sets a high bar as to what can justify dismembering a state. Consider Biafra. The Biafran attempt to separate from the rest of Nigeria from 1967-1970 was in part (if not mostly) due to ongoing violence by the government of Nigeria against the Igbo people who live

160. Id. at Sec. 1.d.
161. Moldova 2004 Country Report, supra note 4, at Sec. 1.e.
162. Smirnov meeting notes, supra note 70.
in Biafra. Yet, for the nearly one million people that died in that secessionist conflict, the Republic of Biafra was recognized by only five states: Tanzania, the Ivory Coast, Gabon, Zambia, and Haiti. Those states that did recognize Biafra as a new state often focused on the brutality of the conflict.163

Yet, although other countries (notably Portugal, France, and Israel) assisted the Biafrans, no other state recognized the secession. The Organization of African Unity, for its part, strongly supported Nigeria and the norm against the dismemberment of states. The emperor Haile Selassie of Ethiopia said that “The national unity and territorial integrity of member states is not negotiable. It must be fully respected and preserved.”164

This is not to say that there is some benchmark of human suffering before there can be a claim of secession. Such a contention would be repugnant; it does, however, point to a reality of international politics: there is a deep aversion to allowing secession. In light of this, an argument that a single battle fifteen years ago should be dispositive in a claim for secession today flies in the face of State practice, particularly when one takes into account that the current human rights situation in Moldova is much improved and there is very little ethnic tension. (Both being in contrast to the situation in Transnistria itself.)

War by its nature is brutal. But not all wars—actually as a matter of State practice very few—lead to accepted claims of a right to secession. The 1992 Battle of Bender and its related skirmishes do not rise to the level of such a war.

Denial of Economic Rights. Perhaps the most constant complaint lodged by our interlocutors in Transnistria was that the central government in Chisinau denied them their economic rights. As Marakutsa put it, Chisinau was built on the riches of Transnistria. Both Marakutsa and Litskai stressed that at the outset of Moldovan independence, Smirnov had sought economic autonomy more than anything and that this had been rejected. Now, however, as Marakutsa explained, Gagauzian-style autonomy would not be enough because—in the view of the TMR’s leadership—the Gagauz

163. See David A. Ijalaye, Was Biafra At Any Time a State in International Law?, 65 Am. J. Int’l L. 551, 554 (1971). The brutality of the conflict was used as a reason for accepting secession: Tanzania explained its recognition was in part due to the real and well-founded fears of the Biafrans based on previous pogroms against them; Gabon and Zambia had similar explanations, though more focused on brutality of the civil war.

164. Id. at 556. One notes the irony of this statement in light of the Ethiopian Eritrean War that would embroil his country with the ultimate secession of Eritrea.
are unable to push forward their economic claims. Marakutsa explained that the main concerns between Tiraspol and Chisinau are economic, but not so much the economy itself as the “methods and forms” of economic decision-making.

Litskai mentioned a similar theme. He explained that Moldova had lost its industrial base very quickly through the form of privatization it used. And, he continued, while Moldovans can live as agrarians, Transnistrians cannot. The concern is that the Moldovan scheme of privatization will destroy the TMR’s industrial base. Conversely, he noted, Moldova refuses to recognize the TMR’s privatization plan.

When asked again why autonomy is the answer to these problems, Litskai explained that this is necessary to defend against economic exploitation of Moldova. This argument is also not persuasive because, despite the economic assets that the TMR controls and is actively selling off to willing buyers, the economic benefits have not been felt beyond a select group of Smirnov associates. As Dov Lynch of the European Union Institute for Security Studies observed, “the great majority of the PMR population lives in deep poverty, with an average income of one U.S. dollar a day.” The TMR has had effective control of the economic assets of Transnistria for fifteen years and, aside from a state-of-the-art soccer stadium and a clean veneer to the main street in Tiraspol, there is little to show for it in terms of general economic benefits to the population.

Over the course of hours of meetings with the TMR’s leadership, we were struck by how often the question came back to who gets to decide what to privatize and who gets to decide how that money is spent. These are, without a doubt, pressing policy issues. But secession is not about changing a policy but about changing a polity, the political organization itself, the State. While the Transnistrians may disagree with Chisinau over how entities should be privatized and what percentage of that revenue should be reinvested in Transnistria, there is nothing that rises to the level of a claim that the only solution is to split the Moldovan State. Rather, if anything, there is a glimmer of hope here: if the parties are really disagreeing over money, then a negotiated solution is more likely, once we strip away the nationalistic rhetoric. But this would be a negoti-

165. Marakutsa meeting notes, supra note 69.
166. Litskai meeting notes, supra note 73.
167. Id. At this point Litskai said that we should also consider the ethnic differences between Moldovans and Transnistrians.
168. LYNCH, supra note 34, at 66.
c. No Other Solution

Litskai argued that the people who have come to power in Chisinau in 1990 aimed the Moldovan State’s mechanisms against Transnistria and that to defend themselves Transnistrians had to create a State in order to respond.\textsuperscript{169} The unitary Moldovan state would not provide the guarantees that the Transnistrians needed and, as such, separation was sought, although, as Smirnov, Litskai and Marakutsa each emphasized, some form of federation or confederation may now be possible.

So, if the TMR is now willing to consider federation, is it accurate to say there is no other solution? We should consider their argument here in the terms that it would need to be made to support a claim for external self-determination. (In any case, as was discussed in Part III.B, above, the TMR’s argument seems to actually be for full sovereignty, though approached obliquely.)

Their claim that there is no other solution but for secession is not persuasive. First of all, the actual history of Moldova since the end of the 1992 War shows that minority rights have been respected to a greater extent than feared. Although Moldova does not have a pristine record, if such a human rights record was enough to lead to a right of secession, the world would be rife with secessionist conflicts.

This conflict has been frozen not so much because there are no other options under domestic and international law besides secession, but because the separatists gained by making the conflict seem intractable. As one commentator put it, “Russophone leaders [in Transnistria] used ethnic outbidding to exacerbate mass hostility and the security dilemma in order to preserve and increase their power.”\textsuperscript{170} Head of TMR internal security Vladimir Antufeyev, for example, “runs a number of social organizations and newspapers that inflate the nature of the Moldovan threat to Transnistria.”\textsuperscript{171} Furthermore, “[s]eparatist violence occurred because Russophone elites had much to gain, especially increased power and career opportunities for themselves, by promoting it.”\textsuperscript{172}

The problem may not only be in Transnistria. The Infotag news agency

\textsuperscript{169} Litskai meeting notes, \textit{supra} note B.
\textsuperscript{170} Kaufman, \textit{supra} note 20, at 126.
\textsuperscript{171} LYNCH, \textit{supra} note 34, at 60.
\textsuperscript{172} Kaufman, \textit{supra} note 20, at 126.
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has reported that Voronin has said that he often has an impression that the Moldovan political elite does not need a Transnistrian settlement as such, that it is more advantageous to live in a split country with an open border, with Transnistrian shadowy economy and a foreign military presence.173

Dr. Charles King of Georgetown University describes the stalemate in Moldova (and other post-Soviet countries with separatist crises) in this way:

It is a dark version of Pareto efficiency: the general welfare cannot be improved—by reaching a genuine peace accord allowing for real reintegration—without at the same time main key interest groups in both camps worse off.174

King also notes William Zartman’s telling description: if the parties feel that they can get more by fighting than by negotiating, if they have not reached a “hurting stalemate”, then they are unlikely to seek peace.175

In the case of Moldova, a hurting stalemate—and real bargaining from the Transnistrian side—is unlikely while the Russians continue to ameliorate the situation for the Transnistrians. Similarly, the Bertelsmann Foundation, along with the East West Institute, the Open Society Institute and other interested non-governmental organizations, issued a report concerning the Transnistrian crisis that stated that “[n]o durable conflict resolution is possible when the separatist rebels are in a better position than the legitimate state.”176

King wrote that “[i]t is the multifaceted origins of the Transnistrian conundrum, as well as the political and economic interest spawned by the war itself, that have made the dispute so difficult to resolve.”177 The
International Crisis Group explains that a “wide array of actors play both sides against the middle by maintaining ties with both Moldovan government and the DMR in an effort to preserve lucrative—and often illegal—trading arrangements made possible by the DMR’s parallel economy and customs policies.” 178 These businesspeople from Ukraine, Moldova, and Russia “constitute a well-financed lobby that wishes to uphold the status quo.” 179

Rosa Brooks has referred to the idea of conflict entrepreneurs — those who profit from ongoing conflicts. 180 Perhaps this is the best way to consider the Smirnov regime and the truest explanation of the conflicts intractability.

Secession is clearly not the only option available to solve this conflict.

5. Conclusion

There is no solid basis for a claim of secession under external self-determination. The most basic requirements for a legal claim are not met.

Moreover, the analysis of the legal requirements of external self-determination only underscore that this is in part an opportunistic crisis. “The Dniestrian leadership’s main approach to justifying itself, however, was not ideological or historical but military: it stoked violent conflict by provoking a security dilemma between Moldova and Dniestrian Russophones, then cast itself as the Russophones’ defender.” 181 The TMR portrays itself as part of the Russian homeland (when seeking support of Cossacks), genuine socialists (when rallying the vestiges of the USSR’s Communist Party),

of the relationship of Igor Smirnov and Vladimir Voronin is a history of slights, great and small. Smirnov, in particular, complained of Voronin “stealing” his gold coins, in reference to a shipment of commemorative gold coins that were seized by Moldovan customs in transit to the TMR from Poland, their place of minting. Smirnov asked us if Voronin would like it if he stole Voronin’s motorcycle. (Unbeknownst to the Team at the time, Voronin seems to enjoy motorcycle riding.) Smirnov, for his part, had refused to let Voronin cross into Transnistria to visit his ailing (now deceased) mother and did not let Voronin come to Transnistria to watch a match of the Moldovan national soccer team. Yes, although Moldova and the TMR are in an ongoing conflict, until 2003 the Moldovan National Soccer Team played certain “home” games in Transnistria where the TMR had built a lavish soccer stadium complex. How the TMR arrived at the funds to do so is a question of some interest to the Moldovans.


179. Id.


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and as progressive capitalists (when seeking support from the New York City Bar, for example).

Perhaps the TMR's strongest argument for sovereignty is not one stemming from the doctrinal requirements of external self-determination but the argument that it was not part of Moldova historically. The MASSR was merged with Bessarabia only as part of the Molotov-Ribbentrop pact. But the historical argument is itself undercut by history as well as sociology. While it is true that the east and west banks of the Dniester were often separated by a boundary, the historical fact is that they have existed in a single state, without separation, since 1940. That is longer than most states in existence today. Moreover, there is no linguistic, ethnic, or religious justifications for separation as the communities on both sides of the Dniester are heterogeneous and multi-ethnic.

The TMR has tried to answer this by arguing that the “average Transnistrarian” wants the TMR's independence. According to one report:

On 12 October 2004, at a conference dedicated to the 80th anniversary of the [MASSR], Igor Smirnov announced that PMR would hold a referendum “to prove the legitimacy” of its independence. The results of the referendum would become law and force the international community to acknowledge the PMR people’s will: “We must hold a national referendum, with international observers to make sure that there can be no doubt about the legitimacy of our state. The results of the referendum will be a law for us, a law that the international community, above all the United States, the European Union and the OSCE, will have to respect.” Smirnov had previously argued in August 2004 that holding separate referendums in Moldova and PMR to settle the PMR-Moldovan conflict was a possibility. Such action would be in accordance with the Cyprus settlement model of conflict resolution, and would afford the people of PMR “the right to self-determination.”

The Aaland Islands Commission found that the ability to choose fate by plebiscite must be decided by the state itself; otherwise such a formulation would infringe on the sovereign right of states.

Secession is a serious undertaking. In order to prevent a general breakdown of the state system, it must be a last resort. Situations short of that do not give rise to a right of secession.

182. Herd, supra note 10, at 9 (citations omitted).
183. Aaland Islands, supra note 132.
Merely wanting to secede does not allow one to secede. The TMR’s arguments do not recognize this and, as such, they are not persuasive.

D. Defining the Legal Status of the TMR

In light of the foregoing, what is the legal status of Transnistria? If it is not a state, then what is it? We considered two issues: (a) the role of recognition in the process of state formation; and (b) whether the TMR is a *de facto* regime.

1. Recognition

The extent to which a new state is able to participate in the international community is, in practice, largely determined by the extent of its bilateral relationships with other states which, in turn, depends primarily on its recognition by them.\(^{184}\) By recognizing a State, the recognizing State gives its opinion that the new State meets the requirements under international law for statehood. When recognition is withheld, the position of the entity in question is in doubt.\(^{185}\)

Although there is no single text that explains what is required to be a “state” the Montevideo Convention sets forth a series of benchmarks which are generally accepted in the international community.\(^{186}\) The Restatement (Third) of the Foreign Relations Law of the United States gives the modern synopsis of the requisites of statehood:

Under international law, a state is an entity that has a defined territory and a permanent population, under the control of its own government, and that engages in, or has the capacity to engage in, formal relations with other such entities.\(^{187}\)

In considering the situation of the TMR, the Russian Ambassador to Moldova, H.E. Nicolai Ryabov, told us that the TMR is unrecognized by any other nation only because of politics. He argued that other entities—

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Bosnia and East Timor, for example—were recognized because the political will existed to recognize them. The TMR’s problem, he implied, though did not state explicitly, was not one of law but of politics. In 2000, Vladimir Bodnar, the chair of the Security Committee of the Supreme Soviet of the TMR, put it this way:

We are an island surrounded by states... What defines a state? First, institutions. Second, a territory. Third, a population. Fourth, an economy and a financial system. We have all of these.

First, although Ambassador Ryabov’s statement implies (and Bodnar says outright) that the TMR has all the requisites for statehood, such a conclusion has little foundation. As one group of commentators wrote, “[o]ne legacy of the traumatic ‘birth’ of the [TMR] is an almost complete lack of permanent, functioning political structures.” As will be further discussed, below, the TMR is less a functioning state and more a hothouse flower, an entity that is able to survive only because of certain carefully regulated conditions—in this case the ample economic and security support of the Russian Federation—that would be unable to survive under normal circumstances.

Besides the question as to whether the TMR could survive as a state, Ambassador Ryabov’s comment also ignores the fact that non-recognition can be due to policy reasons or for some legal deficiency of the new entity, for example, “[r]ecognition may also be withheld where a new situation originates in an act which is contrary to general international law.” The Restatement (Third) notes that

A state has an obligation not to recognize or treat as a state an

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188. As quoted by Lynch, supra note 34, at 43. Note Bodnar’s replacement of “the capacity to engage in formal relations with states” with “an economy and financial system” in his description of the criteria for statehood.


190. Oppenheim supra note 114, at §54, p. 183. and id., n. 4. See also Daniel Thurer’s 1998 addendum on self-determination in the Encyclopedia on Public International Law, which states that

Rather than formally recognizing a right of secession, the international community seems to have regarded all these processes of transition as being factual rearrangements of power, taking place outside the formal structures of international law: international law only became subsequently relevant within the context of recognition.

Daniel Thurer, Self-Determination, 1998 Addendum, supra note 107, at 367.
entity that has attained the qualification for statehood as a result of a threat or use of armed force in violation of the United Nations Charter.\footnote{191. \textit{RESTATEMENT (THIRD) §202(2) “Recognition or Acceptance of States.”}}

State practice gives ample support that the non-recognition of the TMR is consistent with the recent norms of state practice as well as accepted rules of international law. Consider the example of Southern Rhodesia, where a white minority government took control and declared the colony’s independence from Great Britain. The Rhodesian example shows that a unilateral declaration of independence will not be tolerated if the result would be to then impair the rights of others.\footnote{192. Brown-John, \textit{supra} note 120 at 41.} In one basic casebook on international law, the co-authors explain that Rhodesia should have met the traditional criteria for statehood, but the Security Council and General Assembly resolutions denying such recognition were nonetheless accepted as definitive.\footnote{193. \textit{LORI DAMROSCH, LOUIS HENKIN, ET AL, INTERNATIONAL LAW CASES AND MATERIALS 266 (4th ed. 2001) (hereinafter “DAMROSCH, ET AL.”).}} The issue of an entity’s ability to enter in relations with other states is related to the formal recognition by other states of the statehood of the entity in question.\footnote{194. \textit{See Ijalaye, \textit{supra} note 163, at 552. Ijalaye wrote It would appear that there is no other way of acquiring this ‘recognized capacity’ than by the grant of formal recognition by existing states. The question of capacity to enter into relations with other states thus shades into the question of the nascent state’s being formally recognized by other states.}} Great Britain’s refusal to accept the validity of Rhodesia’s unilateral declaration of independence, for example, seems to have played a part in the refusal of any other state to recognize Rhodesia which thus denied Rhodesia from gaining the capacity to enter into relations with states.\footnote{195. \textit{Id.}}

Cyprus provides another instructive example. The combination of different ethnic groups within a single state, the role of guarantor powers, and the ongoing question of recognition provide numerous points of comparison. If anything, Cyprus shows how complex such separatist situations can become if left unresolved.

The modern story of Cyprus starts in the years following World War I where the Mediterranean island came under British control and, in 1925, a formal British colony. However, Cyprus had a mixed Greek and Turkish

\footnote{191. \textit{RESTATEMENT (THIRD) §202(2) “Recognition or Acceptance of States.”}} \footnote{192. Brown-John, \textit{supra} note 120 at 41.} \footnote{193. \textit{LORI DAMROSCH, LOUIS HENKIN, ET AL, INTERNATIONAL LAW CASES AND MATERIALS 266 (4th ed. 2001) (hereinafter “DAMROSCH, ET AL.”).}} \footnote{194. \textit{See Ijalaye, \textit{supra} note 163, at 552. Ijalaye wrote It would appear that there is no other way of acquiring this ‘recognized capacity’ than by the grant of formal recognition by existing states. The question of capacity to enter into relations with other states thus shades into the question of the nascent state’s being formally recognized by other states.}}
population and there were ongoing concerns stemming from sectarian discord. In 1950, for example, Greece argued that Cyprus should be united with Greece. During the era of post-World War II decolonization, Britain began the process of granting the island independence and fostering a stable government to rule Cyprus. It had to keep the interest of the various communities in mind. In 1960, Cyprus’ population was 80 percent Greek Cypriot, 18 percent Turkish Cypriot and 2 percent “Other.” With Britain, Greece, and Turkey playing the role of “guarantor states,” the Greek and Turkish Cypriot communities signed a series of agreements in 1960 known as the 1960 Accords. These Accords included the Basic Structure, essentially to Constitution of the newly independent Cypriot state, the Treaty of Guarantee in which the guarantor States promised to “recognize and guarantee the independence, territorial integrity and security of Cyprus as well as the Basic Structure, and the Treaty of Alliance, which set up a means for the guarantor states to cooperate.

There was disagreement and factionalization almost from the point of independence. There was widespread civil unrest in 1963. The guarantor powers unfortunately did more to sow discord than heal wounds: in 1974 Greece engineered a coup in Cyprus and as a response Turkey invaded and took control of the Northern third of the island.

In February 1975, the leaders of Turkish Cyprus announced that they had formed the “Turkish Federated State of Cyprus,” (“TFSC”) which was not an independent sovereign state, but an autonomous part of a federation with a Greek Cypriot state. In this way, Turkish Cyprus attempted to seize territory first, and then re-negotiate the constitutional order. This has similarities to Moldovan-Transnistrian-Russian relations in the 1990s.

In September 1975, the assembly of the TFSC declared full sovereignty. Although the TFSC has effective control of northern Cyprus, the TFSC remains generally unrecognized.

While the Security Council did not call for non-recognition of the island, it did note its regret over the proclamations of the TFSC and did say that no action should be taken by any Member State of the UN that would divide the island. The situation further devolved with a November 1983 proclamation by what had been the TFSC that the now newly named Turkish Republic of Northern Cyprus (“TRNC”) was an indepen-

196. See OPPENHEIM supra note 114, at §55, p. 189, n. 16.
197. Id. at §55, p. 189-90.
dent state. Security Council Resolution 541 (1983) calls upon states not to recognize any Cypriot state other than the Republic of Cyprus. Only Turkey has recognized the TRNC and the Security Council called the proclamation “invalid.” This shows the interplay of the legal doctrine concerning the attributes of a state and the political reality of membership in the international community.

Rather than pure politics, as Ambassador Ryabov may have it, what we actually see is an evolving state practice. Effective control of territory, though indisputably a crucial stepping stone towards recognition, is not in and of itself enough for recognition.

201. Effectiveness in fact should not be confused with legality as a matter of right.

The latest iteration of this argument, at the time of this writing, is that the situation in Transnistria is similar to that in Kosovo. As Smirnov complained, “[c]urrently they are preparing a recognition of Kosovo, but would deny this to Transnistria. If this is a really fair, universal approach to conflict settlement, it must be applied also to Transnistria, and Abkhazia, and South Ossetia, and Nagorny Karabakh.” Transnistrian President Jealous About Kosovo Variant, Infotag (Tiraspol, Feb. 17, 2006). Moldovan leaders see little resemblance between the situation in Kosovo and that in Moldova and thus one cannot analogize that what may work as a solution in one would be good for the other. Kosovo Experience is No Good for Transnistria—Voronin, Infotag (Chisinau, Feb. 21, 2006).

The situation in Kosovo is quite different from that in Moldova. For example, The situation in Kosovo is animated by ethnic conflict between the Kosovars and the Serbs that includes real concerns over ethnic cleansing by the Serbs; there is no such ethnic conflict in Moldova. Kosovo is currently an internationally administered territory; Transnistria is not.

Finally, one should note that, if the international community supports sovereignty for Kosovo, this is the result of a political bargain. There international community has not used the argument that Kosovo is owed sovereignty as a legal right. Here we were concerned with whether Transnistria has a legal right to sovereignty. To this end, therefore, the Kosovo example is
A frequent reason for not recognizing an entity as a new state is that territorial changes caused by the use of force are generally seen as unlawful and will not be recognized.\footnote{Frowein, \textit{Non-Recognition}, supra note 185, at 628.} Recognition of a territorial acquisition achieved from the threat or the use of force “would be an improper interference in the internal affairs of the state of which the unlawfully acquired territory was a part.”\footnote{DAMROSCH, ET AL, supra note 193, at 267. See also \textit{Restatement (Third), §202(2).}} The secession of Katanga was not recognized by any state. Biafra is another example of an attempted secession that almost no other state accepted. In light of this, whether the predecessor state recognizes the seceding entity as a new state is an important criterion.\footnote{Haverland, \textit{supra} note 115, at 357.} “Third States... may be prevented from according recognition as long as the injured state does not waive its rights since such a unilateral action would infringe the rights of the latter State.”\footnote{Karl Doehring, \textit{Effectiveness}, in 2 \textit{Encyclopedia of Public International Law} 43 (R. Bernhardt, ed. 1995) at 47.} We should note that we believe recognition by a predecessor state is an important criterion, but the U.S. has consistently argued that such recognition is not \textit{required} as a matter of law. Nonetheless, in situations such as this, where there is an incomplete secession, the fact that the predecessor state continues to actively deny the validity of the secession is both legally and politically important, though not dispositive.

A second reason for not recognizing an entity as a state is its lack of independence in relation to some state.\footnote{Jochen A. Frowein, \textit{Recognition}, in 4 \textit{Encyclopedia of Public International Law} 33 (R. Bernhardt, ed. 2000).} This argument could be made \textit{vis a vis} the TMR’s relationship to Russia. But for Russian assistance, the TMR would probably not be able to survive as a separate entity as it “relies heavily on external political and material support.”\footnote{ICG 2004, \textit{supra} note 178, at 1.} This will be discussed at greater length in Part V, below, but warrants a brief mention here. Consider three aspects of Russian support: military assistance, energy subsidies, and the provision of political and military leadership.

The Russian 14th Army, or ROG, effectively ensures the separation of the Transnistria from the rest of Moldova. It was Russian intervention that sealed a Transnistrian victory in the 1992 War and a military stale-
mate since then. Russian military units are essentially the guarantors of a separate Transnistria.

Russia has also made a Transnistrian economy viable by providing low cost energy (at rates lower than what is provided to Moldova). This makes Transnistrian factories able to produce (and sell) goods at lower cost than other manufacturers in the area. Moreover, Gazprom has not sought from the TMR the collection of one billion dollars in debt.

The TMR’s leadership cadre is also largely drawn from Russia. Victor Balala, a former Duma staffer, is the TMR’s “Minister of Justice” and was also a key person in the privatization program until he was fired in July 2005 at the insistence of a majority of the deputies in the Transnistrian Supreme Soviet. Renegade Russian General Vladimir Antufeyev is the TMR chief of internal security. And Russia has also admitted that whole military units from the Russian Army have joined the TMR’s army.

State practice in Europe since the 1990’s and the successor state issues in Yugoslavia and the former-USSR has increasingly established preconditions to recognition. The European Community thus issued a Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union and also a Declaration on Yugoslavia which set out the ground rules for (in the words of the Declaration on the Recognition of New States) “recognition by the Community and its Member States and to the establishment of diplomatic relations.” The Declaration on the Recognition of New States reads, in part:

The Community and its Member States confirm their attachment to the principles of the Helsinki Final Act and the Charter of Paris, in particular the principle of self-determination. They affirm their readiness to recognize, subject to the normal standards of international practice and the political realities in each

208. According to certain interlocutors, although the public explanation cited failure properly to execute his duties, the real cause was Balala’s participation, along with at least two deputies from the Russian Duma, in the theft of $15 million from the first stage privatization of the Moldovskaia GRES, a gas-fired power station in Cuciurgan.

209. Antufeyev is sought by INTERPOL for his role in the murder of a journalist.


case, those new States which, following the historic changes in the region, have constituted themselves on a democratic basis, have accepted the appropriate international obligations and have committed themselves in good faith to a peaceful process and to negotiations.

Therefore, they adopt a common position on the process of recognition of these new States, which requires:

· respect for the provisions of the Charter of the United Nations and the commitments subscribed to in the Final Act of Helsinki and in the Charter of Paris, especially with regard to the rule of law, democracy and human rights;

· guarantees for the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE;

· respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement.\(^{213}\)

Moreover, the Declaration explained that “The Community and its Member States will not recognize entities which are the result of aggression. They would take account of the effects of recognition on neighbouring States.” This goes well beyond the simple reading that recognition simply occurs once there is effective control of territory. In particular, the concern of European states in the protection of democracy, human rights, minority rights and *uti possidetis* should give pause regarding any claim that the TMR deserves immediate recognition. The fact that it exists because of a military conflict, that it has one of the worst human rights record in Europe, and it seeks to redraw the borders of Moldova lead to serious questions as to its recognition under established European and indeed international practice.

The United States has also had a similar practice. Secretary of State James Baker, for example, said in a September 1991 speech to the Conference on Security and Cooperation in Europe that U.S. recognition of new states in Central and Eastern Europe would be based on the new states’ meeting certain criteria. Recognition would be based, in part, on a determination that new states would adhere to the following principles:

· Determining the future of the country peacefully and democratically, consistent with CSCE principles;

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213. Recognition Declaration, *supra* note 211, at 1486. (Emphases added.)
· Respect for all existing borders, both internal and external, and change to those borders only through peaceful and consensual means;

· Support for democracy and the rule of law, emphasizing the key role of elections in the democratic process;

· Safeguarding of human rights, based on full respect for the individual and including equal treatment of minorities; and

· Respect for international law and obligations, especially adherence to the Helsinki Final Act and the Charter of Paris.214

Thus, while Ambassador Ryabov is correct in saying that recognition is generally a political declaration of a legal fact, he did not actually address the issue that state practice of recognition has evolved such that prospective states can be expected to meet certain criteria before being recognized. Those criteria—no territorial acquisition through force, respect for human rights, respect of borders of existing states, etc.—pose a problem for the TMR. While recognition is a political declaration, it does not ignore legality. Rather, the norms of nonrecognition are the means by which a decentralized legal system may enforce its norms. The jurist Sir Hersch Lauterpacht wrote that nonrecognition “is the minimum of resistance which an insufficiently organized but law-abiding community offers to illegality; it is a continuous challenge to a legal wrong.”215 Thus it is not that the TMR is unrecognized merely because of politics; it is unrecognized by even a single state in the world because it does not meet the most basic standards of legality.

Rather than arguing that non-recognition is due to purely political factors; the inverse may be more accurate in this case: that there are good reasons for non-recognition and that recognizing the TMR may be imprudent. James Brierly had written:

It is impossible to determine by fixed rules the moment at which


215. HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 431 (1947); see also DAMROSCH, ET AL., supra note 193, at 267. In relation to this, one should note that being unrecognized does not excuse an entity from the norms of international law. The protection of property rights and of treaty obligations are ensured as the rules of State succession still apply. Haverland, supra note 115, at 358. Moreover, human rights are also protected. For example, the Second Circuit has held that the Torture Victim Protection Act applied even to unrecognized States. See, generally, Kadic v. Karadzic 70 F. 3d 232 (2d Cir. 1995).
other states may justly grant recognition of independence to a new state; it can only be said that so long as a real struggle is proceeding, recognition is premature, whilst, on the other hand, mere persistence by the old state in a struggle which has obviously become hopeless is not a sufficient cause for withholding it.\textsuperscript{216}

One should keep in mind that a struggle need not be military; the norms of the international system, as set out in the UN, seek the peaceful settlement of disputes. It would be against the basic norms of the international system to require that such a struggle must be military. Since the TMR’s original moves towards independence, Moldova has consistently denied the possibility of such separation. Since the end of actual fighting in 1992, the forum has changed from the battlefield to one of diplomatic negotiation, but at no time has Moldova stepped back from its insistence on some form of reintegration (although there have been various plans including varying degrees of autonomy for Transnistria).

In such a case recognition may be unduly precipitous. Lauterpacht would go so far as to call such acts \textit{premature} recognition “which an international tribunal would declare not only to constitute a wrong but probably also be in itself invalid.”\textsuperscript{217} Without deciding whether Lauterpacht’s conception of premature recognition survives today as a legal concept, there is little doubt its political analog—that recognition can be premature and as such warp the politics of the situation—is apparent. “To grant recognition to an illegal act or situation will tend to perpetuate it and to be of benefit to the state which has acted illegally.”\textsuperscript{218} We recognize though, that practice since the 1930’s has been mixed in this regard, especially if the illegal act seems irreversible.\textsuperscript{219}

In summary, there is no obligation to recognize the TMR, even if it does have effective control of territory. Rather, it is likely that (a) the forcible acquisition of territory, (b) the ongoing objections by the pre-existing state, and (c) the lack of independence of the TMR may support a norm of \textit{non}recognition. In similar cases we have seen the Security Council and/or General Assembly call on UN member states not to recognize such seceding entities.

\textsuperscript{216} BRIEFLY, supra note 93, at 138; see also Ijalaye, supra note 163, at 558.
\textsuperscript{217} LAUTERPACHT, supra note 215, at 9, as quoted in Ijalaye, supra note 163, at 559.
\textsuperscript{218} OPPENHEIM supra note 114, at §54, p. 184.
\textsuperscript{219} Id. at §55, p. 186.
2. The TMR as a De Facto Regime

a. Defined

The TMR is stuck in a political no-man’s land. While it has established effective control over Transnistria and the government of Moldova has been unable, as of yet, to oust its leadership, it has not been recognized as a sovereign state by any state. It is an incomplete secession and the status of the TMR can best be understood by using the doctrine of de facto regimes.

A rebel force may become “so well established in part of the national territory that, although it has not overthrown the established government, it is entitled to recognition as a de facto government, at least in respect of that part of the national territory under its effective control.”220 Remembering the four criteria for statehood (permanent population; defined territory; government; capacity to enter into foreign relations with other states), Dov Lynch argues that the post-Soviet “de facto states fulfill the first three of these requirements and claim to pursue the fourth.”221 This doctrine seems to fit the current facts well: “Especially where civil wars last for a long time or parts of a state become factually independent without being recognized as a State, the status of de facto regime has gained acceptance.”222 Such de facto regimes are treated as partial subjects of international law.223 Their unique status does give rise to certain rights and responsibilities.

b. The rights and responsibilities of de facto regimes

De facto regimes may undertake normal acts required for the support of its population. They may conclude agreements that are held at a status below treaties.224 However, as will be discussed in the next section, the legal effectiveness of their decisions is severely curtailed.

Besides the right to act in order to support its population, a de facto

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220. Id at §49, p. 162; see also §46 n. 6.
221. LYNCH, supra note 34, at 16.
222. Frowein, Recognition, supra note 206 at 40. Examples of de facto states from various points in recent history include Taiwan, Eritrea, the Republic of Somaliland, and the Turkish Republic of Northern Cyprus. LYNCH, supra note 34, at 19-21. As for the former Soviet space, Abkhazia (in Georgia), Southern Ossetia (also in Georgia), and Nagorono-Karabakh (in Azerbaijan) are generally considered de facto regimes.
223. Jochen A. Frowein, De Facto Regime, in 1 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 966 (R. Bernhardt, ed. 1992) (hereafter “Frowein, De Facto,”) (stating “State practice shows that entities which in fact govern a specific territory will be treated as partial subject of international law”).
224. Id., at 967.
regime may also be held responsible for breaches of international law. Although states are the primary subject, they are not the exclusive subjects of international law. Our first query then is to what extent the TMR is subject to obligations and/or holds rights under international law. Article 9 of the Draft Articles on State Responsibility, entitled “Conduct carried out in the absence or default of the official authorities,” states:

The conduct of a person or group of persons shall be considered an act of State under international law if the person or group of persons is in fact exercising elements of the governmental authority in the absence or default of the official authorities and in circumstances such as to call for the exercise of those elements of authority.

The commentary specifies that article 9 does not apply to cases when a general de facto regime has seized control of a country but does apply when a de facto regime has seized control of part of a state. Professor Crawford wrote:

The cases envisaged by article 9 presuppose the existence of a government in office and of State machinery whose place is taken by irregulars or whose action is supplemented in certain cases. This may happen on part of the territory of a State which is for the time being out of control, or in other specific circumstances. A general de facto government, on the other hand, is itself an apparatus of the State, replacing that which existed previously.

Thus, a de facto regime must respect human rights and other rights under international law. In the Advisory Opinion on South West Africa/Namibia, the ICJ explained that “Physical control of a territory, and not sovereignty or legitimacy of title, is the basis of State liability for acts affecting other States…” In several cases reparations have been claimed for and paid by de facto regimes.

c. The legal effectiveness of decisions of a de facto regime

While the de facto regime thus has certain rights and responsibilities,
unlike the acts of actual states, acts by of *de facto* regimes have uncertain legal effectiveness. “Acts of an unsuccessful *de facto* regime… will become invalid with the disappearance of the regime.” However, the reintegrated state after a failed *de facto* regime may be held liable for the acts of the *de facto* regime that were “part of the normal administration of the territory concerned” on the assumption that such acts were neutral.

If, on the other hand, the *de facto* regime becomes a state, then its acts will be binding on the new state.

The law of belligerent occupation supplies further insight into the limits on the powers of a *de facto* regime. If control of territory is gained by military force, the occupation is considered belligerent. While the territory must have been taken over the objection of the state that has *de jure* control, “[i]t is sufficient that the territory in question did not belong to the occupying power when the conflict broke out.” The law of belligerent occupation can trace its roots to the Lieber Code of 1863 and through the Hague Conventions of 1899 and 1907 to its modern codification in the Fourth Geneva Convention and Additional Protocol I. While the Geneva Conventions apply as of the start of armed conflict, they apply through the end of occupation. It is generally accepted that civil
wars are an example of where the law of belligerent occupation can apply in a domestic conflict.\textsuperscript{237} 

In the law of belligerent occupation, one draws a distinction between effectiveness and legality. “The occupying power’s ability to enforce respect for its legitimate interest is not an authority to create law.”\textsuperscript{238} An occupier is thus considered \textit{de facto} authority, not \textit{de jure}.\textsuperscript{239} In the present case, while Moldova is recognized as having \textit{de jure} control over Transnistria, the TMR has become the region’s effective occupier, its \textit{de facto} regime. Although there is no longer an armed conflict between the Government of Moldova and the TMR, there is still a state of occupation.

The law of belligerent occupation makes the occupier responsible for the well-being of the inhabitants of an occupied territory. “It has a duty of good government;” this applies essentially to protecting the public health and safety. It is not a license to remake the domestic system; to the contrary, the occupying power must apply the pre-existing laws of the occupied territory.\textsuperscript{240} In a case of secession, of course, it would seem logical that the seceding entity would want to make new laws and apply its own rules. But the critical point is that at issue is an \textit{incomplete} secession, an \textit{attempted} breakaway that has not been successful in garnering recognition from a single other state. While a successfully seceded entity that becomes a new state may of course issue new laws, the TMR’s ability to make fundamental changes in Transnistria is limited inasmuch as it does not have \textit{de jure} control of the territory. As any other such occupying power, it thus “may issue only such laws and decrees which are necessary from the viewpoint of military security.”\textsuperscript{241} Otherwise, the pre-existing laws of Moldova should be applied until the conflict is resolved.

\textbf{E. Conclusions Concerning the Status of the TMR}

The actions undertaken by the TMR are only valid to the extent they are required for the safety, security, and health of the population. Actions beyond this narrow purview that depart from the pre-existing laws of Moldova are enforced only to the extent that the TMR is able to enforce them by force, not as a matter of right. Should Transnistria be re-integrated as a matter of fact into Moldova then the decisions that had been

\textsuperscript{237} See, e.g., Bothe, supra note 234, at 764-65.
\textsuperscript{238} Id., at 764.
\textsuperscript{239} Id.
\textsuperscript{240} Id., at 765.
\textsuperscript{241} Id.
made by the TMR pursuant to the framework of Moldovan law may be imputed to the Government of Moldova. Any other such actions are not imputable to Moldova. “In the absence of a specific undertaking or guarantee... a State is not responsible for the conduct of persons or entities in circumstances not covered by [Chapter II of the Articles on State Responsibility].”242 There is no provision made in Chapter II for ascribing the acts of a secessionist regime to that of the pre-existing state unless, perhaps, if the pre-existing state makes no attempt to ameliorate the situation. That is not the case here, due to Moldova’s ongoing protests to the TMR directly, and to other states more generally, concerning the situation in Transnistria.

In considering the legal issues in this attempted secession more generally, it may be useful to consider the reactions of the international community in similar situations. One analogy that has been repeatedly cited in negotiations as well as in the Ilascu decision is the ongoing conflict over the status of Cyprus. As in the present case, Cyprus is a separated state. Turkey maintains troops in, and is intimately involved in the affairs of, the Turkish part of Cyprus. Related to this, Cyprus v. Turkey,243 the ECHR held that the TFSC did not have jurisdiction in northern Cyprus.244

The Russian Government has argued that Cypriot situation is not a good analogy. “The main difference lay on the number of troops as the [Russian force] had only 2,000 soldiers, whereas the Turkish forces had more than 30,000 in northern Cyprus.”245 This argument is not persuasive. At issue is not the raw numbers of troop deployment but rather the effects of the troops deployed in each instance. Moreover, as discussed in Part III.D.1, the constellation of guarantor powers, occupying troops, de facto separation without formal recognition, and other points, plots a similar picture to the situation in Moldova. The similarities still outweigh the differences for the purpose of this analogy.

In summary, the TMR is an unrecognized entity that has effective control over territory but whose de jure control is not accepted by any state.246 The TMR is thus a de facto regime. While it has the right to under-


244. See also Oppenheim supra note 114, at §55, p. 189, n. 15.


246. Note that the ECHR found in Ilascu that “[o]n the basis of all the material in its possession the Court considers that the Moldovan Government, the only legitimate government of the
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take the basic acts required for the care and security of the population under its effective control, any measures beyond that are legally suspect and may be unwound by the government of Moldova if the TMR is reintegrated into the Moldovan state.

iv. the transnistrian moldovan republic and the conversion of property

a. claims by moldova and by the tmr

at the heart of the dispute between Tiraspol and Chisinau is the issue of control of the economic assets of Transnistria. As Marakutsa and Litskai each reiterated, the form of privatization is of central concern to the TMR’s leadership and they do not want Transnistria’s “riches” going to Chisinau. It is unsurprising, then, that in the period of effective control over Transnistria, the TMR leadership has begun “privatizing” or otherwise converting what had been Moldovan state property in the region. Moldova rejects such privatizations, having passed a law stating that any privatization in the territory of Moldova (including Transnistria) must be approved by the Moldovan parliament.

does the TMR have the right to convert the property in its area of effective control? If the two parts of Moldova are reintegrated, must the decisions of the TMR during this period be respected?

the answers to these questions have far-ranging implications. Since 2002 the TMR has sold 37 major assets for $51.5 million.247 part of the concern is that many of these deals where “sweetheart” deals for those close to Igor Smirnov and his entourage. The privatization program as a whole plans to dispose of over 100 facilities. In 2005, “Tiraspol is looking forward to earning over $38 million in privatization proceeds—nearly one-third of the region’s budget”248 in June, 2005 the “Ministry of Economy” of the TMR released data stating that in the year to date the TMR had “privatized” 10 major assets for a price of $4.8 million.249 This included

248. Id.
249. Id.

republic of moldova under international law, does not exercise authority over part of its territory, namely that part which is under effective control of the [TMR].” case of ilascu, supra note 12, at para. 330. the state department similarly recognizes that the government of moldova does not have control over Transnistria. moldova 2004 country report, supra note 4 (stating “The Government does not control this region”).

248. Id.
249. Id.
the Tiraspol bread-making bakery ($1.49 million), Tiraspol bread-product integrated works ($1.29 million), and the Odema textile factory ($1.29 million). The bread-making assets were purchased by Sheriff Corporation.250 Sheriff Company is TMR’s largest company. It has been and may still be controlled by Smirnov’s son.251 As of June 2005, the highest price paid for a single asset was $29 million for the Moldavskaya Power Plant in 2003 by Saint Guidon Invest of Belgium.252 In 2005 Saint Guidon sold 51 percent of the shares to RAOO Nordic, a subsidiary of RAO EES, a Russian company (United Electricity Networks of Russia).253 Gazprom, the Russian energy company, is seeking to purchase the remaining 49 percent.

Moreover, in early June, 2005, the TMR commenced the sale of “the region’s light-industry flagship—the Tirotex textile factory, which ensures jobs to 20 percent of the working population in Transnistria;” a minimum tender has been set at $22.9 million.254

Besides the conversion of these companies that had been Moldovan state assets, one of the largest properties converted—but not privatized—is the part of the Moldovan railway system that is within Transnistria. In August 2004, “Tiraspol announced the establishment of the independent Transnistrian Railroad Company—through alienation of the railroad network existing in the Transnistrian region and of Bendery and Rybnitsa junction stations with all their property.”255 Sergei Martsinko, the Director of the new Transnistrian Railroad Company explained that the railway in Transnistria became a separate entity so as to avoid taxation from Chisinau. According to one report, Martsinko’s explanation was that

on July 31, 2004 Chisinau demanded that Transnistrian eco-

250. Id. Sheriff also owns “supermarkets, gasoline filling stations, and many other businesses as well as the region’s biggest stadium.”
251. Herd, supra note 10, at 5. Moreover, according to Igor Tokovyi, Deputy Chief of Ukraine’s Southern Border Control Department, approximately 95% of Transnistrian contraband found in Ukraine originates from the Sheriff Company’s storage facilities. “Ukraine Concerned Over Sheriff’s Merchandise Smuggling,” Infotag (Tiraspol, July 5 2005). Current control of Sheriff is somewhat unclear and we have been unable to confirm its current ownership status.
nomic entities must draw up all their tax documents only with
the Republic of Moldova, which [would cause] a double taxa-
tion for Transnistrian companies. Simultaneously with that,
the Moldovian side ceased supplying empty freight cars to the
left Dniester bank and began stopping cargoes heading to
Transnistria via the Moldovan territory.256

According to Infotag, the TMR itself taxes the new entity at “0.1% of the
existing rate of tax on every kind of income provided the income is used
exclusively for technical modernization of company facilities and incen-
tives for workers.” 257

B. Property, State Transitions and International Law

In considering this question, we return to the conception of the TMR
as a de facto regime. Although, once again, we are applying the rules of
belligerent occupation by analogy, 258 an underlying theme of the Hague

256. Id.
257. Id. Smirnov sees the situation in reverse and complains about Moldova expropriating the
railroad assets of the TMR:

“However, Chisinau has not paid even a single ruble for using our railroad network,
despite our numerous demands of payment for the transit”, the minister [of industry
Anatoly Blascu ]complained...

[He also explained] that the Transnistrian railroad company establishment was “a
political rather than economic question, but at any rate that was a forcible measure
taken in response to Moldova’s destructive actions aimed at strangling Transnistrian
economic operators.”

Transnistrian leader Igor Smirnov stated recently, “In all the years of our republic’s
the existence, we have not received a single ruble for exploitation of the Transnistrian
railroad network—the entire profit remained with Moldova. It was in Chisinau’s plans to
carry away to the right Dniester bank the company’s entire movable property. And only
the Transnistrian Railroad Company establishment prevented that large-scale theft.”

“Transnistria Demands Payment for Railroad Transit,” Infotag (Tiraspol, June 24, 2005).

258. Although we note that the analogy is not far from the actual situation. As a matter of
international humanitarian law, “occupation formally ends with the reestablishment of a
legitimate government (or other form of administration, such as that by the U.N.) capable
of adequately and efficiently administering the territory.” Michael N. Schmitt, The Law of
www.crimesofwar.org/special/iraq/news-iraq5.html. Inasmuch as the TMR is the effective
de facto but not the legitimate (de jure) power ruling Transnistria, one could say that
Transnistria is still an occupied territory and that the relevant rules and norms of occupation,
drawn from the Hague and Geneva Conventions, apply. Also, to the extent the Hague and
Geneva Conventions are now part of customary international law, these norms apply regard-
less as to whether Moldova has signed onto the treaties.
and Geneva rules is instructive: “Insofar as the use of force by States is itself unlawful, save in self-defense, it stands to reason that the scope of powers exercised by the Occupant must be considered with care and caution.”259 Similarly, the occupier must respect “unless absolutely prevented, the laws in force in the country.”260 We believe the same holds true for insurgents who chose to attempt to carve out a section of a state: insofar as their actions are against domestic law and may be against international law, the scope of powers they use in the territory they occupy must be considered with care and caution. Some may argue that the fact that this is a struggle for self-determination should allow the TMR greater leeway in how they administer the territory they control. But one cannot use justifications for starting a conflict as a justification for how one acts during a conflict.261

As a general rule, then, occupants should use their powers only for the immediate needs of administration and not for long-term policy changes. As one commentator summarized:

It appears therefore that the Occupant must remain firmly rooted to the immediate demands of the administration with a view to securing order and safety of the occupied territory. Even if a legislative measure has far-reaching fundamental effects, it is not necessarily an invalid measure if it can be demonstrated that it is substantially linked to the essential criteria, that is, military expediency and the securing of public order and safety.262

Applying the analogy of belligerent occupation, one finds that Article 46 of Hague Convention IV of 1907 states that private property must be respected and may not be confiscated,263 except if that private property

260. Id., at 256.
261. See, e.g., id., at 259. (stating “it is not appropriate in law to judge belligerent occupation matters, namely matters jus in bello, by reference to the jus ad bellum; the two categories of law are separate and need to be kept so.”) While in the present case we are not considering jus ad bellum as this is not an international conflict, the analogy is nonetheless instructive.
262. Id. at 259-60.
263. Article 46 states:

Family honour and rights, the lives of persons, and private property, as well as religious convictions and practice, must be respected.

Private property cannot be confiscated.
could be considered war materiel.\(^{264}\) Regarding state property, the occupying power is viewed as the administrator or usufructuary.\(^{265}\) "Ususfructus was the right to enjoy the property of another and to take the fruits, but not destroy it, or fundamentally alter its character..."\(^{266}\) Article 55 of the Hague Convention IV states:

The occupying State shall be regarded only as administrator and usufructuary of public buildings, real estate, forests, and agricultural estates belonging to the hostile State, and situated in the occupied country. It must safeguard the capital of these properties, and administer them in accordance with the rules of usufruct.\(^{267}\)

Consequently,

Enemy State-owned property other than real property, such as cash, funds, transportation, and other movable property, may be confiscated, i.e., taken without compensation, if it is usable for military purposes or for administering the occupied territory. State-owned real property that is non-military in character, such as public buildings, parks, etc., can only be “administered” by the Occupying Power. That power may use the property, but not in a way that negligently or wastefully reduces its value; moreover, the property may not be sold or otherwise disposed of. By contrast, State-owned real property that is military in nature, such as a military post or airfield, is at the absolute disposal of the Occupying Power.\(^{268}\)

This interpretation has been criticized at times. One review explained that, due to qualifying language in Article 43 of the Hague Convention

\(^{264}\) Bothe, supra note 233, at 766.

\(^{265}\) Id., at 766.


\(^{267}\) Hague Convention IV, supra note 263, art. 55.

\(^{268}\) Schmitt, supra note 258.
IV,269 “tribunals have regarded the terms of Article 43 and other provisions of the [Convention] as being sufficient to support extensive reform of, and modification to, government, especially where the Occupant has total de facto control of the State.”270 Concerning economic regulation, orders affecting commodities “essential for the economic welfare of the community such as food and vegetables, olive oil, and timber have been held to be consistent with Article 43.”271 Nonetheless, the tribunals have not accepted such broad latitude and more tightly circumscribe the maneuvering room of the occupier. For example, the Belgian Court of Appeals held that “the orders of the occupying Powers are not laws, but simply commands of the military authority of the occupant…”272

Thus, we believe that an occupying power or its analog (a) may confiscate state property, other than real property, if it is usable for military purposes or in the administration of the territory; (b) may only administer in usufruct non-military state real property without destroying or otherwise converting the economic value of the property; and (c) may not confiscate private property unless it is war materiel.

C. Are the TMR’s Acts Tantamount to Expropriation?

The various actions of the TMR listed above, as well as others alleged by Moldova can be grouped into three basic categories: (a) the use of assets; (b) the sale of assets; and (c) the encumbrance of farmland. We will consider each in turn. We assume for the sake of our analysis that the various plants and factories mentioned above were, at the time of the 1992 War, property of the State of Moldova, rather than private property. To the extent that any of these assets were private property then they are protected from confiscation as described in the previous section.

The Use of Assets. Applying the analogy to the law of belligerent occupation and to usufruct, the TMR has the ability to use items so long as their use does not destroy their economic value or exhaust the resource.

269. Article 43 states:

The authority of the legitimate power having in fact passed into the hands of the occupant, the latter shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.

Hague Convention IV, supra note 263, art. 43.

270. But see Kaikobad, supra note 259, at 256.

271. Id., at 257 citing to Bochart Committee of Supplies of Corneux, 1 ANNUAL DIGEST 462, Belgium Court of Appeal, 1920.

272. Mathot v. Longue 1 ANNUAL DIGEST 471, as quoted by Kaikobad, supra note 259, at 257.
Thus, ongoing use of facilities as required for the ongoing functioning of Transnistria is allowed, anything beyond that is questionable at best.

The Sale of Assets. As described above, the sale of assets is not allowed under the law of occupation or usufructuary rules. While military assets may be destroyed or other assets used for the well-being of the population, seizing and selling property—either private or public—is expressly prohibited. The TMR’s privatization program is thus exceedingly difficult to justify. Any private party taking part in this program as a purchaser consequently does so at its own risk.273

The Encumbrance of Farmland. The plight of the farmers in the Dubasari region has been described in Part I.D of this report. Smirnov explained that the TMR has not taken any land in this case. Rather, there is a land tax that farmers are not paying. He claimed that thirty-three farmers have signed and agreement to pay the tax but the Government of Moldova threatens the farmers who pay the tax with prosecution. In his view, this is a local property matter.274 As this is private property, the TMR’s actions may be viewed as being confiscatory of the economic value of the land. As such, these activities may not be allowed. The TMR may respond that their taxation of the land is part of the normal administration of the territory. Resolution of this issue would require further fact finding. The local farmers have filed a case against Russia before the ECHR for ultimate responsibility of the acts of the TMR in relation to their fields.

273. Whether Moldova would actually challenge any sales if Transnistria were effectively re-unified with the rest of Moldova remains to be seen. In the latest diplomatic maneuver, the administration of President Voronin has sought a rapprochement with Russia. According to Infotag, in an interview on a Russian radio station on February 4, 2006,

Voronin voiced satisfaction that a majority of industrial enterprises in Transnistria are privatized by Russian investors, for “this means there exists a guarantee that these enterprises will be working and developing, will not die or [be] plundered...as very many facilities have been plundered out on the right Dniester bank [i.e. in Moldova proper] in the 1990s. In the Law on the main provisions of a future special legal status for Transnistria, we have written that we [Chisinau] shall not be tackling property questions as such—maybe, perhaps, only to an extent in which such questions work for the benefit of the country and of the investors who have put means in the enterprises.”

President Voronin hopes to Resolve Transnistrian Problem, Infotag (Chisinau, Feb. 6, 2006). While the final hedging language does leave the door open to possible suits and/or refusal to recognize property conversions made during the time of the TMR, the tone implies the opposite. The rest of the interview also included Voronin mourning the break-up of the USSR and reassuring Russians that many statues of Lenin have been restored in Chisinau. ... And Regrets Demise of Soviet Union, Infotag (Chisinau, Feb. 6, 2006). Whether this is a long term policy shift or simply tacking in the political winds remains to be seen.

274. Smirnov meeting notes, supra note 70.
V. THIRD PARTIES AND SECESSIONIST MOVEMENTS

A. Duties of Third Party States Under International Law

Significant domestic turmoil within states can at times implicate relations with other “third-party” states. The rights and duties of third-party states regarding domestic conflicts is an issue that is rooted in the concept of sovereignty: states have a basic duty not to intervene or otherwise interfere with the resolution of the conflict by the recognized government of the state. Under circumstances where self-determination or, more clearly, external self-determination is implicated, or if the Security Council finds that a conflict has become a threat to international peace, then third-party states may have more freedom of action concerning the conflict.

The fundamental norm of non-intervention is linked with concepts of sovereignty, self-determination, and peaceful coexistence. It is one of the cornerstones of the UN and the modern state system. In light of modern means of projecting power, the idea of non-intervention is broadly applied across a spectrum of possible activities:

The exercise of economic or political pressure, unless covered by legitimate aims of the foreign State to assert or defend its rights or interests... may transgress the limits of non-intervention, depending on the adequacy of the goals and means concerned. Borderlines between admissible economic penetration and unlawful coercive interference are still unsettled.

It has a particular application in regards to limiting third parties in their activities concerning secessionists:

A general right to military interventions in aid of insurgents would hardly be compatible with the primary purpose of the United Nations to maintaining international peace and security to which, pursuant to Art. 1 of the Charter, the principle of self-determination is subordinated.

A more complete restatement of the principle is found in the Friendly


277. Thurer, supra note 106, at 368.
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Relations Declaration, a General Assembly Resolution passed by member states of the UN in 1970. Although, as a General Assembly Resolution, the Friendly Relations Declaration is not legally binding upon the member states, it is nonetheless of significant persuasive weight as to the state of customary international law.

The reasoning and substance of the Friendly Relations Declaration, and of the non-intervention norm can summarized in a couple of clauses:

Recalling the duty of States to refrain in their international relations from military, political, economic, or any other form of coercion aimed against the political independence or territorial integrity of any State...

No State or group of States has the right to intervene, directly or indirectly, for any reason whatever, in the internal or external affairs of any other State.

The Declaration does flesh out these concepts in greater detail.

In regards to military matters, the Declaration states that “armed intervention and all other forms of interference or attempted threats against the personality of the State or against its political, economic, and cultural elements, are in violation of international law.” This applies to the assistance of “irregular” forces: “Every State has the duty to refrain from organizing or encouraging the organization of irregular forces or armed bands including mercenaries, for incursion into the territory of another State.”

Besides military matters, economic and political coercion can also lead to a breach of international legal obligations:

No State may use or encourage the use of economic, political, or any other type of measures to coerce another State in order to obtain from it the subordination of the exercise of its sovereign rights and to secure from it advantages of any kind. Also,


279. Id.

280. Id.

281. Id.
no State shall organize, assist, foment, finance, incite or tolerate subversive, terrorist or armed activities directed toward the violent overthrow of the regime of another State, or interfere in civil strife in another State.\textsuperscript{282}

Using these general principles as a guide, we will consider the activities of Russia and Ukraine as third-party states.

**B. Third Parties and the Moldovan Situation**

**1. Russia**

Senior Russian political leaders have consistently treated Transnistria as part of a Russian sphere of influence, regardless as to what state it was within. On November 17, 1995, for example, the Duma declared in Resolution no. 1334 IGD that Transnistria was a “zone of special strategic interest for Russia.”\textsuperscript{283} Alexander Lebed had called Transnistria “the key to the Balkans.”\textsuperscript{284} Even when part of the Soviet Union, Transnistria was favored over the rest of the MSSR; it was not until 1989 that a first secretary of the MSSR Communist Party came from Bessarabia, as opposed to Transnistria.\textsuperscript{285}

Perhaps nowhere has the legal responsibility of Russia for certain acts been made clearer than in the European Court of Human Rights’ decision in the *Ilascu* case. *Ilascu*, however, was concerned with a particular set of facts—the detention of Ilascu and his colleagues—while this Report is concerned with the broader question of whether Russia may have overstepped the norms of what states may do in light of a domestic conflict within another state. To do this more general assessment we will consider (a) the activities of the Russian Army and other organs of the Russian Federation in Transnistria; (b) economic pressure by the Russian Federation on Moldova; (c) ties between the TMR leadership and Russian leadership; and (d) the general diplomatic stance of the Russian Federation.

**a. The activities of the Fourteenth Army**

The activities of the 14\textsuperscript{th} Army\textsuperscript{286} can be divided into combat activi-
ties and other support activities such as transfers of arms, ammunition, and personnel.

The Troops. The direct military involvement of the 14th Army can be traced to the May 19, 1991, order of the Minister of Defense of the USSR to the 14th Army to call up reservists. The Minister allegedly stated that “[g]iven that Transdniestria is Russian territory and that the situation there has deteriorated, we must defend it by all means possible.” Commentators generally agree that the 14th Army was encouraged by the Soviet Ministry of Defense to “tilt toward Tiraspol.” As set out in Part I of this Report, the result was widespread activities by the 14th Army including the occupation of towns throughout Transnistria and eventually engaging Moldovan forces directly. This was immediately objected to by the Government of Moldova. The ECHR noted that

from December 1991 onwards the Moldovan authorities systematically complained, to international bodies among others, of what they called “the acts of aggression” of the former Fourteenth Army against the Republic of Moldova and accused the Russian Federation of supporting the Transdniestrian separatists.

Moreover, in assessing the 1992 War in the course of the Ilascu decision, the ECHR stated that

In 1991-92, during clashes with the Moldovan security forces, a number of military units of the USSR, and later of the Russian Federation, went over with their ammunition to the side of the Transdniestrian separatists, and numerous items of the Fourteenth Army’s military equipment fell into separatist hands.

The parties disagreed about how these weapons came to be in the possession of the Transdniestrians.

It is generally accepted that key elements of the central command as

287. Case of Ilascu, supra note 12, at para. 46.
290. Id., at para. 56.
well as part of the ranks of the TMR’s forces came from defections from the 14th Army.291 The Russian government has confirmed to the ECHR that at least one battalion had joined separatists.292 More generally, though, the 14th Army intervened on the side of the TMR.293 One author wrote that

Instead of deterring Dniester aggression, the Russian army provided Tiraspol with the weapons to launch its offensive. Instead of reassuring the Dniesterians that a compromise with Chisinau could be had, Russian officials visiting Tiraspol confirmed their sense for grievance. Instead of providing the Dniestrian elites with inducements to compromise, Russia subsidized their intransigence. Finally, Russia’s climactic intervention in the Bendery battle served not only to stop the war—though it did that—but also to ensure the Dniesterian victory. Without Russian support, the Dniesterians probably could not have launched their secessionist war, let alone have won it.294

Due to the Russian troops’ active participation in the hostilities on the side of the separatists and also their deterrent effect on further military activity to reintegrate Moldova, their status became an ongoing diplomatic issue and the subject of international agreements between Moldova and Russia.

The Agreement of July 21, 1992, ending hostilities between the Russian and Moldovan stated in its Article 4 that:

The Russian Federation’s Fourteenth Army, stationed in the territory of the Republic of Moldova, will observe strict neutrality. Both parties to the conflict undertake to observe neutrality and not to engage in any action against the Fourteenth Army’s property, its personnel or their families.

291. KING, THE MOLDOVANS, supra note 2, at 192.
293. Besides the role of the Russian Army, Cossacks—nationalistic Russian irregular troops officially organized in the Union of Cossacks—also came from Russia and Ukraine to assist the TMR. KING, THE MOLDOVANS, supra note 2, at 192. As one commentator put it, “Moscow turned a blind eye” to the Cossacks being dispatched. Kaufman, supra note 20, at 131.
All questions relating to the Fourteenth Army’s status or the stages and timetable for its withdrawal will be settled by negotiations between the Russian Federation and the Republic of Moldova.295

Of particular importance here is (a) the obligation of neutrality by the Russian troops to which Russia agreed explicitly; and that (b) withdrawal would be negotiated between Moldova and Russia. The July 1992 agreement between Moldova and Russia also ensconced Russia’s role as peacekeeper and guarantor. However, from the beginning, “Russia was less than impartial as peacekeeper, not intervening when the DMR established border and customs posts and deployed an armed battalion in Bendery.”296 The Russian peacekeeping force also gave the TMR an effective veto on any question as to whether or not peacekeepers should intervene in any situation.

Moldova’s dissatisfaction with the ongoing presence of Russian troops is also evident in its reservation to the Alma Ata Agreement, the document that formed the new Commonwealth of Independent States. The original agreement was dated December 21, 1991 but was ratified by the Moldovan parliament on April 8, 1994,297 with the following reservation:

... 2. Article 6, with the exception of paragraphs 3 and 4 ...
The Parliament of the Republic of Moldova considers that within the CIS the Republic of Moldova will make economic cooperation its priority, excluding cooperation in the political and military sphere, which it considers incompatible with the principles of sovereignty and independence.298

Moreover, an agreement between Moldova and Russia, dated October 21, 1994, states in Article 2 that

The stationing of military formations of the Russian Federation within the territory of the Republic of Moldova is an interim measure.
Subject to technical constraints and the time required to station troops elsewhere, the Russian side will effect the withdrawal

297. Case of Ilascu, supra note 12, at para. 293.
of the above-mentioned military formations within three years from the entry into force of the present Agreement.

The practical steps taken with a view to withdrawal of the military formations of the Russian Federation from Moldovan territory within the time stated will be synchronised with the political settlement of the Transdniestrian conflict and the establishment of a special status for the Transdniestrian region of the Republic of Moldova.

The stages and timetable for the final withdrawal of the military formations of the Russian Federation will be laid down in a separate protocol, to be agreed between the Parties’ Ministries of Defense.299

This agreement was never ratified by the Duma.300

The text of this Agreement is often referred to of its use of the principle of “synchronization,” that troop withdrawal would be linked to a final political settlement of the status of Transnistria. This synchronization argument is denied by others. The U.S. and the OSCE, in particular, view Russia’s previous promise to follow its CFE obligations for troop withdrawal concerning Moldova as unconditional. According to Graeme Herd, “U.S. Secretary of State Colin Powell stated that the U.S. would make its ratification of the Conventional Forces in Europe (CFE) Adapted treaty conditional upon the willingness of the Russian Federation to honor its commitments on unconditional withdrawal of all troops and ammunition from Moldova and Georgia, assumed at the Istanbul summit.”301 However, as recently as October 2005, Russia’s Ambassador to the EU, Vladimir Chizhov, stated that

The presence of Russian troops in Moldova doesn’t play any global or regional role. There are less than 1,100 Russian troops. Their primary task is to guard arms stockpiles on Transnistria territory... But people in Transnistria also count on them as part of their security. So without a settlement it would be difficult to agree to a withdrawal.302

Nicholas Burns, the Department of State’s Undersecretary for Politi-

299. Agreement between Moldova and Russia, art. 2, October 21, 1992.
300. ICG 2004, supra note 178, at 5.
302. David Ferguson, Russia to EU: ‘Hands off Moldova,’ Euro-reporters.com (October 11, 2005).
A basic principle of the CFE (Conventional Forces Europe) Treaty is the right of sovereign states to decide whether to allow the stationing of foreign forces on their territory... Moldova and Georgia have made their choice. The forces should depart and all OSCE member-states should respect that choice.303

By contrast, in July 2005 Vladimir Antufeyev, the former Russian general who is now the head of the TMR’s internal security apparatus, had requested an increase of Russian peacekeepers by 1,900 troops and for the deployment of a Russian helicopter squadron in Tiraspol.304

By this point the ongoing presence of the troops plays a twofold purpose for the Russian Federation: (a) they are a bargaining chip that Russia uses to extract concessions from the Moldovans and (b) they protect the TMR.

The troops allow the Russians to link issues—no troop withdrawal without a satisfactory political solution of Transnistria or, perhaps more generally, no troop removal until there is a satisfactory resolution on the place of Moldova as the new frontier between Russia and the EU. The Russians have used issue-linkage as a negotiating style elsewhere in its periphery; for example Russia had argued that withdrawal of its troops from Georgia was contingent on the resolution of the Ossetian separatist dispute.305 The troops not only allow Russia to exert control over Moldova, but of course over the TMR as well. One little reported aspect is that the payment in rubles of the salaries of the Russian peacekeepers has ensured that the TMR would “remain economically tied to Russia rather than to [its] recognized central government[...], because local goods and services are purchased using rubles rather than national currencies.”306 But keep in mind that the TMR leadership, in any case, want and need the Russian troops to remain in place. Russian officers, for example, had trained TMR forces at least until late 2001.307 In a 2004 interview with Radio Free Eu-

303. U.S. Refuses Arms Treaty While Russian Troops in Moldova, Georgia, supra note 56.
305. See, e.g., King, supra note 145, at 540.
306. Id., at 541.
rope, Litskai said “We think that [Transnistria] is a sphere of Russian interests. We are under the guarantees of Russia as a country, and these guarantees should have a military component.” This was reiterated in the Team’s meeting with Litskai, where he referred to Russia as Transnistria’s only ally.

Geopolitical strategy notwithstanding, the ECHR concluded that:

The Russian army is still stationed in Moldovan territory in breach of the undertakings to withdraw them completely given by the Russian Federation at the OSCE summits in Istanbul (1999) and Porto (2001). Although the number of Russian troops stationed in Transdniestria has in fact fallen significantly since 1992..., the Court notes that the ROG’s weapons stocks are still there. Consequently, in view of the weight of this arsenal..., the ROG’s military importance in the region and its dissuasive influence persist.

The Russian 14th Army thus (a) played a decisive role in the 1992 War; (b) props up the viability of the TMR and makes reintegration more difficult; and (c) provides materiel, expertise, and other support to the TMR on an ongoing basis.

The Weapon Stockpiles. Beyond the presence of the Russian troops, there is also the issue as to how the stockpile of Russian weapons and war materiel have been used to assist the TMR. According to some, Soviet civil defense and paramilitary organizations supplied Transnistrian separatists with weapons as early as 1990. Due to Russian assistance, the TMR forces were able to out-gun the Moldovan army with T-64 and T-72 tanks and Grad and Alazan rocket systems. One of the organizations implicated was DOSAAF, “The Voluntary Association for the Assistance of the Army, Air Force and Navy” a civilian organization that was established in 1951 to prepare the civilian population for war.

308. Maksymiuk, supra note 42.
310. Kaufman, supra note 20, at 130.
311. King, The Moldovans, supra note 2, at 194. The Alazan rocket system was designed for cloud seeding, however the Government of Moldova contends that it was converted for battlefield use to carry explosive or radiological payloads.
312. Case of Ilascu, supra note 12, at para 34. DOSAAF has been described by one interlocutor as a Soviet equivalent of ROTC, giving basic military education to young people between graduation from school and entry onto the formal military.
While there may be denials and disagreements over how the Transnistrian forces came to possess arms from the Russian stockpiles, the ECHR noted that

By a decree of 5 December 1991, Mr. Smirnov decided “[to place] the military units, attached for the most part to the Odessa military district, deployed in the Moldavian Republic of Transdniestria under the command of the Head of the National Defense and Security Department of the Republic of Transdniestria.” The Head of that Department, Mr. Gennady I. Iakovlev, who was also the commander of the Fourteenth Army..., was requested to take all necessary measures to put an end to transfers and handovers of weaponry, equipment and other property of the Soviet Army in the possession of the military units deployed in Transdniestria. The declared aim of that measure was to preserve, for the benefit of the Transdniestrian separatist regime, the weapons, equipment and assets of the Soviet army in Transdniestria.313

Some are suspicious that similar activities are still occurring today and that the Russian forces are using “withdrawal” as a cover to actually transfer arms to the TMR.314 The International Crisis Group believes that the 14th Army transferred substantial amounts of non-offensive military assets in the post-2000 withdrawal.315 The ECHR also noted that the interpretation given by the Russian Government of the term “local administrative authorities”—which is in various Russo-Moldovans agreements including the 21 October 1994 agreement concerning the weapons stockpiles—is different from that put forward by the Moldovan Government, and, in the Russian interpretation allowed them to transfer the military assets directly to the TMR, as the “local administrative authority” of Transnistria.316

Moreover, Ambassador-at-Large Valery Nesteroushkin, Russia’s representative in the Transnistrian negotiations, is quoted as saying, regarding the stockpile

One should realize that although this is Russian property, it is situated in the territory of Transnistria. It is impossible to evacuate

313. Id., at para. 48.
314. Id., at para. 151.
315. ICG 2004, supra note 178, at 8.
316. Case of Ilascu, supra note 12, at para. 388.
it from the region without the local government’s consent, as that could trigger unnecessary, dangerous complications. 317

Similarly, as summarized by Infotag, Russian Defense Minister Ivanov has stated that

the railroad to the Russian military depots has been dismantled by Transnistrians, so it is impossible to use trains for ammunition evacuation. He is convinced that this deadlock is solely due to political problems still unresolved between the two conflicting sides. Until these problems have been settled, the Tiraspol administration will never agree to Russian weaponry withdrawal. But the longer the arsenals are kept there, the more dangerous they will be for the local population. For example, some ammunition consignments were manufactured as long ago as in 1932-1934. They are so old that cannot be evacuated and have to be blasted up on the site...

Voronin is incredulous at such statements. He said in a speech in October 2005:

When the Russian defence minister [Sergey Ivanov] or anyone else tells us that they cannot withdraw their arms... because of a certain Smirnov,... then excuse me, Smirnov is a citizen of Russia and most of the ministers [of the TMR]... are from the Russian FSB [Federal Security Service].

Whether the majority of the TMR’s leaders are actually from the FSB is an allegation that needs to be proven although, as will be discussed below, it is clear that the majority of the leaders do have Russian government ties and/or are Russian nationals. Besides Ivanov and Nesteroushkin’s arguments seeming more pretextual than substantive, the TMR has a great interest in keeping the arms stockpile. There is, first and foremost, the link that remains between the TMR and Russia while the stockpile is in Transnistria. Nesteroushkin explains:

317. No Proper Conditions for Troop Withdrawal Have Been Created Yet, Russia Says, Infotag (Sept. 1, 2005).
319. Moldovan President Accuses Russia of Shielding Separatists, Interfax-Ukraine (Oct. 29, 2005).
MISSION TO MOLDOVA

What we have in Transnistria today are the remains of the formerly gigantic military stocks of the Russian 14th Army... The Transnistrian government and public perceive the arsenals topic as kind of an ultimate guarantee that the region will not be left all alone, and that its interests will be duly taken into consideration.320

But there is also a financial incentive. Russia signed an agreement with the leadership of the TMR, dated March 20, 1998, allowing for the sale of military property with the revenue being split by the Russian Federation and the TMR.321

320. No Proper Conditions for Troop Withdrawal Have Been Created Yet, Russia Says, Infotag (Sept. 1, 2005).
321. As quoted by the ECHR, Case of Ilascu, supra note 12, at para. 299, the March 20 Agreement is as follows:

1. At the close of negotiations on questions relating to military property linked to the presence of the Russian forces in Transdniestria, agreement has been reached on the following points:
all the property concerned is divided into three categories:
- the first category includes the standard-issue weapons of the United Group of Russian forces, its ammunition and its property;
- the second includes weapons, ammunition and surplus movable military property which must imperatively be returned to Russia;
- the third includes weapons, ammunition and military and other equipment which can be sold (decommissioned) directly on the spot or outside the places where they are stored.
Revenue from the sale of property in the third category will be divided between the parties in the following proportions:
Russian Federation: 50%
Transdniestria: 50%, after deducting the expenses arising from the sale of military property in the third category.
Conditions for the use and transfer of property in the third category shall be laid down by Russia with the participation of Transdniestria.
2. The parties have agreed to pay their debts to each other on 20 March 1998 in full by offsetting them against the income from sale of military property or from other sources.
3. Russia will continue to withdraw from Transdniestria the military property essential to the requirements of the Russian armed forces as defined in the annex to the present agreement. The Transdniestrian authorities will not oppose the removal of this property.
4. In agreement with Transdniestria, Russia will continue to destroy the unusable and untransportable ammunition near to the village of Kolbasna with due regard for safety requirements, including ecological safety.
The situation is thus that (a) Moldova wants the immediate removal of the weapons stockpiles; (b) Russia seems to apply the synchronization doctrine to the stockpiles as well as the troop withdrawal; (c) the materiel has been and may still be used to support the TMR both directly and as a source of revenue; and (d) the stockpile likely poses a health and safety risk to Moldova and Transnistria and Ukraine.

b. Economic activities linked to Transnistrian situation

In assessing the economic and financial assistance of Russia to the TMR, the ECHR summarized the situation by emphasizing the financial support enjoyed by the TMR by virtue of the following agreements it has with the Russian Federation:

- the agreement signed on 20 March 1998 between the Russian Federation and the representative of the TMR, which provided for the division between the TMR and the Russian Federation of part of the income from the sale of the equipment of the Fourteenth Army;
- the agreement of 15 June 2001, which concerned joint work with a view to using armaments, military technology and ammunition;
- the Russian Federation’s reduction by 100 million US dollars of the debt owed to it by the TMR; and
- the supply of Russian gas to Transdniestria on more advantageous financial terms than those given to the rest of Moldova.322

Moreover, the Court also noted that

the information supplied by the applicants and not denied by

5. To ensure the rapid transfer of the immovable property, the representatives of the Russian Federation and Transdniestria have agreed that the premises vacated by the Russian forces may be handed over to the local authorities in Transdniestria in accordance with an official deed indicating their real value.

6. It is again emphasised that the gradual withdrawal of Russian armed forces stationed in Transdniestria and the removal of their property will be effected transparently. Transparent implementation of the withdrawal measures can be ensured on a bilateral basis in accordance with the agreements signed between Moldavia and Russia. The essential information on the presence of the Russian forces in Transdniestria will be transmitted in accordance with the current practice to the OSCE, through the OSCE mission in Chisinau.

322. Case of Ilascu, supra note 12, at para. 390. We have been told that the debt write-off has not been completed.
the Russian Government to the effect that companies and institutions of the Russian Federation normally controlled by the State, or whose policy is subject to State authorization, operating particularly in the military field, have been able to enter into commercial relations with similar firms in the [TMR]...323

For the purposes of this report, we are particularly concerned with how Russia may use economic ties to put political pressure on Moldova and/or assist the TMR in a manner that goes beyond the norms of non-intervention. For example, according to Russian press reports, a mid-October 2005 Russian delegation, led by Yuri Zubakov, Deputy Secretary of Russia’s Security Council and former Russian Ambassador to Moldova, to Chisinau on the Transnistrian crisis asked Voronin if he was prepared to resolve the situation according to Russian conditions or otherwise face “economic blockade” from Russia. (Voronin rejected the ultimatum.) 324

Economic pressure is generally not barred; rather such pressure on a state or assistance to separatists must not be used to the extent that Russia has inserted itself into the conflict in a manner that would frustrate either Moldova’s sovereign privileges or would breach one of Russia’s pre-existing commitments to Moldova. In considering the present situation, there are four areas of particular interest (a) the use of energy prices as a carrot or a stick; (b) the increased use of tariff barriers against Moldovan goods; (c) economic assistance to the TMR; and (d) the shared economic interests of Russian and Transnistrian elites.

Energy prices as political pressure

Energy politics are crucial in the post-Soviet space. In Moldova we see energy used as both a carrot and a stick; Russia typically supports the TMR with sub-market energy prices but has been increasing the cost of energy to the rest of Moldova.

Transnistria has received approximately $50 million per year in energy subsidies from Moscow which, calculated from the early 1990’s to today, totals (including interest) approximately $1 billion. According to some of our interlocutors, this Transnistrian debt to Gazprom was assigned to Moldova in an agreement between Moldova and Russia signed in 2001. We have not seen a copy of this agreement and we understand

323. Id.
324. Vladimir Soloviev, Russia Was Not Understood in Chisinau...But Well Received in Tiraspol, Kommersant.com (Oct. 14, 2005).
that it has never been ratified by the Moldovan parliament, although we were told that Russia views that if it has not been officially denounced then it is effective. If this agreement were effective, then Moldova would now be responsible for repaying to Russia the remaining energy debts of the TMR. The irony is that much of the energy being used in the TMR is used by factories, such as the Ribnita plant, which reportedly receive their energy from the TMR at highly subsidized rates. These factories are now owned by Russian and Ukrainian companies. The result would be that Moldova would pay for a large amount of the energy used by Russian and Ukrainian companies that operate plants in Transnistria.

This energy issue has become tied with the status of the Russian arms caches still stored in Transnistria. The TMR has claimed that assets of the Soviet military are now rightfully their own and they have attempted to sell some of these weapons in the open market. Russia has allegedly adopted this view, agreeing to write-off part of the debt.

By contrast to this easing of pressure on Transnistria, Russia has been increasing pressure on Moldova concerning Moldova’s energy needs. In October 2005, Moldovan Prime Minister Vasily Tarlev announced that Moldova was entering into negotiations via Paris Club members for the timing of the full repayment of Moldova’s $120 million debt in gas payments to Russia. Then, on November 29th, 2005 Gazprom announced that it would raise the price of natural gas being sold to Moldova from $80 to $150-$160 per cubic 1,000 meters. Although this is part of a broader policy of charging closer to market prices with its trading partners, commentators note that the price that would be charged to Moldova (and also to Ukraine) is significantly higher than those of other countries—ranging from $110 for Georgia and Armenia to $120-$125 for the Baltic states. It is of particular importance to note that the TMR will seemingly receive a lower energy price than the rest of Moldova. As Marakutsa explained in June 2005, “Transnistria does not deserve Moldova’s fate of receiving the fuel for the world price... In the gas question, our delegation achieved mutual understanding with the Russian side.” This has led to the concern that the price of gas is simply being used as leverage in relation to other political issues.

The TMR has seemingly negotiated a separate peace with Russia concerning its own $1 billion energy debt in which the TMR repaid part of

325. Vasily Tarlev: Moldova will Repay Gas Debt to Russia, Infotag (Oct. 28, 2005).
326. Russia Promises Help to Overcome Budget Deficit—Marakutsa, Infotag (Tiraspol, June 30, 2005).
the debt by transferring its shares in Moldova-Gas to Gazprom. At the end of November, 2005, the TMR transferred the shares to Gazprom. It is unclear how Gazprom currently views the state of the Transnistrian debt.

*Increasing tariff barriers and prohibiting imports from Moldova*

Russia is Moldova’s largest trade partner, accounting for 35.2 percent of all of Moldova’s exports. As such, it is able to exert significant leverage on Moldovan policy based on adjustments to its trade policy.

In April 2005 Russia banned the importation of Moldovan meat. Russia explained that this was due to concerns that Moldova was involved in re-exporting meat to Russia that had not been domestically produced.

In May 2005 Russia banned the importation of Moldovan fruits and vegetables. Russia stated that Moldovan fruits and vegetables did not meet Russian standards.

As of December 2, 2005, Moldova claims that they have complied with all Russian requests concerning meats, fruits, and vegetables, but there has been no response from Russian authorities. The Russian press agency ITAR-TASS reports that, due to the Russian ban, Moldovan farms have lost between 40 and 80 percent of their income.

In addition to these bans on agricultural products, in September 2005 Russia’s Federal Customs Service stopped releasing documentary excise stamps to producers of Moldovan spirits and wines, thus jeopardizing their access to the Russian market. In mid-October 2005, the Bardar Co., de-

327. “Part of the debt will have to be repaid in kind with industrial assets, which is what we have been negotiating,” said Aleksander Ryazanov of Gazprom. Gazprom Wants Transdniester’s Stake in Moldova-Gas Through Debt Reduction Scheme, RFE/RL (Oct. 4, 2005). According to Radio Free Europe:

Moldova-Gas was created in 1999 with capital of 1.33 billion lei ($100 million at the current exchange rate), in which 50 percent plus one share belonged to Gazprom, 35.33 percent of shares were controlled by the Moldovan government, 13.44 percent of shares belonged to Tiraspol, and the remainder was split among more than 1,700 private holders.


330. Id.


scribed by one Russian news source as “a major Moldovan cognac plant,”
needed to close because it no longer had any Russian excise stamps which
are needed to export to Russia. According to Moldpres, the delay seems
to have only affected Moldova.

Assistance to the TMR
As mentioned above, Russian economic assistance to the TMR has
included below-market energy subsidization even when the rest of Moldova
does not have such terms of trade. However, beyond sweetheart energy
deals, Russia has been integral in the construction of a Transnistrian economy
separate and apart from the Moldovan economy. In 1991, the Soviet
Agroprombank established the first separate Transnistrian bank; that bank
operated as the region’s central bank until early 1992. This was a key
step in allowing the Smirnov regime an economic policy that would di-
verge from that of the rest of Moldova. The Transnistrian economy,
such as it is, is completely reliant on Russian munificence.

Private Economic Interests
Besides direct economic assistance by Russia, the fortunes of Russian
economic elites have become intertwined with a successful secession of
the TMR. The TMR’s economy is highly reliant on Russia. “Just over 50% of
the TMR’s] officially registered exports are direct towards two key mar-
kets—Russia and Russian companies registered in North Cyprus.” To
pick just one example, the ECHR found credible evidence that “from 1993
onwards Transdniestrian arms firms began to specialize in the production
of high-tech weapons, using funds and orders from various Russian com-
panies.”

More generally, though, the risk of the TMR’s privatizations—which
were largely bought by Russian and Ukrainian companies—being unwound
or otherwise jeopardized leads to a substantial interest on the part of
some of Russia’s business elite. This is redoubled with the substantial in-

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334. Id.
335. ICG 2004, supra note 178, at 3.
336. In addition to this, Transnistrian banks opened accounts in Odessa, Ukraine, to begin
constructing a separate Transnistrian economy. Id., at 3.
337. Herd, supra note 10, at 5. Cyprus, it should be noted is a favorite “offshore” location for
front companies.
338. Case of Ilascu, supra note 12, at para. 150.
terest that Gazprom now has in the proper transfer of shares in Moldova-Gas from the TMR to Gazprom as a valid means of paying off debt.

Or consider as another example the story of the Moldovan Metallurgical Plant (MMZ) in Ribnita. The Ribnita plant was built in 1984 using German technology and is widely considered to still be the most advanced steel works in the former Soviet Union. The Ribnita plant also generates between 40 percent and 66 percent of the TMR's tax revenues.

The TMR sold the Ribnita plant, despite the protests of the government of Moldova, to the Russian company Itera. Then, in April 2004, Itera sold 75 percent of the plant to the Hares Group, an Austrian company, which purchased another 15 percent from other co-owners. Some have argued that the Hares Group is a “political buffer” which purchases assets in former Soviet republics and then re-sells them to the actual intended owners. In the summer of 2004, Hares allegedly sold 30 percent of the MMZ shares to Alisher Usmanov, one of the “metal tycoons” of Russia, who then announced a plan to consolidate MMZ with five other enterprises from Russia, Ukraine and Kazakhstan making the new enterprise the fourth largest ore mining and processing company in the world. Such high economic stakes may well play a part in driving Russia’s political agenda, regardless of the requirements of international law.

c. Leadership ties

There is ample circumstantial evidence that the Russian government is closely tied with Igor Smirnov and his associates. The current “minister of justice” of the TMR, Victor Balala was actually on the staff of the Duma until 1996 or 1997. He is believed to have been one of the planners of the “privatization” of assets in Transnistria. The chief of internal security of the Smirnov regime is Vladimir Antufeyev, a former Russian general who had headed the OMON unit in Latvia in 1991 and is wanted by Interpol for the murder of Latvian journalists. He “is believed to be under the control

339. King, supra note 145, at 538.
340. LYNCH, supra note 34, at 66 (stating that the steelworks provide 40% to 50% of the TMR’s tax revenue); Herd, supra note 10, at 5 (citing a level of two-thirds of the TMR’s tax revenue).
342. MMZ May Become Part of Mighty Eurasian Mining and Metallurgical Company, Infotag (June 15, 2005)
343. Id.
344. Herd, supra note 10, at 4. A New York Times reported has this exchange with Marakutsa:

Some also say that the region is a hotbed of smuggling and a potential haven for
of and in permanent consultation with Russian Federal Security Service (FSB) personnel and is perceived to be the right hand of the Smirnov clan.\textsuperscript{345}

Most of the TMR’s leadership seem to be Russian nationals. Asked whether he is a Russian citizen, Litskai said that he has two citizenships — Transnistrian and Russian. Although much the TMR’s leadership came to Moldova from other parts of the USSR prior to Russia existing as an independent state, they have been recently been granted Russian citizenship. Smirnov was granted Russian nationality in 1997 and TMR Vice president Alexander Caraman received Russian nationality in 1999. Marakutsa was granted Russian nationality in 1997.\textsuperscript{346} In speaking with the TMR’s leadership after the official meeting, we were unable to find a single senior representative who had not emigrated to Moldova from Russia or Ukraine.\textsuperscript{347}

d. Diplomatic stance and unequal bargaining power

The various activities described above—the economic pressure, the military assistance to the TMR, the energy politics—need to be understood in light of the constant Russian rhetoric in favor of the TMR and critical of Moldova.

Although support for the TMR has come most consistently from the Duma, that is not the only source of support. During the early 1990’s, then Russian Vice President Aleksandr Rutskoi was a vocal supporter of an active Russian foreign policy in aid to the Transnistrians.\textsuperscript{348} In April 1992 Rutskoi visited Chisinau and Tiraspol and said that the Dniestr republic

\textsuperscript{terrorists. “I can assure you,” Mr. Marakutsa said emphatically, “that neither terrorists nor smugglers will find a place on our territory.” They also say that the feared director of internal security, Maj. Gen. Vadim Shevtsov, is actually Vladimir Antufeyev, a former Soviet shock trooper wanted by Interpol for his role in an attack on the Interior Ministry of Latvia in 1991 in which five people died.

Mr. Marakutsa frowned. “There’s probably some bit of truth in that,” he said.

Wines, \textit{supra} note 39.

345. Herd, \textit{supra} note 10, at 4-5.

346. Case of Ilascu, \textit{supra} note 12, at paras. 147-49.

347. More generally, Litskai explained that the TMR allowed dual citizenship as of 1995. He explained that in order to be able to travel abroad, some 90 percent of the population in Transnistria have other citizenship in addition to Transnistrian. According to Tiraspol official estimates, 80,000 people in the TMR have Russian passports; 20,000 are Ukrainian citizens; 100,000 are Moldovan citizens, and several thousand people have passports from other CIS countries. Maksymiuk, \textit{supra} note 42.

“has existed, exists, and will continue to exist.” Rutskoi’s hard-line was offset by Minister of Foreign Affairs Andrei Kozyrev, who sought a more conciliatory policy and attempted to downplay Rutskoi’s rhetoric. Despite Rutskoi’s calls to recognize the TMR, it was Moldova that was recognized by the Russian government at this juncture. However, after the Battle of Bender of June 1992, Yeltsin seemed to shift his support toward Rutskoi. Nonetheless, the ECHR noted that, in one television appearance, President Yeltsin stated that “Russia has lent, is lending and will continue to lend its economy and political support to the Transdniestrian region.”

In September 2004, a Russian delegation led by Sergey Baburin, deputy chairperson of the Duma, said that “one genuine reality must be accepted: Moldova is today made of two states—the Moldovan Transdniestrian Republic and the Republic of Moldova, while the Transdniestrians have fully demonstrated their right to choose their fate alone.”

Observers have noted that Russia increased pressure prior to Moldovan elections in 2005, possibly in part because recent elections in Abkhazia and Ukraine caused a fear of loss of influence. Of particular importance was whether Voronin would support the Kozak Plan that Russia had proposed as a method of settling the Transnistrian conflict. During this period, one sees the most aggressive energy politics as well as the banning of various Moldovan exports. Graeme Herd wrote:

As no party comes to power in Moldova without Russian financial and campaign support, the fact that Serafim Urichean, the mayor of Chisinau visited Moscow in early 2004—albeit for “hospital treatment”—was newsworthy. Voronin was facing an implicit choice: Moscow would back or threaten to back an opposition candidate and party in the spring 2005 parliamentary elections unless Voronin ceased his refusal to support the logic of the Kozak Memorandum.

This occurred with a simultaneous warming towards the separatists. In October 2005—in the midst of Moldova’s concerns over rising energy costs, the Russian press reported on a trip by a Russian delegation to Tiraspol and Chisinau:

349. Id.
350. Id., at 994.
352. Herd, supra note 10, at 5 (citation omitted).
353. Id., at 8.
On the next day after the cold reception in Chisinau, Yuri Zubakov [the Deputy Secretary of Russia's Security Council] took the Russian delegation to Pridnestrovie capital—Tiraspol... the two sides immediately signed an agreement “About the perspectives of cooperation between Russian and Pridnestrovie business communities.”

Tiraspol was full of joy. The head of the Pridnestrovie Foreign Ministry Valery Litskai told [Russian press outlet] Kommersant that Russia had to switch long time ago from diplomatic pirouettes to the pragmatic policy. “That had to start five years ago. Why is there Russian-Moldavian commission and no Russian-Pridnestrovie commission? Now, everything will be different,” he said. According to the minister, there were discussions with Russian experts about the gas supply to Pridnestrovie, cooperation in the area of energy resources, transportation, industry and banking.354

Russia understandably wants the states near its border to be non-threatening. However, using trade embargoes, garrisoned military units, and energy prices to thwart the resolution of a separatist crisis in another state is at odds with the norms of non-intervention contained in the U.N. Charter, the Helsinki Final Act, and the Friendly Relations Declaration, to name only three relevant texts.

Besides obstructing an internal settlement of the conflict, Russia has also attempted to hold at bay third party states seeking to resolve the crisis. Russia’s EU Ambassador Vladimir Chizhov was reported as welcoming EU and US involvement in settling the Transnistrian conflict, he “stressed the limits to expanded territorial discussions, especially with the Baltic states: ‘Border agreements are not a Russia-EU issue. They are bilateral matters between Russia and its neighbors.’”355 He also noted that “You may claim that Moldova is an immediate neighbor of the EU, but so is Iraq in a certain manner after the opening of negotiations with Turkey.”356 One should note that Moldova is not an immediate neighbor of Russia, but Russian Ambassador Ryabov said that Russia would not let

354. Soloviev, supra note 324.
355. Ferguson, supra note 302.
356. Id. Similarly, Gleb Pavlovsky, an advisor to Russian President Putin, explained “Russia is currently revising its policy in the post-Soviet space and the mechanisms of its implementation.” He stated that “any country [that would] promote the doctrine of Russia’s rollback will certainly create a conflict in relations with this country.” Herd, supra note 10, at 14.
Transnistria’s interests be infringed by the December 2005 Moldova-Ukrainian agreement.\textsuperscript{357}

While a key concern for Russia may be to maintain primary influence in the former Soviet space, it needs to keep in mind that there are legal limits to what influence is allowed. As the ECHR concluded in the \textit{Ilascu} decision:

\begin{quote}
In the light of all these circumstances the Court considers that the Russian Federation’s responsibility is engaged in respect of the unlawful acts committed by the Transdniestrian separatists, regard being had to the military and political support it gave them to help them set up the separatist regime and the participation of its military personnel in the fighting. In acting thus the authorities of the Russian Federation contributed both militarily and politically to the creation of a separatist regime in the region of Transdniestria, which is part of the territory of the Republic of Moldova.

The Court next notes that even after the ceasefire agreement of 21 July 1992 the Russian Federation continued to provide military, political and economic support to the separatist regime (see paragraphs 111 to 161 above), thus enabling it to survive by strengthening itself and by acquiring a certain amount of autonomy vis-à-vis Moldova.\textsuperscript{358}
\end{quote}

Influence as a matter of fact may lead to responsibility as a matter of law, especially when one finds that the state overreached its acceptable bounds and used undue influence. Regardless as to whether one is convinced that Russia’s actions and statements give rise to such a claim of state responsibility under international law, these actions are properly understood as part of a larger pattern of behavior that fosters the Transnistrian conflict. Contrast this with Turkey’s involvement in resolving the situation in Gagauzia.

So why is Russia acting in this manner? We have no definitive answer. Some have argued that there are psychological reasons—that Russia wants to hold back the tide of Western influence and revolutions. Perhaps the domestic political cost would be too high for whoever “lost” the TMR to the West. Perhaps, as some have argued, one should think of the

\textsuperscript{357} Russian Ambassador Against Dictate and Extremities in Border Regulations, Infotag (Chisinau, Feb. 6, 2006).

\textsuperscript{358} Case of Ilascu, \textit{supra} note 12, at para. 382.
TMR as a “Giant Offshore” used by businesses in the region because it is unregulated and untaxed. In a similar vein, The Economist has called Transnistria “a big, ugly smuggling racket with a piece of land attached.” These and/or the other reasons listed above may explain Russia’s stance towards the Transnistrian crisis. However none of these political explanations confers the legal right to intervene in the domestic affairs of another state.

2. Ukraine

Due to its common border with Moldova—and particularly Transnistria—as well as the significant ethnic Ukrainian population in Transnistria and throughout Moldova, Ukraine has had a special interest in the resolution of this frozen conflict. In part to its own internal disputes, Ukraine’s official stance was critical of Transnistrian separatism from the beginning. Moreover, Since 1991, Ukraine has advocated the complete withdrawal of Russian troops from Transnistria.

Nonetheless, although Ukraine has acted in many ways as a counterbalance to Russian influence in Transnistria, its attentions have often been viewed by the Moldovans with a mixture of hope and suspicion. Despite early calls by Ukrainian leadership for a Russian troop withdrawal, there have also been attempts by Ukraine to build a relationship with the TMR’s leadership. During the 1990’s, for example, Smirnov had several visits to Ukraine in which he met with the President and the Minister of Foreign Affairs. Some reports claim that the son-in-law of Kuchman, the former president of Ukraine, allegedly owns one of the steel companies based in Transnistria. And now, there are reports that some close to Yuschenko are alleged to have business interests in Transnistria.

But, given that the Transnistrian economy seems to be reliant on illegal trafficking of goods, and that such trafficking needs the open

361. Id.
363. See, e.g., Lynch, Yuschenko Undercutting?, supra note 84 (noting allegations that Yuschencko associate Poroschencko has business interests in Transnistria.)
364. Consider that in 1998, during a brief period of joint customs control that had been encouraged by the OSCE, Transnistria imported 6,000 times as many cigarettes as Moldova. King, supra note 145, at 547. Oazu Nantoi, who was the president’s senior advisor on Transnistria, resigned and attempted to publicize the issue via television broadcasts. The head
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of Moldovan National Television, supposedly on orders from government officials, ordered the broadcasts to stop.


Socor himself tends to have a critical view of Ukrainian policy:

The peace plan’s real author, former National Security and Defense Council secretary Petro Poroshenko, in effect farmed out Ukraine’s customs service to a group of his long-time associates from the grey-business world in Vynnytsya, an oblast adjacent to Transnistria and known as a conduit for smuggling. Poroshenko’s close associate from Vynnytsya, Volodymyr Skomarovsky, top chief of Ukrainian customs until September 2005, advocated publicly and imposed in practice a policy whereby Transnistria’s exports via Ukraine are legal, unless the cargos contain drugs, illicit arms, or trafficked humans. Through this definition, Ukraine legalized the Tiraspol leadership’s lucrative exports, despite the fact that they do not carry customs seals, stamps, or certificates from any recognized authorities. This issue has been discussed at length in the Ukrainian press this year, corrupt interests were exposed, and the president could not have been unaware of the adverse implications for Ukraine’s international image.

For their part, Moldova (in the first place) and the EU (less consistently) took the position that all cargos out of Transnistria that do not carry legal customs seals, border with Ukraine in order to move the goods to Odessa or other Black Sea ports, Ukraine’s policies concerning the separatist situation have great impact. Some have argued, perhaps wishfully, that if Ukraine closed its Transnistrian border, the Smirnov regime would be forced to negotiate a settlement.

Such a result is not so definite. Litskai quipped in his meeting with the Mission that even if Moldova and Ukraine economically blockaded Transnistria, Russia would save them with an airlift of food and supplies and that such an operation could be viable for a very long time. The TMR’s leadership and Russia are deploying the blockade rhetoric once again with the advent of the new Moldova-Ukraine border regime—which cannot reasonably be considered a blockade—as of March 3, 2006. Images of the Berlin Airlift notwithstanding, it is unlikely that better border patrols alone would solve the situation, especially if the whole customs system is venal, as some have argued. Ukrainian Minister of Foreign Affairs Boris Tarasyuk has said that “the previous authorities in Ukraine actually established a chain of smuggling.”365 However, he said, there is some hope because, regarding planned anti-smuggling projects in Ukraine, “[i]t was impossible to imagine such things before [Viktor] Yushchenko was elected president. The former leadership of Ukraine had served as a cover for smugglers. Today, legal business could celebrate and smugglers should despair.”366
While a certain amount of Tarasyuk’s rhetoric is merely a new regime contrasting itself to the previous rulers, the disposition of the border is undoubtedly a central component to any solution as border controls make separatism more economically difficult.

The European Union is now lending its weight to resolving the border situation. “Under an initiative known as the Neighbourhood Policy, the EU will send 65 staff to help monitor Moldovan and Ukrainian border guards at 38 crossing points.”367 The EU’s Border Assistance Mission began on December 1st, 2005.368 Besides “back office” staff and advisers, there are five teams each composed of nine to fifteen customs officers seconded from EU member-countries.369 The Border Assistance Mission is monitoring the entire length of the Moldovan—Ukrainian border, including the 400 kilometer section between Transnistria and Ukraine. According to the “Martini mandate”—a paraphrase of an old advertisement for the drink—the EU border guards can go “any time, any place, anywhere” to monitor the situation.370

Although preliminary results seem promising, whether and to what extent the Border Assistance Mission makes a long-term difference remains to be seen.

Beyond the open border question, Ukraine under the leadership of

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367. Castle, supra note 365.
370. Castle, supra note 365.
Victor Yuschenko has sought a comprehensive solution in a proposal that has been called “the Yuschenko Plan.” At its heart, it tries to satisfy Transnistrian demands for self-rule, Moldovan requirements that their state not be carved-up, and Russian desire to maintain its Near-Abroad as a sort of buffer zone where it has control. Moldovans are concerned that the Yuschenko Plan would make eventual secession too easy and pre-secession relations too difficult. As some see it, the Ukrainian plan “would allow Transnistrian officials to have input into, and perhaps veto power over, international agreements signed by Moldova.” Whether and how the Plan evolves in continuing discussions among Ukraine, Moldova, the TMR, Russia, and other interested parties remains to be seen.

While the Yuschenko Plan was greeted with optimism, events since then have not borne out the Plan’s promise as of this writing. Russia and Ukraine became embroiled in a crisis over energy sales from Gazprom to Ukraine. Ukraine has argued that Gazprom was acting under instructions from the Russian government. On the Transnistrian question, Ukraine has at times taken a stance that is markedly closer to Russia’s. First, after criticism from the TMR and Russia, Ukraine backed away from the border agreement it had made with Moldova. (Although it did subsequently enact a revised border regime, under Russian and TMR criticism.) Ukraine and Russia also had a fact-finding mission to Transnistria concerning alleged arms production. They found that there was no evidence of any weapons being manufactured in Transnistria. While the Mission has been skeptical of some of the more fantastic allegations of military production in the TMR, there seems to be a reasonable claim that at least some level of small arms manufacturing, as well as the manufacturing of component parts for larger weapons systems, still occurs in Transnistria. In light of this, the credibility or at least the rigor of the Russian-Ukrainian fact-finding mission must be considered.

The current and future role of the Ukraine can be summarized as follows: (a) stricter border controls are a necessary, though not conclusive, step in resolving the Transnistrian crisis, however Ukraine now seems reluctant to enact border controls; (b) Ukraine has made what may be a good faith effort at designing a solution to the crisis, however the proposal is still fluid and the final version of the Yuschenko Plan needs to be

371. For example, Graeme Herd reports that Konstantin Zatulin, a member of the Duma, has said “At least we are a superpower on the territory of the former Soviet Union. I mean the CIS and the Baltic states. We are a superpower in relation to Moldova, Ukraine, and Georgia.” Herd, supra note 10, at 14.

372. Lynch, Yuschenko Undercutting?, supra note 84.
CONCLUSION: PERIL AND PROMISE

Secessions are more a problem of politics than law. If an entity secedes and the parent state accepts the secession, there is little role for legal argument. If an entity secedes and such a secession is largely accepted by the international community then, even if the parent state objects, such an entity will likely enter into the community of states as a new member.

If, however, an entity attempts to secede and the result is a military victory for the secessionists (by denying the parent state the ability to reconquer the territory, at least for the moment) but a political victory for the parent state (no other country recognizes the secession), then one has a hard case both for politics and for law. Here, where politics is most prevalent and power is most naked, the role of law is (perhaps paradoxically) most important. It is where political rhetoric becomes overheated that it especially makes sense for stakeholders to return to the norms of the international system and to first principles.

Based on the principles of international law examined in this report, we conclude the following:

Concerning the Status of the TMR. Attempted secessions are largely viewed as domestic affairs that need to be resolved by the state itself. There is no right to secede as a general matter. At most, secessions may be accepted in cases where a people have been oppressed and there is no other option for the protection of their human rights. In light of these rules, the TMR has not made a legally sufficient case that it has a right to external self-determination or secession.

Consequently, the effective control of the TMR of the Transnistrian part of Moldova is that of a de facto regime and may be viewed as analogous to control by an occupying power. The TMR is thus limited as to what it may legally do with the territory it administers.

Concerning the Conversion of Property by the TMR. The law of occupation recognizes that the occupying power may, as a matter of fact, control the economic resources within a territory but, as a matter of law, the rightful owners are the previous owners. The final disposition of the property is not decided by the current effective control by the occupier and as such, the occupier has the legal duty not to destroy the economic value of
the property. Any economic activities undertaken jointly with the separatists or insurgents by another party are at the peril of that party. There is no comfort that such activities will be sanctioned after the final resolution of the separatist conflict and they may, in fact, be “unwound.”

In light of the rules governing de facto regimes and also the law of occupation, the TMR’s privatization program can leave investors with no confidence that these transactions would be enforced if the TMR is re-integrated into Moldova.

**Concerning the Responsibilities of Third-Party States**

Interventions by third parties are not favored and are assessed in relation to the norms of non-intervention set out in numerous global and regional treaties and legal documents. Sovereignty requires that a state’s wishes concerning affairs within its own territory be respected up to the point that some other core interest of the international system is implicated. Thus, for example, the garrisoning of troops on foreign soil is not allowed if the host state requests that the troops leave. Russia’s activities concerning the Transnistrian situation, particularly the intervention of the 14th Army on behalf of the separatists, the ongoing military assistance to the TMR, the economic support of the TMR, and effectively bargaining on behalf of the TMR using energy process and other levers of power against Moldova, leads to credible claims of state responsibility on the part of Russia for the continuing separatist crisis and its proximate results.

Similarly, in light of the experience with Russia, Ukraine’s increased participation in the conflict should be monitored.

This is a time of peril and promise in the Transnistrian crisis. The peril of the situation is that, given recent events, attitudes will harden and that there will be no soft landing or “buy-out option” in which Smirnov will simply be given enough money to go away.\(^\text{373}\) The ever-present promise of the situation is that a “negotiated reintegration process [for Transnistria] might also then serve as a template for the reintegration of South Ossetia and Abkhazia into a sovereign Georgia.”\(^\text{374}\) As always, the role of law in international politics is to assist in the peaceful settlement of disputes. The first step in any such settlement is an honest accounting of the strengths and weaknesses of the position of each side. That is what this report has attempted to do.

May 2006

\(^{373}\) Herd, *supra* note 10, at 10.

\(^{374}\) Id., at 3.
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Retirement and Pro Bono Activities

The Committee on Senior Lawyers

When he was inaugurated as President of the New York City Bar Association in 1998, Michael A. Cooper made this observation:

As the retirement age lowers in the legal profession and elsewhere at the same time that life expectancy is increasing, the number of retired lawyers is growing rapidly. Some wish to enjoy their retirement years away from the law, travelling or playing golf or tennis. Others may pursue a second and very different career or concentrate upon hobbies that they never had enough time to pursue. But many retired lawyers are not only able but eager to devote the skills and experience they gained as lawyers to addressing our society’s many pressing legal needs.

In the decade since these remarks were made, there has been a growing focus on two subjects that, we believe, bear a close relationship: first, the increasing interest by law firms in pro bono activities; second, the growing number of senior lawyers who wish to continue the active practice of law but are faced with mandatory retirement requirements.

These developments offer significant opportunities for both law firms and their senior attorneys. Specifically, we believe law firms should adopt the practice of utilizing senior lawyers, who would otherwise be subject to mandatory retirement, by offering them major roles in the firms’ pro
bono practices, in return for the lawyers’ commitment to devote all, or substantially all, of their working time to such work. In this way, the firms will benefit by having talented, experienced attorneys play a role in their pro bono activities while, at the same time, the attorneys will have an opportunity to make use of their talents and experience. Of course, such pro bono work should not be limited to senior lawyers. However, the purpose of this report is to focus on the role senior lawyers can play in this expanding area. Specifically, we recommend that member firms take affirmative steps to provide opportunities for certain senior lawyers, including lawyers who would otherwise retire, to participate in their firm’s pro bono activities, including, but not limited to, the retention of such attorneys as full-time, compensated, participants in these pro bono efforts.

I. MANDATORY RETIREMENT

Mandatory retirement from law firms is a difficult and controversial topic. In general, most institutional law firms include in their partnership agreements provisions requiring retirement of partners who reach a certain age, often 65 to 70, or providing for some form of “decompression” at those ages leading to retirement. The purpose of these provisions is to promote internal growth by preventing senior partners from holding on to their relationships with clients, or creating limits on the available compensation for younger lawyers and, in general, to ensure that older partners do not continue to dominate their firms or work beyond their capacities.

Mandatory retirement and “decompression” provisions vary, not only to the ages at which they take effect, but other terms as well. Often, partnership agreements provide that at a certain age, perhaps 65, the partners enter into a period of “decompression,” whereby their compensation is gradually reduced on an annual basis until, for example, the age 70, at which point compensation totally ends and the partners retire. There are, of course, many variations. In some cases, partners continue to receive full compensation until reaching retirement and then are required to leave. Often, partnership agreements authorize management of the firm to waive retirement requirements, so that the firms may continue their relationship with senior lawyers whose judgment, experience, and significant client relationships continue to make them of special value to the firms. Firms also vary with respect to whether they provide post-retirement financial benefits in the form of pension or other payments. In the past, such benefits were customary, at least in large firms. However, it appears
that funded or even unfunded retirement plans are less common today, with the growth of 401(k) and other self-financed pension plans intended to provide retired persons with sufficient income.

The practice of forced retirement is becoming increasingly controversial, and questions have arisen concerning the continuing viability of the concept. This is due to the growing number of senior lawyers who are physically and mentally able and eager to continue performing productive work. Further, the recognition that the viability of many retirement plans is threatened, or that such plans may be unduly expensive, is generating a new look at mandatory retirement. As the Wall Street Journal recently noted in an article entitled, “Gray Is Good: Employers Make Efforts To Retain Older Employees,” “the % of workers 55 and over are growing four times faster than the workforce as a whole. By 2012, this age group will account for more than 19% of the labor force up from less than 16% now.” 1 Similarly, the New York Law Journal, in an article entitled, “Senior Partners Balk At Retirement Policies,” observed that New York City law firms are increasingly retaining lawyers who have passed the traditional retirement age, at least where such lawyers are able to attract substantial business. The article cited several prominent lawyers who made arrangements allowing them not only to continue working past the usual retirement age, but at significant compensation levels as well. Likewise, The New York Times recently described a 61-year old attorney who left private practice to take a corporate position as chief ethics and compliance officer of a major public corporation. However, while these are good examples of senior lawyers continuing active practices, they will not provide much comfort to the ordinary practitioner approaching retirement, since they involve lawyers of exceptional standing.

Of more general interest is the recent creation by the American Bar Association of a Task Force, “The Second Season of Service,” which will examine issues facing aging lawyers, specifically “what services and benefits the ABA can provide to our members as they mature in their practice . . . .” Maury B. Poscover, who heads the Task Force, has noted that, “if someone is of good health and sound mind and financially able to do so, they may well wish to reduce their level of involvement in law. Others who enjoy what they are doing will continue well beyond retirement.” Since

1. In EEOC v. Sidley Austin, a complaint was filed on behalf of a group of non-equity former partners at a major law firm alleging violations of the federal age discrimination laws in connection with the termination of their employment. Similarly, there has been considerable litigation involving the question whether a retirement plan can be conditioned upon a lawyer’s refraining from taking part in law practice.
II. PRO BONO ACTIVITIES

Participation by lawyers in pro bono programs probably is as old as the profession itself. The City Bar Association has for years been actively involved in recruiting legal resources from the profession to assist needy individuals or worthwhile charitable groups, and indeed through its City Bar Justice Center (formerly the City Bar Fund) it annually arranges for legal representation or service to 25,000 pro bono clients of all types. However, pro bono work is now performed in a more sophisticated manner than in the past. There are several reasons for this development, including the growth of not-for-profit legal service programs but limited public funding for them, efforts to improve the image of the Bar, the interest of law students and young lawyers in pro bono work, and the growth of large institutional law firms that have the financial strength to underwrite extensive pro bono programs. As reported by the New York State Bar News in February 2006, “Institutionalized pro bono programs are becoming the industry standard for private New York law firms . . . .” In essence, this means that in addition to the very extensive commitment that firms and individual lawyers have made in the past through the efforts of the City Bar Justice Center and its City Bar Public Service Network, which has successfully expanded its mission to match the individual interests of participating lawyers with appropriate worthwhile pro bono clients, pro bono services will increasingly become a planned part of law firms’ overall practice. This was made evident recently when the City Bar Association released a “Statement of Pro Bono Principles,” and identified a number of prominent major law firms as inaugural signatories to the Statement.

The Statement of Pro Bono Principles requests the participating firms to “adopt and abide by a written pro bono policy” and to pledge to perform an aggregate amount of pro bono legal work that at least equals an average of 50 hours per lawyer per year. According to City Bar President
Bettina Plevan, “These principles are more than a promise of a number of hours; they are a set of best practices to help ensure these pro bono efforts receive the requisite recognition and support.” By signing this statement, the firms pledge that pro bono hours will be counted the same as billable hours; that newly hired lawyers will be asked to participate in at least one pro bono matter during the first year of employment, and that in recognition that people lead by example, “senior lawyers will be strongly encouraged to participate in pro bono activities.”

The Statement of Pro Bono Principles illustrates the broad, national commitment by law firms to pro bono work on an institutionalized basis. This commitment leads to increased visibility for the firms, rewards attorneys who participate in the programs, provides mentoring, supervision, and training for junior lawyers, and makes it easier for the firms to reach out to the not-for-profit community for important, productive matters for the firms’ pro bono agendas.

By pursuing such ventures, law firms make themselves more attractive to both clients and young lawyers. In this regard, it has been reported that many large corporations seeking to place legal work or choose law firms for their approved lists, now consider not only the quality and costs of competing firms’ legal services, but their dedication to pro bono work as well.

The significance attached to pro bono work is illustrated by the annual surveys of *The American Lawyer*. This widely read publication uses a complicated formula for compiling an “A-List” of leading law firms which rates firms in four respects: revenue per lawyer, associate satisfaction, diversity of membership, and commitment to pro bono activities. The American Lawyer has made “a value judgment” about the importance of pro bono commitments to the evaluation of law firms, stating that “some core values are more important than others. We double the value of revenue per lawyer . . . and pro bono scores.” As for pro bono work, firms are ranked “by a formula that includes both per capita hours and the number of firm lawyers who perform at least 20 hours of service annually.” The American Lawyer separately lists firms on the basis of their pro bono activities, and publicizes those lists. Anecdotal evidence suggests that law firms consider a good ranking in these American Lawyer surveys as very important.

In light of their large size, many firms today no longer rely on the part time effort of individual partners, or other attorneys, to supervise and handle pro bono matters. The pro bono programs are too complex, varied, and extensive, and the number of lawyers involved too large, for the firms to rely on such part time voluntary efforts. Instead, law firms
are designating full time attorneys to act as coordinators or participants in pro bono activities.

Reflecting the current trend, a prestigious 1200 lawyer Manhattan firm utilizes one of its attorneys to serve as full time Pro Bono Counsel to facilitate the firm’s initiatives and unify its pro bono efforts, under the direction of a Pro Bono Committee chaired by a senior litigation partner. Other pre-eminent firms have recruited lawyers from the public sector to run their pro bono projects on a full time basis. And to widen pro bono opportunities for older attorneys, in 2000, a group of Washington, D.C. lawyers founded the International Senior Lawyers Project which reportedly has over 150 senior lawyer volunteers.

The nature of the pro bono projects themselves have evolved, from traditional pro bono programs focused on legal services for the poor, elderly, or minority groups, in such areas as landlord/tenant, social security, disability, and family law, to highly visible litigation and corporate endeavors in sophisticated, far ranging matters. For example, one large multi-office firm recently announced the creation of New Perimeter, a non-profit affiliate of the firm, to provide legal support on a pro bono basis for international problems such as economic development, law reform and human rights.

III. A PROPOSAL FOR MARRYING RETIREMENT WITH PRO BONO SERVICE

The area of pro bono service offers a valuable avenue for dealing with the task of finding useful work for lawyers reaching normal retirement age, who are both able and eager to continue rendering legal services on a full time or largely full time basis. Retired lawyers have, of course, often sought fulfillment in pro bono work.

However, the pro bono efforts of retired lawyers is done on a voluntary, ad hoc, individual basis. Such volunteerism is highly commendable, and can be a source of a great deal of satisfaction to retired lawyers. However, the increasing interest of law firms in sophisticated, high profile pro bono work, offers a more concrete and wider opportunity for senior lawyers. Specifically, we recommend that law firms take affirmative steps to draw upon the services of senior lawyers facing retirement, by offering to employ as many of them as possible in significant pro bono projects, on a full time or other negotiated basis. Senior lawyers are particularly well equipped to take part in law firm pro bono work. They have proven abilities, are well respected in their firms, and their experience, knowledge,
and judgment make them especially suited for leadership roles in the pro bono area. While some senior lawyers may not wish to be encumbered by the administrative work entailed in managing pro bono agendas, some will be willing and able to coordinate pro bono activities. Still others can provide significant expertise as mentors or teachers for young lawyers who are actively involved in pro bono work, but who require supervision. Senior lawyers also can play a direct role in litigation, contract negotiation, and rendering other advice for not-for-profit organizations, and other areas. Importantly, senior lawyers can assist their firms in meeting their commitment to pro bono quotas.

For all these reasons, firms should reexamine the role of lawyers reaching retirement age, and take affirmative steps to open the door for them to remain active by devoting themselves to pro bono activities. In this manner, the firms can take advantage of the lawyers' extensive knowledge, experience, and skills, without creating impediments to the advancement of younger lawyers that have led to mandatory retirement requirements.

Firms with “decompression” programs have a particularly attractive opportunity to encourage and enlist senior lawyers to devote an increasing amount of their time to pro bono work. A transition from predominantly client work to pro bono undertakings would have the multiple benefits of raising the perceived status and importance of the firms’ pro bono programs while offering to the senior lawyers a sense of professional fulfillment, continued professional status, and a positive transition to a continued active professional career while their client responsibilities are reduced. Hopefully, there would also be an opportunity for interested and committed senior lawyers to continue their contribution to the firms’ pro bono efforts after the conclusion of the phase down period. Thus, it is the Committee’s recommendation that the firms with “decompression” programs place more weight on pro bono participation as part of the programs by enlisting and encouraging senior lawyers to participate in pro bono activities. The senior lawyers’ compensation would be as traditionally structured by the firm during such periods and pro bono time would be given full credit, as it now is for associate time on pro bono work. For firms that do not utilize a formal decompression program, the Committee recommends that they introduce a pro bono participation plan for senior lawyers at some point prior to retirement age, with the comparable objective of encouraging senior lawyers to participate both before and after their formal retirement.

In our view, retired senior lawyers who fill such roles should also be compensated, though not at their pre-retirement levels. Compensation
would signify a commitment by the firms to its pro bono program and to the participating senior lawyers while, at the same time, requiring a corresponding commitment by the senior lawyers to serious and continuing legal services. Although some senior lawyers will be receiving other payments from their firms in the form of unfunded retirement benefits, those benefits should not require the lawyers to render significant pro bono service without compensation. In this regard, we agree with ReServe, a distinguished not-for-profit organization founded to “connect educated older adults with stipend-paying jobs at non-profit organizations,” that “when money changes hands, older adults and the non-profit partners alike take the jobs more seriously.” The inclusion of senior lawyers in pro bono work should not preclude the employment of younger attorneys as coordinators or managers of pro bono projects. There clearly is room – indeed need – for multiple leadership in the pro bono area, especially in firms with hundreds or thousands of lawyers. Take, for example, a firm of 500 lawyers which has pledged 50 hours a year of pro bono work per lawyer. This pledge entails the expenditure of 25,000 billable hours of work per year—the equivalent of some dozen or more lawyers working full time. Obviously, the management, coordination, and supervision of such extensive work—the equivalent of running a small law firm—while interfacing with client organizations to develop important pro bono projects, is a major task requiring the devoted efforts of several lawyers able to play leadership roles. This may explain why a number of law firms have created positions for both full-time pro bono partners, and separate full-time pro bono managers who deal with different aspects of the pro bono programs. With such multiple leadership, the firms are able to ensure that their pro bono efforts are properly managed, that liaison work with non-profit organizations is conducted at a high level and the necessary training and supervision is provided so that the pro bono clients receive equal treatment with clients of the firm’s more traditional practice.

IV. CONCLUSION

This Association and its members have been leaders in the struggle for diversity in legal education and employment and have pledged themselves to take affirmative steps to promote such goals. They have also taken the lead in the development of pro bono work. We believe the Asso-
Retirement and Pro Bono Activities

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May 2006
A Proposal to Apply Ethics Agreements on the State and Local Government Level

The Committee on Government Ethics

INTRODUCTION

An ethics agreement is an oral or written promise by a reporting individual, typically a candidate or nominee for public office or employment, to undertake specific actions in order to remedy an actual or apparent conflict of interest.¹ These agreements aim to set forth the specific actions that a nominee or other candidate agrees to undertake to remedy actual or potential conflicts of interest with his or her proposed public duties. Much like an opinion from an ethics board, the ethics agreement provides useful, individualized guidance to the nominee as to what he or she must do, in light of his or her financial situation or outside activities, in order to meet the applicable ethical standards while in government.

Although widely used by the federal government, such agreements are rarely, if ever, used by state and local governments. We consider here whether such agreements would be useful at the state and local level. In considering the application of ethics agreements at the state and local level, we examine how the federal nominee ethics agreements function; what remedial measures for nominees’ conflicts of interest ethics agreements contemplate; and whether the replication of the federal require-

ment of financial disclosure reports and ethics agreements at the state and local levels might prove valuable.

ETHICS AGREEMENTS IN THE FEDERAL GOVERNMENT

In 1951, under the direction of Senator Paul Douglas, the Senate Committee on Labor and Public Welfare produced one of the first comprehensive reports on ethical abuses in government. Senator Douglas further explored the theme of ethical standards in his 1952 Godkin lecture series at Harvard University and in his book reprinting these lectures, entitled *Ethics in Government*. The Godkin lectures focused on unethical behavior in lobbying, campaign finance, regulation of the economy, procurement practices, and tax policies, and provided an important foundation for later legislation relating to the fiscal accountability of public officials, both elected and appointed.

Following Douglas's lead, Congress enacted the loosely worded *Code of Ethics for U.S. Government Service* in 1958. The Code invoked general ethical and legal principles without specifying rules, procedures, or prohibited conduct. In the wake of the Watergate scandal, the Senate and the House of Representatives debated new ethical codes in 1977; the following year, Congress enacted the Ethics in Government Act of 1978, with the goal of “preserv[ing] and promot[ing] the integrity of public officials and institutions.”

The Ethics in Government Act and its subsequent amendments mark the cornerstones of the movement to promote and ensure ethics in government. At the heart of the Act is the requirement that legislative, executive, and judicial personnel at the federal level file periodic financial and conflict of interest reports. The Act also requires that presidential nominees file financial disclosures and, in most circumstances, sign ethics agreements prior to their Senate confirmation proceedings. Finally, the Act establishes the Office of Government Ethics (“OGE”), an independent executive agency that enforces conflict of interest laws and works

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3. See *Public Officials Integrity Act of 1977, Blind Trusts, and Other Conflict of Interest Matters: Hearings Before Senate Comm. on Governmental Affairs*, 95th Cong.
to prevent and resolve the conflicts of interest of federal employees. OGE accomplishes this through policy-making and by monitoring the ethics agreements, financial disclosures, and conflict of interest reports signed by government officers and nominees.

A. Executive Nominee Financial Disclosure
Reports & Ethics Agreements: Structure and Function

Prior to their Senate confirmation proceedings, presidential nominees generally receive several forms from the White House’s legal counsel requiring full disclosure of their personal and financial history. These confidential forms include the “Personal Data Statement Questionnaire”; the “Questionnaire for National Security Positions”; an FBI background check consent form; a credit check authorization; a medical release authorization; a “tax check waiver”; and the OGE’s Standard Form 278, “Public Financial Disclosure Report.”6 The Public Financial Disclosure Form requires the nominee to report certain interests in property, earned and non-investment income, gifts and reimbursements, liabilities, ongoing relationships with a prior employer, and outside positions in organizations.

The Public Financial Disclosure Report is forwarded on to the Designated Agency Ethics Official (“DAEO”) within the executive agency for which the nominee will work. The DAEO reviews the report and, in accordance with criminal conflict of interest statutes7 and regulatory standards of conduct for executive branch officials,8 prepares an ethics agreement for the nominee if such an agreement is deemed necessary by the DAEO in light of the nominee’s disclosures.

Ethics agreements prepared by the DAEO are submitted to the OGE, which, in higher profile cases, will vet the public disclosure reports and ethics agreements and make its own determination as to whether the nominee’s holdings or activities pose potential conflicts of interest.9 Compliance with ethics agreements must be secured no later than three months from the date of the agreement (or of Senate confirmation, if applicable).10

The DAEO then forwards the signed ethics agreement to the Senate along

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8. See Executive Order 11222 and regulations promulgated pursuant thereto.
10. 5 C.F.R. § 2634.802(b).
with a letter from the OGE stating that the nominee is in compliance with conflict of interest laws and regulations. At this point, a nominee's financial disclosures and ethics agreement generally become public record. The DAEOs are responsible for continuing to monitor compliance with ethics agreements after nominees enter office. The Ethics in Government Act of 1978 and the Code of Federal Regulations emphasize the importance of compliance with ethics agreements in the confirmation and appointment process, expressly recognizing this in the requirement that individuals provide written notice “of any action taken by the individual pursuant to [the] agreement.” Both the 2001 “DAEOgram” issued by the OGE and the Code of Federal Regulations list the kinds of evidence that are generally acceptable for common actions required by ethics agreements.

It is important to note that not all presidential nominees must enter into ethics agreements. Only nominees with conflicts of interest, as determined by their DAEOs, are asked to enter into such agreements, which may be written or oral. However, those nominees requiring Senate confirmation must have their agreements reduced to “some form” of writing, so that they can be transmitted with the financial disclosure reports to the OGE. The written forms that these ethics agreements may take include a letter or memorandum from the nominee to the DAEO or to the OGE, or a letter from the DAEO to the OGE summarizing the nominee's promised actions. Although the OGE has drafted a model ethics agreement, the agency also emphasizes that “DAEOs remain free to develop and use their own ethics agreement language, provided, of course, that any agreements adequately describe the specific actions that would be required for the given nominee to avoid any actual or apparent conflicts of interest.”


12. Exceptions include: (1) nominees requiring Senate confirmation who file financial disclosure forms (SF 278s) but are exempt from public reporting because they will perform their agency duties less than 60 days per calendar year, and (2) nominees who have not physically attached their ethics agreements to their SF 278s or incorporated the agreements by reference into their financial disclosure reports. In the second situation, the financial disclosure report will become a public document, but the ethics agreement will remain confidential.


In 2001, President Bush nominated to executive positions many individuals with significant financial interests and/or involvement in activities that posed a potential conflict of interest with the agencies they might soon represent. In response, the OGE issued a DAEOgram to the DAEOs clarifying the form and scope of nominee ethics agreements. Ethics agreements, the DAEOgram emphasized, “are established so that the steps the individual must take in order to insulate himself and protect the agency processes from conflict of interest are clear, not only to the individual, the agency and the public, but to the Senate committee responsible for holding the confirmation hearing. These agreements, therefore, serve an important purpose and should not be taken lightly by the individuals making them.” OGE will often make an ethics agreement a “necessary condition,” the DAEOgram continued, for the agency’s certification of a nominee’s financial disclosure statement.

B. Remedial Measures for Nominees’ Conflicts of Interest

Remedial measures in ethics agreements include recusal from a matter of official action, divestiture of a financial interest, and resignation from a non-Federal position. Other, less common, remedial measures such as waiver (if determined that the conflict is not “substantial” or it is outweighed by the individual’s services), establishment of a qualified trust (blind or diversified), and outside earned income limitations, are also incorporated depending on the specific circumstances. OGE has underscored the importance that “ethics agreement be sufficiently specific to make clear—to the nominee, the agency, OGE, and the Senate—precisely what measures will be undertaken” to remedy potential or actual conflicts. Without such specificity, the usefulness of an ethics agreement would be significantly compromised because the nominee may not understand what curative actions are being required of him.

Compliance with an ethics agreement is a key component of success-

18. Id.
19. DAEOgram DO-01-013, March 28, 2001 (citing OGE Informal Advisory Opinion 88 x 13 (Sept. 12, 1988)).
20. Id.
23. Id. (citing H.R. Rep. 89, 98th Cong., 1st Sess. 20 (1983)).
ful completion of the confirmation and/or appointment process. Under the federal model, when a nominee or candidate takes any action under an ethics agreement, he or she is required to provide written notice of that action and provide sufficient evidence of compliance. The nominee or candidate has three months from the date of confirmation or appointment, unless extensions are provided, to produce evidence to the DAEO that the terms of the ethics agreement have been satisfied. In turn, the DAEO transmits the evidence to OGE, which has general oversight of ethics agreement compliance by nominees.

Ethics agreements explicitly provide for the types of evidence that the nominee or candidate is required to submit to demonstrate compliance. Generally acceptable evidence for divestitures would include a written statement that an item has been sold, along with the sale date or copy of sale document; for resignations, a written statement documenting the resignation along with the date and a copy of the resignation letter (not required for nominees leaving full-time private employment for full-time government service); for recusals, a copy of the recusal document identifying the matters from which the appointee will be recused and detailing the recusal screening process naming those individuals who will screen matters from the appointee and to whom they will be referred for action (OGE recommends that such written recusals be updated regularly to reflect changed circumstances, and be provided to the appointee’s superiors and subordinates); for a statutorily authorized waiver, a copy of the waiver signed by the appropriate official; and, for a qualified (blind or diversified) trust, all information required by rule for certification.

Allegations involving breach of ethics agreements have led to investigations of government officials. For example, in 2004 the Office of the Inspector General (“the “OIG”) of the Department of the Interior (“DOI”) issued a report of its findings after an investigation into allegations that

26. See 5 C.F.R. § 2634.801 et seq.
J. Steven Giles, then Deputy Secretary of DOI, violated the terms of his written agreement to restrict his involvement from matters involving his former employers and clients. After his nomination as Deputy Secretary, Griles had executed an ethics agreement in which he described the steps that he would take to avoid actual or perceived conflicts of interest. Griles specifically promised to resign from his firm within a specified period of time, sell his interest in the firm, and recuse himself from any particular matter that involves his former clients or that would have a direct and predictable effect on his former firm’s ability to make annual severance payments to him. It was alleged that while he was Deputy Secretary of DOI Griles arranged meetings between his former clients and government officials and that he participated in matters that affected his former clients and firm. In a report issued in March 2004, the OIG determined that Griles had not been sufficiently briefed about his obligations under his ethics agreements and that there was generally lax oversight of ethics matters at the agency. The OIG reported its findings to the OGE.

**Value of Ethics Agreements at the State and Local Level**

State and local governments have little, if any, history utilizing ethics agreements in their appointment processes. Indeed, New York State and New York City are two examples of jurisdictions that do not use them for individuals nominated by the Governor or Mayor for positions requiring approval by the State Legislature or City Council, let alone for other high-level public officials not subject to legislative confirmation. Although many jurisdictions, including New York State and New York City, have ethics or conflicts of interest laws that govern the conduct of public officials, the introduction of ethics agreements as a tool might be an effective means to help insulate the nominee from potential conflicts of interest by requiring recusal, divestiture, and other appropriate steps prior to appointment with appropriate guidance and deadlines.

Currently, under the New York State Ethics Law, individuals who are nominated by the Governor for positions requiring approval by the Legislature are not considered employees or officers of the state, for

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34. Griles, a former lobbyist and consultant for the oil, gas, and coal industries, held an interest in the firm for which he worked. When he was confirmed as Deputy Secretary, he sold his interest back to that firm and received, for four years, an annual severance payment from his former firm.
the purposes of application of the law, until they are actually sworn in. 35
Only after an individual is deemed an employee or officer of the State
do the financial disclosure provisions of the law, requiring annual fil-
ing of financial disclosure statements with the State Ethics Commission,
apply. 36

Similarly, in New York City, individuals who are nominated by the
Mayor or other elected officials for positions, some of which may require
advice and consent of the City Council, are not considered “city employee[s]”
for the purpose of application of the City’s Conflicts of Interest and Fi-
nancial Disclosure Laws, until after they are appointed. 37

Thus, neither State nor City law formally requires that conflicts of
interest be identified or resolved prior to appointment. This leaves the
appointee and the government to resolve any actual or apparent conflicts
only after the fact, unless there are administrative protocols in place
designed to identify and provide prescriptions for resolving such con-
flicts before appointment. Absent such protocols, state and local govern-
ments could potentially find themselves with an appointee who, depend-
ing upon specific circumstances, may be unable or unwilling to resolve a
conflict of interest, or who after appointment may simply forget to do so
in a manner that would foster accountability, transparency and best serve
the public interest. As a consequence, completion of important public
work could be stalled, or otherwise impaired, while the conflict is either
being resolved, negatively played out in the press, or a new appointee is
sought.

As an example of informal procedures currently in place, the Bloomberg
Administration has established rigorous pre-appointment protocols to screen
each nominee for advice and consent, or for direct appointment, for con-
flicts of interest regardless of the position for which he or she is being
considered. 38 In particular, for nominations that require the advice and
consent of the City Council, both the Administration, working with the
City’s Department of Investigation, and the City Council require the nominee
to complete a common 40-page background investigation questionnaire.
If any potential conflicts are identified, the nominee is either asked to
remedy the conflict prior to appointment, or shortly thereafter, and of-

35. Under the Public Officers Law, § 73(5), however, the restrictions on gifts do apply to an
individual whose name has been submitted by the Governor to the Senate for confirmation.
36. See Public Officers Law §§ 73 & 74.
37. New York City Charter § 2601(19) and Administrative Code § 12-110(a)(2).
38. Source Anthony Crowell, Counselor to the Mayor.
Requiring formal pre-appointment review and ethics agreements at the state and local government level, however, might add a useful measure of clarity to the process of unwinding and safeguarding against potential and actual ethical conflicts for political nominees more generally. In addition, for some state and local governments, requiring formal ethics agreements could also make the appointment process more substantive by giving the executive and legislative branches an opportunity to be probative with the nominee about the full extent of his or her general background, including business and other financial ties. Ethics agreements could also make the appointment process more transparent if, as with the federal level, they were treated as public documents subject to freedom of information laws, or even open to public inspection by statute.

Although on the federal level ethics agreements are used in a process whereby the executive nominates the candidate and the Senate confirms him or her, their use on a state and local government level could be applied to direct appointments by the executive or another branch of government of certain candidates for high-level office. For example, state and local appointees could enter into ethics agreements with the appropriate ethics agency as a condition of their appointment where necessary. The determination of which appointees would be potentially required to submit such agreements would be based on their rank within the government hierarchy and their official responsibilities. As with the federal model, the state and local appointees would agree to take the action set forth in the ethics agreement within a specified period after their appointment, or in some cases even prior to their appointment. The appointee would also agree to provide to the state or local agency that has jurisdiction over ethics and conflicts of interest of public servants documents...

39. See e.g., Conflicts of Interest Board Advisory Opinion No. 2003-07 (2003) (in response to a request from New York City Deputy Mayor Daniel Doctoroff for advice regarding his private financial interests, the Conflicts of Interest Board determined that Deputy Mayor Doctoroff should recuse himself from certain matters and that a blind trust established by the Deputy Mayor would satisfy the conflicts of interest law). The Governor’s Office oversees a similar informal procedure whereby nominees going before the Legislature complete a background investigation administered by the State Police and the Governor’s office will consult the Ethics Commission when questions arise as a result of this investigation or based on the papers submitted by the nominee.

40. Even high-ranking appointees and those vested with substantial contracting responsibilities and discretion would of course only be required to submit such ethics agreements if their private financial interests created a actual or potential conflict of interest.
mentary proof that he or she has taken corrective or preemptive action pursuant to the ethics agreement. Most importantly, the ethics agreements would provide clear guidance to the new appointee by identifying the actions that the appointee will need to take with respect to his or her private interests. Requiring ethics agreements at the state and local government level should not place an undue administrative or financial burden on these governments since the agreements would be required from a relatively limited number of appointees, as determined by the state and local ethics agencies, and could be made to complement and/or formalize mechanisms that already used to assist newly appointed public servants.

Pre-appointment financial disclosure statements and formal ethics agreements would serve to identify actual and potential conflicts of interest at the outset and establish a transparent course of action both to resolve existing conflicts and avoid others prospectively. By setting forth the specific remedial measures and backup documentary evidence required of a nominee, ethics agreements can establish the appropriate parameters for public servants either to wind down their private businesses or completely separate their business from their official public duties by clear deadlines, and thereby give everyone involved a measure of comfort that the ethics laws are being satisfied.

CONCLUSION AND RECOMMENDATIONS

Ethics agreements could add significant value to state and local government appointment processes. In New York State and New York City, changes to state and local law would be needed both to make the relevant ethics and conflicts laws formally apply to nominees or other candidates prior to appointment, as well as to mandate the use of ethics agreements to help guide the nominee or candidate in the resolution of his or her conflicts of interest.

Although such changes in the law are worthy of recommendation, it is important to note that nothing under current law prevents either the State, the City, or other localities from establishing a voluntary program under which ethics agreements could be administered during the pre-appointment process. Such voluntary programs could be governed by basic principles of contract law, fashioned on a case-by-case basis to fit the specific circumstances of each candidate, and establish the appropriate time frames for resolving conflicts of interest, taking into account the time requirements of the appointing authority who may have a need to fast-track certain appointments, especially at the beginning of an admin-
istration. Indeed, perhaps such a program is the next logical step for appointing authorities, like the State and the City, to ensure that actual and apparent conflicts are identified and remedied in a timely and transparent fashion to safeguard the public’s confidence in the appointment of public officials.

June 2006

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The committee thanks Astrid Gloade and Marjory Herold for their contributions to this article.
Open Source Software and the Free Software Movement

The Committee on Information and Technology Law

The following letter re: comments of the New York City Bar Association to GPL Version 3 was sent to the Free Software Foundation of Boston, MA, June 12, 2006.

Members of the Association hold a wide variety of views about open source software and the free software movement. The Association has no institutional view regarding the desirability of “free” software or the principles of “copyleft.” The Association and its members, however, recognize that the body of open source software is large and growing larger, and that over the past decade there has been a huge increase in the use of open source software in the business and commercial environment. Given the tremendous economic and technological importance that free software has taken on in our society, the Association strongly believes that the rules governing the use of such software should be as clear as possible for both creators and users. We therefore are grateful for the opportunity to submit our comments regarding Version 3 of the GNU General Public License.

Although only one of many forms of license utilized in distributing the plethora of open source programs, the GNU General Public License (GPL) is probably the most important because of the large body of software works governed by the GPL, most especially Linux. The Association
agrees that the current Version 2 of the GPL, now in use for some 15 years, could benefit from a review and overhaul in light of experience and today’s legal and technological environment. The Association welcomes the opportunity to comment on the draft of proposed Version 3 of the GPL in the open revision process the Free Software Foundation has adopted.

The Association is firmly of the view that, when it comes to the GPL, ambiguity should be dispelled to the maximum extent possible. Before undertaking the commitment to use software subject to the GPL in a project, with all the cost and risk entailed in such commitment, a prospective licensee should clearly understand the conditions and obligations to which it is subjecting itself. In particular, the Association feels that additional clarification is necessary with respect to the following issues: when the obligation to distribute modified source code attaches; what constitutes a private modification; the consequences of a merger or acquisition on the right to continued use of a private modification; and the GPL’s assertion that it is not a contract.

We recognize that there is a tension in the free software community regarding the use of open source in commercial products, especially when commercial developers wish to preserve the proprietary nature of all or some of their enhancements, extensions and compatible software. In principle, advocates of free software believe that any retention of proprietary rights is inconsistent with the concept of free software. In practice, however, many in the free software community wish to encourage the broadest possible use of open source, even if that means a certain amount of compromise.

As a consequence of this tension, activity that is arguably violative of Version 2 of the GPL has not been challenged, or not been challenged consistently, in order not to discourage the widespread use of open source software. On the other hand, rather than concede the desirability of compromise with free software principles, there appears to be a reluctance to expressly clarify the GPL to make such activity permissible. The hope seems to be that ambiguity will discourage and limit the extent of such activity.

The Association believes there is too much at stake to perpetuate such ambiguity in Version 3. While there may be a “gentlemen’s agreement” in some quarters of the free software community that certain types of activity will be tolerated, even if in technical violation of the GPL, not every contributor to an open source program necessarily subscribes to such a “gentlemen’s agreement,” and the potential for being subjected to copyright infringement litigation, and monetary and injunctive relief, is a significant risk for potential licensees. The extent of that risk is impos-
sible to gauge, given the often hundreds of copyright owners in any given open source program and the ambiguity of the GPL itself. The Association believes that licensees should be put on clear notice of what is and is not permissible, rather than being forced to either risk violating the GPL, now or in the future, or forego the use of open source software altogether. This is especially true in today’s legal environment, when guessing wrong on the status of intellectual property assets potentially can subject a public company’s officers to criminal liability under the Sarbanes-Oxley Act.

In the balance of this letter, the Association highlights the four instances in which it believes the current draft of GPL Version 3 could benefit from clarification. These four instances are not exhaustive, and the Association hopes that further areas deserving clarification will be identified by the comment process.

1. Distributing Modified Source Versions

Section 5 of proposed Version 3 permits the copying and distribution of modified versions of a licensed Program if certain conditions are met, chief among these being that the GPL applies to the modified work as a whole and that the “Complete Corresponding Source Code” of the entire modified work must be made available. (See Section 6.) Section 5(c) provides that, when the licensee “distribute[s] [“identifiable sections” of the work added by the licensee which are not derived from the unmodified version of the Program]” for use in combination with covered works, no matter in what form such combination occurs, the whole of the combination must be licensed under this License . . . .”

Proposed Version 3 does not define the phrases “identifiable sections” or “for use in combination with covered works.” The question thus arises as to the distinction between sections of a modified work that are used “in combination with covered works” and separate works that interoperate with the covered work. On the one hand, we assume for example that it is not the intent of Version 3 to mandate that every application program written to run under Linux be subject to the GPL. On the other hand, the definition of “Complete Corresponding Source Code” indicates that a work includes “any shared libraries and dynamically linked subprograms that the work is designed to require, such as by intimate data communication or control flow between those subprograms and other parts of the work, and interface definition files associated with the program source files.”

Though an improvement over Version 2 in terms of clarity, Version 3 leaves uncertain where the line lies between “identifiable sections” of a
covered work and a separate interoperable program. Proposed Version 3 suggests that “intimate communication or control flow” may often be a key to the distinction, but the Association does not believe this phrase has a sufficiently uniform meaning, even to programmers, to serve as a legal criterion.

Accordingly, the Association suggests that the term “identifiable section” of a work and the phrase “for use in combination with covered works” be further clarified. In that connection, it would help to elucidate in more detail the concept of “intimate data communication or control flow” or, alternatively, to substitute for this phrase more specific and generally understood criteria.

2. Propagation

Proposed Version 3, Section 0, defines the term “propagate” as follows: “To ‘propagate’ a work means doing anything with it that requires permission under applicable copyright law, other than executing it on a computer or making private modifications. This includes copying, distribution (with or without modification), sublicensing, and in some countries other activities as well.” (Emphasis added.) While the foregoing definition indicates that “making private modifications” does not constitute propagation, the phrase “making private modifications” is not defined.

Section 2, paragraph 2, provides that: “This License gives unlimited permission to privately modify and run the Program . . . . “ Again, however, the phrase “to privately modify” is not defined.

Presumably, a private modification must be private to the licensee, but who is the licensee? Is it the individual who downloads the software? If the individual downloads the software within the scope of his or her employment, is the licensee the corporation or other entity by which the individual is employed? Might the licensee be a group of related companies, one of which is the employer for whom the individual works? These are not academic questions, but rather go directly to whether there is an obligation to make source code of the modified work generally available.

One very practical question is whether making a modified version of a program available to a consultant or outsourcer destroys the private nature of the modification and constitutes a propagation requiring that source code be made available. Neither the license nor the accompanying Rationale document answers this question.

The Free Software Foundation’s FAQs regarding GPL Version 2, however, has the following to say: “[P]roviding copies to contractors for use off-site is distribution.” In discussions with the Association’s Informa-
tion Technology Law Committee, Professor Eben Moglen has suggested that this statement would apply to Version 3. If this is the intent, we fail to see any persuasive rationale for distinguishing between on-site and off-site usage. Nothing in the license suggests that an employee’s off-site usage would destroy the private nature of a modification. Why is a consultant’s off-site usage different? If a distinction is to be drawn between employees and contractors, it does not seem to the Association that basing that distinction on the place where users are located makes much sense. Indeed, in some cases, where off-site personnel access on-site servers, it may be unclear whether the “usage” is on-site or off-site—further blurring any logical or discernible distinction.

We believe that a more reasoned way to determine whether a modified work remains private is to ask whether the modified work is being used solely for the benefit of the licensee, regardless of whether the use is by a contractor or an employee. Thus, if the contractor or employee uses the modified program for a purpose other than for the licensee’s benefit (i.e., for his or her own or another’s benefit), whether or not such use is in breach of a contract between the employee/contractor and the licensee, the modification would no longer be private to the licensee, and the licensee would have a duty to make source code available. The failure to comply with that duty would negate the license as a defense and, hence, continued use of the program would constitute copyright infringement.

At a minimum, the license should be clarified to make clear the consequences of providing a contractor with access (both on-site or off-site) to a work that otherwise constitutes a private modification.

3. Mergers and Acquisitions

Proposed Version 3 remains unclear with respect to the effect of the merger or acquisition of a licensee on the right to use private modifications without publishing the source code of such modifications. Under Section 2 of Version 3, a licensee has unlimited permission privately to modify and run the licensed program (provided it does not bring suit for patent infringement). There is an ambiguity, however, as to whether such private modifications become subject to the GPL’s distribution requirements in the event of an assignment of the licensee’s stock by operation of law (as by merger of the licensee into another surviving entity) or an assignment in the context of a sale of all or substantially all the licensee’s assets.

The definition of “propagate” does not appear to address this ambiguity. Nor is there any definition of “licensor” or “you.” The Association
perceives no good reason why a successor should not continue to enjoy a licensee's right to use private modifications without making the source code of such modifications publicly available. This ambiguity should be clarified by adding a sentence to the definition of propagate making it clear that neither an assignment by operation of law nor an assignment accompanying the sale of all or substantially all the licensee's assets (or the assets of the line of business in which the licensed program is used) constitutes propagation.

4. A License, Not a Contract

Section 9 of proposed Version 3, entitled “Not a Contract,” states as follows: “You are not required to accept this License in order to receive a copy of the Program. However, nothing else grants you permission to propagate or modify the Program or any covered works. These actions infringe copyright if you do not accept this License. Therefore, by modifying or propagating the Program (or any covered work), you indicate your acceptance of this License to do so, and all its terms and conditions.” In discussions with the Association’s Information Technology Law Committee, Professor Moglen reiterated that the GPL is a “license” and not a “contract.”

Given the title of Section 9, and Professor Moglen’s statement, we do not understand the intended import of the last sentence of Section 9, namely, that “by modifying or propagating the Program (or any covered work), you indicate your acceptance of this License to do so, and all its terms and conditions.” Use of the term “acceptance” suggests formation of a contract.

The distinction can be significant. Professor Moglen has publicly expressed the view that, if a recipient of GPL software violates a condition of the GPL, for example by distributing a modified version of a GPL program in object code only, the consequence is simply to remove the license as a defense to an action for copyright infringement. In an action for copyright infringement, the defendant could be held liable for damages and enjoined from further distribution of the infringing software, but the defendant could not be compelled to make the source code of the modified program publicly available because that is not a remedy provided by copyright law.

However, if the recipient has “accepted” the terms of the GPL by modifying or propagating the work, then the recipient’s distribution of a modified version in object code only is arguably also a breach of contract. Potentially, that breach may be remedied by an order of specific performance, at least if a court determines that money damages are not an adequate remedy.
If the GPL is, in fact, not a contract, the last sentence of Section 9 of proposed Version 3 should be modified to make it clear that, under no circumstances, will any of the conditions of the GPL (such as distribution of source code) be affirmatively enforced. In such event, the licensors’ sole remedy would be an action for copyright infringement.

The Association hopes the foregoing comments prove useful, and that they will contribute to the adoption of a Version 3 of the GPL which is both clear and fair to both licensors and licensees.

June 2006

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Formal Opinion 2006-2

Duties to
Prospective Clients

The Committee on
Professional and Judicial Ethics

TOPIC: Duties to Prospective Clients; Beauty Contests; Advance Conflict Waivers; Imputation of Conflicts; Screens.

DIGEST: A lawyer who participates in a “beauty contest” with a prospective client, but who ultimately is not retained by the prospective client, is not personally prohibited from later representing a client with materially adverse interests in a substantially related matter if the lawyer did not learn confidences or secrets of the prospective client during the beauty contest. If the lawyer learned confidences or secrets of the prospective client, the lawyer may nonetheless later represent a client with materially adverse interests in a substantially related matter: (a) if, before the beauty contest, the lawyer obtained the prospective client’s advance waiver of any conflict that might result from the prospective client sharing confidences or secrets;
(b) without an advance waiver, unless the confidences or secrets could be significantly harmful to the prospective client; or (c) if it can be established that the prospective client revealed confidences or secrets with no intention of retaining the lawyer, but for the purpose of disqualifying the lawyer's firm from later representing possibly adverse parties.

Moreover, even if the individual lawyer described above is personally prohibited from later representing a client with materially adverse interests in a substantially related matter, the presumption that other lawyers at the law firm have knowledge of the prospective client's confidences or secrets may be rebutted, under the circumstances discussed below, by using ethical screens.

**CODE:** DR 4-101; DR 5-108; EC 4-1.

**QUESTION**

May a law firm that participated in a beauty contest with a prospective client, but that ultimately was not retained by the prospective client, thereafter represent a client in a matter substantially related to the subject of the beauty contest, when the client’s interests are materially adverse to the prospective client’s interests?

**OPINION**

**A. The Beauty Contest Scenarios**

Consider the following situation. Company A (the “Prospective Client”) is interested in suing Company B for breach of contract. In an effort to choose litigation counsel, the Prospective Client conducts a beauty contest involving several law firms, including Firm X. Assume the following two possible scenarios for the beauty contest:

Scenario 1: Firm X presents its qualifications to represent the Prospective Client, and the Prospective Client does not divulge any confidences or secrets regarding its proposed lawsuit.

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1. “Confidences” and “secrets” are defined in DR 4-101. As used in this Opinion, these terms encompass confidential information divulged by the prospective client even though no actual attorney-client relationship has yet been formed.
Scenario 2: Firm X presents its qualifications to represent the Prospective Client, and the Prospective Client divulges confidences and secrets regarding the underlying facts and legal theories supporting its proposed lawsuit.

Further assume that the Prospective Client ultimately decides not to retain Firm X to represent it in the lawsuit, and that Company B thereafter seeks to retain Firm X to defend it in the lawsuit.\(^2\)

This opinion analyzes the ethical considerations applicable to law firms participating in beauty contests. The analysis applies equally to when a law firm holds a preliminary meeting with a prospective client that is not approaching other law firms for possible retention.

**B. Attorney-Client Relationship**

In today’s legal environment, where individuals and corporations often conduct extensive searches for legal representation, a law firm must be mindful that participating in a beauty contest may, as discussed below, enmesh the firm in a disabling conflict of interest that would require it to decline to represent a client with materially adverse interests in a substantially related matter, or risk a court granting the prospective client’s motion for disqualification. A law firm participating in a beauty contest would be mistaken to believe that a court would nonetheless allow it to represent such a client because the beauty contest failed to result in the formation of an actual attorney-client relationship with the prospective client, evidenced by the signing of a retention agreement, by the rendering of services, or by the receipt of payment. Indeed, the formation of an actual attorney-client relationship is not a prerequisite to the disqualification of a firm that participated in a beauty contest.

The critical issues determining whether, following an unsuccessful beauty contest, a firm will be allowed to represent the client described above are whether the attorneys who participated in the beauty contest on behalf of the firm had access to confidences or secrets of the prospective client that could be significantly harmful to the prospective client and, if so, whether the firm (1) had obtained an adequate advance waiver from the prospective client before the beauty contest, or (2) established and acted in accordance with adequate procedures to rebut the presumption that those confidences or secrets were or will be shared with other attorneys in the firm.

\(^2\) This opinion assumes that the Prospective Client does not consent to Company B’s retention of Firm X.
C. The Individual Attorney

Whether Firm X, in the situation described above, is prohibited from representing Company B because one of its attorneys participated in the beauty contest with the Prospective Client involves two inquiries. The first is whether the attorney who participated in the beauty contest is personally disqualified from representing Company B.\(^3\)

The Code of Professional Responsibility (the “Code”) does not contain any provision directly informing this inquiry, or, more generally, addressing the duties that a lawyer owes to a prospective client. But certain Code provisions are nonetheless relevant. DR 4-101 provides that “[a] lawyer should preserve the confidences and secrets of a client.” DR 5-108 imposes the same duty on a lawyer regarding the confidences and secrets of a former client. And Ethical Consideration 4-1 states that the obligation to preserve confidences and secrets is not limited to current or former clients, but also includes prospective clients: “[b]oth the fiduciary relationship existing between lawyer and client and the proper function of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ the lawyer.” (emphasis added).

At the same time, it is important to recognize that a prospective client does not stand on entirely equal footing with a client. A lawyer’s discussions with a prospective client are necessarily limited in both duration and detail, a lawyer must be able to obtain—without undue risk of disqualification—the information necessary to determine whether the representation is appropriate, and the lawyer or the prospective client or both may decide not to proceed any further. As the Restatement (Third) of The Law Governing Lawyers (2000) (the “Restatement”) cogently observed in explaining why the prospective client should receive some, but not all, the protections given to a client:

[A] lawyer’s discussions with a prospective client often are limited in time and depth of exploration, do not reflect full consideration of the prospective client’s problems, and leave both prospective client and lawyer free (and sometimes required) to proceed no further. Hence, prospective clients should receive some but not all of the protection afforded clients.

*Id.* § 15 cmt. b.

We believe that the ABA Model Rules of Professional Conduct and

\(^3\) The second issue—whether the firm itself is disqualified—is discussed below in Section D.
the Restatement struck the appropriate balance in defining the duties owed to prospective clients. Under both Model Rule 1.18(b) and Restatement § 15(1)(a), a lawyer shall neither disclose nor make adverse use of confidential information learned from a prospective client. At the same time, in addressing whether a lawyer who participates in a beauty contest with a prospective client should later be personally disqualified from representing a client with materially adverse interests in a substantially related matter, Model Rule 1.18 provides that “[a] lawyer ... shall not represent a client with interests materially adverse to those of a prospective client in the same or a substantially related matter if the lawyer received information from the prospective client that could be significantly harmful to that person in the matter....” Similarly, Section 15(2) of the Restatement, entitled “A Lawyer’s Duties to a Prospective Client,” provides that “[a] lawyer ... may not represent a client whose interests are materially adverse to those of a former prospective client in the same or a substantially related matter when the lawyer ... has received from the prospective client confidential information that could be significantly harmful to the prospective client in the matter....”

The “significantly harmful” test sets the bar lower than in the case of a lawyer opposing a former client. Under Model Rule 1.9(a) and under Restatement § 132, as under DR 5-108(A), the bar against a lawyer acting adversely to a former client in a substantially related matter is automatic.

Applying these principles to the scenarios described above, the attorney from Firm X who participated in the beauty contest should not be personally prohibited from representing Company B in Scenario 1 because that attorney did not receive any confidences or secrets from the Prospective Client during the beauty contest. See, e.g., Interpetrol Berm., Ltd. v. Rosenwasser, 1988 U.S. Dist. LEXIS 14307, at *7 (S.D.N.Y. Dec. 19, 1988) (in a pre-retention situation, the failure to proffer evidence that the attorney had access to confidences and secrets “is necessarily fatal to the disqualification motion”); N.Y. Univ. v. Simon, 498 N.Y.S.2d 659, 662 (Civ. Ct. N.Y. County 1985) (denying motion to disqualify “based on what

4. See also ABCNY Formal Op. 2001-1 (adopting the “significantly harmful” test in the context of a law firm’s receipt of an unsolicited e-mail containing confidential information).

5. See also 1 Geoffrey C. Hazard and W. William Hodes, The Law of Lawyering (3d ed. 2005), § 21A.6, at 21A-15. (“Because the relationship between a prospective client and a lawyer by definition never reaches the stage where the duty of loyalty attaches with full force, however, Rule 1.18 imposes a less stringent regime on the lawyer than where actual clients and former clients are involved. Put another way, the protections afforded to prospective clients are not as extensive as those provided to ‘real’ clients.”)
is, in essence, movant’s conclusion that the matters discussed were significant” without any showing that confidences and secrets were revealed).

But in Scenario 2, in which confidences or secrets of the Prospective Client are shared with the attorney, the attorney would be prohibited from representing Company B, except in the following three situations. First, the attorney from Firm X should be allowed to represent Company B unless the confidences or secrets the attorney had received from the Prospective Client could be significantly harmful to the Prospective Client in the litigation.

Second, the attorney from Firm X should be allowed to represent Company B if, before the beauty contest, the attorney obtained the Prospective Client’s informed advance waiver of any conflict that might otherwise result from the Prospective Client sharing confidences or secrets with the attorney during the beauty contest. In order to maximize the likelihood of such a waiver being effective, a lawyer should consider having the waiver (1) in writing, (2) signed by the prospective client, (3) explain the preliminary nature of the beauty contest, (4) request that the prospective client not reveal any confidences or secrets during the beauty contest, and (5) state that, if the prospective client nonetheless divulges confidences or secrets, and the attorney is not retained by the prospective client, the prospective client waives any objection to (a) the attorney’s later retention by a client whose interests may be materially adverse to the prospective client’s interests, and (b) the attorney’s use of the confidences and secrets in that representation. See, e.g., Bridge Prods. Inc. v. Quantum Chem. Corp., 1990 U.S. Dist. LEXIS 5019, at *10-11 (N.D. Ill. Apr. 27, 1990) (placing the burden on the attorney to make clear that “the initial meeting was purely preliminary and that confidences would not necessarily be protected”).

Third, the attorney from Firm X should be allowed to represent Company B if it can be established that the Prospective Client revealed confidences or secrets without any intention of retaining Firm X, but for the purpose of disqualifying Firm X from any later representation of possibly adverse parties. In this case, the attorney from Firm X should not be prevented


7. Revealing confidences and secrets in a preliminary meeting for the purpose of disqualifying the law firm is known as “taint shopping.” See, e.g., Geoffrey C. Hazard, Ethics, The Would-Be Client, Nat’l L.J., Jan. 15, 1996 at A19 (“taint shopping describes the behavior in which someone purporting to be seeking legal assistance interviews a lawyer or law firm for the purpose of disqualifying them from future adverse representation.”)
from representing Company B because the reasonable expectation of confidentiality underlying DR 5-108(A) and DR 4-101 is absent, given that the Prospective Client’s purpose in meeting the attorney as part of the beauty contest was merely to preclude the attorney from representing Company B, as opposed to selecting counsel.

Model Rule 1.18 supports this conclusion. Under that Rule, a prospective client is “[a] person who discusses with a lawyer the possibility of forming a client-lawyer relationship.” Having had no intention of retaining the attorney from Firm X when conducting the beauty contest, the Prospective Client would not qualify as a true prospective client. See also Restatement § 15(1) (defining prospective client as “a person [who] discusses with a lawyer the possibility of their forming a client-lawyer relationship for a matter”).

That the attorney from Firm X should not be disqualified from representing Company B when the Prospective Client uses the beauty contest as a “sword” is also supported by the Committee on Standards of Attorney Conduct of the New York State Bar Association (the “NYSBA Committee on Standards of Attorney Conduct”). Indeed, the NYSBA Committee on Standards of Attorney Conduct recently proposed Rule 1.18, entitled “Duties to Prospective Client,” which is nearly identical to Model Rule 1.18, but which explicitly withholds the confidentiality protections of the rule from one who uses the beauty contest as an offensive tool. See Proposed New York Rule of Professional Conduct 1.18 (Sept. 30, 2005) (“Proposed Rule 1.18”). As the drafters of Proposed Rule 1.18 make clear in Comment 2, “a person who communicates with a lawyer for the sole purpose of preventing the lawyer from handling a materially adverse representation on the same or a substantially related matter is not entitled to the protection of this Rule.”

D. The Law Firm

Even if the individual attorney from Firm X, who participated in the beauty contest with the Prospective Client, is prohibited from representing Company B in a substantially related matter, Firm X may still be able to represent Company B in that matter. Generally, a conflict which prohibits an individual attorney from representing a client will be imputed to other attorneys working at the law firm, creating a presumption of disqualification of every attorney at the firm. Thus, DR 5-105(D) provides that “[w]hile lawyers are associated in a law firm, none of them shall knowingly accept or continue employment when any one of them practicing alone would be prohibited from doing so....” Similarly, Model Rule
1.18 provides that “[i]f a lawyer is disqualified from representation ... no lawyer in a firm with which that lawyer is associated may knowingly undertake or continue representation in such a matter....”

But the presumption that the other attorneys at the law firm have knowledge of the disabling confidences or secrets can be rebutted under certain circumstances. See, e.g. Kassis v. Teacher’s Ins. and Annuity Ass’n 695 N.Y.S.2d 515, 518 (1999) (stating that an “imputed disqualification is not an irrebuttable presumption. A per se rule of disqualification ... is unnecessarily preclusive because it disqualifies all members of a law firm indiscriminately, whether or not they share knowledge of the former client’s confidences and secrets. [...] [B]ecause disqualification of a law firm during litigation may have significant adverse consequences to the client and others, it is particularly important that the Code of Professional Responsibility not be mechanically applied.”) (internal citations and quotation marks omitted); U.S. Football League v. Nat’l Football League, 605 F. Supp. 1448, 1466 (S.D.N.Y. 1985) (“The presumption of shared confidences is, however, rebuttable...").

We believe that, in this context, ethical screens are an appropriate means to rebut the presumption of shared confidences or secrets. To be sure, the Code specifically endorses the use of screens only in cases involving government attorneys and judges, see DR 9-101, but the Code’s failure to mention screens to rebut the presumption of shared confidences or secrets in the context of prospective clients is not dispositive. After all, as stated earlier, the Code does not address duties to prospective clients. In addition, the courts have found screens to be effective in the context of prospective clients. See, e.g., Cummin v. Cummin, 695 N.Y.S.2d 346 (App. Div. 1999); Interpetrol Berm., Ltd. v. Rosenwasser, 1988 U.S. Dist. LEXIS 14307 (S.D.N.Y. Dec. 19, 1988). The courts have also endorsed the efficacy of screens to rebut the presumption that confidences or secrets were or will be shared within the firm in other settings, see, e.g., Battagliola v. Nat’l Life Ins. Co., 2005 U.S. Dist. LEXIS 650 (S.D.N.Y. Jan. 19, 2005); In re Del-Val Fin. Corp. Sec. Litig., 158 F.R.D. 270 (S.D.N.Y. 1994); Papyrus Tech. Corp.

This result is supported by the relevant sections of the Model Rules and of the Restatement, with which we also otherwise agree. Model Rule 1.18 explicitly recognizes the use of screens to rebut the imputation of the conflict of interest in the case of a prospective client:

(d) [w]hen the lawyer has received disqualifying information ... representation is permissible if:

* * *

(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and

(i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and

(ii) written notice is promptly given to the prospective client.9

Moreover, the NYSBA Committee on Standards of Attorney Conduct, in its Proposed Rule 1.18, explicitly recognizes the efficacy of screens. See Proposed Rule 1.18 (d) (stating that the firm may still represent the client if the lawyer who received the disqualifying information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client and the disqualified lawyer “is timely screened from any participation in the matter....”).

**E. The Effective Screen**

In assessing whether a law firm has effectively screened a personally

9. Similarly, the Restatement in this context allows the firm to represent a client adversely to the former prospective client, if “(ii) any personally prohibited lawyer takes reasonable steps to avoid exposure to confidential information other than information appropriate to determine whether to represent the prospective client, and (ii) such lawyer is screened as stated in § 124(2)(b) and (c).” Restatement at § 15(2)(a)(i).
prohibited lawyer from the rest of the firm, thus enabling the firm to represent a client with materially adverse interests to the prospective client in a substantially related matter, courts evaluate a number of factors:

- First, consideration is given to the timeliness of the firm’s implementation of the screen. See In re Del-Val Fin. Corp. Sec. Litig., 158 F.R.D. 270, 274 (S.D.N.Y. 1994) (approving the use of screen to rebut the presumption that confidences were shared with other attorneys at the firm when firm instituted screen “as soon as [it] did discover the conflict”, despite the fact that the conflict had arisen two months earlier); Papyrus Tech. Corp. v. N.Y. Stock Exch., Inc., 325 F. Supp. 2d 270, 281 (S.D.N.Y. 2004) (presumption rebutted when firm “immediately established appropriate screening mechanisms” after it “received actual notice that ... confidences or secrets may have been disclosed...”); Mitchell v. Metro. Life Ins. Co., 2002 U.S. Dist. LEXIS 4675, at *29 (S.D.N.Y. Mar. 20, 2002) (presumption not rebutted when firm implemented screen almost two months after conflict arose and “well after the time the firm had actual notice of the conflict”).

- Second, a screen’s efficacy may depend on the size of the firm, as courts can be skeptical of a screen’s adequacy in small firms. See In re Del-Val Fin. Corp. Sec. Litig., 158 F.R.D. at 274 (screen approved for firm of over 400 attorneys); Papyrus Tech. Corp., 325 F. Supp. 2d at 280 n.10 (affirming use of screen in firm of 50 attorneys while stating that “there exists no per se rule that a small-firm (to the extent that ... a fifty-member patent firm qualifies as small) cannot erect an effective screen.”); Decora Inc. v. DW Wallcovering Inc., 899 F. Supp. 132 (S.D.N.Y. 1995) (not allowing screen in firm of 44 attorneys); Yaretsky v. Blum, 1981 U.S. Dist. LEXIS 12624, at *15 (S.D.N.Y. Apr. 15, 1981) (not allowing screen in firm of less than 30 attorneys); Crudele v. N.Y. City Police Dep’t, 2001 U.S. Dist. LEXIS 13779, at *13-14 (S.D.N.Y. Sept. 6, 2001) (declining to approve screen at 15-member law firm).

- Third, courts consider whether the personally prohibited lawyer works in proximity to the lawyers at the firm who will represent the client. See Battagliola v. Nat’l Life Ins. Co., 2005 U.S. Dist. LEXIS 650, at *46 (S.D.N.Y. Jan. 19, 2005) (screen allowed when personally prohibited lawyer worked at a different office (New Jersey) than the attorneys handling the client’s matter (New York)); Decora Inc., 899 F. Supp. at 140 (not allowing screen when personally prohibited lawyer worked in same department
as other attorneys representing client); Yaretsky, 1981 U.S. Dist. LEXIS 12624, at *15 (disallowing screen when personally prohibited lawyer worked in firm’s health law section, which was also the section of the firm charged with handling case for client).

· Fourth, courts accord weight to affidavits submitted by (1) the personally prohibited lawyer stating that the lawyer has not shared the confidences or secrets with others at the firm, and (2) the other lawyers at the firm confirming that they have not received those confidences or secrets. In re Del-Val Fin. Corp. Sec. Litig., 158 F.R.D. at 274; Papyrus Tech. Corp., 325 F. Supp. 2d at 281.

· Fifth, the effectiveness of a screen may be lessened if the personally prohibited lawyer works on other matters with the lawyers representing the client. Decora Inc., 899 F. Supp. at 140; Mitchell, 2002 U.S. Dist. LEXIS 4675, at *28.

· Last, the effectiveness of a screen may be questioned if the personally prohibited lawyer maintains files containing the confidences or secrets. See In re Del-Val Fin. Corp. Sec. Litig., 158 F.R.D. at 274.

CONCLUSION

To best position itself so as not to be precluded from representing a client with materially adverse interests in a matter substantially related to the subject of a beauty contest, a law firm should consider developing protocols for participating in these and similar preliminary meetings with prospective clients. Those protocols might include:

1. establishing a process whereby the risk of having any lawyer at the firm tainted is minimized, e.g.:
   a. by discussing with the prospective client the disqualification issues presented by participating in the meeting;
   b. by seeking an advance waiver from the prospective client; and
   c. by not obtaining confidences or secrets from the prospective client during the meeting.

2. having a written formal screening process in place that will effectively and immediately seal off the firm’s personally prohibited lawyer (assuming a taint exists) from the other lawyers at the firm.

April 2006
The Committee on Professional and Judicial Ethics

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