

COMMENT

PROTECTING NATIONAL FLAGS: MUST THE UNITED STATES PROTECT CORRESPONDING FOREIGN DIGNITY INTERESTS?

INTRODUCTION

On a summer day in 1984, Gregory Lee Johnson found his fifteen minutes of fame. He burned an American flag outside the Republican National Convention in Dallas and was convicted of violating a Texas statute that penalizes flag desecration.¹ His conviction was eventually appealed to the United States Supreme Court.² The resulting June 21, 1989 decision, holding that his conviction was unconstitutional, has been derided in the legal³ and popular⁴ press.

Mr. Johnson would not have been prosecuted had he burned a foreign flag instead of the American flag, because no federal or state statute prohibits the desecration of a foreign flag.⁵ He would not have been prosecuted under any legal theory, as shown by the

1. TEX. PENAL CODE ANN. § 42.09 (Vernon 1989) provides in full:
Section 42.09 Desecration of Venerated Object

(a) A person commits an offense if he intentionally or knowingly desecrates:

- (1) a public monument;
- (2) a place of worship or burial, or
- (3) a state or national flag.

(b) For purposes of this section, 'desecrate' means deface, damage, or otherwise physically mistreat in a way that the actor knows will seriously offend one or more persons likely to observe or discover his action.

(c) An offense in this section is a Class A misdemeanor.

Subdivision (a)(3) was deleted by the 71st Legislature in 1989. The 71st Legislature added subdivision (d) which provides: "An offense under this section is a felony of the third degree if a place of worship or burial is desecrated." (Vernon 1990).

2. *Texas v. Johnson*, ____ U.S. ____, 109 S. Ct. 2533 (1989).

3. See, e.g., James, *Term's Decisions on Expression Confound Many*, THE NAT'L L.J., Aug. 21, 1989, at S6.

4. See, e.g., Trippett, *A Few Symbol-Minded Questions*, TIME, Aug. 28, 1989, at 72; Editors, *The Banner Yet Waves* READER'S DIGEST, Sept. 1989, at 49-50.

5. See *infra* notes 122-31 and accompanying text.

Texas Court of Criminal Appeal decision in *Johnson v. State*,⁶ reversing his conviction. A footnote⁷ states that demonstrators burned an unidentified foreign flag the same day Mr. Johnson was arrested. No one was arrested over that incident, even though “[t]his act led to a physical brawl”⁸ and Texas has a statute penalizing breaches of the peace.⁹

These facts emphasize that, like defilement of the American flag, acts of defilement toward foreign flags are constitutionally protected. This proposition is grounded in the Texas court’s rationale concerning respect for American flags:

Recognizing that the right to differ is the centerpiece of our First Amendment freedoms, a government cannot mandate by fiat a feeling of unity in its citizens. Therefore, that very same government cannot carve out a symbol of unity and prescribe a set of approved messages to be associated with that symbol when it cannot mandate the status or feeling the symbol purports to represent.¹⁰

This same proposition is found in the Supreme Court’s position that the first amendment protects expressive conduct involving American flags.¹¹ The Supreme Court’s position, combined with the virtual absence of legislative protection of foreign flags, establishes that persons who defile foreign flags in the United States should likewise not be penalized.

However, not all members of the world community endorse that result. Indeed, many states in Europe, Latin America and the Pacific Rim have enacted statutes penalizing acts of disrespect toward foreign flags.¹² These statutes point to another proposition—that national governments have a legal obligation¹³ to prevent insults to foreign national dignities, which represent those states’ sovereignty and legal personality.¹⁴

6. *Johnson v. State*, 755 S.W.2d 92 (Tex. Ct. App. 1988).

7. *Id.* at 94 n.3.

8. *Id.*

9. TEX. PENAL CODE ANN. § 42.01 (Vernon 1989).

10. *Johnson v. State*, *supra* note 6, at 97.

11. *Texas v. Johnson*, *supra* note 2, 109 S. Ct. at 2539, *citing e.g.*, *Spence v. Washington*, 418 U.S. 405 (1974); *Smith v. Goguen*, 415 U.S. 566 (1974); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Stromberg v. California*, 283 U.S. 359 (1931).

12. *See infra* notes 67-76 and accompanying text.

13. An “obligation” is “that which a person is bound to do or forbear.” BLACK’S LAW DICTIONARY 968 (5th ed. 1979).

14. A dignity interest arises only when a population entity achieves statehood. *See* RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES § 201 (1987) [hereinafter RESTATEMENT]. Professors Lauterpacht and Guggenheim write that states have a legal duty to recognize entities possessing the characteristics of statehood. I. BROWNLIE,

This Comment examines the tension between these propositions. Advocates of a legal obligation preventing foreign dignity insults argue that disrespect to a foreign flag is also disrespect to the state it represents. This argument is timely¹⁵ and reasonable.¹⁶ States that take offense when their flag is insulted in other states may elect to curtail or terminate diplomatic relations, resulting in a general breakdown of peace and security among peoples.¹⁷ This scenario is antithetical to the United Nations Charter's purposes and principles.¹⁸

Meanwhile, advocates of the first amendment-based proposition argue that punishing acts that defile foreign flags conflicts with constitutional privilege. They contend that the first amendment protects most expressive conduct, despite dicta upholding dignity interests¹⁹ and a broadly-worded legal obligation that recognizes the sovereignty and equality of states.²⁰ Therefore, American jurisprudence recognizes, at best, a moral but not a legal obligation to protect national dignities through flag respect.

This Comment begins by establishing an international legal obli-

PRINCIPLES OF PUBLIC INTERNATIONAL LAW 94 (3d ed. 1985) [hereinafter BROWNLIE]. However, this legal duty does not require the political (and hence discretionary) act of establishing diplomatic ties with that state's government, with all the concomitant issues that act entails. See *Memorandum on Legal Aspects of Representation in the United Nations*, U.N. Doc. S/1466 (1950).

15. The media in November 1989 showed Iranian women casting American flags to the ground to mark the tenth anniversary of seizing the U.S. embassy in Tehran. See, e.g., Lacayo, *A Game of Winks and Nods*, TIME, Nov. 20, 1989, at 65.

16. International incidents involving disrespect to foreign flags are numerous throughout history. D. MANWARING, *RENDER UNTO CAESAR: THE FLAG SALUTE CONTROVERSY 2* (1968).

17. See, e.g., Vienna Convention on Diplomatic Relations, preamble, *opened for signature* Apr. 18, 1961, 500 U.N.T.S. 95, [hereinafter Vienna Convention]. The United States signed and ratified the Vienna Convention in 1972 (23 U.S.T. 3227, T.I.A.S. No. 7502).

18. U.N. CHARTER, art. 1 provides:

The purposes of the United Nations are: to maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace.

19. "The law of nations requires every national government to use 'due diligence' to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof." *United States v. Arjona*, 120 U.S. 479, 484 (1886). "International law is part of our law." *The Paquete Habana*, 175 U.S. 677, 700 (1899). See also Address by Deputy Secretary of State Warren Christopher, *Normalization of Diplomatic Relations*, at Occidental College (June 11, 1977) reprinted in L. HENKIN, R.C. PUGH, O. SCHACHTER & H. SMIT, *INTERNATIONAL LAW: CASES AND MATERIALS* 243-44 (2d ed. 1987) [hereinafter *CASES AND MATERIALS*].

20. U.N. CHARTER, art. 2, para. 2 provides: "To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace."

gation preventing national insults through flag defilement. The next section analyzes the United States' practice regarding protection of foreign flags. The Comment concludes that the United States is legally compelled to incorporate the international obligation into its domestic law, while accommodating the constitutional safeguards of the first amendment.

I. THE INTERNATIONAL OBLIGATION NOT TO INSULT FOREIGN FLAGS AND DIGNITIES

A. Introduction

Before the United States will enforce an international obligation, it must first determine that the obligation exists in international law. Any discussion of international legal materials must start by identifying the sources of international law. The International Court of Justice, the judicial organ of the United Nations,²¹ has codified the traditional sources as: (a) conventions, (b) international custom, (c) general principles and (d) "subsidiary means" of judicial decisions and the writings of internationally-recognized authors.²² Other sources may augment this list,²³ but they have never gained the same degree of universal acceptance as the list codified by the Court.²⁴

21. U.N. CHARTER, art. 92 provides: "The International Court of Justice shall be the principal judicial organ of the United Nations. It shall function in accordance with the annexed Statute, which is based upon the Statute of the Permanent Court of International Justice and forms an integral part of the present Charter."

The Permanent Court of International Justice (P.C.I.J.) was created by the League of Nations in 1922. It dealt with 29 contentious cases and delivered 27 advisory opinions until World War II caused it to remove to Geneva. The San Francisco Conference of 1946 replaced the P.C.I.J. with the I.C.J. as the principal judicial organ of the newly-Constituted United Nations. THE INTERNATIONAL COURT OF JUSTICE 14-18 (3d ed. 1986).

22. Statute of the International Court of Justice, art. 38, para. 1 [hereinafter Statute of the I.C.J.] provides in full:

The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting States;

(b) international custom, as evidence of a general practice accepted as law;

(c) the general principles of law recognized by civilized nations;

(d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

23. For a criticism of why the activities of international organizations, the doctrine of *ius cogens*, or statements appealing to justice or natural law are unlikely valid sources today, see M. AKEHURST, A MODERN INTRODUCTION TO INTERNATIONAL LAW 38-39 (6th ed. 1987) [hereinafter AKEHURST].

24. *Id.* at 23. See also Schachter, *International Law in Theory and Practice*, 178 REC. DES COURS 60-61 (1982-V) [hereinafter Schachter].

Some sources of international law are more legally significant than others. For example, conventions (or treaties)²⁵ are accorded more weight than custom (the individual practice by states of what they understand as legal obligations) when they control particular issues or declare that they codify existing custom.²⁶ When conventions come into force, they can also override or disregard existing customs²⁷ that are either ambiguous or not clearly analogous to the issue.²⁸ However, emerging customs²⁹ can replace outdated conventions as evidence of international law addressing new issues.³⁰ Therefore, when they cannot be reconciled, the latter in time is generally treated as the controlling source of law.

When conventions and custom conflict and neither one disposes of an issue, another source of international law which may be considered is general principles.³¹ General principles are legal analogies and conclusions drawn from existing conventions and custom.³² One of their main purposes is to fill gaps left by conventions and

25. Conventions include "law making" treaties, bilateral agreements, and conclusions of international conferences. See BROWNLIE, *supra* note 14, at 12-15.

26. Codification is "the more precise formulation and systematization of rules of international law where there already has been extensive state practice, precedent and doctrine." Schachter, *supra* note 24, at 91-95. Where existing custom is codified under treaty, those states that conclude the treaty are bound by the underlying custom. BROWNLIE, *supra* note 14, at 12-13. For a differing opinion on codification, see R. Baxter, *Treaties and Custom*, 129 REC. DES COURS 25, 99-101 (1970-1) [hereinafter Baxter].

27. Custom is a "general recognition among states of a certain practice as obligatory." BROWNLIE, *supra* note 14, at 5. As noted in the Statute of the I.C.J., *supra* note 22, custom is a recognized source of international law. It is usually found in official government pronouncements, statutes and case law, all of which demonstrate what that State understands to be its international legal obligations. See AKEHURST, *supra* note 23, at 25-34.

28. See, e.g., Case Concerning Right of Passage over Indian Territory (Port. v. India), 1960 I.C.J. 6 (Merits); G. TUNKIN, *THEORY OF INTERNATIONAL LAW* 133-36 (Butler trans. 1974); Baxter, *supra* note 26.

29. An example of a new custom since the 1950s covers the exploration of outer space. When a conflict arises over an alleged regional custom, evidence must establish that the custom binds all states involved in the conflict. See, e.g., Asylum Case (Colom. v. Peru), 1950 I.C.J. 266, 276 (Judgment of Nov. 20).

30. "Desuetude" describes a treaty which has been discontinued or terminated by implication. See BROWNLIE, *supra* note 14, at 614-15; see also AKEHURST, *supra* note 23, at 40.

31. The International Court of Justice and its predecessor, the Permanent Court of International Justice, have evoked general principles of international law to extrapolate general practices in the world community. General principles are more prevalent and more readily accepted in common law states than in civil law states. See AKEHURST, *supra* note 23, at 35-36.

32. See Virally, *The Sources of International Law*, *MANUAL OF PUBLIC INTERNATIONAL LAW* 143-48 (Sorensen ed. 1968). But Schachter cautions theorists from inferring a general principle too readily from domestic law, because the principle must apply on the international level and not merely to a handful of states. See Schachter, *supra* note 24, at 78-80, and BROWNLIE, *supra* note 14, at 16, 19.

custom.³³

As “subsidiary means,”³⁴ one may refer to judicial decisions³⁵ and to the writings of international lawyers. There is little difference in scholarly value between judicial and arbitral decisions³⁶ and both can be evidence of international custom.³⁷ International lawyers provide concise summaries of custom.³⁸ Such writers are commonly consulted by the International Court, as well as by domestic courts that are unfamiliar with technical points of international law.³⁹

B. *Examining The Sources to Find The International Obligation*

I. *Conventions*

The United States has concluded many bilateral and multilateral conventions throughout its history.⁴⁰ Some of the conventions arguably create a “principal obligation”⁴¹ for the United States to prohibit its citizens from insulting foreign states through their flags.

This principal obligation is referenced in the United Nations Charter, which created an “Organization based on the principle of the sovereign equality of all its Members.”⁴² The doctrine of sovereign equality of states is the cornerstone of international law.⁴³ Thus, the principal obligation arising from the United Nations Charter is that Members are required to respect the sovereignty of all other Members. A corollary of that obligation is that no Mem-

33. See AKEHURST, *supra* note 23, at 40.

34. Statute of the I.C.J., *supra* note 22, art. 38 para. 1(d).

35. The International Court of Justice is not bound by stare decisis. *Id.* art. 59. However, prior decisions are respected and their rationales may be incorporated into subsequent decisions. See CASES AND MATERIALS, *supra* note 19, at 107-09.

36. See 2 S. ROSENNE, THE LAW AND PRACTICE OF THE INTERNATIONAL COURT 614 (1965); CASES AND MATERIALS, *supra* note 19, at 110; AKEHURST, *supra* note 23, at 244-45.

37. See AKEHURST, *supra* note 23, at 26.

38. Examples of “the most highly qualified publicists” include treatise authors, reports and memoranda from the International Law Commission, and Harvard Research drafts.

39. See, e.g., M. Lachs, *Teachings and Teaching of International Law*, 151 REC. DES COURS 163-252 (1976-III).

40. Conventions are incorporated into our domestic law under the Supremacy Clause, provided that they are ratified by Congress. U.S. CONST. art. VI, cl. 2. A treaty is considered a contractual relation with the other signing state(s). However, only self-executing treaties can supersede inconsistent local laws or create private rights. See *Sei Fujii v. State of California*, 38 Cal. 2d 718, 721, 242 P.2d 617 (1952); *Dreyfus v. von Finck*, 534 F.2d 24, 29-30 (2d Cir. 1976) *cert. denied* 429 U.S. 835 (1976).

41. “A principal obligation is one which arises from the principal object of the engagement of the contracting parties.” BLACK’S LAW DICTIONARY, *supra* note 13, at 970.

42. U.N. CHARTER, art. 2, para. 1.

43. BROWNLIE, *supra* note 14, at 287.

ber may denigrate the sovereign status of another Member,⁴⁴ which includes insulting the national flag that represents that Member. In all these situations, the exercise of international relations is conditioned by law.⁴⁵

Specific references to the relation between national flags and representative sovereignty are found in the Vienna Convention on Diplomatic Relations,⁴⁶ signed and ratified by the United States, which codifies the 1961 United Nations Conference on Diplomatic Intercourse and Immunities.⁴⁷ Article 20 of the Vienna Convention grants a diplomatic mission the right to exhibit its national flag on the mission premises and on the head of mission's transport.⁴⁸ Article 22, paragraph 1 ensures the inviolability of the mission. Article 22, paragraph 2 obliges the receiving State to prevent impairment of the mission's dignity: "The receiving State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity."⁴⁹ These provisions were designed to foster "the sovereign equality of states, the maintenance of international peace and security, and the promotion of friendly relations among nations."⁵⁰

Thus, the United States has a principal obligation under both the United Nations Charter and the Vienna Convention to conduct its foreign relations so as to promote the sovereign equality of other parties to these conventions. Because most states are parties to at least the United Nations Charter,⁵¹ the United States has a principal obligation to respect the sovereign equality, and hence the flag, of virtually every state on earth.

These principal obligations toward flags are not mere precatory language. The United States, although not a party to the Vienna Convention on the Law of Treaties,⁵² has submitted through the

44. See, e.g., *The Corfu Channel Case (U.K. v. Alb.)*, 1949 I.C.J. 4, 35 (Merits).

45. BROWNIE, *supra* note 14, at 288.

46. See Vienna Convention, *supra* note 17.

47. United Nations Conference on Diplomatic Intercourse and Immunities, Official Records 1961 (A/CONF. 20/14 & Add. 1).

48. See also Report of the International Law Commission to the General Assembly (10th Sess., Apr. 28 - July 4, 1958), reprinted in [1958] 2 Y.B. INT'L L. COMM'N 78, 94 U.N. Doc. A/3859, A/CN.4/SER. A/1958/Add.1.

49. Vienna Convention, *supra* note 17, art. 22, para. 2.

50. *Id.* preamble.

51. The United Nations had 159 members as of mid-1986. CASES AND MATERIALS, *supra* note 19, at 340.

52. Vienna Convention on the Law of Treaties, *opened for signature*, May 23, 1969, U.N. Doc. A/CONF. 39-27 [hereinafter "Law of Treaties"]. For preparatory materials, see Report of the International Law Commission to the General Assembly (18th Sess., May 4 -

State Department that the convention “is already recognized as the authoritative guide to current treaty law and practice.”⁵³ This Convention recognizes that the doctrine of *pacta sunt servanda* (agreements and stipulations of the parties to a contract must be observed)⁵⁴ is universally recognized.⁵⁵ The doctrine of *pacta sunt servanda* is recognized expressly in Article 26 of the Law of Treaties: “[E]very treaty in force is binding upon the parties to it and must be performed by them in good faith.”⁵⁶

2. International Custom

Customary international law is found primarily in individual state practice.⁵⁷ State practice, as deduced from government pronouncements, statutes and judicial decisions, indicates what those states understand to be their customary (and hence legal) obligations under international law.

The International Court of Justice has said that custom depends on “a constant and uniform usage”⁵⁸ and that state practices should be as consistent as possible to constitute adequate evidence of that custom. Major inconsistencies in state practices are evidence that a dispositive customary rule probably does not exist.

Custom should not be confused with usage. Usage is also a general practice of states, but it consists mostly of diplomatic protocol arising from motives of courtesy, fairness, or morality. Unlike custom, usage does not create a legal obligation under international law.⁵⁹ Nor is custom based only on the doctrine of *opinio iuris*.⁶⁰ Critically, custom is based on what states say the law is, not what

July 19, 1966), U.N. Doc. A/6309/Rev. 1, reprinted in [1966] 2 Y.B. INT'L L. COMM'N 173-274, 279-361, U.N. Doc. A/CN. 4/SER.A/1966; see also United Nations Conference on the Law of Treaties, First Session, Official Records, A/CONF. 39/11; Second Session, A/CONF. 39/11 Add.1.

53. S. Exec. Doc. L. 92d Congress, 1st Sess. 1 (1971).

54. BLACK'S LAW DICTIONARY, *supra* note 13, at 999; BROWNLIE, *supra* note 14, at 613.

55. Law of Treaties, *supra* note 52, preamble.

56. *Id.* art. 26.

57. See *supra* note 27 and accompanying text.

58. The Asylum Case, *supra* note 29, at 276-77.

59. A moral obligation binds in conscience but is not enforceable at law. See BROWNLIE, *supra* note 14, at 5, 8.

60. *Opinio iuris sive necessitatis* (“*opinio iuris*”) is a state's belief that it has a legal duty to act a certain way, premised on an existing rule of international law. This is a subjective, not an objective, requirement. The International Court requires two conditions to establish *opinio iuris*: (1) the act must amount to a settled practice, and (2) the act must evidence a belief that the act is obligatory under an existing rule. See, e.g., North Sea Continental Shelf Cases (W. Ger. v. Den.) (W. Ger. v. Neth.), 1969 I.C.J. 4, 45 (Judgment of Feb. 20).

they believe the law to be.⁶¹

Consequently, a custom emerges when some states assert its existence and other states do not deny its existence.⁶² The key to avoid being bound by a customary rule is for a state to expressly declare its opposition to the custom, or to act in a way that conflicts with the custom. Those states that do not either make an express declaration or act contrary to the custom are presumptively bound even if they did not join in creating the custom.⁶³

An early example of state practice addressing foreign dignity interests comes from Great Britain. In the eighteenth century, Westminster forbade British subjects to enlist in foreign armies or assist rebellions against foreign princes.⁶⁴ The official view was that involvement by individual persons constituted insults to foreign princes, which would then be imputed to Westminster and the only recourse was war.⁶⁵

Westminster's anticipation of international incidents has more recently led other states to enact criminal statutes against any person under their jurisdiction—whether a citizen or an alien—who insults a foreign flag posted within their territory. The legal obligation behind these statutes lies in their promulgation and not necessarily in their enforcement. Although enforcement shows consistency within domestic law, evidence of judicial decisions is only a “subsidiary means” to ascertain international law, assuming no evi-

61. Ordinarily, states are bound when they freely conclude conventions or accept usages that express general principles of law. *See, e.g.*, The Lotus Case (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18. This so-called “consensual theory” of international law helps to explain divergent practices among different states. Otherwise, principles and custom form: (1) legally enforceable obligations when states are convinced that certain conduct is a duty (i.e. *opinio iuris*); or (2) merely permissive rules in the absence of protest by other states. The subjective intent is not important here; what is critical in determining a legal obligation is what the state represents as its understanding of the obligation. *See, e.g.*, AKEHURST, *supra* note 23, at 29-33.

62. *See* AKEHURST, *supra* note 23, at 30. Mere uniformity does not establish the existence of custom. De Visscher, a former President of the International Court, has written: “Governments attach importance to distinguishing between custom by which they hold themselves bound and the mere practices often dictated by considerations of expediency and therefore devoid of definite legal meaning. . . . The inductive reasoning that establishes the existence of custom is a tied reasoning: the matter is not only one of counting the observed regularities but of weighing them in terms of social ends deemed desirable.” C. DE VISSCHER, *THEORY AND REALITY IN PUBLIC INTERNATIONAL LAW* 156-57 (Corbett trans. 1968).

63. Waldock, *General Course on Public International Law*, 106 REC. DES COURS I, 49-53 (1962-II).

64. Lauterpacht, *Revolutionary Activities by Private Persons Against Foreign States*, 22 AM J. INT'L L. 105, 111 (1928) [hereinafter *Revolutionary Activities*].

65. 4 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 67-78 (1783 ed. 1978).

dence of custom is established.⁶⁶

Europe is one region that has promulgated many statutes criminalizing disrespect to foreign flags. For example, the Federal Republic of Germany punishes an insulting act toward a foreign flag posted at a recognized diplomatic mission, with two years imprisonment or a fine.⁶⁷ Other states enact more expansive statutes. Finland does not require that the flag or symbol be posted in a specified place,⁶⁸ while Norway does not distinguish between the flags of friendly or hostile states.⁶⁹

Evidence of similar state practice is also found in the Warsaw Pact. Poland has shown no recent efforts to change its two distinct and separate anti-flag defilement statutes,⁷⁰ which are similar to those statutes promulgated in Western Europe.

Other European statutes incorporate a requirement that diplomatic notes must be exchanged between the aggrieved state and the

66. BROWNIE, *supra* note 14, at 20.

67. Federal Republic of Germany Penal Code § 104 provides in full: "(1) Whoever removes, destroys, damages, or renders unrecognizable or commits an insulting act with respect to the flag of a foreign state, publicly displayed according to law or recognized usage, or to a symbol of sovereignty of such a state, publicly installed by a recognized mission of this state, shall be punished by up to two years' imprisonment or by fine. (2) The attempt is punishable." THE PENAL CODE OF THE FEDERAL REPUBLIC OF GERMANY, § 104, at 125 (J. Darby trans. 1987).

Section 104 differs from Section 483 of the Draft Penal Code in that Section 483, paragraph 1 also proposed to punish insults to flags of international organizations. This proposal was dropped when Section 104 was enacted. See THE GERMAN DRAFT PENAL CODE E. 1962, § 483 ¶ 1, at 252 (N. Ross trans. 1966).

68. Finnish Penal Code ch. 14 § 4 provides in full: "If someone defaces the state seal or other symbol of power of a friendly state set in a public place, he shall be sentenced to imprisonment for at most three months." THE PENAL CODE OF FINLAND, ch. 14, § 4, at 51 (M. Joutsen trans. 1987).

69. Norwegian Penal Code § 95 provides in full: "Anybody who, in this country, publicly insults the flag or national symbol of a foreign state, or is accessory thereto, shall be punished by fine, or jailing or imprisonment up to one year." THE NORWEGIAN PENAL CODE § 95, at 50 (H. Schjoldager trans. 1961).

70. The Polish Penal Code art. 284, § 1 provides in full: "Whoever insults, damages or removes a publicly displayed emblem, banner, standard, flag, ensign or other symbol of the Polish State or of an allied State or the symbol of the International Workers Movement, shall be subject to the penalty of deprivation of liberty for up to three years."

Polish Penal Code art. 285 provides in full: "Whoever on the territory of the Polish People's Republic, insults, damages or removes an emblem, a standard, a flag or an ensign of a foreign State, publicly displayed either by its representation or by order of a Polish State organ, shall be subject to the penalty of deprivation of liberty for up to two years, limitation of liberty or a fine."

THE PENAL CODE OF THE POLISH PEOPLE'S REPUBLIC art. 284, § 1 & art. 285, at 112 (W.S. Kenny & T. Sadowski trans. 1973).

offending state before prosecution ensues.⁷¹ Still other statutes incorporate a guarantee of reciprocity from the aggrieved state.⁷² Finally, other states incorporate treaty provisions into their statutes.⁷³

If found only in Europe, these statutes would be evidence of only a regional custom at best. In that case, the custom could not bind states outside Europe.⁷⁴ However, the custom of protecting foreign flags from insult has been codified throughout the world. Similar statutes are found in Latin America⁷⁵ and the Pacific Rim.⁷⁶

Despite individual differences, these world-wide statutes are evidence that a comprehensive international custom exists concerning respect for foreign flags. As the developing states in Africa, Asia and the Pacific assert themselves more forcefully into the international arena, this custom may become more susceptible to change and variance. As these changes occur, the test of consistency⁷⁷ will become more critical. However, in the absence of official declarations or conduct to the contrary, the current custom continues in force.

71. Turkish Penal Code § 165 provides in full: "Whoever, with the purpose of insulting, removes, tears, or damages or otherwise humiliates, an officially masted flag or emblem of a foreign country, shall be punished by imprisonment for three months to one year. Institution of a prosecution is subject to the application of the government concerned." THE TURKISH CRIMINAL CODE § 165, at 67 (N. Gurelli trans. 1976).

72. Italian Penal Code art. 299 provides in full: "Whoever in the territory of the State vilifies, in a public place or place open or exposed to the public, the official flag or another emblem of a foreign State, in use in conformity with the domestic law of the Italian State, shall be punished by imprisonment for from six months to three years." ITALIAN PENAL CODE § 300 provides in pertinent part: "The provisions of Articles . . . 299 shall apply only insofar as the foreign law reciprocally guarantees equivalent penal protection to the Head of the Italian State or the Italian flag. . . ." THE ITALIAN PENAL CODE arts. 299-300, at 108 (E.M. Wise trans. 1978).

The Greek penal code likewise requires a reciprocal guarantee. See THE GREEK PENAL CODE art. 155, at 98 (N.B. Lolis trans. 1973).

73. Austrian Penal Code § 66 provides in full: "He who undertakes one of these acts against a[nother] foreign state or its head becomes guilty of the same felony and shall be punished in the same manner, insofar as reciprocity is either guaranteed by the laws of that state or by specific treaties implemented by statute in the Austrian Republic." THE AUSTRIAN PENAL ACT § 66, at 43-44 (N.D. West & S.I. Shuman trans. 1966).

74. See BROWNLIE, *supra* note 14, at 10.

75. See, e.g., Colombian Penal Code §§ 126, 128 & 132, reprinted in THE COLOMBIAN PENAL CODE, § 126, at 47, § 128, at 48, § 132, at 48-49 (P. Eder trans. 1967).

76. See, e.g., Korean Criminal Code arts. 109 & 110, reprinted in THE KOREAN CRIMINAL CODE arts. 109-10, at 65 (P. Ryu trans. 1960); see also Japanese Criminal Code art. 92, reprinted in THE CRIMINAL CODE OF JAPAN art. 92, at 33 (J.E. de Becker trans. 1918); Filipino Criminal Code art. 118, example 2, reprinted in 2 L.B. Reyes, THE REVISED PENAL CODE art. 118, at 26-27 (12th ed. rev. 1981). The People's Republic of China enacted a new penal code in 1980. It emphasizes economic rights and little or no civil or political rights. Hence it does not address the issue of flag desecration. THE CRIMINAL CODE OF THE PEOPLE'S REPUBLIC OF CHINA (C. Kim trans. 1985).

77. See *supra* note 58 and accompanying text.

3. *General Principles of International Law*

As stated above,⁷⁸ general principles of international law are analogized from conventions and custom when those sources do not control an issue. Even though this Comment has established a legal obligation from conventions and custom, general principles are useful because they lead to two conclusions about foreign flags.

First, states are legally obliged by conventions and custom to respect other states' sovereign equality. A corollary is the right to have one's national dignity protected from foreign insults. Second, national sovereignty and dignity are represented by flags and other symbols of national identity. Insults to these symbols are insults to the states they represent.

These two principles further establish the legal obligation at international law for states to penalize domestic acts of flag defilement that cause disruption of diplomatic relations, which can lead to breaches of international peace and security.

4. *Writings of the Most Highly Qualified Publicists*

Two subsidiary means of international law are judicial decisions and internationally-recognized writings of "publicists."⁷⁹ Because pertinent opinions by the Permanent Court of Justice and the International Court of Justice have been cited throughout the footnotes of this Comment, the works of international writers deserve separate attention here.

Hersch Lauterpacht, an eminent author and editor of international works, is not convinced that there is sufficient evidence of a custom protecting foreign dignities.⁸⁰ He thinks that the responsibility to avoid denigrating foreign sovereignty is a mixture of comity and "purely political factors."⁸¹ This sense of exigency depends on whether an insulted foreign government elects to use retorsions or reprisals⁸² against a state that allows acts of flag defilement to go unpunished.

Lauterpacht's view goes directly to the type of obligation involved. If dignity interests are governed by usage, then according to

78. See *supra* notes 31-33 and accompanying text.

79. Statute of the I.C.J., *supra* note 22, art. 38, para. 1(d).

80. *Revolutionary Activities*, *supra* note 64, at 107.

81. *Id.*

82. Retorsions and reprisals are forms of self-help to defend against non-military aggression. See, e.g., O.Y. ELAGAB, *THE LEGALITY OF NON-FORCIBLE COUNTER MEASURES IN INTERNATIONAL LAW* (1988); Schachter, *supra* note 24, at 168.

Lauterpacht, states have only a moral obligation to prohibit these acts. In other words, states should not be held accountable to enforce legal standards if they refuse to, or are unable to, prohibit such acts.

Lauterpacht's colleague and mentor, Louis Oppenheim,⁸³ believes that basing state practice of respecting foreign dignities on usage instead of custom is dispositive that a legal obligation does not exist. Oppenheim gives the example of traditional maritime rituals honoring flags of foreign vessels to suggest that state practice regarding foreign flags is grounded in usage or comity, not legal obligation.⁸⁴ Other writers do not share Lauterpacht's and Oppenheim's views on exigency and politics. For example, the United States Supreme Court has said in dicta⁸⁵ that international relations do not subsist as the arbitrary device of one or two states without regard for other states. Also, two British scholars have shown through their research that Lauterpacht's position is not wholly sound. Ian Brownlie⁸⁶ argues that international law represents the ongoing practice of a given number of states. Michael Akehurst⁸⁷ likewise contends that when states consent to bind themselves by a convention, they are clearly bound by the custom underlying the convention if it declares it is codifying custom, as in the case of the Vienna Convention.⁸⁸

Furthermore, Oppenheim's example of maritime ceremonials may be inappropriate in light of comments by Professor Ellery Stowell, a contemporary of Lauterpacht and Oppenheim, who wrote extensively on the issue of foreign dignities throughout the 1930s:

By the display of the same ceremonial respect to the flag of the smallest state as that which is accorded to the mightiest empire, the equality of the states is proclaimed in the sense that each one of them is recognized as an independent and sovereign member of international society.

'To deny ceremonial equality' is to put a state beyond the pale of

83. See 7 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 154-55 (1970) [hereinafter WHITEMAN].

84. One such ritual is a courtesy gun salute bestowed by one state's warships upon another state's warships entering the first state's harbor on an official visit. See 1 L. OPPENHEIM, *INTERNATIONAL LAW* 285 (H. Lauterpacht ed. 7th ed. 1974) [hereinafter OPPENHEIM].

85. *The Scotia*, 81 U.S. (14 Wall.) 170, 187 (1871).

86. BROWNLIE, *supra* note 14, at 8.

87. AKEHURST, *supra* note 23, at 26. See also *supra* note 61 and accompanying text.

88. Vienna Convention, *supra* note 17, preamble.

international intercourse. It is tantamount to a decree of excommunication. No wonder then that it is regarded as an act of justifying war. . . . *The requirement that the national flag and emblems be treated with the utmost respect is one of the few ceremonial requirements which has survived, superseding many of the former intricate observances.*⁸⁹

Stowell notes elsewhere that “a generally recognized principle of international law [is] that the flag and sovereign of a foreign state should not be insulted or treated with disrespect.”⁹⁰ Stowell also believes that this principle is linked with custom to create an unavoidable legal obligation.⁹¹

Lauterpacht would likely respond by arguing that “respect” for a foreign flag encompasses a wide range of meanings.⁹² These meanings range from non-interference and neutrality in foreign affairs, to a positive duty to protect another state’s dignity interests, rendering the international standard both vague and ambiguous.

Yet even Lauterpacht recognizes an exception to his own rule that there is no legal obligation to respect foreign dignities. He writes that a government may suppress a person’s acts if those acts threaten to disturb that state’s relations with another state.⁹³ In the case of another state taking offense and imputing responsibility to the government, Lauterpacht’s exception consumes his rule.

On another point, an American think tank named Procedural Aspects of International Law (“PAIL”) argues that research of foreign state practices has no relevance for American foreign policy.⁹⁴ A conference sponsored by PAIL in 1983 concluded that it is futile to study practices of states that do not provide the same constitutional safeguards found in the U.S. Constitution.⁹⁵ The argument is that other states can enact statutes curtailing expressive conduct because they are not restricted by constitutional jurisprudence similar to ours.

The PAIL argument coincides with a theory belonging to Professor Lawrence Preuss.⁹⁶ Preuss surveyed individual state practices

89. E.C. STOWELL, *INTERNATIONAL LAW* 79-80 (1931) (emphasis added).

90. Stowell, *Courtesy to our Neighbors*, 36 AM. J. INT’L L. 99, 101 (1942).

91. Stowell, *Picketing of Diplomatic and Consular Premises*, 32 AM. J. INT’L L. 344-46 (1938) [hereinafter *Picketing*].

92. *Revolutionary Activities*, *supra* note 64, at 106.

93. Lauterpacht, *Boycott in International Relations*, 1933 BRIT. Y.B. INT’L L. 125, 128.

94. See Lillich & Hannum, *Linkages Between International Human Rights and United States Constitutional Law*, 79 AM. J. INT’L L. 158-59 (1985).

95. *Id.*

96. Preuss, *International Responsibility for Hostile Propaganda Against Foreign*

concerning international relations, and concluded that weaker states enact statutes favoring foreign dignities because they fear retribution from stronger neighbors.⁹⁷ Preuss found in his survey no indication that these states believed there was an enforceable legal obligation.⁹⁸

Preuss neglects to consider two realities of international practice. First, relations between states are based on their common consent as sovereign and equal entities.⁹⁹ Second, many former rules of comity have evolved into rules of customary law,¹⁰⁰ and protection of foreign flags is now one of those rules of customary law.

The inconsistent positions raised by these esteemed writers illustrate why their works are categorized as only subsidiary sources of law. Lauterpacht stresses that courts have sufficient reason to avoid relying on them:

There is no doubt that the availability of official records of the practices of states and of collections of treaties has substantially reduced the necessity for recourse to writings of publicists as evidence of custom. Moreover, the divergence of views among writers on many subjects as well as apparent national bias may often render citations to them unhelpful.¹⁰¹

C. Summary

The principal obligation to respect the sovereign equality of states, represented by national flags, is derived from conventions which specifically protect foreign dignities. States entering into such conventions have a good faith legal obligation to prevent desecration of these flags.

Individual state statutes show a broad-based custom that respect for foreign sovereignty is tied directly to respect for foreign flags. The fact that states enact these statutes indicates that states understand they have a legal obligation to prevent incidents attributable to themselves.

The difficulty of analogizing clearcut principles and reaching a consensus among publicists shows that this issue is controversial. Nevertheless, examination of international sources provides a

States, 28 AM. J. INT'L L. 649, 650 (1934).

97. *Id.* at 649.

98. *Id.*

99. OPPENHEIM, *supra* note 84, at 22-23.

100. *Id.* at 34.

101. H. LAUTERPACHT, *THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT* 24 (1958).

strong argument that a legal, not merely a moral, obligation does exist today. This obligation is not recognized and practiced consistently in the United States when the government and courts are confronted with international law issues.

II. THE TASK OF ACCOMMODATING INTERNATIONAL LAW AND AMERICAN JURISPRUDENCE ON FLAG RESPECT

A. Introduction

A discussion of the United States' position on foreign flags requires at the outset a brief review of federalism and the doctrine of separation of powers. United States foreign policy is a product of federalism because the work of foreign relations is the exclusive domain of the federal government.¹⁰² This is because the several states never possessed international powers *ab initio* as did the federal government,¹⁰³ due to the American colonies separating from Great Britain as a unit.¹⁰⁴ Separation of powers is also a factor for analysis because, within the federal government, the responsibility of formulating and enforcing foreign policy has traditionally been vested in the executive branch.¹⁰⁵

B. Incorporation Problems

"International law is part of our law."¹⁰⁶ This dictum by Justice Gray in an often-cited 1899 Supreme Court case restated a long-standing principle of American jurisprudence.¹⁰⁷

102. "The Congress shall have Power . . . to define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations." U.S. CONST. art. I § 8, cl. 10. The Constitution expressly prohibits the several states from concluding conventions with foreign governments. U.S. CONST. art. I, § 10, cl. 1. *See* United States v. Curtiss-Wright Corp., 299 U.S. 304, 316 (1936).

103. United States v. Curtiss-Wright Corp., *supra* note 102; Henkin, *International Law as Law in the United States*, 82 MICH. L. REV. 1555, 1556 (1984).

104. Unlike other grants of power, the power to handle foreign affairs does not derive from the Constitution. It is vested in the federal government as the "national concomitant of nationality." United States v. Curtiss-Wright Corp., *supra* note 102. *See also* Burnet v. Brooks, 288 U.S. 378, 396 (1932).

105. The President is responsible only to the Constitution when handling foreign affairs. United States v. Curtiss-Wright Corp., *supra* note 102, at 319-20.

106. The Paquete Habana, *supra* note 19, 175 U.S. at 700.

107. The early United States government, first under the Articles of Confederation and later under the 1789 Constitution, knew its survival depended on assuring European states of its good faith intent to observe international custom. *See* THE FEDERALIST No. 3 (J. Jay); Finzer v. Barry, 798 F.2d 1450, 1455-56 (D.C. Cir. 1986). It was this necessity of securing commercial recognition that first brought the United States into the international forum. *See* CASES AND MATERIALS, *supra* note 19, at xii; Henkin, *International Law as Law in the United States*, *supra* note 103, at 1555.

Despite Justice Gray's dictum, many Americans question the legitimacy of international law as a legal system.¹⁰⁸ Critics of international law as a system point to the absence of a supranational enforcement power forcing states to comply with its rules.¹⁰⁹ Critics also contrast the moral tone of international law with the political pragmatism that earmarks American jurisprudence.¹¹⁰ Moreover, international custom has no counterpart in forming our domestic law.¹¹¹

Therefore, the conundrum of international law for American jurists is a fundamental issue of jurisprudence. On one hand, conventions are incorporated into federal law under the Supremacy Clause.¹¹² On the other hand, these conventions may codify customs and lead to general principles of international law which conflict with other provisions of the U.S. Constitution, or else can be worded so generally that they should be rejected as void for vagueness.¹¹³

Nevertheless, the United States is responsible under international law for incorporating international norms into its domestic law.¹¹⁴ According to the Permanent Court of International Justice, every state is required to incorporate international law and no state can

108. See AKEHURST, *supra* note 23, at 1-11; CASES AND MATERIALS, *supra* note 19, at 1-2.

109. See AKEHURST, *supra* note 23, at 2, 5-7.

110. See H.L.A. HART, *THE CONCEPT OF LAW* 222-25 (1961). However, not all international law is premised on natural law (which is the philosophical foundation for international law's perceived appeal to morality). Since the nineteenth century, legal positivism has taught in international law that laws are artificial constructs that respond to extrinsic needs. This doctrine is favored today by developing states. Nevertheless, natural law has enjoyed a rebirth since the Nuremberg trials of the 1940s.

Emich von Vattel tried with uneven success to synthesize natural law and legal positivism. Vattel greatly influenced early American legal thinkers, and was cited by Justice Bork while sitting in the D.C. Circuit. See, e.g., *Finzer v. Barry*, *supra* note 107, 798 F.2d at 1457. Many American perceptions of international law come from Vattel and not from Grotius, Pufendorf and other "founders of international law." See Shestack, *The Rise and Decline of Human Rights in United States Foreign Policy*, 15 COLUM. HUM. RTS. L. REV. 19, 22-24 (1984); AKEHURST, *supra* note 23, at 14-15.

American jurisprudence has undergone its own transition from appeals to natural law (the "oracular theory") to public policy and economic considerations (the "factfinder theory"). See G.E. WHITE, *THE AMERICAN JUDICIAL TRADITION* (1988).

111. The idea that nations are both creators and subjects of law is alien to American legal thought. D'Amato, *Book Review*, 34 J. LEGAL EDUC. 742 (1984) (reviewing *THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW; ESSAYS IN LEGAL PHILOSOPHY DOCTRINES AND THEORY* (R. St. J. McDonald & D. M. McDonald ed. (1983))).

112. "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land." U.S. CONST. art. IV, cl. 2.

113. RESTATEMENT, *supra* note 14, at § 302, comment b.

114. BROWNLIE, *supra* note 14, at 52.

plead domestic law conflicts as a way to avoid a legal obligation.¹¹⁵ The U.S. Supreme Court accepted this principle: “The law of nations requires every national government to use ‘due diligence’ to prevent a wrong being done within its own dominion to another nation with which it is at peace, or to the people thereof.”¹¹⁶

Hence, our courts may take notice of foreign statutes and case law.¹¹⁷ Although this notice does not bind federal courts under the Federal Rules of Civil Procedure,¹¹⁸ these statutes and case law are often the only available evidence of international law upon which to base a decision in federal court.¹¹⁹

The incorporation process also moves in the other direction. A general principle of international law requires states to amend their domestic laws to conform with international norms when domestic laws conflict.¹²⁰ Failure to amend or repeal domestic laws that conflict with international norms constitutes an international breach when that failure prevents a state from legally resolving an international conflict.¹²¹

C. *United States Practice Regarding Protection of Foreign Flags*

1. *Federal Statutes*

The United States does not have a controlling statute penalizing desecration of a foreign flag. The only exception is narrowly drawn: Title 18 U.S.C. section 708¹²² prohibits use of the Swiss coat of

115. “It should . . . be observed that . . . a State cannot adduce as against another State its own Constitution with a view to evading obligations incumbent upon it under international law or treaties in force.” *Id.* at 36, *citing* *Polish Nationals in Danzig*, 1932 P.C.I.J. (ser. A/B) No. 44, at 24.

116. *United States v. Arjona*, *supra* note 19, 120 U.S. at 484.

117. *Thirty Hogsheads of Sugar v. Boyle*, 13 U.S. (9 Cranch.) 191, 197 (1815).

118. “A party who intends to raise an issue concerning the law of a foreign country shall give notice by pleadings or other reasonable written notice. The court, in determining foreign law, may consider any relevant material or source, including testimony, whether or not submitted by a party or admissible under the Federal Rules of Evidence. The court’s determination shall be treated as a ruling on a question of law.” FED. R. CIV. P. 44.1. *See* FED R. CRIM P. 26.1. No Federal Rule of Evidence deals with judicial notice of “legislative” facts. FED. R. EVID. 201, Advisory Committee’s Note, 56 F.R.D. 183, 201.

119. *See* BROWNIE, *supra* note 14, at 57; *see also* Oliver, *Problems of Cognition and Interpretation in Applying Norms of Customary International Law of Human Rights in United States Courts*, 4 Hous. J. INT’L L. 59, 60 (1981).

120. *See* BROWNIE, *supra* note 14, at 38.

121. *Id.*

122. 18 U.S.C. § 708 (1988) provides in full:

Whoever, whether a corporation, partnership, unincorporated company, association, or person within the United States, willfully uses as a trademark, commercial label, or portion thereof, or as an advertisement or insignia for any business or organiza-

arms for advertising. The statute was enacted in 1948 by request of the State Department.¹²³ Section 708 is similar to little-known Public Law 84¹²⁴ enacted by the Third Session of the 58th Congress in 1905. Unfortunately, Public Law 84's legislative history does not explain why "any foreign nation" was added to the list of those domestic governmental emblems that shall not be incorporated into trademark designs.

The Senate has acknowledged that insults to a foreign flag can cause conflict with that foreign government:

No American, nor any foreign-born person who enjoys the privileges of American citizenship, should ever look up [to the American flag] without taking pride in the fact that he lives under this free Government. Hence, it has often occurred that insults to a flag have been the cause of war; and indignities cast upon it, in the presence of those who revere it, have often been resented and sometimes punished on the spot."¹²⁵

This acknowledgement may have prompted Congress to enact 36 U.S.C. section 175, providing courtesies when posting foreign flags.¹²⁶ Congress, however, did not consider the threat of an insulted foreign state to be overly dangerous to national security, because the Flag Code¹²⁷ is only declaratory and carries no penalties to prevent insults from occurring.¹²⁸

18 U.S.C. section 970¹²⁹ purports to imprison or fine persons who

tion or for any trade or commercial purpose, the coat of arms of the Swiss Confederation, consisting of an upright white cross with equal arms and lines on a red ground, or any simulation thereof, shall be fined not more than \$250.00 or imprisoned not more than six months, or both.

123. See 5 WHITEMAN, *supra* note 83, at 175-77.

124. Pub. L. No. 58-84, § 5, 33 Stat. 724 (1905) provides that no mark shall be refused as a trademark on account of its nature "unless such mark . . . consists of or comprises the flag or coat of arms of the United States, or any simulation thereof or of any State or municipality or of any foreign nations." This Public Law was cited by the Supreme Court in *Halter v. Nebraska*, 205 U.S. 34, 39 (1906).

125. S. Rep. No. 258, 83d Congress, 1st Sess. 1850 (1953).

126. 36 U.S.C. § 175, para. (c) provides in part: "No person shall display the flag of the United Nations or any other national or international flag equal, above, or in a position of superior prominence or honor to, or in place of, the flag of the United States at any place within the United States or any Territory or possession thereof." 36 U.S.C. § 175 para. (g) provides in full: "When flags of two or more nations are displayed, they are to be flown from separate staffs of the same height. The flags should be of approximately equal size. International usage forbids the display of the flag of one nation above that of another nation in time of peace."

127. 36 U.S.C. §§ 173-178 (1988).

128. *Holmes v. Wallace*, 407 F. Supp. 493, 496 (M.D. Ala. 1976).

129. 18 U.S.C. § 970, para. (a) provides in full: "Whoever willfully injures, damages, or destroys, or attempts to injure, damage, or destroy, any property, real or personal, located within the United States and belonging to or utilized by any foreign government or international organization, by a foreign official or official guest, shall be fined not more than

“injure, damage, or destroy” personal or real property belonging to a foreign government, international organization, or official foreign guest. However, section 970 does not control whether a person who desecrates a foreign flag may be imprisoned or fined, because Section 970 is a property law, not a foreign relations law. A flag is not merely a piece of cloth; its value lies in its symbolic-value of representing a state, according to *Texas v. Johnson*.¹³⁰ This rationale invalidates any application of section 970.

Finally, 18 U.S.C. section 956¹³¹ might be construed to punish conspiracies within the United States that intend to “injure or destroy” foreign governmental property located in foreign states. However, section 956 does not and should not apply to flags and emblems for the same reasons that section 970 probably fails.

2. Federal Case Law

No federal court has ruled on the desecration of a foreign flag. The only possible exception was an 1802 incident in Philadelphia, where the Spanish minister’s flag was torn down “with the most aggravating insults.”¹³² The Pennsylvania courts considered this act a triable offense, but no record has survived of any trial or its outcome.¹³³ A similar incident did not involve a flag, but occurred in 1784 when the French consul general was assaulted in Philadelphia.¹³⁴ The court in that case construed the insult to the consul general’s person the same as an insult to the French sovereign, constituting a crime under international law.¹³⁵

Despite the lack of precedent, three twentieth century federal decisions¹³⁶ have ruled on political demonstrations outside diplomatic missions. The courts’ rationales on the issue of protecting foreign

\$10,000, or imprisoned not more than five years, or both.”

130. *Texas v. Johnson*, *supra* note 2, 109 S. Ct. at 2548.

131. 18 U.S.C. § 956, para. (a) provides in part: “If two or more persons within the jurisdiction of the United States conspire to injure or destroy specific property situated within a foreign country and belonging to a foreign government or to any political subdivision thereof with which the United States is at peace . . . each of the parties to the conspiracy shall be fined not more than \$5,000 or imprisoned not more than three years, or both.”

132. See *Finzer v. Barry*, *supra* note 107, 798 F.2d at 1456; 4 J. MOORE, A DIGEST OF INTERNATIONAL LAW § 658, at 627 (1906).

133. *Id.*

134. *Respublica v. De Longchamps*, 1 U.S. (1 Dall.) 110 (Pa. 1784).

135. “Whoever offers violence to [public ministers] not only affronts the sovereign he represents but also hurts the common safety and well-being of nations—he is guilty of a crime against the whole world.” *Id.* at 116.

136. *Frend v. United States*, 100 F.2d 691 (D.C. Cir. 1938); *Finzer v. Barry*, *supra* note 107, and *Boos v. Barry*, 485 U.S. 312 (1988).

dignities indicate how a case might be decided involving an attack on a state's flag, instead of its mission.

In *Frend v. United States*,¹³⁷ appellants were convicted under a federal statute¹³⁸ prohibiting the display of flags or banners intended to bring a foreign government into "public odium," within 500 feet of that government's mission. Appellants had protested outside the German and Austrian embassies in Washington. The court upheld the convictions, stating that Congress' power to define and punish offenses under international law required Congress to take "every reasonable precaution" to prevent foreign missions from experiencing public disrepute.¹³⁹ The statute did not violate constitutional due process because Congress reasonably exercised its police power.¹⁴⁰

In *Frend* the court recognized that our Government is required under international law to prevent persons from insulting states. If the insult came from protests outside the mission, a similar insult would have arisen from burning a German or Austrian flag. Unfortunately, *Frend* is not dispositive on the issue because the court was more interested in discussing Congress' police power than in defining the obligation to protect foreign dignities.

Almost fifty years after *Frend*, the same D.C. Circuit decided *Finzer v. Barry*.¹⁴¹ *Finzer's* facts are similar to *Frend's* except that the protests occurred outside the Soviet and Nicaraguan missions. *Finzer* disregarded *Frend's* holding, citing the growth of first amendment law since *Frend* was decided.¹⁴²

In writing for the majority, Justice Bork did not avoid the difficulty of accommodating international obligations with the requirement of upholding the first amendment. He affirmed the convictions and found that the international obligations were compatible with the first and fourteenth amendments.¹⁴³ To emphasize the importance of the international obligation, he wrote:

First, shielding government officials from public protest is incompatible with our democratic structure, which relies on public criticism as a means of promoting responsive government. Foreign

137. 100 F.2d 691.

138. D.C. Law §§ 22-1115, 22-1116, *repealed by* D.C. Law 7-105 § 2, 35 D.C.R. 728, Pub. L. No. 100-690, 102 Stat. 4381 (Michie Supp. 1989).

139. 100 F.2d at 692-93.

140. *Id.* at 693.

141. 798 F.2d 1450.

142. *Id.* at 1545.

143. *Id.* at 1463.

ambassadors, in contrast, have no similar obligation to be accessible to public attack, and our policy does not have the same interest in ensuring that they are. Second, we cannot ignore the fact that American diplomats living overseas are always to some degree at risk. The perception abroad that our government is diminishing the protection accorded the embassies to whom we are host would, we are told, seriously compound that risk. Finally, and most fundamentally, *we face here a question of living up to our obligations under international law and a treaty*. These considerations distinguish the issues presented here from those involving protests in front of the White House, the Capital, and the Supreme Court.¹⁴⁴

He then discussed the issue of accommodation:

The obligations of the United States under international law, reaffirmed by treaty, do not, of course, supersede the first amendment. *Neither, however, has it ever been suggested that the first amendment is incompatible with the United States' most basic obligations under the law of nations. The two must be accommodated.* . . . What has been done through [D.C. Code] section 22-1115 is to give first amendment freedoms the widest scope possible consistent with the law of nations.¹⁴⁵

Chief Justice Wald's vigorous dissent denied that a foreign dignity interest is compelling enough to override first amendment protections.¹⁴⁶ The dissent specifically argued that the issue of tearing down a foreign flag is an issue of protecting the mission's physical security, and not an issue of protecting the sending state's dignity.¹⁴⁷

The value of *Finzer* is Justice Bork's effort to accommodate international law and the first amendment. The quoted passage shows his unequivocal position that neither international law nor the first amendment can supersede the other. In an appropriate case, the trier of fact must form a marriage between the two obligations, provided they do not conflict.

Finzer was appealed to the Supreme Court in *Boos v. Barry*¹⁴⁸ and overturned on other grounds.¹⁴⁹ The appeal and reversal were probably based on Justice Bork's "deviation"¹⁵⁰ from traditional

144. *Id.* at 1462 (emphasis added).

145. *Id.* at 1463 (emphasis added).

146. *Id.* at 1484.

147. *Id.* at 1482 n.6.

148. *Boos v. Barry*, *supra* note 136.

149. *Id.* at 1162.

150. Comment, *Abridgements of Free Speech Which Discriminate on the Basis of*

first amendment analysis by concentrating on the speech's content instead of its inflammatory effect.

In *Boos*, the Supreme Court acknowledged the United States' interest in protecting the dignity of diplomatic agents.¹⁵¹ However, in writing for the majority, Justice O'Connor considered the dignity standard so inherently subjective as to be inconsistent with the Court's traditional position of not restricting speech simply because the audience is affected negatively.¹⁵² Justice O'Connor commented on the difficulty of accommodating international law and the first amendment:

[I]t is well-established that 'no agreement with a foreign nation can confer powers on the Congress, or on any other branch of Government, which is free from the restraints of the Constitution.' [Citations] . . .

[T]he fact that an interest is recognized in international law does not automatically render that interest 'compelling' for purposes of First Amendment analysis.¹⁵³

Justice O'Connor decided not to discuss whether a dignity interest could ever be compelling, but focused instead on the controlling D.C. statute's faulty drafting.¹⁵⁴ Her only other comment on Justice Bork's efforts at accommodation was that the United States does have a "vital national interest in complying with international law."¹⁵⁵

Based on the foregoing, the federal judiciary has recognized the dignity issue but has not clearly defined how to accommodate international law and the first amendment. The analogous issue of foreign flags is thus unresolved under common law.

3. *The State Department and Diplomacy*

The lack of legal prohibitions against desecration of foreign flags does not mean such desecration never happens. Americans have burned or otherwise desecrated foreign flags during periods of protest, beginning in 1802.¹⁵⁶ Following some of the resulting international incidents, the State Department has responded to the ag-

Viewpoint: Finzer v. Barry, 61 ST. JOHN'S L. REV. 127, 142 (1986).

151. *Boos v. Barry*, *supra* note 136, 485 U.S. at 323.

152. *Id.* at 322.

153. *Id.* at 324.

154. *Id.*

155. *Id.* at 323.

156. *See, e.g., supra* note 132 and accompanying text.

grieved states by only issuing a formal apology.¹⁵⁷

The most notable apologies occurred in the 1930s and 1940s and involved the swastika flag of Nazi Germany. In March 1932, an American torched the flag flying over the German consulate in St. Louis.¹⁵⁸ In July 1935, a minor government official removed the flag from a German merchant vessel, the S.S. Bremen, when it anchored in New York harbor.¹⁵⁹ In January 1941, unknown persons tore the flag from the German consulate in San Francisco.¹⁶⁰ On each occasion, the German government registered a formal protest under a 1922 convention concluded between the Weimar Republic and the United States.¹⁶¹ On each occasion the State Department formally apologized.¹⁶²

The State Department apologized because these incidents were controlled by a principal obligation¹⁶³ arising from a bilateral convention. However, other flag-related incidents are not controlled so clearly. They usually are resolved by negotiation before they escalate into international incidents.¹⁶⁴ Formal apologies have also avoided threatened lawsuits for slander and libel.¹⁶⁵

Other conflicts have arisen in the opposite context, where American flags are desecrated overseas. On some occasions, desecration is timed to protest official visits by American leaders or occurs during periods of internal strife.¹⁶⁶ Each time the State Department reiter-

157. See *infra* notes 158-62 and accompanying text.

158. *Picketing*, *supra* note 91, at 345.

159. 2 G.H. HACKWORTH, DIGEST OF INTERNATIONAL LAW, § 129, at 145 (1941) [hereinafter HACKWORTH].

160. 5 WHITEMAN, *supra* note 83, at 174-75. An American sailor was subsequently court martialed, but it is not clear on what grounds he was convicted. *Id.*

161. *Id.*

162. In response to the Bremen incident, the State Department answered through an undersecretary: "It is unfortunate that, in spite of the sincere efforts of the police to prevent any disorder whatsoever, the German national emblem should, during the disturbance which took place, not have received that respect to which it is entitled." (Aug. 1, 1935). Wilson, *Respect for National Flag*, 29 AM. J. INT'L L. 662, 663 (1935).

163. See *supra* note 41 and accompanying text.

164. See, e.g., 5 WHITEMAN, *supra* note 83, at 175. An example is a series of negotiations between the People's Republic of China and the United States in 1958. The PRC intended to issue a postage stamp to commemorate the tenth anniversary of the joint Chinese-American reconstruction efforts following World War II. The proposed stamp design depicted the national flags of both the PRC and the United States, but in disproportionate sizes. After a series of communications, the final design showed both flags with equal respect.

165. Stowell, *The General Smedley D. Butler Incident*, 25 AM. J. INT'L L. 321, 323 (1931). "Patriotism alone should prevent further comment of a nature to increase international resentment. No good citizen will add to the difficulties of the government when it is obligated to make amends for an offense for which, under international law, the whole nation is responsible." *Id.*

166. In May 1958, the Peruvian government apologized to then-Vice President Nixon after anti-American factions tore up an American flag in front of local police. 5 WHITEMAN,

ates its position that diplomatic incidents should be prevented by observing local flag laws.¹⁶⁷ However, local laws are sometimes thrown into upheaval during periods of civil unrest,¹⁶⁸ and the State Department insists that local authorities respect both the economic and dignity interests represented by persons posting the American flag.¹⁶⁹

D. Summary

American lawyers contend with fundamental issues of jurisprudence whenever they try to accommodate international law and the first amendment into a cohesive system. These difficulties and confusions may explain why the Congress has not enacted a statute prohibiting desecration of foreign flags.

The courts have grappled with issues of accommodation, but to date there has been no decision on whether to punish an act defiling a foreign flag. This judicial silence may be due in part to the lack of legislative guidance.

The State Department responds to some diplomatic crises arising from flag desecration by issuing formal apologies. American diplomats also elect to negotiate some local problems before they escalate. However, these incidents are handled on an *ad hoc* basis; they are insufficient evidence that the United States consistently practices a customary obligation at international law.

CONCLUSION

This Comment illustrates that, in terms of protecting national flags, the domestic law of the United States on foreign dignity interests is hazy at best. Jurists struggle alongside diplomats to accommodate both international legal obligations and first amendment safeguards for expressive conduct.

The conclusion that foreign flags in the United States are some-

supra note 83, at 178. The Panamanian foreign minister apologized in November 1959 when the American flag at the United States embassy in Panama City was vandalized. *Id.* at 179. The Venezuelan foreign minister apologized when pro-Cuban demonstrators burned an American flag in front of the Venezuelan Congress building in Caracas. *Id.* at 180-81.

167. See HACKWORTH, *supra* note 159, § 127, at 128.

168. Official use of the American flag in foreign states is distinguished in this case from long-time usage that a national flag denotes foreign ownership of property. Long-time usage, especially in unstable circumstances, is a practical necessity not to be discarded quickly. 2 J. MOORE, A DIGEST OF INTERNATIONAL LAW, *supra* note 132, at 140. But the American flag should not be posted by non-American citizens seeking protection under those circumstances. *Id.* at 137.

169. *Id.* at 139.

how entitled to more protection from desecration than American flags does not turn the first amendment on its head. Instead, it is a conclusion that reflects a political awareness American leaders have known since the Articles of Confederation were in place: we live in an interdependent world where the practices of other states cause us to examine our own practices.

This is not to say that accommodation comes easily. Given the controversy over the Flag Protection Act of 1989,¹⁷⁰ a new federal statute or constitutional amendment is not likely. The clearest opportunities for accommodation come from the courts and the State Department. The courts should accept a test case and implement Justice Bork's accommodation rationale. Similarly, the State Department should establish consistent guidelines preventing incidents as well as resolving them when they arise. In the meantime, this Comment follows the majority's exhortation in *Texas v. Johnson*: "the remedy to be applied is more speech, not enforced silence."¹⁷¹

*Mark C. Phillips**

170. Flag Protection Act of 1989, Pub. L. No. 101-131, 103 Stat. 777 (West Supp. 1990).

171. *Texas v. Johnson*, *supra* note 2, 109 S. Ct. at 2547.

* This Comment is dedicated with love to my wife, Pamela, a passionate world traveler; and with respect to Professor Howard D. Berman, an unwitting mentor.