NOTE

THE DOCTRINE OF LACHES IN INTERNATIONAL LAW

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INTRODUCTION

The doctrine of laches, as understood within the corpus of Anglo-American law, is an equitable principle barring a stale claim due to the passage of time.[1] The doctrine is derived from a particular application of the Latin maxim *vigilantibus non dormientibus aequitas subvenit,* translated as "equity aids the vigilant, not those who sleep on their rights,"[2] and may have existed in early Roman Law.[3] Unlike statutes of limitations, which are legislatively created and mechanically applied in courts of law, the doctrine of laches developed as an affirmative defense in courts of equity—historically outside the statute of limitations' purview.[4] As a result, the doctrinal underpinnings of the laches principle are not based upon extrajudicially prescribed time limits, but instead upon a rich history of justice, fairness, and the equitable balancing of rights.[5] This distinction between the doctrine of laches and

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[1] For a basic review of the doctrine as applied in American courts of law and equity, see Henry L. McClintock, Handbook of the Principles of Equity § 28 (2d ed. 1948); Visdean R. Vass & Xia Chen, The Admiralty Doctrine of Laches, 53 La. L. Rev. 495 (1992); Thomas G. Robinson, Note, Laches in Federal Substantive Law: Relation to Statutes of Limitation, 56 B.U. L. Rev. 970 (1976).

[2] See Vass & Chen, supra note 1, at 497. The word "laches" itself stems from the Latin word *laxus* which means "lax." Id.

[3] Id. Scholars of American legal history note that "Justice Story imported the doctrine into the jurisprudence of the fledgling American Republic in 1815." Id. See Brown v. Jones, 4 F. Cas. 404, 406 (C.C.D. Mass. 1815) (No. 2017).

[4] See McClintock, supra note 1, § 28, at 75; Robinson, supra note 1, at 971. American admiralty courts have also drawn upon the doctrine of laches in rejecting stale claims. See, e.g., Young v. Key City, 81 U.S. 653, 660 (1871); Vass & Chen, supra note 1, at 495-506.

[5] Courts in the United States have announced a myriad of factors affecting the legal application of the doctrine. See, e.g., McClintock, supra note 1, § 28, at 71-74 (stating that courts have generally considered: (1) unreasonable delay; (2) prejudice to the defendant; (3) potential loss of evidence; and (4) change in the value of the subject-matter involved).

statutes of limitations has become less precise as courts of law, legally bound by statutes of limitations, are more willing to accept a laches defense to combat instances of strategic delay or unfair litigation.[6] Thus, the doctrine of laches, at least within Anglo-American domestic legal systems, can be an effective tool in rectifying the problem of unreasonably late claims.[7]

In public international law, where there is no established, supra-judicial legislative body to prescribe an international statute of limitations, stale claims before international tribunals are even more problematic.[8] Judicial and arbitral tribunals applying international law must look elsewhere for principles that will allow them to deny claims that are either decades old or patently unfair to a particular party due to the passage of time.[9] As a practi-

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Note that American courts of law and equity merged throughout the 18th and 19th centuries. See id. §§ 5-7, at 12-19 (discussing the development of equity in the United States). This merger was intended to facilitate a complete fusion of legal and equitable principles so that equitable defenses should also apply in courts of law. See 4 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1043 (2d ed. 1987).

[6] Perhaps the most striking example of a federal court of law applying the equitable defense of laches may be found in Birdwell v. United States, 11 Cl. Ct. 862 (1987), in which the court noted:

> [A] statute of limitation does not confer an entitlement to a grace period in which to sue. Rather, the statute of limitations establishes an outside limit beyond which Congress has determined claims are simply too stale to be litigated fairly. As a result, implicit within the statute of limitations is a shorter period in which the doctrine of laches may provide an affirmative defense, in the event a particular plaintiff has unreasonably delayed and caused some prejudice to the [defendant].

Id. at 865. See also Deering v. United States, 620 F.2d 242 (Ct. Cl. 1980) (laches applied to bar military pay claim filed on last day allowed by statute of limitations). For a discussion of the role of statutes of limitations in the application of laches in federal courts, see Robinson, supra note 1, at 976-81.

[7] See, e.g., Marshall v. Meadows, 921 F. Supp. 1490, 1494 (E.D. Va. 1996) (holding that a plaintiff cannot use his own strategic delay to avoid laches); Parsons v. Jefferson-Pilot Corp., 141 F.R.D. 408, 416 (M.D.N.C. 1992) ("Information regarding strategic delay by the plaintiff would be relevant to defenses of unclean hands and laches and could affect the equitable remedy the Court may ultimately choose if [the] plaintiff establishes liability.").

[8] This problem is hardly a new one in international law. As Jeremy Bentham observed, "Few things are more wanting than a code of international law." Bin Cheng, General Principles of Law as a Subject for International Codification, *in* 4 Current Legal Problems 35 (George W. Keeton & Georg Schwarzenberger eds., 1951) (citing 10 Jeremy Bentham, Collected Works 584 (1843)). Without the existence of an international legislature propagating so-called "hard law," an international court is forced to explore other, more ephemeral "rules" and "principles" of international law that might bar a claim because of undue delay. See, e.g., Restatement (Third) of the Foreign Relations Law of the United States, pt. I, ch. 1, introductory note, at 16-21 (1987) [hereinafter "Restatement"]. Moreover, like many civil law systems, international courts are not bound by judicial precedent or other applications of stare decisis. Id. § 103 cmt. b. This "sources of law" problem in international law and its relation to the doctrine of laches are discussed below. See infra text accompanying notes 213-253.

[9] See Restatement, supra note 8, § 902 cmt. c ("No general rule of international law limits the time within which a claim can be made."). But see 2 D.P. O'Connell, International Law 1066 (2d ed. 1970) ("International law contains a rule for the extinction

cal matter, the doctrine of laches, sometimes referred to as extinctive prescription,[10] may solve this legal quandary. An international court applying the doctrine could invoke principles of equity and fairness to expel a stale claim.[11] Yet, an international tribunal's authority to invoke such an equitable principle as an established "rule" of international law is hardly a settled issue, perhaps on account of the doctrine's lethal consequences to a claim.[12] Moreover, the precise scope of the laches doctrine is an even less settled question, as its sparse application in international law has been neither uniform nor consistently reasoned.[13]

Recent literature on the doctrine of laches as a defense in international litigation has been sparse and cursory at best.[14] Yet, many international courts have been consistently seized of the issue, as their dockets are replete with claims that are decades old.[15] The most recent examples may be found in the Iran-U.S. Claims Tribunal's adjudication of two claims brought separately by Iran and the United States, each citing grievances that occurred well over forty years ago.[16] In both these cases, the United States and Iran raised

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or barring of claims upon lapse of time.").

[10] See infra note 20.

[11] See, e.g., Cheng, supra note 8, at 46 (arguing that the codification of a rule barring stale claims from litigation would be one of the more "usefully considered" principles in international law).

[12] See H. Lauterpacht, Private Law Sources and Analogies of International Law 273-74 (1970); Cheng, supra note 8, at 46-48. The debate among international jurists and publicists will be discussed below. See infra text accompanying notes 140-171.

[13] See Francis Vallat, International Law and the Practitioner 30 (1966) ("[U]ndue delay may defeat an international claim. This is well established in principle, although . . . rarely applied in practice."). The spectrum of the doctrine's application is discussed at length below. See infra text accompanying notes 44-139.

[14] The most recent article presenting a survey of the doctrine of laches in international law was written by a British international lawyer in 1934. See B.E. King, Prescription of Claims in International Law, 15 Brit. Y.B. Int'l L. 82 (1934). The most recent note discussing the issue was published in 1904. See Note, Prescription in International Law, 17 Harv. L. Rev. 346 (1904). More current legal literature examining the topic has been generally incorporated into larger treatises of international law, often treating the issue in a somewhat truncated manner. See, e.g., Bin Cheng, General Principles of Law as Applied by International Courts and Tribunals 373-86 (1953) [hereinafter General Principles]; Lauterpacht, supra note 12, at 273-75; Jackson H. Ralston, The Law and Procedure of International Tribunals 375-83 (2d ed. 1973) [hereinafter Law and Procedure]; Georg Schwarzenberger, International Law 565-70 (3d ed. 1957); J.L. Simpson & Hazel Fox, International Arbitration: Law and Practice 122-26 (1959); Jackson H. Ralston, Prescription, 4 Am. J. Int'l L. 133 (1910). Cf. Cheng, supra note 8, at 46-48 (surveying the laches doctrine as part of an argument towards increased codification of international law).

[15] The Iran-U.S. Claims Tribunal in particular has faced numerous laches issues in the past 10 years. See, e.g., Amoco International Finance Corp. v. Iran, 15 Iran-U.S. Cl. Trib. Rep. 189, 275 (1987); Oil Field of Texas, Inc. v. Iran, 12 Iran-U.S. Cl. Trib. Rep. 308, 313 (1986); General Dynamics Telephone Systems Center, Inc. v. Iran, 9 Iran-U.S. Cl. Trib. Rep. 153, 176 (1985).

[16] United States v. Iran, Award No. 574-B36-2 (1996); Iran Railway v. United States,

the doctrine of laches as an equitable defense barring the claims from adjudication on the merits.[17] Much of the controversy before the Tribunal, not surprisingly, surrounded the scope of the doctrine's application and whether it was applicable at all.[18] With more than $150 million at stake between the litigants,[19] as well as the Tribunal's own judicial resources in adjudicating the claim, the question of the doctrine's legitimacy in international jurisprudence was of critical importance.

This Note will examine the doctrine of laches in public international law as a potential defense against undue delay in litigating an international claim, arguing that a rule of laches is firmly established in international jurisprudence and provides an invaluable tool for thwarting stale claims. Part I will distinguish a strict application of the laches doctrine from other similar legal principles used by international courts to bar stale claims. Part II will survey pertinent international decisions affirming the doctrine of laches as recognized international law. Here, the analysis will focus on the various arguments presented by international tribunals in favor of, and in opposition to, the doctrine in international jurisprudence, and ultimately will conclude that arguments against the doctrine's application in international law are unfounded. Part III will outline the essential elements of the defense, exploring various issues of application that delineate the general contours of the doctrine's scope. Part IV will present the analytical problems of justifying the laches principle under the doctrine of sources in international law, contending that a rule of laches is well founded as a "general principle" of international law. Finally, this Note will argue that the doctrine of laches is a necessary and established legal principle that should be recognized by international jurists and scholars.

I. ACQUIESCENCE, ESTOPPEL, AND LACHES

Often called "extinctive prescription" in international law,[20] the doctrine of laches is defined generally by international jurists and scholars as "the bar

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Award No. 572-B58-2 (1996). The first of these cases, B/36, involved a contract dispute where the United States sued Iran for withholding payment pursuant to two military sales agreements executed between 1945 and 1948. In B/58, the second claim before the tribunal, Iran Railway sued the United States for damage to its railroad incurred during the Second World War.

[17] See United States v. Iran, Award No. 574-B36-2, paras. 2, 72-75; Iran Railway v. United States, Award No. 572-B58-2, paras. 2, 57-60.

[18] See United States v. Iran, Award No. 574-B36-2, paras. 72-75; Iran Railway v. United States, Award No. 572-B58-2, paras. 57-60; see also United States v. Iran, Case No. B/36, Reply Brief of the United States at 15-20 (arguing that the doctrine of laches does not apply to the case at bar) (on file with the Virginia Law Review Association).

[19] See United States v. Iran, Award No. 574-B36-2, para. 1; Iran Railway v. United States, Award No. 572-B58-2, para. 1.

[20] A minority of international legal scholars draws a distinction between "extinctive prescription" and the doctrine of laches. The majority view has been announced by

of claims by lapse of time."[21] Although variations of this definition exist,[22] the underlying concept remains constant: Undue delay in the presentation of an action before an international tribunal will vitiate the merits of the claim and work inequity between the litigating parties.[23] Laches, in its most basic application, addresses the right to adjudicate an action under international law regardless of the substantive merits at issue.[24]

Yet, even the most rudimentary definitions of the laches doctrine overlap with other related, and perhaps better established, legal doctrines—namely the equitable principles of acquiescence and estoppel.[25] Both the doctrine of

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Marjorie Whiteman in her extensive review of the relevant authority:

> Delay by an individual claimant in the presentation of a claim has at times been held to bar the right of a state to present the claim subsequently as a valid one in international law. The grounds for the refusal to allow claims under these circumstances have been variously expressed. At times the disallowance is merely stated in terms of the claimant's non-action or laches, and at other times in terms of prescription or of a limitation on international claims.

1 Marjorie M. Whiteman, Damages in International Law 236 (1937). The opposing view focuses on the procedural subtleties that potentially distinguish the two concepts. See, e.g., Edwin M. Borchard, The Diplomatic Protection of Citizens Abroad §§ 384-85, at 826-27 (1928) (arguing that the principle of laches "merely raises . . . presumptions" while extinctive prescription is an anathema to the claim before an international tribunal); cf. General Principles, supra note 14, at 379-80 ("Although there may be a recent tendency to do so . . . , previous international decisions have not primarily relied merely on prolonged delay in order to justify prescription, but rather on the presumptions which . . . naturally arise from such delay, a distinction that is not without its practical consequences."). But see King, supra note 14, at 93 (contending that an analysis of laches as a rule raising certain "presumptions" is not useful). For the purposes of this Note, the terms "extinctive prescription" and the "doctrine of laches" will be used synonymously, denoting a more general time bar to stale claims.

[21] 1 Oppenheim's International Law § 154 (Robert Jennings & Arthur Watts eds., 9th ed. 1992) [hereinafter Oppenheim]. See also King, supra note 14, at 82 (defining extinctive prescription as "[t]he effect of lapse of time in destroying international claims").

[22] See, e.g., Ian Brownlie, Principles of Public International Law 153 (4th ed. 1990) (the doctrine of laches is "[t]he failure to bring a claim before an international tribunal due to the negligence or laches of the claimant party . . . [causing] an international tribunal eventually seized of the dispute to declare the claim to be inadmissible"); Cheng, supra note 8, at 47-48 ("Any claim of one State against another shall be deemed invalid if the claimant State has, by its own negligence, delayed the presentation of the claim for so long that, as a result thereof, it is to be feared that there would be danger of mistaking the truth.") (footnotes omitted); Gentini Case (Italy v. Venez.), 10 R.I.A.A. 551, 557 (Italy-Venez. Comm'n 1903) ("Quand un droit d'action périt parce que le titulaire néglige de l'exercer dans un certain délai, cette extinction de droit s'appelle prescription de l'action.") [When a right of action becomes extinguished because the person entitled thereto neglects to exercise it after a period of time, this extinction of the right is called prescription of the action.].

[23] See generally Vallat, supra note 13, at 30 ("Perhaps the underlying principle which international tribunals tend to apply is that the claimant State will not be allowed to profit by long delay at the expense of the defendant State.").

[24] See Simpson & Fox, supra note 14, at 122-23 ("[T]he principle of extinctive prescription applies to the right to bring an action before an international tribunal.").

[25] See, e.g, 1 Oppenheim, supra note 21, § 154, at 527 ("Undue delay in presenting a claim, which may lead to it being barred, is to be distinguished from effects of the passage

laches and the related doctrines of acquiescence and estoppel will bar a claim from adjudication before an international tribunal.[26] The legal foundations underlying the latter two principles, however, are quite different, and international scholars consistently have distinguished the doctrines.[27] As understood and applied in international law, the doctrines of acquiescence and estoppel are analogous to their counterparts in domestic legal systems:

> A claim of estoppel may—and indeed frequently does—relate to the existence, non-existence or deemed existence of a particular state of mind of the respondent State, and in particular its acceptance of, or consent to, a particular matter; but while a claim of acquiescence asserts that the State concerned *did* accept or agree on that point, a claim of estoppel accepts, by implication, that the respondent State did *not* accept or agree, but contends that, having misled the applicant State by behaving as though it did agree, it cannot be permitted to deny the conclusion which its conduct suggested.[28]

In other words, a defense of acquiescence or estoppel relates to the substantive merits of the claim, separate from the procedural inequities involved with the doctrine of laches.[29] The most compelling evidence underlying a claim of acquiescence is often the inordinate passage of time before pressing the claim.[30] Thus, the legal reasoning involved in rejecting an action either under the guise of acquiescence is syllogistically based on two logical presumptions. First, the offending state is deemed to have a particular state of mind, evidenced by the delay in litigation. Second, this subjective element is substantively relevant in the litigation at bar. Laches, on the other hand, rejects a claim simply because it is stale, regardless of whether the passage of time indicates the respondent state's willingness to adjudicate the stale claim.[31]

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of time on the merits of the claim in cases where the claimant state has, by failing to protest or otherwise, given evidence of acquiescence."); King, supra note 14, at 82 ("[Laches] may operate as part of a more general defence, such as release, election, waiver, or estoppel, where lapse of time is said to operate by way of acquiescence.").

[26] See 1 Oppenheim, supra note 21, § 154, at 527-28, § 579, at 1193-94.

[27] Oppenheim provides a thorough review of the international authorities comparing the doctrines of acquiescence and estoppel with the principle of extinctive prescription. See id. § 154, at 527 n.6.

[28] Hugh Thirlway, The Law and Procedure of the International Court of Justice: 1960-1989, 60 Brit. Y.B. Int'l L. 3, 29 (1990). See generally Christopher Brown, Comment, A Comparative and Critical Assessment of Estoppel in International Law, 50 U. Miami L. Rev. 369, 383-86 (1996) (examining the origins of estoppel theory in international law).

[29] Thirlway, supra note 28, at 30 (citing Gulf of Maine, 1984 I.C.J. 304-05, paras. 129-30 (Oct. 12)).

[30] See, e.g., id. at 46 ("The time element is likely to be more material in cases of acquiescence than in cases of estoppel.").

[31] See King, supra note 14, at 82-83; Simpson & Fox, supra note 14, at 122-123; Oppenheim, supra note 21, § 154, at 527; Brownlie, supra note 22, at 159. Not all international scholars have drawn these sharp distinctions between extinctive prescription,

Having derived from principles *ex aequo et bono,*[32] the equitable principles of estoppel and acquiescence are more established in international law than the doctrine of laches.[33] Given that all three principles have the same legal consequence—precluding the offending party from litigating the claim—international courts have, at times, framed their consideration of undue delay somewhat equivocally, so that the precise principle of international law used in dismissing the action is ambiguous.[34] One example of such an ambiguity between the doctrines and an international tribunal's reluctance to directly address the issue of laches may be found in the jurisprudence of the International Court of Justice ("I.C.J.").[35]

The *Temple of Preah Vihear* case[36] illustrates the point. The issue before the I.C.J. was the legitimacy of a map produced by France and submitted to Thailand (then known as Siam) as the authoritative border between Thailand

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acquiescence, and estoppel. See, e.g., Schwarzenberger, supra note 14, at 566 ("[A]cquiescence in a situation contrary to international law has been honoured with the distinct nomenclature of extinctive prescription.").

[32] Loosely translated, the phrase *ex aequo et bono* means "according to justice."

[33] See Thirlway, supra note 28, at 29-49 (noting that the doctrines of acquiescence and estoppel have been applied in at least 11 different cases before the International Court of Justice); see also D.W. Bowett, Estoppel Before International Tribunals and Its Relation to Acquiescence, 33 Brit. Y.B. Int'l L. 176, 180-81 (1957) (arguing that the rule of estoppel has a basis in the "general principle of good faith" and finds general acceptance in the jurisprudence of international tribunals); Brown, supra note 28, at 385-86 (the justifications cited for estoppel in the international context include good faith, consistency, and "public policy").

[34] See, e.g., Case Concerning the Arbitral Award Made by the King of Spain on 23 December 1906 (Hond. v. Nicar.), 1960 I.C.J. 192, 194, 197 (Nov. 20). In this dispute, the court dismissed Nicaragua's arguments that the Gámez-Bonilla Treaty of 1894 was invalid:

> [T]he Court considers that, having regard to the fact that the designation of the King of Spain as arbitrator was freely agreed to by Nicaragua, that no objection was taken by Nicaragua to the jurisdiction of the King of Spain as arbitrator either on the ground of irregularity in his designation as arbitrator or on the ground that the . . . Treaty had lapsed even before the King of Spain had signified his acceptance of the office of arbitrator, and that Nicaragua fully participated in the arbitral proceedings before the King, it is no longer open to Nicaragua to rely on either of these contentions as furnishing a ground for the nullity of the Award.

Id. at 209. As one international publicist has noted, "The *King of Spain* case is more difficult to categorize: the Court in the judgment did not use any of the terms estoppel, preclusion or acquiescence." Thirlway, supra note 28, at 46. A close reading of the pleadings submitted to the court does not shed any further light on the issue. Honduras argued that Nicaragua must be "estopped" on broad theories of equity and international justice. Memorial of Honduras (Hond. v. Nicar.), 1960 I.C.J. Pleadings (1 Arbitral Award Made by the King of Spain on 23 December 1906) 51 (May 1, 1959).

[35] See Thirlway, supra note 28, at 30-37 (arguing that the I.C.J. has recognized narrow, and often ambiguous, distinctions between acquiescence, estoppel, and extinctive prescription). For an example outside the jurisprudence of the I.C.J., see Case of Stratton & Black (U.S. v. Mex.) (U.S.-Mex. Comm'n 1868), *in* 3 John Bassett Moore, International Arbitrations to Which the United States Has Been a Party 3138, 3138-39 [hereinafter Moore]; Case of the Canada (U.S. v. Braz.) (1870), *in* 2 Moore, supra at 1733, 1736.

[36] Case Concerning the Temple of Preah Vihear (Cambodia v. Thail.), 1962 I.C.J. 6 (June 15).

and Cambodia. Although the map showed the Temple of Preah Vihear within the confines of the Cambodian border, the Thai government did not object before an international tribunal until decades later, asserting then that the map was invalid. The court held that:

> Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map.... It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it.[37]

Although the court noted that France and Cambodia had relied on Thai silence in the matter, it is unclear which equitable principle barred the Thai rejection of the map's legitimacy—its undue delay in pressing the claim (suggesting the doctrine of laches), or the French and Cambodian reliance (suggesting either estoppel or acquiescence). Thus, the court, consistent with its previous opaque jurisprudence surrounding the issue,[38] avoided the opportunity to invoke the doctrine of laches in an unambiguous fashion.[39]

Some international scholars have argued that the doctrinal distinction between acquiescence, estoppel, and laches is simply one of nomenclature, and should have no legal consequences.[40] These arguments, however, are misguided. Even though the application of the principles may produce the same consequences, each doctrine invokes a distinct legal analysis and often rests on different forms of evidence.[41] For example, evidence showing that a claimant state did not consent to the disputed issue, even though the under-

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[37] Id. at 32.

[38] See supra notes 34-35 and accompanying text.

[39] In a separate opinion, Judge Fitzmaurice, perhaps cognizant of the equivocal reasoning of the majority, held that the principle of laches is "quite distinct theoretically from the notion of acquiescence," but nevertheless noted that "acquiescence can operate as a preclusion or estoppel in certain cases, for instance where silence, on an occasion where there was a duty or need to speak or act, implies agreement, or a waiver of rights." *Temple of Preah Vihar*, 1962 I.C.J. at 62.

[40] See Schwarzenberger, supra note 14, at 566:

> Prolonged inactivity in circumstances in which, in *jus aequum*, silence must be interpreted as abandonment of a claim, may result in the extinction of an international claim. Although not differing in substance from other forms of acquiescence, acquiescence in a situation contrary to international law has been honored with the distinct nomenclature of extinctive prescription. (Footnotes omitted).

[41] See Thirlway, supra note 28, at 45-47.

lying claim is decades old, may defeat an argument of acquiescence.[42] Similarly, if a state were to show that its conduct was not misleading to another state, then there can be no claim of estoppel—regardless of the passage of time in pressing the claim for adjudication.[43] In the case of laches, however, the critical inquiry is the age of the claim and the resulting unfairness to the defending state. Consequently, only evidence pertaining to these issues is legally relevant, and no inquiry into incidental issues relating to state of mind, reliance, or consent is necessary.

II. THE LEGITIMACY OF THE DOCTRINE OF LACHES IN INTERNATIONAL LAW

A. Historical Authority Affirming the Doctrine

A thorough review of case law rendered by international jurists—the International Court of Justice notwithstanding—reveals a willingness to apply the doctrine of laches against stale claims tainted with undue delay.[44] Although opinions rendered by international courts and arbitration fora are not uniformly reasoned or uniformly applied,[45] the frequent use of the laches principle is telling evidence of the doctrine's legitimacy in international law. Most international scholars will not dispute the numerous applications of the doctrine as an indication of a potential rule of international law.[46] Thus, an analysis of laches in international law must begin with its historical applica-

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[42] See *Temple of Preah Vihear*, 1962 I.C.J. at 120-22 (Spender, J., dissenting) (arguing that evidence in the case suggested that Thailand did not accept France's map, even though it waited 50 years to adjudicate the claim).

[43] See Thirlway, supra note 28, at 46 ("If there has been reliance on a statement leading to a change of the relative position of the parties, the time it has taken for this to occur is not relevant....").

[44] See, e.g., 1 Whiteman, supra note 20, at 222-47; Law and Procedure, supra note 14, at 375-83; King, supra note 14, at 87-96. As discussed above, no single authority extensively surveys extant case law applying the doctrine of laches as an established principle of international law. With the possible exceptions of Whiteman and Ralston, literature treating the doctrine only cites a few relevant cases, with little or no discussion of the underlying facts. See supra note 14. Since the principle of extinctive prescription is fact-sensitive, conclusions drawn from a conclusory treatment of pertinent case law are only tenuous at best.

[45] See infra text accompanying notes 47-139.

[46] See, e.g., Documents of the Tenth Session [1958] 2 Y.B. Int'l L. Comm'n 47, 67, U.N. Doc. A/CN.4/111. Even the Restatement, which boldly proclaims that there is "[n]o general rule of international law limit[ing] the time within which a claim can be made," admits that "international tribunals have barred claims because of a delay in presentation to the respondent state if the delay was due to the negligence or laches of the claimant state." Restatement, supra note 8, § 902 cmt. c. Cf. Lauterpacht, supra note 12, at 273-75 (arguing that the doctrine of laches as applied by international law is not necessarily a rule of international law, but an instance of an international tribunal applying municipal law). Arguments against the doctrine of laches as a rule of international law are presented below. See infra text accompanying notes 140-171.

tions in international jurisprudence, tracing its development from the earliest stages of the doctrine's existence to more recent attempts at codification.

1. The Early Applications of Laches in International Law—1858

One of the earliest instances of a state pleading a defense of laches in international law is the *Macedonian* case,[47] decided in 1858 by a Belgian arbitrator. The United States sued Chile for the seizure of a U.S. ship in purported violation of international maritime law.[48] Although the incident in question occurred in 1819, the United States did not press the claim until 1841, when it presented an official letter of protest to the Chilean government demanding restitution.[49] In return, Chile argued that the claim was barred by "prescription," since twenty years had passed since the incident took place.[50] The United States, in its memorial before the tribunal, vehemently argued against dismissing the case on account of the delay, claiming that such a doctrine was simply not applicable to sovereign states governed by public international law.[51] After much posturing and strongly worded diplomatic correspondences, the Chilean government reserved the question

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[47] Case of the Brig Macedonian (U.S. v. Chile) (King Leopold of Bel., sole arb. 1858), *in* 2 Moore, supra note 35, at 1449.

[48] Id.

[49] Id. at 1449, 1452.

[50] Id. at 1452. The Chilean memorials, which are unpublished, did not present any international authority to the effect that "prescription" was a principle of international law and was consequently applicable to the case at bar. This can be inferred from the assertion of the United States that "[it] had never heard of . . . the doctrine of prescription [being] applied between sovereigns." Id.

[51] The argument, as advanced by Acting Secretary of State Cralle, stated:

> [T]he position . . . that a claim due from one government to another is barred by the lapse of twenty years, seems equally novel and untenable. The idea of an international act of limitations is entirely new, and so far as I am informed, has no support either in the opinions of any respectable Publicist, or the decisions of the prize courts of any civilized nation. Governments are presumed to be always ready to do justice; and whether a claim be a day or a century old, so that it be well-founded, every principle of natural equity, of sound morals, requires that it should be paid. . . . It is plain, therefore, that if this new principle be admitted as a bar to the claim, it would only be to work acknowledged injustice . . . .

1 Whiteman, supra note 20, at 230-31. Not surprisingly, this was the majority view at the time, as the doctrine of laches was understood as an equitable construct in municipal legal systems, not applicable to states under notions of sovereignty and supremacy. See 2 Francis Wharton, Digest of International Law of the United States § 239 (2d ed. 1887); cf. Henry Wheaton, Elements of International Law 218 (6th ed. 1855) (arguing that "writers on natural law have questioned how far . . . *prescription*[] is justly applicable as between nation and nation," but "the uninterrupted possession of territory, or other property, for a certain length of time, by one State, excludes the claim of every other"). The argument is discussed at length below, infra notes 140-147 and accompanying text.

of prescription from arbitration.[52] As a result, the arbitrators proceeded to the merits of the claim and awarded damages to the United States.[53]

In the *Case of Louis Brand*,[54] the United States sued Peru on behalf of an American citizen who alleged tortious injuries caused by Peruvian soldiers twenty-six years prior to the suit.[55] In rendering its decision, the Peruvian Claims Commission noted that the delay was "an unfortunate and unaccountable element in the claim."[56] Having chastised the United States for the delay, the Commission then proceeded to the merits and held that the Peruvian soldiers did not violate international law in their attack on Louis Brand.[57] As a result, it is not clear if the rejection of the action rested on American delay in pressing the claim or on the merits.[58] Yet the significance of the case in the doctrine's development should not be understated; it was the first time an international tribunal chastised a state for pressing a stale claim—albeit in dicta—possibly suggesting redress under international law.[59]

Similarly, other international tribunals during the doctrine's fledgling period of development began to find an innate unfairness in litigating claims plagued with undue delay. Although these decisions did not invoke the doctrine of laches as such and are scant in providing any authority regarding the validity of laches in international law,[60] they nevertheless dismissed stale claims due to the inherent inequity in their litigation.[61] The tacit implication of these cases is that international law will not excuse a claim plagued with undue delay.

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[52] *Macedonian*, *in* 2 Moore, supra note 35, at 1452-53.

[53] Id. at 1465-67.

[54] (U.S. v. Peru) (Peru Comm'n 1863), *in* 2 Moore, supra note 35, at 1615, 1625.

[55] Id. at 1625.

[56] Id.

[57] Id. at 1626.

[58] The record, moreover, shows no consideration of the issues raised in the *Macedonian* or whether the United States had even argued against the significance of the delay in international law.

[59] The *Louis Brand* case has been cited for this proposition. See Law and Procedure, supra note 14, at 376.

[60] See, e.g., Selkirk's Case (U.S. v. Mex.) (U.S.-Mex. Comm'n 1868), *in* 4 Moore, supra note 35, at 3130-31 (the tribunal summarily dismissed an action by the United States that was brought over 20 years after the alleged violation of international law had occurred).

[61] See, e.g., Mossman's Case (U.S. v. Mex.) (U.S.-Mex. Comm'n 1858), *in* 4 Moore, supra note 35, at 4180-81 (holding that it would simply "seem[] unfair" to allow the action, given that the claimant had waited over 15 years before invoking the international legal process).

2. Establishing the Validity of the Doctrine—Williams Case—*1890*

The seminal authority affirming the existence of the laches doctrine in international law is the celebrated *Williams Case*,[62] announced in 1890 by Commissioner Little, an American arbitrator presiding over the United States-Venezuelan Claims Commission.[63] In this case, the United States sued the Venezuelan government in 1868 on behalf of a New York merchant who alleged that Venezuela had breached its contract obligations in 1841.[64] Although the defense did not specifically plead laches, it argued nonetheless that the twenty-six year delay "placed [it] at a disadvantage . . . as to the matter of personal testimony, some, if not all, [of its] witnesses to the transaction having before then died."[65] In dismissing the action without any consideration of the underlying merits, Commissioner Little began his inquiry by declaring that the issue was "left to the direction of international law on the subject."[66] The opinion's reasoning embraced the premise that extinctive prescription is: "[A] 'rule' of inference: not necessarily perhaps that debts have been paid or titles granted, or other particular thing done, but that *something* at least has transpired which, in the *natural order*, as the Civilians say, forms a basis and demand for its operation."[67] As a "natural" law, the analysis continued, the doctrine of laches must exist in international law as a recognized principle common in any legal system.[68] To reach this proposition, Commissioner Little largely cited American, English, Roman, and European jurisprudence holding that extinctive prescription is, unquestionably, a central tenet of law.[69] Consequently, reasoning by inference, international law must recognize the doctrine of laches as a bar to stale claims.[70]

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[62] (U.S. v. Venez.) (U.S-Venez. Comm'n 1890), *in* 4 Moore, supra note 35, at 4181.

[63] Id. at 4199. Many international scholars cite the *Williams Case* as one of the most explicit early applications of the doctrine of laches in international law. See, e.g., 1 Whiteman, supra note 20, at 222-24; General Principles, supra note 14, at 375-76. The *Williams Case*, and initial decisions from the United States-Venezuelan Commission, were impeached years later on account of fraud. See 1 Whiteman, supra note 20, at 223. This fact, nonetheless, has not affected the stature of the decision nor its significance in the development of the laches doctrine.

[64] *Williams Case*, *in* 4 Moore, supra note 35, at 4181-82.

[65] Id. at 4182.

[66] Id. at 4182-83. Even this analytical commencement point is quite significant, as later arguments against the doctrine of laches contended that domestic law—not international law—governed the time bar to stale claims. See infra notes 151-161 and accompanying text.

[67] *Williams Case*, *in* 4 Moore, supra note 35, at 4192.

[68] See id. at 4196-97.

[69] Id. at 4186-90 (citing Wood v. Carpenter, 101 U.S. 135, 139 (1879); Rhode Island v. Massachusetts, 45 U.S. (4 How.) 591, 639 (1846); Domat, Civil and Public Law 483-84 (Strahan ed. 1732)).

[70] *Williams Case*, *in* 4 Moore, supra note 35, at 4199. Whiteman, in her brief report of the *Williams Case*, notes—somewhat curiously—that the "Commissioner relied upon

Commissioner Little was nevertheless mindful of the arguments advanced by the United States in *Macedonian* in 1858.[71] In response, he asserted that a state cannot escape the universal principle of laches simply by virtue of state sovereignty:

> While international proceedings for redress are not bound by the letter of specific statutes of limitations, they are subject to the same presumptions as to payment or abandonment as those on which statutes of limitation are based. A government can not any more rightfully press against a foreign government a stale claim, which the party holding declined to press when the evidence was fresh, than it can permit such claims to be the subject of perpetual litigation among its own citizens. It must be remembered that statutes of limitations are simply formal expressions of a great principle of peace which is at the foundation not only of our own common law but of all other systems of civilized jurisprudence.[72]

Moreover, Commissioner Little explained that even if the principle that there may be no time limit on a valid claim between sovereign states was well established in international law, a claim riddled with undue delay cannot be "valid" as to disputed facts.[73] That is, "[a]s to any *admitted or indisputable* fact, the public [international] law, not resting 'upon the niceties of a narrow jurisprudence, but upon the enlarged and solid principles of state morality,' . . . would not oppose the lapse of time . . . even where municipal prescription might."[74] In contrast, a stale claim riddled with undue delay may not be factually "well-founded" and thus may be reasonably barred in light of its questionable validity.

The U.S.-Venezuelan Commission handed down a companion decision in the *Cadiz Case* later that same year.[75] In the *Cadiz Case*, the United States, in espousing the claim of an American citizen who alleged a Venezuelan failure to perform various contractual obligations,[76] waited over forty years to

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slight, if any, authority for a rule that lapse of time bars an international claim." 1 Whiteman, supra note 20, at 223. A close reading of the decision shows that this is not entirely accurate. Commissioner Little's analysis included a thorough review of older, international writers that acknowledged the effect of time in vitiating claims based upon the acquisition of title. *Williams Case*, *in* 4 Moore, supra note 35, at 4183-89. Although more closely related to the doctrines of acquiescence and estoppel, the authorities cited nonetheless stood for the proposition that even a sovereign state would be subject to international rules governing undue delay.

[71] *Williams Case*, *in* 4 Moore, supra note 35, at 4190.

[72] Id. (quoting 3 Wharton, Digest of International Law, app. § 239 (2d ed. 1887)).

[73] Id. at 4198.

[74] Id. (emphasis added).

[75] Case of Ann Eulogia Garcia Cadiz (U.S.-Venez. Comm'n 1890), *in* 4 Moore, supra note 35, at 4199.

[76] Id. at 4200-02. The allegations in the United States complaint before the Commission were actually changed several times throughout the proceedings. Id.

file the action.[77] In response to this delay, Commissioner Findlay, writing for the Commission, rejected the claim, holding that, "it [would be] impossible to say whether [the action] is well founded or not, the delay being without excuse or justification."[78] Furthermore, the decision dismissed the argument that extinctive prescription had no place in international law:

> [T]here are certain principles, having their origin in public policy, founded in the nature and necessity of things, which are equally obligatory upon every tribunal seeking to administer justice. Great lapse of time is known to produce certain inevitable results, among which are the destruction or the obscuration of evidence, by which the equality of the parties is disturbed or destroyed, and, as a consequence, renders the accomplishment of exact or even approximate justice impossible. *Time itself is an unwritten statute of repose.* Courts of equity constantly act upon this principle, which belongs to no code or system of municipal judicature, but is as wide and universal in its operation as the range of human controversy. A stale claim does not become any the less so because it happens to be an international one, and this tribunal in dealing with it can not escape the obligation of an universally recognized principle, simply because there happens to be no code of positive rules by which its action is to be governed.[79]

Eloquently echoing the analysis in the *Williams Case*,[80] the opinion ultimately recognized this "jurisdictional question which might give rise to serious difficulty [even] if the claim was well founded in other respects."[81]

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[77] Id. at 4202.

[78] Id. at 4203.

[79] Id.

[80] See id. at 4181; supra notes 62-74 and accompanying text.

[81] *Cadiz Case*, 4 Moore, supra note 35, at 4199. See, e.g., Case of Seth Driggs (U.S. v. Venez.), *excerpted in* Opinions Delivered by the Commissioners in the Principal Cases 403 (U.S.-Venez. Comm'n 1890). In the *Driggs Case*, decided by the same tribunal as the *Williams Case* and the *Cadiz Case*, Commissioner Little again had the opportunity to dismiss an international claim for undue delay. The United States sued Venezuela for restitution arising from the seizure of American goods in purported violation of international law. Id. Although the alleged events occurred in 1828, Driggs did not bring his claim to the attention of the United States until 1856. Id. In dismissing the case, Commissioner Little's opinion squarely addressed the unwarranted delay:

> There is not a case on our list that better illustrates the wisdom of the prescriptive rule. The evidence is contradictory, and the actual witnesses to the essential transactions on the part of the Government had presumably passed away, for their evidence was not procured when the claim was asserted. Like [the *Williams Case*], the claim is largely fictitious as to its support—time having furnished the opportunity for fraudulent engraftment.

Id. at 404. This ruling was once more applied by the Commission in the Horatio Case (U.S. v. Venez.), *excerpted in* Opinions Delivered by the Commissioners in the Principal Cases 37 (U.S.-Venez. Comm'n 1890), *in* 3 Moore, supra note 35, at 3027.

3. The Venezuelan Arbitrations of 1903

The next major development in international jurisprudence affirming the existence of the laches doctrine was a series of international arbitrations decided in the Hague by the various Venezuelan tribunals of 1903.[82] The most prominent of these decisions is the *Gentini Case*,[83] announced by the mixed Italian-Venezuelan Commission under the direction of Umpire Ralston. In this case, Italy, after a thirty year delay, sued Venezuela on behalf of an Italian citizen who claimed that Venezuelan soldiers had illegally seized his business establishment.[84] Venezuela pleaded that the claim was "barred by prescription," but nevertheless conceded that "no national statute can be invoked against [Italy]."[85] In its response, Italy argued that laches could "not be recognized in international tribunals," because such a doctrine would constitute nothing more than an application of domestic law to a sovereign state—essentially violating principles of state sovereignty and international legal supremacy.[86] Umpire Ralston, writing the opinion of the Commission, dismissed the claim entirely, holding that "[t]he permanent court of arbitration has never *denied* the principle of prescription, a principle well recognized in international law, and it is fair to believe it will never do so."[87] Ralston echoed the analysis of the *Williams Case,* arguing that the doctrine of laches was so well-founded in natural law that it would be "upset[ing]" if interna-

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[82] All arbitrations pursuant to the Venezuelan protocols decided at the Hague are reported in Jackson H. Ralston, Venezuelan Arbitrations of 1903 (1904) [hereinafter Venezuelan Arbitrations]. The arbitration tribunals consisted of the American Commission, the Belgian Commission, the British Commission, the French-Venezuelan Commission, the German Commission, the Italian-Venezuelan Commission, the Mexican-Venezuelan Commission, the Netherlands-Venezuelan Commission, the Spanish-Venezuelan Commission, and the Swedish and Norwegian-Venezuelan Commission. Id. at v-xi.

[83] (Italy v. Venez.) (Italy-Venez. Comm'n 1903), *in* Venezuelan Arbitrations, supra note 82, at 720.

[84] Id. at 724.

[85] Id. at 724-25. It is not particularly clear why Venezuela had conceded that no national statute may toll against Italy, as the tribunal's jurisdiction lay solely in international law and not any domestic legal system. Id. It seems that this pleading was a reflection of the confusion among international lawyers who considered the laches doctrine nothing more than an application of a state's statute of limitations in an international context. As discussed below, many jurists misread international precedent to support this point. See infra text accompanying note 160.

[86] *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 725. Italy's argument clearly draws from the American arguments advanced in *Macedonian*. See supra note 51. Italy's focus, however, shifted slightly by implying that international law reigns supreme over domestic law, and will not permit the simple application of municipal legal doctrines. *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 725. As discussed below, this argument draws from an incorrect reading of international precedent. See text accompanying note 152.

[87] *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 725 (emphasis added).

tional law did not recognize its existence.[88] Moreover, the *Gentini Case* cited prior international jurisprudence affirming the doctrine's viability in international law—namely *Mossman's Case*, the *Williams Case*, the *Cadiz Case*, and the *Driggs Case*.[89] Thus, Umpire Ralston concluded that the doctrine of laches was unquestionably a recognized "principle" of law[90] —inclusive of international law—and applicable to sovereign states.[91]

An analogous case decided in the Hague as part of the 1903 Venezuelan arbitrations also recognized the doctrine of laches in international law. In the *Spader Case*,[92] handed down by the American-Venezuelan Commission, the tribunal heard a contracts claim by an American citizen who argued that the Venezuelan government owed him for various services performed between 1810 and 1821.[93] Here, Commissioner Bainbridge held that, "[a] right unasserted for over forty-three years can hardly in justice be called a 'claim.'"[94] Following the lead taken by Umpire Ralston in the Italian-Venezuelan Commission, the opinion countered the argument that sovereign states are not subject to municipal rules governing the time bar of claims:[95]

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[88] Id. at 725-28. The opinion cites Wheaton, Vattel, Phillimore, Hall, Polson, Calvo, Vico, Grotius, Taparelli, Sala, Coke, Sir Henry Maine, Brocher, Domat, Burke, Wharton, Markby, the Napoleonic Code, Laurent, Savigny, and the *Williams Case* itself. Id.

[89] These cases are discussed above, see supra notes 62-81. Umpire Ralston cited these cases as "international precedents [that] exist upon the subject." *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 728-29. Although this is true, the opinion does not fully explain the unique legal reasoning involved in each decision. As explained above, some cases rest their holdings on "natural law" induction—the *Williams Case*, for example—while others are based on more ephemeral concepts of "fairness." See supra notes 47-81 and accompanying text.

[90] *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 725. But see id. at 720-23 (Agnoli, Comm'r, supp. op.) (arguing that because laches is not a "rule" of international law, it cannot operate to bar stale claims from litigation). Commissioner Agnoli's dissent will be discussed below, infra text accompanying notes 162-163. In another separate opinion, Commissioner Zuloaga generally recognized the doctrine of laches in international law, but under a different legal analysis. See *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 723-24 (Zuloaga, Comm'r, sep. op.) (suggesting that the international doctrine of laches would not toll against a claim that is allowed by a domestic statute of limitations on the grounds of logic and fairness).

[91] See *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 725-30.

[92] (U.S. v. Venez.) (U.S.-Venez. Comm'n 1903), *in* Venezuelan Arbitrations, supra note 82, at 161-62.

[93] Id. at 161. The claimant did not inform the United States government until 1889, at which time the United States introduced the action to the tribunal. Id.

[94] Id. at 162.

[95] This case represents the second time the United States reversed its policy regarding the doctrine of laches in international law. As discussed above, the United States in *Macedonian* had initially opposed the doctrine's application in international law. See supra notes 47-53. Later in 1902, the American government tried to distinguish the operation of laches against a claim it had presented against Mexico. See Replication of the United States of America to the Answer of the Republic of Mexico in Reply to the Memorial Relative to the Pious Fund of the Californias, *in* Jackson H. Ralston, United States v. Mexico: Report of Jackson H. Ralston 11 (1902); infra text accompanying notes

> It is doubtless true that municipal statutes of limitation can not operate to bar an international claim. But the *reason* which lies at the foundation of such statutes, that 'great principle of peace,' is as obligatory in the administration of justice by an international tribunal as the statutes are binding upon municipal courts.[96]

The Commission, in ultimately dismissing the action before the tribunal, cited the *Cadiz Case* along with many of the same authorities mentioned in the *Gentini Case*.[97]

Concomitant with the *Gentini Case* and the *Spader Case* were several other decisions that not only affirmed the doctrine of laches, but also sought to outline relevant factors in the balancing of equities between international litigants: how diligent the claimant was in pursuing his claim, whether the adverse party had unnecessarily prolonged the process, and whether allowing a claim would be unfair to the defendant.[98] Consequently, the Commission

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153-157. In the *Spader Case*, the United States once again adopted the arguments against the doctrine initially advanced during the *Macedonian* litigation. Interestingly, authorities cited by Whiteman indicate that, internally, the State Department since 1902 had been denying applications for espousal on the basis of laches. 1 Whiteman, supra note 20, at 243-44.

[96] *Spader Case*, *in* Venezuelan Arbitrations, supra note 82, at 162.

[97] Id. Different commissions at the Hague, however, have not uniformly approached the issue of laches. See, e.g., Daniel Case (Fr. v. Venez.) (Fr.-Venez. Comm'n 1903), *in* Venezuelan Arbitrations, supra note 82, at 507 (holding that a delay by the claimant, even when the defendant has not specifically pleaded laches, affects the quantum of damages due). The Permanent Court of Arbitration has taken a similar approach. See, e.g., Russian Indemnity Case (Russ. v. Tur.), Hague Ct. Rep. (Scott) 297, 313 (Perm. Ct. Arb. 1912) (holding that "the general principle of [state responsibility] implies a special responsibility in the matter of delay in the payment of a money debt, unless the existence of a contrary international custom is proven").

[98] In the Tagliaferro Case, for example, the Italian-Venezuelan Commission heard a claim in 1903 by an Italian citizen who alleged wrongful imprisonment by the Venezuelan government in 1872. (Italy v. Venez.) (Italy-Venez. Comm'n 1903), *in* Venezuelan Arbitrations, supra note 82, at 764. Venezuela pleaded a bar by prescription. Id. The claimant, however, argued that the facts of his particular case did not warrant a dismissal by laches; he had immediately appealed to the relevant Venezuelan judicial authorities, then to Italian diplomats in Venezuela, then to the Commission itself. Id. See also 1 Whiteman, supra note 20, at 247. The whole process took nearly 30 years to complete, and Umpire Ralston hints that Venezuela itself is guilty of subterfuge in prolonging the claimant's appeals. *Tagliaferro Case*, *in* Venezuelan Arbitrations, supra note 82, at 764. The Commission agreed that prescription, although a recognized principle in international law, did not apply in the present case. Noting that the doctrine of laches should not be rigidly applied in international law, the opinion held that "[w]hen the reason for the rule of prescription ceases, the rule ceases, and such is the case now." Id. at 765. See also Stevenson Case (U.K v. Venez.) (U.K.-Venez. Comm'n 1903), *in* Venezuelan Arbitrations, supra note 82, at 327 ("There can be no just allegation of laches properly chargeable to either the claimant or the claimant Government. The delay has been either in the inability, or the unwillingness of [the defendant] to respond to this claim."). The Giacopini Case, decided by the same tribunal, affirmed the analysis heralded in the *Tagliaferro Case* and claimed that "the principle of prescription finds its foundation in the highest equity—the avoidance of possible injustice to the defendant." (Italy v. Venez.)

adopted the position that the doctrine of laches is more than a simple application of an international statute of limitations. Rather, the doctrine as legitimate international law is grounded in the "highest equity" and takes into account the underlying circumstances of the delay.[99]

4. Initial Codifications of the Doctrine

By 1925, the doctrine of laches had gained enough stature in international jurisprudence that the Institute of International Law sought to codify the principle as a guide for future international adjudication and arbitration.[100] In this regard, the Institute explicitly "refrain[ed] . . . from drawing up a detailed set of rules . . . to recommend to governments for adoption," yet announced that the limitations of actions in public international law was a general rule that "should influence international arbitrators and judges in rendering their awards."[101] The Institute announced further that:

> Practical considerations of order, of stability and of peace, long accepted in arbitral jurisprudence, should include the limitations of actions for obligations between states among the general principles of law recognized by civilized nations, which international tribunals are called upon to apply.
>
> In the absence of a conventional rule in force in the relations of the litigant states, fixing the limit of the prescription, its determination is a question left entirely to the decision of the international judge, who, in order to admit the plea based on the lapse of time, should recognize in the circumstances of the case the existence of one of the reasons which

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(Italy-Venez. Comm'n 1903), *in* Venezuelan Arbitrations, supra note 82, at 765, 767 (citing *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 727). The tribunal also rejected Venezuela's laches defense, finding no potential for unfairness toward Venezuela since it had full notice of the action and had "ample opportunity to prepare its defense." Id. at 767.

[99] See supra note 94; see also Irene Roberts Case (U.S. v. Venez.) (U.S.-Venez. Comm'n 1903), *in* Venezuelan Arbitrations, supra note 82, at 142. The *Irene Roberts Case* arose out of a claim by a U.S. citizen regarding an illegal seizure of property by Venezuela in 1871. Id. at 142-43. In its response to the Venezuelan plea of laches, the United States noted that it had presented the claim to Venezuela in 1871, but attempts to resolve the dispute were consistently thwarted by Venezuelan delay. Id. at 144. Commissioner Bainbridge held that the doctrine of laches did not apply: "The contention that this claim is barred by the lapse of time would, if admitted, allow the Venezuelan Government to reap advantage from its own wrong in failing to make just reparation to [the United States] at the time the claim arose." Id.

[100] Institute of International Law, Limitations of Actions in Public International Law, 19 Am. J. Int'l L. 758, 760 (1925).

[101] Id. The rapporteur, James Brown Scott, did not report the authorities cited during the Institute's deliberation on the matter. The report itself, however, "noted with satisfaction" that the League of Nations' Committee of Experts for the Progressive Codification of International Law had undertaken to scrutinize the doctrine as a potential rule of international law. Id. As is discussed below, the League of Nations voted in favor of adopting a rule of laches in the codification of international law. See infra notes 117-121.

impose the prescription.[102]

The Institute's report signifies that, for the first time, international jurists and scholars had agreed that laches was not only a recognized principle in international law, but is worthy of codification as an applicable rule of international litigation.[103]

The next series of decisions recognizing the laches doctrine in international law were decided in the late 1920s by various international tribunals at the Hague. In the *Cayuga Indians Case*,[104] the United Kingdom officially notified the United States of its claim in 1899 on behalf of the Canadian Cayuga Indians for various treaty violations occurring in 1810.[105] Here, the mixed Great Britain-United States Commission recognized that "[t]here is no doubt that there has been laches on the part of Great Britain,"[106] but nevertheless rejected the laches defense using principles of international "equity" and "justice."[107] The doctrine of laches, "[under] the general principles of justice," did not run counter to "those who are unable to act."[108] Because the Cayuga Indians claimed inordinate difficulty in invoking the international legal process, the Commission held the delay was excusable under the circumstances.[109] The case is significant through its affirmation of laches as an accepted principle of impartiality and justice.[110]

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[102] Institute of International Law, supra note 100 at 760.

[103] See, e.g., Law & Procedure, supra note 14, at 383 (arguing that the report had "virtually summed up" relevant international jurisprudence regarding the issue). Nevertheless, the report's significance was somewhat undermined by the League of Nations in 1928. See infra note 190 and accompanying text.

[104] (U.K. v. U.S.), 6 R.I.A.A. 173 (U.K.-U.S. Arb. Trib. 1926).

[105] Id. at 173-74, 189.

[106] Id.

[107] Id. at 180. Although the jurisdiction of the Commission was technically limited to the terms of the various treaties involved in the dispute, the treaties themselves, as interpreted by the decision, provided that arbitration would be decided in accordance with "equity" and "justice" as understood in international law. Id.

[108] Id. at 189.

[109] Id. ("Indians, not free to act except through the appointed agencies of a sovereign which has a complete and exclusive protectorate over them, are not to lose their just claims through the laches of that sovereign, unless at least there has been so complete and bona fide change of position in consequence of that laches as to require such a result in equity."). See also Daylight Case (U.S. v. Mex.), 4 R.I.A.A. 164, 169 (U.S.-Mex. Comm'n 1927) (holding that the Mexican plea of laches against the United States must be disallowed because the delay was due to an impasse in diplomatic negotiations).

[110] See *Cayuga Indians Case*, 6 R.I.A.A. at 180-189; see also Simpson & Fox, supra note 14, at 125 (contending that the *Cayuga Indians Case* established a recognized exception to the rule); General Principles, supra note 14, at 384-85 & n.48; cf. Faulkner Case (U.S. v. Mex.) 4 R.I.A.A. 67, 74 (U.S.-Mex. Gen. Claims Comm'n 1926) (Am. Comm'r, sep. op.) (arguing that the laches doctrine relates to principles of evidence as well as equity and justice).

The doctrine of laches was once again affirmed in *Sarropoulos v. Bulgarian State*,[111] involving a Greek citizen who sued Bulgaria in 1921 for personal injuries sustained during revolutionary upheaval in 1906.[112] The Bulgarian government responded by invoking a plea of laches, arguing that the claim must be barred by prescription because of the fifteen year delay.[113] The tribunal sustained the plea, but noted *a priori* that "[p]ositive international law has not so far established any precise and generally adopted rule either as to the principle of prescription as such or as to its duration."[114] Nevertheless, the tribunal's analysis, reminiscent of the *Williams Case*, acknowledged that:

> [P]rescription appears to constitute a positive legal rule in almost all systems of law. It is an expression of a great principle of peace which is at the basis of the common law and of all civilised systems of jurisprudence. Stability and security in human affairs require that a delay should be fixed outside which it should be impossible to invoke rights or obligations. . . . Prescription being an integral and necessary part of every system of law must be admitted in international law.[115]

The opinion's pronouncement of the laches doctrine has been noted by international scholars and publicists as significant in the doctrine's development.[116] In essence, the decision affirms the analysis that international law

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[111] (Greece v. Bulg.), 4 Ann. Dig. 263 (Greco-Bulg. Arb. Trib. 1927).

[112] Id.

[113] Id.

[114] Id.; see also F.V. García-Amador, Louis B. Sohn & R.R. Baxter, Recent Codification of the Law of State Responsibility for Injuries to Aliens 312 (1974) [hereinafter 1974 Draft Articles] ("[P]ositive [international] law has not hitherto recognized that the claim of a State may be barred by its failure to make timely submission of the claim . . . ."). These statements, of course, assume that laches is a positive rule of international law—one that emphasizes the obligatory nature of legal norms and the fixed authoritative character of the formal sources. See Prosper Weil, Towards Relative Normativity in International Law?, 77 Am. J. Int'l L. 413, 421 (1983). The tribunal may indeed correctly state that international law has yet to recognize a positive rule of laches, but it ignores the possibility of a more normative principle of laches. Although some cases dispute the doctrine's legitimacy in international law, see infra notes 140-171, it would be inaccurate to state that no generally adopted rule had been in existence at this time—especially given the previous 60 years of jurisprudence affirming the doctrine. See, e.g., Institute of International Law, supra note 100, at 760.

[115] *Sarropoulos*, 4 Ann. Dig. at 263-64. The opinion did not cite any prior authority supporting this proposition. The inductive reasoning here is not new. See, e.g., supra notes 67-70 and accompanying text (discussing the natural law analysis announced in the *Williams Case*). But see George W. Cook v. Mexico (U.S. v. Mex.), 4 R.I.A.A. 213, 214 (U.S.-Mex. Comm'n 1927) (holding that "[t]here is, of course, no rule of international law putting a limitation of time on diplomatic action or upon the presentation of an international claim to an international tribunal."). This holding, however, may be distinguished from precedent cited above. See infra notes 159-171 and accompanying text (contrasting a *rule* of laches from the *principle* of laches).

[116] See, e.g., 1 Oppenheim, supra note 21, §154 n.2; 2 O'Connell, supra note 9, at 1066 n.53; Simpson & Fox, supra note 14, at 126 n.76.

not only recognizes a time bar to stale claims, but also mandates its application.

By 1930, the League of Nations, in its general effort to codify existing international law, had considered the issue of whether the doctrine of laches was indeed a recognized principle of international law.[117] The commission debating the doctrine broadly recognized the rule of extinctive prescription and noted that its doctrinal underpinnings are "not only of an international character but are also connected with civil law."[118] Reflecting the natural law arguments first announced in the *Williams Case*, the commission noted that a time bar of stale claims is "a necessary condition for maintaining order in any society."[119] The commission, moreover, recognized that the "object of this [proposal]. . . . [i]s to prevent a State from being indefinitely threatened with international proceedings."[120] Hence, the codification by the League of Nations—albeit without any citation to prior international jurisprudence—is persuasive evidence of the doctrine's recognition in international law.[121]

5. Modern Interpretations of the Doctrine—1956 to the Present

The Arbitration Commission in 1956 announced the next major validation of the laches doctrine as a viable rule of international law. In the *Ambatielos Claim*,[122] Greece had sued the United Kingdom on behalf of a Greek citizen who pleaded various contract claims against the British government.[123] Al-

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[117] Minutes of the Third Committee, Conference for the Codification of International Law, League of Nations Doc. C.351(c) M.145(c), *reprinted in* 4 Conference for the Codification of International Law 1575-1581 (1930) (Shabtai Rosenne ed., 1975) [hereinafter 1930 Codification Conference].

[118] Id. at 1581. Professor Hackworth, the United States delegate to the commission, argued against the doctrine of laches as international law subject to codification:

> At the present time, there is no statute of limitations on the presentation of diplomatic claims. Our purpose here is to codify international law. By [adopting these proposals] we would, in effect, be making new law, and we would be circumscribing the rights of claimants and the rights of their Governments in the matter of obtaining justice through the diplomatic channel.

Id. at 1576. The commission adopted the proposals over U.S. objections. 1930 Codification Conference, supra note 117, at 1582. It should be noted, however, that the commission adopted proposals regarding the doctrine of laches by a narrow margin: 16 votes to 15. Id.

[119] Id. at 1581.

[120] Id.

[121] See, e.g., Marjorie M. Whiteman, The Codification of the Responsibility of States, 8 N.Y.U. L.Q. Rev. 185, 194 (1930). The League of Nations minutes originally adopting a proposal to study the issue are much less resounding in their acceptance of extinctive prescription as a recognized rule of international law. See infra note 164 and accompanying text.

[122] (Greece v. U.K.), 23 I.L.R. 306 (Arb. Comm'n 1956).

[123] See id. at 306, 307. The procedural history of this case is somewhat convoluted, as the 1956 arbitration actually resulted from two hearings before the International Court of

though the incidents in question had occurred in 1919, Greece did not file the action with the Arbitration Commission until 1952.[124] In response, the United Kingdom pleaded laches and argued that the claim must be barred for the unwarranted delay.[125] The Commission disagreed, but only after a careful consideration of the issue, initially noting that "[i]t is generally admitted that the principle of extinctive prescription applies to the right to bring an action before an international tribunal."[126] Holding that the issue is "left to the unfettered discretion of the international tribunal,"[127] the Commission found that Greek efforts during the delay[128] were laudable and could not sustain "an allegation of 'undue delay.'"[129]

The *Ambatielos Claim* and other contemporary international cases were so influential that the Special Rapporteur of the Draft Articles on State Responsibility included a section on the "Lapse of the Right to Bring a Claim" in his 1958 report to the International Law Commission.[130] In addressing the issue, he broadly proclaimed that "writers on international law have stated

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Justice at the Hague. See id. at 307-09; Ambatielos Case (Greece v. U.K.), 1953 I.C.J. 10 (May 19) (holding that the United Kingdom was under an obligation to arbitrate the merits of the case).

[124] *Ambatielos Claim*, 23 I.L.R., at 306-08. Neither Greece nor its claimant remained dormant during this hiatus. Id. at 306-09. Sir Francis Vallat, who was the British agent litigating the case before the tribunal, provides a concise timeline of Greek efforts at judicial redress. Vallat, supra note 13, at 31. In short, the claimant had sued in British trial courts, appealed several times, then notified the Greek government of a potential denial of justice violating international law. Greece consequently notified the British government five times of its intention to arbitrate the matter, but to no avail. Finally, after the Second World War, Greece pursued the matter before the I.C.J. Id.

[125] 23 I.L.R. at 310. Vallat notes that the British argument had actually admitted that the various diplomatic correspondences between the two governments throughout the 32-year period had been sufficient to keep the claim alive. Vallat, supra note 13, at 31. Nevertheless, the United Kingdom argued in its memorial before the Arbitration Commission that Greece had changed the nature of claim in 1939, and actually represented a delay of 21 years. The Commission does not clearly make this distinction. Id. at 31-32.

[126] *Ambatielos Claim*, 23 I.L.R. at 314 (citing Oppenheim, International Law § 155(c) (H. Lauterpacht ed., 8th ed. 1955)).

[127] Id. at 315 (citing Institute of International Law, supra note 100, at 760 (announcing that the question of laches is "left entirely to the decision of the international judge")).

[128] Id. See supra note 124.

[129] *Ambatielos Claim*, 23 I.L.R. at 315. See also Lighthouses Arbitration (Fr. v. Greece), 23 I.L.R. 659 (Perm. Ct. Arb. 1956). The tribunal in the *Lighthouses Arbitration* initially recognized that the doctrine of laches was indeed "a defence of a general nature, based upon considerations of public international law." Id. at 671. Nonetheless, the tribunal held that the parties, as evidenced by their agreement to arbitrate and the history of their relations, had intended "to leave their claims in suspense until an eventual settlement of the outstanding questions as a whole." Id. at 671-72. Presumably invoking the adjudicating authority's "unfettered discretion," as announced in the *Ambatielos Claim*, see 23 I.L.R. at 315, the tribunal rejected the laches plea and ultimately maintained that the doctrine of laches did not apply to the case at bar, despite the 35-year delay. *Lighthouses Arbitration*, 23 I.L.R. at 671-72.

[130] State Responsibility, [1958] 2 Y.B. Int'l L. Comm'n 47, 67 U.N. Doc. A/CN.4/111 [hereinafter 1958 Draft Articles].

that the principle of the [extinctive] prescription of claims is recognized by international law and has been applied by arbitral tribunals in a number of cases."[131] Reminiscent of the analysis underlying the *Williams Case*, the Special Rapporteur sought to justify the rule under principles of natural law.[132] The Draft Articles constitute significant evidence that the doctrine of laches existed as a well recognized principle in international law by 1958. In the 1974 revisions to the Draft Articles, the rapporteurs of the Harvard Draft Convention were even more explicit, adding Article 26, which stated that: "If the presentation of a claim is delayed, after the exhaustion of local remedies . . . , for a period of time which is unreasonable under the circumstances, the claim shall be barred by the lapse of time."[133]

In the late 1980s, decisions by the Iran-U.S. Claims Tribunal affirmed the existence of laches in international law.[134] For example, in *Iran National Airlines v. United States*,[135] the Claims Tribunal affirmed that "extinctive prescription is an established principle of public international law which has been applied by international tribunals,"[136] but held that the doctrine did not apply to the case at bar.[137] Similarly, in a companion case,[138] the Tribunal an-

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[131] Id. at 67 (citing Schwarzenberger, supra note 14, at 246-47; Sarropoulos v. Bulgarian State (Greece v. Bulg.), 4 Ann. Dig. 263 (Greco-Bulg. Arb. Trib. 1927).

[132] 1958 Draft Articles, supra note 130, at 67. Specifically, the rapporteur noted that:

> Just as private individuals cannot remain subject to obligations indefinitely and under the permanent threat of legal action without any limitation of time, so the State likewise cannot be held responsible for an indefinite duration of time, or remain under the threat of an international claim which is subject to no limitation.

Id.

[133] 1974 Draft Articles, supra note 114, at 312 (1974).

[134] Nevertheless, the Claims Tribunal's decisions regarding laches doctrine have not been uniformly clear. Professor Lillich, who litigated many cases before the Tribunal, provided a thorough review of Tribunal decisions regarding the principle of laches in his memorial to the Tribunal regarding United States v. Iran, Case No. B/36, Reply Brief of the United States at 20 (on file with the Virginia Law Review Association).

[135] 17 Iran-U.S. Cl. Trib. Rep. 187, 190 (1987).

[136] Id. at 190 (citing Ian Brownlie, Principles of Public International Law 505-06 (3rd ed. 1979)). The Tribunal did not cite prior jurisprudence, nor did it offer any justification for the principle as recognized international law.

[137] Id. Iran Air filed several claims against the United States in connection with outstanding Iran Air invoices. The Tribunal held that, "[g]iven the commercial nature of the transactions at issue . . . the Tribunal does not consider it appropriate to apply the principle of extinctive prescription as a matter of public international law." Id. Several other cases in international law, although clearly a minority, have distinguished the doctrine of laches in commercially related cases. See, e.g., Payment of Various Serbian Loans Issued in France (Fr. v. Serbia), 1929 P.C.I.J. (ser. A) No. 20/21, at 38-39 (July 12); Payment in Gold of the Brazilian Federal Loans Issued in France (Fr. v. Braz.), 1929 P.C.I.J. (ser. A) No 20/21 at 119-20 (July 12). These cases reason that commercial transactions are often well-enough documented that a delay in litigation will not prejudice the defending state through a loss of relevant evidence. See infra note 202 and accompanying text.

[138] Iran National Airlines v. United States, 17 Iran-U.S. Cl. Trib. Rep. 214 (1987). The facts of this case are identical to *Iran National Airlines*, 17 Iran-U.S. Cl. Trib. Rep. 187.

nounced that although "municipal statutes of limitation are not necessarily binding on claims before international tribunals[,] . . . such periods may be taken into account when determining the effects of an unreasonable delay in pursuing a claim before such a tribunal [applying international law]."[139]

B. Criticism of and Opposition to the Doctrine of Laches

Opposition to the doctrine, especially during the nascent stage of relevant international jurisprudence, focused on three distinct arguments criticizing the principle as legitimate international law: (1) the sovereign right of states to litigate stale claims, (2) the violation of international legal supremacy when applying domestic statutes of limitation, and (3) the inherent vagueness of applying extinctive prescription without predefined time limits.

First, the contention that sovereign states are not bound by traditional rules of prescription in international litigation has persuaded many tribunals. The argument, originally advanced by the United States in cases such as *Macedonian*, contends that a sovereign state operates outside a rule of laches because the doctrine is nothing more than domestic law and not international law as such.[140] A "valid" claim, under this logic, cannot lose its legitimacy in international law in cases where a tribunal's jurisdiction is strictly limited to recognized principles of international justice.[141]

Given the lack of guidance when the argument was initially made, it is not surprising that early tribunals were reluctant to reject this reasoning and strove to defeat a defense of laches from operating against states. In the *Alsop Claim*,[142] decided by a British commission of arbitrators in 1911, the United States sued Chile in 1906 on behalf of an American citizen who claimed outstanding contract obligations dating from 1876 which the Chilean government had assumed from Bolivia.[143] The Chilean government argued that the action must be dismissed on grounds of prescription, as the United States had not pursued a remedy against the principal debtor.[144] In response,

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[139] *Iran National Airlines*, 17 Iran-U.S. Cl. Trib. Rep. at 216. Again, the Tribunal offered no analysis in support of its holding.

[140] See 1 Whiteman, supra note 20, at 230-31 (quoting Acting Secretary of State Cralle's argument, supra note 51). The United States once again advanced the argument—unsuccessfully—in the Case of the Canada (U.S. v. Braz.) (1870), *in* 2 Moore, supra note 35, at 1733, 1736 (citing the common law maxim "*nullum tempus occurit regi*" [time does not run against the sovereign]).

[141] See supra note 140.

[142] (U.S. v. Chile), 5 Am. J. Int'l L. 1079 (U.K. Comm'n 1911).

[143] Id. at 1081-84. Whiteman provides a clear summary of the convoluted facts of the case. In short, the claimant had contracted with the Bolivian government in 1876, which then defaulted on its obligations that same year. In 1879, a war occurred between Bolivia, Chile, and Peru, and Chile assumed the Bolivian contract obligations toward the American claimant. 1 Whiteman, supra note 20, at 225.

[144] *Alsop Claim*, 5 Am. J. Int'l L. at 1099-1100. The Chilean memorial cited general rules

the commission agreed that "from the time of the Chilean occupation no real effort was made to secure payment of the debt by Bolivia . . . until 1906."[145] Even conceding this fact, however, the commission ultimately held against Chile on its defense of laches:

> The principle of the limitation of actions does not, in our opinion, operate as between states. It is based upon the theory that the party had a right of action capable of being enforced by legal proceedings, neglect of which should in time relieve the debtor from further liability, but as against, or between, sovereign states this rule does not apply. . . . The liability of Bolivia under the . . . contract remains, in our view, unaffected.[146]

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of bankruptcy and the "principle of limitation of actions" in its argument that "Bolivia had in effect been discharged from liability under her contract by reason of the absence of any effort on the part of the [American claimant] or of the United States of America to obtain payment of the debt from her." Id.

[145] Id. at 1100.

[146] Id. See also Cook Case (U.S. v. Mex.), 4 R.I.A.A. 213, 214 (1927) ("[N]o rule of international law putting a limitation of time on diplomatic action or upon the presentation of an international claim to an international tribunal [exists]."); Butterfield Claim (U.S. v. Den.) (Monson, sole arb. Jan. 22, 1890), *in* 2 Moore, supra note 35, at 1185-90. In the *Butterfield Claim,* the Danish and Venezuelan governments seized two American steamships in purported violation of international law. Although the alleged incidents took place in 1855-56, the United States had pressed the claim in lackadaisical fashion and did not actually agree to litigate until 1885, when Secretary of State Seward proposed arbitration. Id. at 1188-90. Specifically, the United States had conducted "immediate representations" after the incident, but then made "subsequent reappearances and disappearances" in its litigation against Denmark. Id. at 1201. By 1886, Denmark had agreed to arbitration, but immediately invoked a plea of laches, claiming that "[p]ersons whose testimony was important to the Danish government were dead[;] [p]apers had disappeared, and it was only after a long search and almost by chance that the Danish Government procured the documents [relevant to the case]." Id. In holding that the plea of laches did not bar the United States, the opinion proclaims that while the Danish criticism of the U.S. delay was "legitimate," such delay "can not bar the recovery of just and reasonable compensation . . . [if] consideration of the merits of the case result[s] in the decision that such compensation is due." Id. at 1205. Without any international jurisprudence or legal reasoning supporting this conclusion, it is difficult to ascertain why the tribunal held the way it did. It is possible to conclude that the tribunal could not fault the United States for laches because of its initial promptness in notifying the Danish government. See, e.g., Law and Procedure, supra note 14, at 381 (citing the *Butterfield Claim* for the idea that "negligence on the part of the claimant government in pressing for a disposition of a case to which the attention of the respondent government has once been directed cannot be invoked as a ground of prescription"); General Principles, supra note 14, at 382 (sharing Ralston's interpretation of the case); King, supra note 14, at 88 (arguing that the *Butterfield Claim* stands for the rule that there must be a delay in the *presentation* of the claim). In a broader sense, however, it is also plausible that the tribunal was simply unwilling to apply a novel international doctrine against a sovereign state, since precedent governing the issue was scarce at the time. See supra notes 47-61 and accompanying text.

The commission did not refer to any international authority to buttress its holding that a rule of laches is inapplicable as between sovereign states.[147]

Although these early cases were legitimately concerned with traditional notions of state sovereignty—a fundamental tenet of international law—more recent cases and scholarship have largely dispelled the conclusion that the doctrine of laches is unfounded in international jurisprudence.[148] Few modern international scholars, jurists, or publicists will claim outright that the doctrine of laches is not a well-founded principle in international law.[149] Once a rule has transcended into international law, sovereign states are generally expected to comply.[150] Arguments against the operation of laches in an international setting were strongest when international precedent was scarce. With a century of jurisprudence affirming the doctrine of laches, however, the sovereignty contention is less persuasive and should no longer cause traditional misgivings about the violation of a state's sovereign status in international law.

Opposition to the doctrine of laches in international law has also rested on a similar, yet doctrinally distinct, argument: The time bar of claims violates the supremacy of international law over domestic law.[151] The doctrine of

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[147] See *Alsop Claim*, 5 Am. J. Int'l L. at 1100. International scholars have tried to distinguish the *Alsop Claim*. Whiteman cites the case as support for the proposition that a "lapse of time may defeat a claim of an individual claimant on account of *his* non-action or laches, [but not the laches of the claimant state]." 1 Whiteman, supra note 20, at 225. But see Law and Procedure, supra note 14, at 382 (arguing that the language of the *Alsop Claim* is too broad). The facts of the case, however, do not seem to indicate a delay on behalf of the claimant any more than the United States government. See *Alsop Claim*, 5 Am. J. Int'l L. at 1081-84. In any case, Whiteman herself concedes that the distinction "is not always made in connection with the general subject of lapse of time." 1 Whiteman, supra note 20, at 225. Even if this distinction were well supported in international law, it still contradicts much of the international jurisprudence previously announced by international tribunals. See, e.g., supra notes 53-156 and accompanying text.

[148] See, e.g., supra Section II.A.

[149] See supra notes 47-139 and accompanying text; cf. Lauterpacht, supra note 12, at 273 ("It would be a mistake to assume that the recourse had by international tribunals to rules of private law is a method uncritically adopted and simply following the line of least resistance.").

[150] See, e.g., Restatement, supra note 8, pt. 1, introductory note at 17 ("International law has the character and qualities of law, and serves the functions and purposes of law, providing restraints against arbitrary state action and guidance in international relations.").

[151] See *Gentini Case*, (Italy v. Venez.) (Italy-Venez. Comm'n 1903), *in* Venezuelan Arbitrations, supra note 82, at 723-24 (Commissioner Zuloaga's assertion that international law should parallel domestic laws in the time-barring of claims). Commissioner Zuloaga found it difficult to entertain an international claim barred by a domestic statute of limitations. Id. at 723. The opinion noted that if the Italian constitution itself barred stale claims pressed by Italy's own government, it would be illogical to give the same illegitimate action credence in international law. Id. Moreover, Commissioner Zuloaga argued that if these principles were "just" under domestic legal systems, it would be ridiculous to hold the same principles unjust under international law. Id. For an overview

laches, the argument contends, is a construct of domestic jurisprudence and its application by a tribunal applying international law, therefore, is inconsistent with traditional notions of supremacy. This was precisely the argument rejected by the Permanent Court of Arbitration in the *Pious Fund Case*, decided in 1902.[152] The *Pious Fund* litigation commenced when the United States sued Mexico for the Mexican government's failure to pay interest due on a prior claim dating back to 1869.[153] The United States did not pursue the matter until 1898, culminating in the 1902 arbitration with Mexico.[154] In its defense, Mexico pleaded that the claim was barred by the Mexican statute of limitations.[155] More precisely, the Mexican argument was that the central issue at bar, a property right arising under Mexican law, was necessarily governed by the Mexican statute of limitations; laches as a matter of *international* law was simply not the issue.[156] The United States responded that such an application of prescription was unfounded in international law: "It has never yet been held in international tribunals that a claim brought before them could be defeated by reason of the existence of a statute of this sort; such statute having no authority whatsoever over international courts."[157] Faced with the issue, the court agreed that Mexico's statute of limitations had no place in international law.[158] The opinion, however, is curiously succinct on the matter: "[T]he rules of prescription, belonging exclusively to the domain of civil law, can not be applied to the present dispute between the two States in litigation. . . ."[159]

Without a full immersion into the underlying arguments of the claim, the court's literal holding—that that "rules of prescription . . . can not be applied

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of international legal supremacy, see generally Restatement, supra note 8, § 111 cmt. d (discussing international law as supreme federal law in the United States), 311(3) (stating that a state may not invoke a violation of its domestic law to vitiate an international agreement); Certain German Interests in Polish Upper Silesia (Merits) (Ger. v. Pol.), 1926 P.C.I.J. (ser. A) No. 7, at 19, 22, 42.

[152] (U.S. v. Mex.), Hague Ct. Rep. (Scott) 1 (Perm. Ct. Arb. Oct. 14, 1902). The supplemental documents to the case, including each party's memorials, are reprinted in Jackson H. Ralston, United States v. Mexico: Report of Jackson H. Ralston (1902) (hereinafter Pious Fund Report). Ralston, who had presided over the Italian-Venezuela Commission in 1903, see supra note 82, litigated *Pious Fund* for the United States.

[153] *Pious Fund*, Hague Ct. Rep. (Scott) at 1-2. A summary of the facts is in the Report of Jackson H. Ralston, Agent of the United States and of Counsel in the Matter of the Pious Fund Case, *in* Pious Fund Report, supra note 152, at 5-7.

[154] *Pious Fund*, Hague Ct. Rep. (Scott) at 1-2.

[155] The full text of the Mexican reply to the United States complaint is reprinted at Argument of the Agent of Mexico, *in* Pious Fund Report, supra note 152.

[156] Id.

[157] Replication of the United States of America to the Answer of the Republic of Mexico in Reply to the Memorial Relative to the Pious Fund of the Californias, *in* Pious Fund Report, supra note 152, at 11.

[158] *Pious Fund*, Hague Ct. Rep. (Scott) at 5-6.

[159] Id.

to the present dispute between the two States"—is misleading and has led many international commentators and jurists to adopt the argument that laches has no place in international law.[160] The court was refuting Mexico's attempt to apply a domestic statute of limitation in an international litigation and not, as the language of the opinion might suggest, the existence of an international rule of prescription. Ralston provided the necessary explanation of the decision's holding:

> In the Pious Fund case, . . . it was held that the rules of prescription related exclusively to the domain of civil law and could not be applied to the international dispute between the United States and Mexico. Nevertheless, . . . [there is a] distinction between *rules* of prescription, which were such as would be established by a government, and the *principle* of prescription, which . . . [is] "well recognized in international law," and could be applied as well to a conflict in which a state was a party as to a conflict between private individuals.[161]

Once understood in this light, the *Pious Fund* decision does little to refute the doctrine of laches as a matter of international law. As both the memorials before the tribunal and Ralston himself indicate, the *Pious Fund* rule is simply that a domestic statute of limitations has no place in international law.

Another distinct objection to the recognition of the laches doctrine in international law has focused on the nature of the doctrine itself, contending it cannot be a *rule* of international law as it is too indefinite in its terms. Without an international statute of limitations explicitly governing the precise period of time allowed before the prescription of a claim, the amorphous doctrine of laches cannot operate as a rule of law governing state behavior.[162] Commissioner Agnoli advanced this argument in his dissent to the *Gentini Case*:

> As there is not in international law an exact and generally accepted provision which establishes when and within what limits a credit becomes null and void through prescription, there can not be a presump-

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[160] Whiteman, for example, suggests that *Pious Fund* stands for the proposition that "the rules of prescription did not apply between states in an international litigation." 1 Whiteman, supra note 20, at 233. Oppenheim likewise describes the *Pious Fund* decision as an "apparent rejection of the principle of extinctive prescription." 1 Oppenheim, supra note 21, § 154 n.2, at 526. Similarly, the Italian memorial submitted to the Italian-Venezuelan Commission in the *Gentini Case* cited *Pious Fund* in its contention that "prescription can not be recognized in international tribunals." See Gentini Case (Italy v. Venez.) (Italy-Venez. Comm'n 1903), *in* Venezuelan Arbitrations, supra note 82, at 725; Law and Procedure, supra note 14, at 375 (footnotes omitted).

[161] Law and Procedure, supra note 14, at 375 (footnotes omitted). Moreover, in the *Gentini Case*, Ralston again clarified the holding in *Pious Fund Case* and included relevant portions from the American memorial. *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 725.

[162] See, e.g., *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 722.

> tive negligence on the part of the dilatory creditor, and the plea of prescription must be absolutely rejected.[163]

Similar objections were voiced by delegates to the League of Nations' initial meetings for codifying international law in their deliberations over the doctrine of laches.[164]

Although the premise underlying these arguments is certainly legitimate—in the sense that the doctrine of laches is too indefinite to operate as a concrete rule of international law—the conclusion that international law does not recognize a time bar of stale claims is unfounded. Rather, international jurisprudence has affirmed the *principle* of laches, with all its uncertainties, as the legal basis for rejecting stale claims.[165] A doctrine of law is not any less legitimate as law simply because the contours of its application have yet to be determined.[166] As with American courts of equity applying the doctrine of laches, the principle of laches is no less valid because it does not dictate a precise period for prescription.[167] The commission in the *Williams Case* recognized the polemic against the laches doctrine and its lack of a precise application in international law.[168] Commissioner Little countered that "[c]ourts of equity, where [statutes of] limitation ... do not apply, have invariably

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[163] Id.

[164] See Minutes, 1st Sess., 8th mtg., League of Nations Doc. C.P.D.I./1st Sess./P.V., *reprinted in* 1 League of Nations, Committee of Experts for the Progressive Codification of International Law (Shabtai Rosenne ed., 1972) at 3, 37-38. As noted by Professor Diena, Vice-Chairman of the League of Nations Committee, the doctrine of laches "existed in international law ... in a general way, from a positive point of view.... [Nevertheless,] it would be necessary to adopt precise rules for the application of prescription [in international law]." Id. at 38. Many other representatives announced analogous concerns. Id.

[165] Professor Cheng has made this distinction in his treatment of the issue: "I cannot share Professor Lauterpacht's interpretation that ... denie[s] prescription in international law. [He] correctly said that 'there is, of course no *rule* of international law' of the character of a municipal statute of limitation, but [international case law] was referring to the principle of prescription...." Cheng, supra note 8, at 47 n.57 (citations omitted).

[166] International law operates in much the same fashion. Cf. id. at 47 ("General Principles of [international] law ... are indeed the *ensemble* of those general principles which underlie, antedate, vary from, and form the model of municipal rules of law, which are the same in all jurisdictions and aim at justice in every case. They are a necessary part of international law.").

[167] See, e.g., Gardner v. Pan. R.R. Co., 342 U.S. 29, 30-31 (1951) ("Though the existence of laches is a question primarily addressed to the discretion of the trial court, the matter should not be determined merely by a reference to and a mechanical application of the statute of limitations"); In re The Key City, 81 U.S. 653, 660 (1871) ("[N]o arbitrary or fixed period of time has been, or will be, established as an inflexible rule, but that the delay which will defeat such a suit must in every case depend on the peculiar equitable circumstances of that case.").

[168] 4 Moore, supra note 35, at 4193 ("Prescription has been denied a place in the public [international] law because it has 'no definite fixed limit,' which is very like objecting to it because it is not [a statute of] limitation." (citation omitted)).

given lapse of time due weight in adjudications."[169] Likewise, the *Gentini Case* held that although there are many exceptions to the principle of laches in international jurisprudence, it is nonetheless a recognized doctrine of international law.[170] An international tribunal charged with applying the dictates of international law, based on essential tenets of equity, justice, and natural law, should not therefore dismiss the laches principle for want of precision.[171]

III. ELEMENTS OF THE DEFENSE

As discussed above, several international jurists and scholars have argued that the doctrine of laches is an amorphous principle of international law which consequently cannot operate as a rule of law in international litigation.[172] A close reading of relevant jurisprudence, however, shows that there are general "elements" that constitute the laches defense which are pertinent in the consideration of the doctrine's application.[173] Although these factors certainly lack the relative precision of domestic statutes of limitations, they nonetheless outline the general contours of the laches principle. As with most other principles of law, tribunals have not agreed as to the intricacies of each relevant factor. Yet, as discussed below, most tribunals examine two basic factors in their analysis of the doctrine—the negligent passage of time and the resulting prejudice to the defending state.

First, as a general proposition, all tribunals agree that there must be a lapse of time by the offending state in order to accept a plea of laches.[174] This element raises the issue of how long a claim must remain dormant before the doctrine takes hold. A majority of international jurists considering the issue, as announced by the *Williams Case*, has declined to provide a specific answer:

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[169] Id.

[170] See *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 730.

[171] Commissioner Little suggested the same conclusion: "While statutes of limitation are doubtless in good part aimed to be, as they are often alluded to as, expressions of prescription, they are, nevertheless, inaccurate expressions, because, for one thing, of their rigidity and want of adaptation to varying conditions and circumstances." *Williams Case*, *in* 4 Moore, supra note 35, at 4191. See also Schwarzenberger, supra note 14, at 567 ("The incorporation of extinctive prescription in international law is a typical illustration of reliance by international judicial institutions on the *jus aequum* rule in the absence of clear-cut rules of international law."); King, supra note 14, at 82-83 ("[I]t is submitted that... prescription may be properly used despite the absence in international law of definite time limits such as are usually found in municipal systems—though indeed the absence of such limits presents grave difficulties.").

[172] See supra notes 162-164 and accompanying text.

[173] B.E. King presents the only expansive survey of the various elements in a laches defense. See King, supra note 14, at 88-95. As the article was written in 1934, however, it does not take into account modern international jurisprudence that has treated the issue.

[174] Indeed, the very definition of laches necessitates such a requirement. See, e.g., 1 Oppenheim, supra note 21, § 154, at 526.

> How is one in practice to know in a given case when [the doctrine of laches] arises, . . . since it has no fixed periods, and no analogies to guide one arising from limitation acts, such as obtain in courts of equity. A definitive answer it would be difficult to frame. But in general we should say, where, all the evidence considered, it appears from long lapse of time and as a result thereof . . . that material facts including means of ascertainment pertaining to support or defense are lost, or so obscured as to leave the mind, intent on ascertaining the truth, reasonably in doubt about them, or in "danger of mistaking the truth," a basis for the presumption exists.[175]

It has been suggested that, at a minimum, a state cannot invoke the doctrine of laches for a delay of less than one year.[176] Beyond that, there has been no established pattern and tribunals have applied the doctrine flexibly.[177] For this reason, the Institute of International Law, in its 1925 pronouncement on the doctrine of laches, adopted the position that the necessary time period "is a question left entirely to the decision of the international judge," having consideration of relevant principles of order, stability, and peace.[178]

A minority of international jurists, on the other hand, has been dissatisfied with the majority's approach and has sought to establish a more precise time limit for the presentation of a claim before an international tribunal. The League of Nations, for example, originally debated the codification of a one-year rule as the appropriate time span for the doctrine of laches in international law.[179] This formulation, however, was rejected by most delegates to

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[175] *Williams Case*, *in* 4 Moore, supra note 35, at 4196; see also Vallat, supra note 13, at 30 ("There is no fixed period [constituting undue delay]. . . . Everything depends on circumstances."). In this regard, some international jurists have added a similar element: the delay must stem from the negligence of the plaintiff state or party. See King, supra note 14, at 88-89. However, most international tribunals include an investigation of the claimant's negligence as part of their consideration of the passage of time.

[176] See Kahale v. Secretary General of the United Nations, 43 I.L.R. 290, 299-300 (U.N. Admin. Trib. 1968) (holding that a delay of approximately one year would not by itself justify barring a claim). But cf. *Gentini Case* (Zuloaga, Comm'r, sep. op.), *in* Venezuelan Arbitrations, supra note 82, at 723 ("What would be the length of time necessary for prescription? It would be difficult to determine the shortest period, because an international law can not govern . . . .").

[177] Even the most cursory glance at the international decisions cited above reveals great variations in the extent of delay held to justify barring claims—from approximately 16 years, as announced in Case of Stratton & Black (U.S. v. Mex.) (U.S.-Mex. Comm'n 1868), *in* 3 Moore, supra note 35, at 3138-39, to over 30 years, as applied in the *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 723.

[178] Institute of International Law, supra note 100, at 760.

[179] 1930 Codification Conference, supra note 117, at 1575. The basis of the one-year rule was explained by the Italian delegate to the commission: "[T]his proposal originates from a formula that appears in certain arbitration and conciliation treaties signed by Switzerland. . . . An almost similar formula is found in a hundred different conventions." Id. at 1581. The issue of when the international time bar starts is discussed below, infra notes 186-196 and accompanying text.

the commission on the ground that it was too short.[180] Instead, the commission adopted a qualified two-year period as the pertinent limit: "Claims against a State must be lodged within two years of the date of the judicial decision, unless it is proved that there are special reasons which justify an extension of that period."[181] The International Law Commission's 1958 Draft Articles on State Responsibility adopted a somewhat more stringent two-year rule: "Except where the parties concerned have agreed upon a different time limit, the right to bring an international claim shall lapse after the expiry of two years from the date when local remedies were exhausted."[182] Here, the special rapporteur noted that the Commission's formulation was different from the majority's approach in that "the time limit is short, in keeping with modern procedure and with the changed conditions of international life."[183]

Nevertheless, the 1974 revisions to the Draft Articles deleted the explicit time limit altogether and adopted a rule reflective of the majority's reasoning: "If the presentation of a claim is delayed, after the exhaustion of local remedies . . . , for a period of time which is unreasonable under the circumstances, the claim shall be barred by the lapse of time."[184] The special rapporteur offered this reason for the alteration:

> No precise definition may be given of what constitutes a "period of time which is unreasonable." It has been considered preferable to leave this matter to judicial determination in the light of all the facts and circumstances of each case. Among the circumstances to be taken into account would be such obstacles to the submission of the claim as the existence of a state of war, the suspension of diplomatic relations with the responsible State, the incapacity of the injured alien or of a person qualified to claim through him, and such other types of justification for delay in the presentation of claims as are generally recognized by the principal legal systems of the world.[185]

Any substantial delay in presenting the claim must be accompanied by an exculpatory reason overcoming the respondent's defense of laches. Otherwise, the delay will be presumed negligent and unreasonable. As a result, the factual considerations adopted by the 1974 Draft Articles are quite significant. Claimants faced with a defense of laches may counter with case-specific fac-

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[180] 1930 Codification Conference, supra note 117, at 1581-82.

[181] Id. at 1581. But see id. at 1582 (Dinichert objecting to the two-year rule). The rule was adopted by a very narrow margin. Id.

[182] 1958 Draft Articles, supra note 130, art. 23, at 61.

[183] Id. at 67. The rapporteur cited the 1930 adoption of the two-year limit by the League of Nations. Id. at 67 n.59.

[184] 1974 Draft Articles, supra note 114, art. 26, at 312.

[185] Id. at 313. The *Williams Case*, *in* 4 Moore, supra note 35, at 4195, also provided a laundry list of justifications for a state's delay: "Incapacity, disability, want of legal agencies, prevention by war, well-grounded fear, and the like are not faults." Id.

tual excuses that may salvage the suit from extinction. Moreover, judicial tribunals adjudicating the laches plea are now free to draw upon concrete and palpable standards of conduct rather than the more ephemeral principles of equity.

A related issue surrounding the time element involves the party against whom the doctrine of laches tolls.[186] International jurists have disagreed on whether an international claim is barred by the undue delay of the individual claimant, the state adopting the claimant's action in an international forum, or both.[187] The Restatement, for example, states that the delay must arise from the "negligence or laches of the claimant state."[188] Other scholars, however, have suggested that the delay by the individual claimant is the dispositive factor.[189] In almost cryptic fashion, the 1930 codification efforts by the League of Nations took no position on the matter.[190]

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[186] This problem stems from the doctrine of espousal in international law, under which most international tribunals and arbitration fora will not entertain a claim brought by an individual. Rather, a state must espouse the claim on behalf of the individual so that the litigation is theoretically between two sovereign states. See generally Restatement, supra note 8, § 713 cmt. a; Statute of the International Court of Justice art. 34, para. 1; Louis Henkin et al., International Law: Cases and Materials 375-88 (3d ed. 1993). The idea here is that a violation of international law against an individual claimant is also a violation against the claimant's state. See Mavrommatis Palestine Concessions (Greece v. U.K.), 1924 P.C.I.J. (ser. A) No. 2, at 11-12 (Aug. 30). Because of this often mandatory intercession, the application of the laches principle is necessarily more complex. In essence, the issue arises of whether the laches of the individual claimant, versus the laches of the espousing state, is the operative factor in the analysis. Scholars have argued that the delay inherent in the process of espousal is one of the reasons why the doctrine of laches gains particular significance. See Richard B. Lillich, International Claims: Their Adjudication by National Commissions 5-6 (1962).

[187] This issue is distinct from arguments against the doctrine of laches applied against a sovereign state, as discussed above, supra notes 51, 140-147 and accompanying text. Where a plaintiff state is suing another state on behalf of an individual, the action is still considered the plaintiff state's claim, and not the individual's. See Henkin et al., supra note 186, at 375. Thus, arguments that the doctrine of laches did not apply to a state, as a general proposition, necessarily concerned principles of state sovereignty and international legal supremacy—even if the delay stemmed from the individual claimant's negligence. The analysis here, on the other hand, already accepts the doctrine of laches as running against states and instead focuses on whose delay matters: the state's or the individual claimant's.

[188] Restatement, supra note 8, § 902 cmt. c.

[189] See, e.g., 1 Whiteman, supra note 20, at 229 ("In practically all of the cases where it has been stated that there is no rule of prescription in international law, the tribunal has spoken with reference to non-action by the claimant state, as distinguished from non-action by the individual claimant."). But see Daylights Case (U.S. v. Mex.), 4 R.I.A.A. 164, 172 (U.S.-Mex. Comm'n 1927) (Nielsen, Comm'r, sep. op.) ("A fundamental point in any proper application of [the laches] principle must be delay in the time or presentation of a case by a claimant government.").

[190] 1930 Codification Conference, supra note 117, at 1575, 1582. However, the commission implicitly suggested that the time bar operates after the exhaustion of local remedies by the individual claimant. Id. at 1582. Presumably, individual claimants must not act in a dilatory fashion if they are to claim exhaustion of local remedies. See 1974

Nevertheless, a majority of international jurists has announced that the doctrine of laches is analyzed in a different manner altogether—international law will bar a stale action if there has been a delay in the *presentation* of the claim, regardless of whether the delay is caused by the state or by the individual.[191] Many international decisions have adopted this position.[192] In the *Gentini Case*, for example, Commissioner Ralston announced that the reasoning behind this analysis is straightforward: A delay in the presentation of the claim, regardless of the actual culprit, "justif[ies] a belief in [its] nonexistence."[193] As a corollary to the analysis, international jurisprudence has concluded that the claimant state is responsible solely for the presentation of the claim, so that a "[d]elay in the prosecution of a claim once notified to the defendant state is not so likely to prove fatal to the success of the claim as delay in its original notification."[194] The underlying justification, as announced by the framers of the 1974 Draft Articles, is that the respondent state should not be allowed to take advantage of its own delay in replying to the original action:

> [The rule] is attributable to the comparatively weak position in which the individual claimant and the State of which he is a national find themselves if the respondent State refuses to negotiate the claim or to submit it to international adjudication. If the claim is once laid before the authorities of the respondent State, there may be little else that can be done to force settlement of the claim. Presentation of the claim to that State has at least put it on notice of the existence of the

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Draft Articles, supra note 114, at 313 ("If the claimant has not exhausted local remedies within the time limits provided in domestic law, his claim would lapse as a result of the impossibility of his complying with the requirement that he must exhaust local remedies before the case may be presented internationally.").

[191] See King, supra note 14, at 88; 1 Oppenheim, supra note 21, § 154, at 526-27. The precise formulation adopted by the revised Draft Articles states that:

> An unreasonable delay in the presentation of a claim on the international level may be attributable either to the neglect of the individual claimant or to that of the State which has the capacity to present the claim on behalf of its national. In either event, [these Draft Articles cut] off the right of the individual to present the claim . . . and the corresponding right of the State [to press the action].

1974 Draft Articles, supra note 114, at 312. In fairness to the Restatement, it is difficult to ascertain whether the rule it announces adopts the majority position; the text is fairly ambiguous. Restatement, supra note 8, § 902 cmt. c. See supra text accompanying note 188.

[192] See, e.g., *Williams Case*, *in* 4 Moore, supra note 35, at 4197; Stevenson Case (G.B. v. Venez.) (Brit.-Venez. Comm'n 1903), *in* Venezuelan Arbitrations, supra note 82, at 328; Irene Roberts Case (U.S. v. Venez.) (U.S.-Venez. Comm'n 1903), *in* Venezuelan Arbitrations, supra note 82, at 144. See also Law and Procedure, supra note 14, §§ 692, 693, at 381 (describing how delay after the initial presentation of a claim will not prove fatal to the claim).

[193] *Gentini Case*, Venezuelan Arbitrations, supra note 82, at 730.

[194] 1 Oppenheim, supra note 21, §154, at 527; see also Law and Procedure, supra note 14, at 381. Ralston has distinguished the Butterfield Claim (U.S. v. Den.) (Monson, sole arb. Jan. 22, 1890), *in* 2 Moore, supra note 35, at 1205, on these grounds. See supra note 146.

claim.[195]

Thus, the rule is mutually operative; undue delay by an individual claimant vitiates the espousing state's action against the defendant state, as will delay by the espousing state in presenting the claim.[196]

The second general element of the laches defense in international law is prejudice to the defendant state resulting from the claimant's undue delay.[197] This factor and its justification was clearly announced by the *Stevenson Case* as early as 1903:

> When a claim is internationally presented for the first time after a long lapse of time, there arise both a presumption and a fact. The presumption, more or less strong according to the attending circumstances, is that there is some lack of honesty in the claim .... The fact is that by the delay in making the claim the opposing party ... is prevented from accumulating the evidence on its part which would oppose the claim, and on this fact arises another presumption that it could have been adduced. In such a case the delay of the claimant, if it did not establish the presumption just referred to, would work injustice and inequity in its relation to the respondent Government.[198]

Thus, a stale claim presented before an international tribunal raises an im-

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[195] 1974 Draft Articles, supra note 114, at 313. Cf. 1 Oppenheim, supra note 21, at 527 (offering a slightly different reasoning underlying the rule: "[O]ne of the main justifications of the principle is to avoid the embarrassment of the defendant by reason of its inability to obtain evidence in regard to a claim of which it only becomes aware when it is already stale.").

[196] The Cayuga Indians Case (U.K. v. U.S.), 6 R.I.A.A. 173, 189 (U.K.-U.S. Arb. Trib. 1926), presents an interesting exception. Here, the tribunal held:

> [N]o laches can be imputed to the [individual claimants], who in every way open to them have pressed their claim ... continuously and persistently.... In view of their dependent position, their claim ought not to be defeated by the delay of the [espousing state] in urging the matter on their behalf.... On the general principles of justice on which it is held in the civil law that prescription does not run against those who are unable to act,... we must hold that dependent Indians, not free to act except through the appointed agencies of a sovereign which has a complete and exclusive protectorate over them, are not to lose their just claims through the laches of that sovereign unless at least there has been so complete and bona fide change of position in consequence of that laches as to require such a result in equity.

Id. See supra notes 104-110 and accompanying text. This is somewhat perplexing, as all individual claimants must rely on their respective governments to press a claim in an international forum that bars nationals from invoking jurisdiction. Moreover, international law grants sovereign states the discretion concerning which claims they espouse. See, e.g., Restatement (Second) of the Foreign Relations Law of the United States § 212 (1965). Thus, as is quite often the case, individual claimants may indeed "continuously and persistently" petition their government for espousal, but nevertheless lose their claim due to the laches of their state.

[197] See King, supra note 14, at 90 ("The defendant must be placed at a disadvantage in establishing his defence.").

[198] *Stevenson Case, in* Venezuelan Arbitrations, supra note 82, at 328.

portant presumption: The respondent is prejudiced by the undue delay. This presumption is rebuttable, allowing the offending state to overcome a defense of laches if it shows that there has been no resulting harm to the defendant.[199] This corollary stems from the very justification offered for the principle itself: "the highest equity—the avoidance of possible injustice to the defendant."[200] In the *Ambatielos Claim*, for example, the tribunal dismissed the laches claim by the United Kingdom on the ground that it did not suffer any harm in the preparation of its defense.[201] In a similar vein, international jurisprudence suggests another permutation of the rule. A claim that has been well documented since its inception, by both the claimant and respondent states, will defeat a defense of laches.[202]

Some international jurists have suggested that the doctrinal premise underlying the laches principle does not stem from a concern about prejudice to the defending state.[203] On the one hand, several scholars have suggested that the true reasoning behind the doctrine is to penalize the state slow to bring its claim rather than avoiding the possibility of prejudice to the respondent.[204] Because the delaying state is itself guilty of "unclean hands," the argument contends, it cannot avail itself of the international legal process.[205] In con-

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[199] See, e.g., Vallat, supra note 13, at 31-32.

[200] King, supra note 14, at 90 (quoting *Gentini Case*, Venezuelan Arbitrations, supra note 82, at 727).

[201] 23 I.L.R. at 315-16. This closely relates to the "notice" argument adopted by the Giacopini Case (Italy v. Venez.) (Italy-Venez. Comm'n 1903), *in* Venezuelan Arbitrations, supra note 82, at 766-67 (holding that the claim of laches must be defeated because the defending state was put on "notice" years earlier and had an "ample opportunity to prepare its defense").

[202] See, e.g., King, supra note 14, at 90 ("[I]f the defendant has, or might have had, a clear record of the facts, or if the facts are admitted, prescription will not lie."); Borchard, supra note 20, at 831 ("[W]here public records support the existence of the claim, the reason for the principle ceases."). This rule has been applied primarily to public contract claims, where evidence of the underlying contract and each party's concomitant obligations is indisputable. See, e.g., Payment of Various Serbian Loans Issued in France, 1929 P.C.I.J. (ser. A) No. 20/21, at 38 (July 12); Payment in Gold of Brazilian Federal Loans Contracted in France, 1929 P.C.I.J. (ser. A) No. 20/21, at 119-20 (July 12); 2 O'Connell, supra note 9, at 1066 ("A public debt claim, provided the records exist, subsists for a long time because there is no great evidentiary problem resulting from effluxion of time.").

[203] Cf. 2 O'Connell, supra note 9, at 1066 (examining the different juridical bases which have been used to support the doctrine).

[204] See, e.g., Vallat, supra note 13, at 30 ("Perhaps the underlying principle which international tribunals tend to apply is that the claimant State will not be allowed to profit by long delay at the expense of the defendant State."); Borchard, supra note 20, § 384, at 825 ("The indolence of those who are dilatory in recovering their property and claiming what is due them, should be punished, and . . . those who are indolent shall impute to themselves the punishment." (citation omitted)).

[205] This proposition stems from the larger doctrine of "unclean hands" in international law:

> [A] State which is guilty of illegal conduct may be deprived of the necessary *locus*

trast, other writers have justified a claim of laches through a more political rubric: The passage of time legitimates the status quo and the extinguishing of rights.[206]

Although both of these arguments may have logical appeal, they are inconsistent with the majority of international jurisprudence regarding the doctrine of laches. A rejection of the underlying premise that the time bar of claims stems from considerations other than possible prejudice to the defendant effectively confuses the laches principle with other equitable doctrines.[207] Thus, the argument that the claimant's non-action legitimates the status quo is more closely related to notions of acquisitive prescription or adverse possession.[208] Similarly, the contention that justifies laches through the offending state's unclean hands closely mimics the equitable doctrine of estoppel, where the claimant is punished for acting in an equivocal fashion.[209]

IV. LACHES AND THE DOCTRINE OF SOURCES

As with any rule of law, the source of the principle is of immense significance in defining its precise application. In international law, where there is

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standi in judicio for complaining of corresponding illegalities on the part of other States, especially if these were consequential on or were embarked upon in order to counter its own illegality—in short were provoked by it.

Gerald Fitzmaurice, The General Principles of International Law, 92 Recueil des Cours 119 (1957-II); see David J. Bederman, Contributory Fault and State Responsibility, 30 Va. J. Int'l L. 335 (1990); cf. Case of Seth Driggs (U.S. v. Venez.), *excerpted in* Opinions Delivered by the Commissioners in the Principal Cases 403, 403-04 (U.S.-Venez. Comm'n 1890) (suggesting that this reasoning, although doctrinally distinct from a strict concern toward the respondent state, is still related to the element of prejudice). In dismissing the claim before the tribunal, the opinion notes that a claim fraught with delay may be "largely fictitious as to its support—time having furnished the opportunity for fraudulent engraftment." Id. at 404. Consequently, because the claimant state has acted in a dilatory fashion, necessary evidence to adjudicate the claim may be inaccessible and the claimant must be punished. Id. at 404-05.

[206] The Institute of International Law adopted this position in its 1925 consideration of the issue. See Institute of International Law, supra note 100, at 760 (stating that the doctrine stems from "[p]ractical considerations of order, of stability, and of peace"). See also 2 O'Connell, supra note 9, at 1066 (stating that the doctrine is based on the belief that "[the] status quo should be disturbed as little as possible").

[207] This reasoning has been clearly announced in the American legal system. See, e.g., A.C. Aukerman Co. v. R.L. Chaides Construction Co., 960 F.2d 1020, 1034 (Fed. Cir. 1992) (distinguishing the equitable doctrine of laches from various doctrines of estoppel); Goodman v. McDonnell Douglas Corp., 606 F.2d 800, 805 (8th Cir. 1979) ("Equity has acted on the principle that 'laches is not like limitation, a mere matter of time; but principally a question of the inequity of permitting the claim to be enforced, an inequity founded upon some change in the condition or relations of the property or the parties.'") (quoting Galliher v. Cadwell, 145 U.S. 368, 373 (1892)).

[208] As noted above, international jurists have argued consistently that acquiescence is distinct from extinctive prescription. See supra notes 25-42 and accompanying text.

[209] Cf. Arnold McNair, The Legality of the Occupation of the Ruhr, 5 Brit. Y.B. Int'l L. 17, 34 (1924) (arguing that estoppel is a rule of evidence that precludes the claimant from unfairly denying previously made statements).

no judicial or legislative hierarchy to announce binding law, the source of law problem assumes even greater importance. International jurists must examine thoroughly the nature of a given rule in international law, as well as its origin, in order to determine its scope.[210] In this regard, international jurisprudence has identified three major categories of legal sources: (1) "customary law," (2) treaty law,[211] and (3) "general principles of law recognized by civilized nations."[212] Under this "doctrine of sources," laches as a rule of international law must find a well recognized source; otherwise, the very existence of the laches doctrine is open to question.[213] Similarly, different sources of law will implicate unique dimensions to the doctrine of laches.

Several scholars have identified "customary law" as a possible source of international law for the doctrine of laches.[214] Under traditional notions of international customary law, the doctrine of laches will only be binding international custom if: (1) there has been consistent state practice supporting the limitations of actions under international law; and (2) states have supported a time bar to stale claims out of a sense of legal obligation under the custom.[215] This was the position adopted by the 1930 League of Nations codification conference where several delegates announced that the rule of laches originated from "a hundred different conventions."[216] The implication here was

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[210] See, e.g., Oscar Schachter, International Law in Theory and Practice 35-36 (1991).

[211] Treaty law as a direct source of law recognizing the doctrine of laches is not discussed in this Note, since no major multilateral treaty broadly governs the issue. As will be discussed below, infra notes 217-225 and accompanying text, this is to be distinguished from treaties adopting a time bar of claims as evidence of a more generalized international custom. See Henkin et al., supra note 186, at 101-02.

[212] See Restatement, supra note 8, § 102(1). The International Court of Justice adopts a similar formulation:

> 1. 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) . . . judicial decisions and the teachings of the most qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

Statute of the International Court of Justice art. 38.

[213] See, e.g., Restatement, supra note 8, § 102 cmt. a (identifying the sources of international law as the means by which a rule of international law is accepted as such by the international community).

[214] See, e.g., Schwarzenberger, supra note 14, at 570 ("Actually, the rules of international customary law on which acquiescence is founded provide all that is required [in defining the doctrine of laches].") (footnote omitted).

[215] See Restatement, supra note 8, § 102 cmts. b, c. The second requirement is often referred to as *opinio juris*. Id. § 102 cmt. c.

[216] 1930 Codification Conference, supra note 117, at 1581. Both the Italian and Danish delegates advanced this argument. Id. It is not clear, however, if the phrase "a hundred different conventions" was used in a figurative or literal sense. Certainly, there has been no study showing that at least 100 different treaties had adopted a rule of laches. See infra

that laches had become a positive custom of international law through consistent treaty conventions.[217] Professor King advanced this particular argument after analyzing nine treaties ratified during the nineteenth century, largely involving either the United States or the United Kingdom, from which he concluded that "[the doctrine of laches] is already recognized . . . in positive international law."[218]

If a rule of laches has crystallized as general international custom, then it is binding upon all states unless superseded by an international agreement.[219] Moreover, international custom is generally applied by most tribunals charged with applying international law, including United States courts.[220] In this situation, a tribunal adjudicating an international claim may freely apply a rule of laches—even if the jurisdiction of the forum were restricted to the most narrow definitions of international law. On the other hand, the principle of laches as a potential rule of international custom is constricted by the doctrine of the persistent objector. Under this doctrine, a state is exempted from compliance if the state has uniformly objected to the custom during its formation.[221] Consequently, if the doctrine of laches as an international custom meets widespread objection from many states, its very existence is open to doubt.[222]

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note 225 and accompanying text.

[217] Curiously enough, the 1930 Codification Conference did not explicitly adopt the doctrine of laches as international custom. The official declaration adopted by the conference took no position on the matter. As discussed above, however, the delegates had advanced this reasoning during their deliberations. See 1930 Codification Conference, supra note 117, at 1581-82. For a general discussion of how international treaties contribute to customary international law, see North Sea Continental Shelf Cases (F.R.G. v. Den. & Neth.), 1969 I.C.J. 3, 28-43 (Feb. 20); Restatement, supra note 8, § 102 cmt. i; Schachter, supra note 210, at 66-69, 71-72.

[218] King, supra note 14, at 83-87, 96. Similar to the 1930 Codification Conference, King does not explicitly argue that laches is a rule of international custom. In fact, King seemingly hints that the doctrine may be both custom, as evidenced by his survey of treaty law, and a general rule of international law. Id. at 95-96. Yet, it would be difficult to assert why the survey of treaties, which assumes the majority of King's analysis, is relevant to his discussion if it were not offered as support for the doctrine as a rule of custom.

[219] See Restatement, supra note 8, § 102 cmt. l. International custom has been implicitly analogized to a "default" rule of law, where, in the absence of any explicit agreement to the contrary, states are presumed to have accepted the custom as "emanat[ing] from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law." S.S. Lotus (Fr. v. Turk.), 1927 P.C.I.J. (ser. A) No. 10, at 18 (Sept. 7).

[220] See generally John Crook, Applicable Law in International Arbitrations: The Iran-U.S. Claims Tribunal Experience, 83 Am. J. Int'l L. 278 (1989) (presenting the various bases of international law, including customary international law, applied by the Iran-U.S. Claims Tribunal); Comment, Customary International Law in United States Courts, 32 Vill. L. Rev. 1089 (1987) (surveying the various applications of customary international law by U.S. courts).

[221] See, e.g., Restatement, supra note 8, § 102 cmt. d; Humphrey Waldock, General Course on Public International Law, 106 Recueil des Cours 1, 49-52 (1962-II).

[222] See Restatement, supra note 8, § 102 cmt. d.

A careful analysis of existing international jurisprudence, however, suggests that international custom cannot provide the basis of the laches doctrine. The analysis proposed by the 1930 League of Nations codification conference and Professor King—that a survey of relevant treaty law depicts a rule of laches as international custom—is logically appealing, but inconclusive. Neither the delegates to the 1930 codification conference nor Professor King present any evidence that international conventions have adopted a rule of laches out of a binding commitment to international law, the second element required of international custom.[223] Also, except for Professor King's limited survey,[224] no other study has maintained that the practice of limiting stale claims through treaty law meets the consistent state practice prong of establishing a general international custom.[225] Outside the realm of treaty law as international custom, it would be difficult to assert consistent state practice in adopting the doctrine of laches, especially given the relative paucity of international decisions. As seen in early international jurisprudence, every state that argued strongly for the doctrine's existence met equally vehement contentions against it.[226] This can hardly be construed as the consistent state practice requisite for customary international law.[227] Further, the application of the persistent objector doctrine to laches would permit the absurd result that a state which objects to laches could bring a stale claim against other states, but those states which have not objected could not

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[223] But see 1 Whiteman, supra note 20, at 243-44 (suggesting that, internally, the United States was denying claims for espousal on the ground that the claims were stale and would never pass muster before an international tribunal). Nevertheless, it would be equally plausible to contend that states were adopting treaty limitations on stale claims out of a sense of judicial expeditiousness and not a binding commitment to international law.

[224] See King, supra note 14, at 83-87, 96.

[225] This necessarily begs the question of how much state practice is required before international law recognizes a rule of custom. Although that issue remains unanswered, see, e.g., Henkin et al., supra note 186, at 55, Professor King's survey of two nations most likely would not meet the "widespread and representative participation" an international tribunal would expect to see in order to announce a general international custom. See *North Sea Continental Shelf Cases*, 1969 I.C.J. at 42.

[226] See, e.g., supra notes 51-99 and accompanying text.

[227] Cf. Myres S. McDougal, The Hydrogen Bomb Tests and the International Law of the Sea, 49 Am. J. Int'l L. 356-57 (1955) (describing international customary law as "a process of continuous interaction, of continuous demand and response, in which ... particular nation states unilaterally put forward claims of the most diverse and conflicting character ... and in which other decision-makers, external to [the debate] ... weigh and appraise these competing claims ... and ultimately accept or reject them"). Yet even Professor McDougal notes that these views would have to be "expressed in countless decisions in foreign offices, national courts, and national legislatures" in order to gain recognition as custom. Id. at 358. As discussed above, supra notes 225-226, this has not been the case. The Restatement has also taken this position: "[T]he passage of time as a defense to an international claim by a state on behalf of a national may not have had sufficient application in practice to be accepted as a rule of customary law." Restatement, supra note 8, § 102 cmt. l.

assert such claims against the objecting state. This would create a serious mutuality problem. No tribunal has ever suggested that such a rule emanates from the doctrine of laches.[228]

Nevertheless, several scholars have advanced the argument that a customary international law of procedure has developed from international litigation.[229] The argument suggests that if a state is to avail itself of the international judicial process, it is bound by procedural rules dictated by evolving customary law.[230] Thus, the defense of laches may indeed find legitimacy in international custom if it has gained the requisite levels of recognition in international arbitration procedure, regardless of state practice and policy. If this were the case, many of the criticisms advanced against international custom would no longer apply. State objections to a laches plea would be less relevant to the analysis than would the recognition of the defense by impartial international tribunals applying procedural law. Still, it would be difficult to prove that the doctrine of laches has crystallized into international procedural custom without an exhaustive survey of domestic state practice accepting the custom as practiced by international tribunals. Without such an inquiry, the customary international law of procedure only provides a potential legal source supporting laches.

Another possible source of law underlying the doctrine of laches is the more amorphous "general principles of law recognized by civilized nations."[231] Although few international decisions have explicitly announced a

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[228] The rejoinder here is that international tribunals have not generally analyzed the doctrine of laches as a rule of custom. However, dicta in many decisions discussed above suggest that the doctrine of the persistent objector, applicable to customary international law, would not apply to the laches principle. See, e.g., Sarropoulos v. Bulgarian State (Greece v. Bulg.), 4 Ann. Dig. 263 (Greco-Bulg. Arb. Trib. 1927) (stating that laches is a necessary rule of "[s]tability and security in human affairs"); *Gentini Case*, *in* Venezuelan Arbitrations, supra note 82, at 727 (holding that the doctrine of laches stems from "the highest equity—the avoidance of possible injustice to the defendant"); *Williams Case*, *in* 4 Moore, supra note 35, at 4190 ("A government can not any more rightfully press against a foreign government a stale claim, which the party holding declined to press when the evidence was fresh, than it can permit such claims to be the subject of perpetual litigation among its own citizens.").

[229] Professor Lillich was the main advocate of this contention. See, e.g., Lillich, supra note 186, at 2-7; 1 Richard B. Lillich & Burns H. Weston, International Claims: Their Settlement by Lump Sum Agreements 1-8 (1975).

[230] For example, this includes the acceptance by the international legal community of "lump-sum" agreements as a way to settle international claims. See Lillich & Weston, supra note 229.

[231] Professor Schachter and other international jurists have distinguished "general principles of law recognized by civilized nations" from other general principles of law applied by international courts. Schachter, supra note 210, at 50-55. These include:

(1) The principles of municipal law "recognized by civilized nations."

(2) General principles of law "derived from the specific nature of the international community."

(3) Principles "intrinsic to the idea of law and basic to all legal systems."

laches rule under this framework,[232] this source of law most accurately reflects the equitable underpinnings advanced by the international jurisprudence affirming the doctrine. The natural law analysis offered by the *Williams Case*—that a time bar to stale claims is inherent to any legal system and must be recognized by international law as law[233]—can only be accepted as international law under a "general principles" rubric.[234] This inductive reasoning precisely conforms to the general principles framework in announcing a rule of international law. If every municipal legal system adopted a statute of limitations, then the process of prescribing stale claims must constitute a more general legal principle that is inherent in international law. Similarly, international decisions that justify laches under principles of equity are only legitimate as international law as a "general principles" source.[235] To hold otherwise would produce a *non sequitur* in legal analysis: Although all legal systems adopt a given rule of law, it is not international law unless an international legal source recognizes the common rule as international law. This was the position adopted by the Restatement:

> [T]he passage of time as a defense to an international claim . . . may be invoked as a rule of international law, at least in claims based on injury to persons . . . because it is a general principle common to the major legal systems of the world and is not inappropriate for international claims.[236]

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(4) Principles "valid through all kinds of societies in relationships of hierarchy and co-ordination."

(5) Principles of justice founded on "the very nature of man as a rational and social being."

Id. at 50 (citations omitted). These strict distinctions have not been universally recognized as such. See, e.g., Restatement, supra note 8, § 102, reporter's notes, 7-8; Louis Henkin, International Law: Politics, Values, and Function, 216 Recueil des Cours 9, 52 (1989-IV). Nevertheless, even Schachter recognizes that several legal principles may fall under more than one category. Schachter, supra note 210, at 50. In any case, this Note argues that "general principles of law recognized by civilized nations" offer the most analytically correct source of law underlying the doctrine of laches.

[232] Few cases explicitly use the phrase "general principles of law recognized by civilized nations" in affirming the doctrine as international law. Most, however, reach the same conclusion in an indirect fashion. See, e.g., *Sarropoulos*, 4 Ann. Dig. at 264 ("Prescription being an integral and necessary part of every system of law must be admitted in international law.").

[233] 4 Moore, supra note 35, at 4181-99.

[234] Cf. Cheng, supra note 14, at 374-75 (analyzing the *Williams Case* under a "general principles" of law framework rather than a "general principles of law recognized by civilized nations"). Nevertheless, as Cheng concedes, the case may be adopted as international law under either principle. Id. at 376-77.

[235] See, e.g., Cadiz Case (U.S. v. Venez.) (U.S.-Venez. Comm'n 1890), *in* 4 Moore, supra note 35, at 4203 (holding that the doctrine of laches is a "universally recognized principle"); cf. King, supra note 14, at 96 (arguing that "[l]imitation . . . is recognized as a 'general rule of jurisprudence'" not necessarily derived by induction from municipal law).

[236] Restatement, supra note 8, § 102 cmt. l.

The 1958 Draft Articles echoed this view, arguing that international law must affirm the doctrine of laches because an individual in any other legal system "cannot remain subject to obligations indefinitely and under the permanent threat of legal action without any limitation of time."[237]

As a general principle of law recognized by civilized nations, the application of the laches rule is outlined by the doctrine of sources.[238] The clearest advantage of the laches application under a general principles foundation is the universality of obligation. Unlike customary international law, a rule adopted under a general principles framework does not exempt a state from compliance. Even if the state has historically and consistently objected to its formation, a "universally recognized principle" applies, by definition, to all entities subject to international law.[239] Secondly, as with customary law, international tribunals often apply general principles of law in adjudicating international claims, even given the narrowest restrictions to subject-matter jurisdiction.[240] Moreover, it is extremely difficult to supplant a general principle of law with another rule of international law. In contrast to customary international law, which may be replaced with another international custom, general principles of law are announced in universal and timeless terms that are not easily dismissed in place of a more modern legal tradition.[241] Similar to principles of *res judicata* or *pacta sunt servanda*, a rule of laches, as a general principle of law, would not be subject to repeal or transformation in international law.[242]

The use of this general principles framework as a source of law establishing the doctrine of laches in international law is not beyond controversy. One potential criticism is that there has been no comprehensive inquiry examining a rule of laches as adopted by the legal systems of the world. Because a rule of laches, as established under a general principles framework, is derived by induction from domestic law, there must be significant authority

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[237] 1958 Draft Articles, supra note 130, at 67. Curiously, the 1974 revisions did not explicitly adopt this analysis. See 1974 Draft Articles, supra note 114, at 312. Rather, the special rapporteur announced that the doctrine of laches stemmed from principles of "sound policy." Id. It is not clear whether the framers had intended "sound policy" to extend to international law through a "general principles" framework.

[238] For a discussion of general principles, see General Principles, supra note 14; Schachter, supra note 210, at 50-55.

[239] See, e.g., *Cadiz Case*, *in* 4 Moore, supra note 35, at 4203.

[240] See, e.g., Diversion of Water from the Meuse (Neth. v. Belg.), 1937 P.C.I.J. (ser. A/B) No. 70, at 76-78 (June 28); Schachter, supra note 210, at 50-55.

[241] See South West Africa Cases (Eth. v. S. Afr.; Eth. v. Liber.), 1966 I.C.J. 3, 296 (July 18) (Tanaka, J., dissenting). Judge Tanaka viewed "general principles" as "valid through all kinds of human societies." Id. Cf. Restatement, supra note 8, § 102 cmt. l (holding that a general principle is a subsidiary source of law used to fill the interstices of international law).

[242] Schachter, supra note 210, at 50-55.

showing that the rule does indeed exist as such in all the major legal systems.[243] Beyond the limited inquiries announced in the *Williams Case* and the *Gentini Case*, no such evidence exists. Secondly, not all international scholars have uniformly accepted the natural law process of induction characteristic of a general principles analysis.[244] Here, international scholars have argued that municipal rules must receive the imprimatur of international consent before they are elevated to international law.[245] Thus, the doctrine of laches, although possibly common to every body of domestic law, is not recognized as international law unless states have explicitly recognized it as such.[246] Under this analysis, it would be almost impossible to announce a consistent state affirmation of the doctrine.[247]

These criticisms, however, should not warrant a dismissal of the laches doctrine as a general principle of law. First, no international authority has maintained that every known legal system must recognize a rule of law in order for it to apply as international law.[248] Even without an extensive inquiry into every national legal system, it is certainly plausible that a majority of legal systems adopt a time bar for stale claims. Further, the doctrine of laches has strong roots in Anglo-American, Roman, and civil law traditions, and is an undisputed tenet of many bodies of law.[249] Summarily dismissing the principle for want of comprehensiveness would constitute precipitate analytic judgment and has never been the practice of international tribunals.[250] Sec-

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[243] Professor Tunkin, a leading Soviet scholar of international law, has advanced this argument. See G.I. Tunkin, Theory of International Law 200-01 (William E. Butler trans., 1974).

[244] See, e.g., Schachter, supra note 210, at 50-54.

[245] Id. at 50-51.

[246] But see Schachter, supra note 210, at 51 (citing Lauterpacht, supra note 12) (arguing that international law recognizes a "common law of mankind").

[247] See supra notes 225-227 and accompanying text (discussing the lack of evidence showing consistent state practice in ascertaining customary international law).

[248] See, e.g., Restatement, supra note 8, §102(4) ("General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.").

[249] See generally McClintock, supra note 1, § 28 (outlining the equitable origins of the doctrine); Vass & Chen, supra note 1, at 497 (suggesting the existence of the doctrine of laches in Roman, English, and early American jurisprudence).

[250] See, e.g., Henkin et al., supra note 186, at 112 ("[T]ribunals that have applied 'general principles' have not considered it necessary to carry out a detailed examination of the main . . . systems of national law to determine whether the principles pervade 'the municipal law of nations in general.'"); F.A. Mann, Reflections on a Commercial Law of Nations, 33 Brit. Y.B. Int'l L. 20, 38-39 (1957). The reasoning here is that the "way in which international law borrows from [domestic legal systems] is not by means of importing private law institutions 'lock, stock, and barrel.'" International Status of South West Africa (Eth. v. S. Afr.), 1950 I.C.J. 127, 148 (July 11) (McNair, J., sep. op.). Rather, international law looks to general principles of law recognized by civilized nations as "an indication of policy and principles" that are useful in international jurisprudence. Id.

ond, arguments against the inductive reasoning characteristic of international general principles have not garnered the attention of international jurisprudence, nor have they significantly affected international decisions.[251] As Professor Schachter notes, "[t]he use of municipal law rules for international judicial and arbitral procedure has been more common and more specific than any other type of application."[252] In fact, most scholars arguing against the general principles source of law are prepared to concede that certain more universal "juridical notions or concepts common to municipal law" still constitute international law.[253] Certainly, the doctrine of laches is one of those concepts.

CONCLUSIONS

A thorough review of relevant international jurisprudence, albeit limited in quantity, reveals the healthy existence of the laches doctrine as a legitimate and applicable principle of international law. International fora, from 1863 to the present, have consistently affirmed the doctrine of laches as a viable rule of international law. Although the doctrine has entertained criticism on the grounds of sovereignty, positivism, and vagueness, it has withstood analytical opposition and remains a legally recognized principle by most international jurists, scholars, and publicists. As legitimate international law, the laches equitable defense characteristically maintains two "elements" which outline its general contours: (1) a negligent lapse of time; and (2) a resulting prejudice to the defendant state. Similarly, the principle of laches is derived from a valid international source of law: a "general principle of law recognized by civilized states."

From a normative point of view, the doctrine of laches must constitute legitimate international law. Most international jurists and publicists point to generic principles of equity and inherent unfairness in justifying the principle—namely difficulties in procuring necessary evidence, protecting the defendant from a constant threat of litigation, and even punishing the claimant for "unclean hands." Although compelling, these justifications are seemingly truistic in nature, and do not directly address why the doctrine of laches must apply to international law as opposed to domestic legal systems. International courts and arbitration tribunals must recognize the doctrine's utility

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[251] See Schachter, supra note 210, at 52 (arguing that only a few international jurists assert that "national law principles . . . cannot *ipso facto* be international law").

[252] Id. at 51. Both Cheng and Lauterpacht have devoted two full volumes of scholarly work in support of this statement. See generally General Principles, supra note 14 (a study of the application of general principlesof municipal law in public international law); Lauterpacht, supra note 12 (commentary on application of municipal law in public international law).

[253] Schachter, supra note 210, at 51.

in preserving their own limited judicial resources without passing judgment on the underlying merits of a stale claim. As international litigation increases in popularity, both in U.S. courts and various international fora,[254] the doctrine of laches necessarily becomes an efficient mechanism to prevent the adjudication of stale claims.

[254] See generally Hans Smit, Recent Developments in International Litigation, 35 S. Tex. L. Rev. 215 (1994) (arguing that various reforms in U.S. federal procedure, including more accessible service of process, have led to increased international litigation in domestic courts).