ARTICLES & ESSAYS

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I. INTRODUCTION
In 1969, Congress passed the National Environmental Policy Act (NEPA) with the objective of causing governmental agencies to consider
Questions arose early regarding who had standing to initiate judicial review under the Act, and what the proper scope was for consideration of environmental effects of agency actions. A line of cases provided some guidance regarding these issues in the domestic context. When the same questions arose in the context of government action having impact outside the sovereign territory of the United States, the analysis became even more complex.

Part II of this article outlines the underlying tenets of the NEPA and the modifications of the NEPA at the executive and administrative level. Part III examines the judiciary's interpretations of the NEPA's application internationally to direct government agency actions. Part IV examines NEPA application stemming from indirect or collaborative government action. Part V sets out a framework for analyzing the competing factors which may affect future cases concerning the application of NEPA abroad. Part VI concludes that until a statutory amendment is approved, or NEPA's Environmental Impact Statement (EIS) mechanism becomes a general principle of customary international law, the extraterritorial application of NEPA will likely remain an open question. Since weighing of the competing factors is the province of the judicial branch, this will likely mean continued deference to the executive branch's view with respect to foreign policy.

II. THE DEVELOPMENT OF NEPA INTERNATIONAL APPLICATION

A. Outline

A summary of the main issues confronted when applying NEPA domestically is useful for considering their impact in the international context. Under NEPA, federal agencies are required to act in an environmentally responsible manner, yet they must also comply with other

2. Section 102(2)(c) of NEPA reads as follows:

The Congress authorizes and directs that, to the fullest extent possible: . . . (2) all agencies of the federal government shall . . .

(c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on-

(i) the environmental impact of the proposed action,
(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
(iii) alternatives to the proposed action,
(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and


This cross-policy coherence obligation is especially important with respect to agency activities abroad. As a threshold, to trigger the necessity of an EIS a proposed federal agency action must qualify as major and having a significant environmental impact.\footnote{4}

If the threshold is met, the next step is to determine the scope, timing, and content of the EIS. The Council on Environmental Quality (CEQ) regulations contain a detailed description of the procedural requirements for the preparation of an EIS.\footnote{5} To address uncertainty surrounding the timing of any obligations under NEPA, the CEQ provides a definition of the proposal for purposes of EIS preparation: “a proposal exists at that stage in the development of an action when an agency subject to the Act has a goal and is actively preparing to make a decision on one or more alternative means of accomplishing that goal and the effects can be meaningfully evaluated.”\footnote{6}

Since government action in the international sphere is susceptible to being kept from the purview of the public, the secrecy issue is particularly relevant when considering NEPA’s application abroad. In \textit{Weinberger v. Catholic Action of Hawaii/Peace Education Project}, the United States Supreme Court addressed the classified information issue in the domestic context. The plaintiff challenged the government’s creation of nuclear-capable storage facilities, but because the alleged project was classified, the plaintiffs were unable to prove the existence of an actual proposal for nuclear weapon storage.\footnote{8} The Court dismissed the plaintiff’s claim for failure to establish a cause of action, but instructed the United States Army (Army) to prepare a classified EIS if it was in fact storing nuclear weapons at the sites.\footnote{9} This holding creates the possibility that an agency’s good faith may be the only impetus to NEPA compliance when the underlying action implicates national security. This holding also increases the likelihood that courts will allow a reduced level of review of actions taken under the guise of national security.

\begin{itemize}
\item \textit{v} any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
\end{itemize}

\footnotesize
\begin{itemize}
\item Id.
\item 3. Id. §§102-4.
\item 4. Id. § 102(C).
\item 5. Because of the importance of the scoping issue, the CEQ established it as a particular element of the procedure, in order to obtain early participation by other agencies and the public.
\item 6. 40 C.F.R. § 1508.23 (1996).
\item 8. Id.
\item 9. Id.
\end{itemize}
Once the *scope* analysis provides the particular matters to be included in the EIS, the *content* query asks what must be discussed in relation to these matters, and in particular, what alternatives should be included. The test for determining what alternatives must be considered is the rule of reason, namely, "whether a reasonable person would think that an alternative was sufficiently significant to warrant extended discussion." Of significance to the international discussion is the District of Columbia Circuit Court's ruling that the agency discuss alternatives within the jurisdiction of any part of the federal government, and not just that of the agency in question. The amount of detail with which an alternative must be discussed is directly proportional to the likelihood of its implementation. Under the CEQ regulations a *no-action* alternative must be considered in the EIS, but a *worst case scenario* discussion requirement was later rescinded.

**B. Executive Order 12,114**

On January 4, 1979, President Jimmy Carter issued Executive Order 12,114 in an effort to clarify the questions surrounding NEPA's international application. The order was to represent the government's "exclusive and complete determination of the procedural and other actions to be taken by the federal agencies to further the purpose of the National Environmental Policy Act, with respect to the environment outside the United States, its territories and possessions." The actions covered in the Order include major federal actions significantly affecting the environment "of the global commons outside the jurisdiction of any nation (e.g. the oceans or Antarctica)" or "of a foreign nation not participating with the United States and not otherwise involved in the action." Actions which provide the foreign nation with a

14. *Id.*
15. *Id.*
17. *Id.* at 3269. Under section 2, every federal agency had eight months to develop procedures to implement the Order and were to consult with the State Department and the CEQ in this effort. *Id.*
18. *Id.* at 3270.
19. *Id.*
product or projects producing a "principal product or an emission or effluent" which is strictly regulated or prohibited by federal law because of its toxic effects or radioactivity are also included. \(^{20}\) Finally, the Order covers major federal actions outside the United States, its territories, and possessions which "significantly affect natural or ecological resources of global importance" by declaration of the President or international agreement binding on the United States. \(^{21}\)

The documents acceptable in this procedure include EISs, bilateral or multilateral studies by the United States and one or more foreign nations, studies by an international organization or body of which the United States is a member, and concise reviews of environmental issues, including environmental impact assessments (EIAs), summary analyses, and other appropriate documents. \(^{22}\) Section 2-4(b) of the Order calls for a provision in agency procedures for document preparation according to the environmental effects involved. \(^{23}\) For actions affecting the global commons, the agency must prepare an EIS. \(^{24}\) For the uninvolved, non-participating foreign nation situation, and for the toxic effect and radioactivity instances described above, bilateral or multilateral studies or concise reviews are sufficient. \(^{25}\) For the globally important resource scenario, any of the documents mentioned above are allowed. \(^{26}\) Thus, the review's type and scope are substantially impacted by the nature of the action and its effects, the level of coordination with the foreign nation, and the existence of any obligations stemming from international organization membership.

The Order also allows for "existing regulations of any agency adopted pursuant to court order . . . or judicial settlement of any case" or for procedures in addition to those in the Order which further NEPA's purposes or those of other environmental laws (with specific laws listed), as long as they are consistent with foreign and national security policies. \(^{27}\) When read in conjunction with the decision in \textit{NRDC v. Morton}, \(^{28}\) this section seems to imply that an individual agency's particular provisions, as long as they pass the foreign policy/national security consistency test, will be triggered when

\(\begin{align*}
20. & \text{ \textit{Id.}} \\
21. & \text{\textsc{Executive Order 12,114 supra} note 16, at 3270. Such recommendations should be accompanied by the views of the State Department and the CEQ. \textit{Id.}} \\
22. & \text{\textsc{Executive Order 12,114, supra} note 16, at 3270.} \\
23. & \text{\textit{Id.}} \\
24. & \text{\textit{Id.}} \\
25. & \text{\textit{Id.}} \\
26. & \text{\textit{Id.}} \\
27. & \text{\textit{Id.}} \\
28. & \text{\textit{NRDC, Inc. v. Morton, 458 F.2d 827 (D.C. Cir. 1972).}}
\end{align*}\)
actions have reasonable alternatives within the jurisdiction of any federal agency.

It is significant to note the Order's Presidential action exemption: intelligence activities and arms transfers, nuclear activities, actions arising from membership in international organizations, and emergency relief actions. Also exempt are actions which, "in the view of the agency," do not have a significant effect on the environment. Under section 2-5(b) agencies "may provide for" appropriate modifications in contents, timing, and availability of documents to fellow agencies or affected nations when necessitated by urgency, concerns of adverse impacts on foreign relations, or sovereign responsibilities. Modifications needed to reflect certain factors of diplomacy, competitiveness, confidentiality, national security, information collection obstacles, or ability of an agency to affect a decision are also allowed. Indeed, in emergency circumstances and those involving "exceptional foreign policy and national security sensitivities," an agency procedure can even provide for exemptions and categorical exclusions beyond those listed in the order. Section 2-5(d) addresses constitutional issues by limiting section 2-5's applicability to the extent permitted by law.

Finally, section 3 eliminates the availability of a private cause of action based on the Order. Furthermore it calls for coordination with the State Department and, in multi-agency actions, calls on the agencies to choose a lead agency responsible for implementation of the Order. The definition of environment is restricted to the "natural and physical environment" and expressly excludes "social, economic and other environments." Thus, unlike in the domestic context, where the Supreme Court has not limited consideration to the natural environment, Order 12,114 appears to do just that. And section 3-5 seems to say that if an EIS is prepared because an action affects the United States or the global commons, a separate EIS need not be prepared concerning the effects of the environment on foreign nations.

29. EXECUTIVE ORDER 12,114, supra note 16, at 3271.
30. Id.
31. Id.
32. Id.
33. Id.
34. Id.
35. EXECUTIVE ORDER 12,114, supra note 16, at 3271.
36. Id.
38. EXECUTIVE ORDER 12,114, supra note 16, at 3272.
III. NEPA APPLICATION TO DIRECT ACTION BY AGENCIES

A. Pre-Order 12,114

The first case to raise the issue of NEPA's applicability outside of the fifty states was brought in 1973 by the people of Enewetak, an atoll which is one of the Trust Territories of the United States. The people of Enewetak sought a preliminary injunction against the United States government's program of nuclear blast simulation by means of high explosive detonation. The United States District Court of Hawaii held that NEPA did apply to the Trust Territories of the Pacific Islands, stating that the government's drilling and seismic studies fell within the scope of the prohibition of the preliminary injunction requested where its primary purpose was to further the project in dispute, and where delay would not lead to irreparable injury.

In analyzing the statute's scope, the court noted that Congress must "manifest an express intention" that a statute apply to the Trust Territories, since federal legislation is not automatically applicable there. The court looked at the language of the statute and pointed out that the legislators used the broader term of Nation, and used United States only twice, both times in order to reference certain policies, regulations, and laws which would be unclear without that modifier. Judge King also pointed to the expansive language as indicating a concern for all persons subject to federal action having a major impact on their environment and not merely those located in the fifty states. He found additional support in the statements of Senator Jackson, NEPA's principal sponsor, as well as in the Senate Conference Committee Report. The court also cited the House Report as evidence of Congressional recognition of the worldwide scope inherent in environmental problems: "[I]mplicit in [U.S. Environmental Policy] is the understanding that the international implications of our current activities will also be considered, inseparable as they are from the purely national consequences of our actions."

40. Id. at 813.
41. Id. at 815.
42. Id. at 820-21.
43. Id. at 815.
44. Id. at 816.
46. Id. at 817.
47. Id. at 817-18.
In *Sierra Club v. Adams,* the plaintiff environmental group sought to enjoin the United States construction of the Darien Gap Highway in Panama and Colombia, alleging that the environmental impact statement was deficient. The Supreme Court agreed on the issue of the plaintiff's standing to challenge the EIS based upon concern regarding the spread of aftosa, or foot and mouth disease, to the United States, and that once standing is found with respect to one ground, a plaintiff may raise other challenges to the EIS based upon the public interest in having government officials meet their duties under NEPA. The Supreme Court noted the distinction between the issues of NEPA applicability to United States' government projects which involve entirely local environmental impacts, projects with some strictly local impacts, and some which affect the United States. But the Court held that based on the facts present in *Sierra Club,* it need only assume NEPA's applicability to the construction in Panama, and deferred the resolution of the issue of NEPA applicability to projects with "strictly local impacts."

In addressing the adequacy issue, the Court noted that the draft EIS had been circulated to over seventy officials in the United States, Panama, and Colombia, and neither the CEQ nor the Environmental Protection Agency (EPA) raised any objections to the statement. The Court also noted the significance of the government's response to the adverse comments to the draft, the level of detail in the discussion concerning aftosa, and the exploration of alternatives in ruling that the statement met its NEPA requirements. But the Court's green light was conditioned upon the Department of Agriculture filing a certification concerning the aftosa control issue with the court and the appellees before any construction began in Colombia. The Court found this necessary because the government appeared too anxious to complete the project. Apparently in the Congressional Budget request for Fiscal Year 1979 the "certain environmental requirements" which led to the delay in the Darien Gap Highway project were described as "[having] been met" despite the fact that

49. *Id.* at 390.
50. *Id.* at 391-92.
51. *Id.* at 392.
52. *Id.*
53. *Id.* at 393-94.
55. *Id.* at 397.
56. *Id.*
no final decision had been made by the Court on the case when the document was sent to Congress.  

In the second 1978 case concerning NEPA's application abroad, the National Organization for the Reform of Marijuana Laws (NORML) sought a declaratory judgment that the government violated NEPA by failing to prepare an EIS with respect to a joint program of herbicide spraying of marijuana and poppy plants in Mexico.  

The plaintiff group alleged that Mexican grown marijuana consumed in the United States was found to contain significant levels of the herbicide paraquat, and that this posed a "serious health hazard" to some of their members who smoke marijuana or ingest it in food or drink.  

NORML also claimed that some of its members visited Mexico for "recreational and professional purposes" and had an interest in having the food and drink they consume there free from potentially harmful herbicides. In addition, the plaintiffs asserted a "recreational and aesthetic interest" that the areas of scenic beauty in Mexico not be harmed by herbicide usage. Finally, the group claimed they had an interest in having Mexican agricultural imports free from potentially harmful herbicides. The United States District Court for the District of Columbia found that at least some of plaintiff's members had satisfied the minimal standing requirements set out in *Sierra Club v. Adams*, and had at the very least alleged a sufficient informational interest under NEPA.  

The court noted that the extraterritoriality of NEPA was still an open question in the Circuit. But since the defendant agreed to prepare an EIS regardless of the outcome of the litigation, the Court, as in *Sierra Club*, did not have to directly address the issue. The court refused to issue an injunction requiring the agencies to use their best efforts to dissuade the Mexican government from continuing the spraying program until the EIS was prepared, holding this to be a nonjusticiable political question beyond its powers, and that such relief would infringe upon the foreign relations powers of the President. The court noted that marijuana and heroin (also affected by the program) were Schedule I Controlled Substances and that simple

57. *Id.*  
59. *Id.* at 1228.  
60. *Id.*  
61. *Id.* at 1228-29.  
64. *Id.* at 1232.  
65. *Id.* at 1229, 1232-33.  
66. *Id.* at 1234-35.
possession was a criminal violation.\textsuperscript{67} Thus, even though NEPA demanded that federal agencies not rush blindly into major federal actions affecting the environment, this did not mean that environmental concerns could justify disregarding the criminal laws created by Congress.\textsuperscript{66} Because of this and the fact that the relief sought presented a nonjusticiable political question, all other aspects of the relief sought by NORML were denied.\textsuperscript{69}

B. Post-Order 12,114

Two years later, an environmental group sought judicial review of the Nuclear Regulatory Commission’s (NRC) approval of nuclear export applications to the Philippines.\textsuperscript{70} The petitioners challenged the adequacy of the review under both the Atomic Energy Act and NEPA.\textsuperscript{71} The NRC relied extensively on generic analyses, Philippine EISs submitted, and other environmental review information compiled under Executive Order 12,114.\textsuperscript{72} Officials also stated that principles of national sovereignty constrained them from insisting on visits to the local sites, such that it did not need to examine site-specific impacts on the global commons.\textsuperscript{73} The Commission also pointed to several specific efforts undertaken with the Philippines in order to carry out the NEPA requirement that an agency “maximize international cooperation” to prevent deterioration of the worldwide environment.\textsuperscript{74}

The court characterized the NEPA dispute as a legal question between the plaintiff’s claim that NEPA should apply to the foreign effects of a domestic licensing decision, and the government’s response that the requirement of an EIS, to the fullest extent possible, was narrowly limited to major federal actions taking place in, or having effects upon, the United States itself.\textsuperscript{75} Judge Wilkey referred to the legitimate overlapping of the regulatory jurisdiction of the United States and the Philippines, but remarked that they were not the same.\textsuperscript{76} While noting that the nature of the program as one of energy provision made the foreign political interest significant, the court also said that the “common defense and security” and the “international

\textsuperscript{67} NORML, 452 F. Supp. 1226, 1234.
\textsuperscript{68} Id. at 1324.
\textsuperscript{69} Id. at 1235.
\textsuperscript{70} Id. at 1325.
\textsuperscript{71} NRDC, Inc. v. NRC, 647 F.2d 1345 (1981).
\textsuperscript{72} Id.
\textsuperscript{73} Id.
\textsuperscript{74} Id. at 1366.
\textsuperscript{76} Id. at 1353.
\textsuperscript{75} NRDC, 647 F.2d 1353, 1355. The opinion contains a parallel analysis of the government’s obligations under the NEPA.
\textsuperscript{76} Id. at 1356.
reputation" of the United States were "on the line." Also of significance was the court's view that the rule against extraterritoriality, when interpreting a statute, justified the NRC's refusal to extend the scope of the review to the impact on American military personnel stationed in the Philippines.  

Judge Wilkey of the District of Columbia Court of Appeals ruled that the Commission had acted properly by declining to consider the foreign impact, and that its deference to the executive's analysis and foreign policy judgment was "fully consistent" with congressional objectives. More specifically, the court was not able to find that NEPA imposed a requirement for an EIS where the impact fell exclusively within foreign jurisdictions. In analyzing the language of the statute, the court felt that deference to the Presidential authority in foreign relations dictated that NEPA's putative extraterritorial reach be curbed with respect to nuclear exports. The court concluded that NEPA's legislative history revealed nothing about extraterritorial application, and that the line of precedent was distinguishable from the case at hand, such that the holding was entirely consistent with the NEPA jurisprudence to date. Judge Wilkey did restrict the NEPA holding to a finding that NEPA was inapplicable to NRC nuclear export licensing decisions, but that did not necessarily mean that the EIS requirement was inapplicable to some other types of major federal actions abroad.

In Greenpeace v. Stone, a coalition of environmental groups and individuals contested the government's transportation of the chemical weapons from West Germany to Johnston Atoll for ultimate destruction. The United States District Court of Hawaii refused the requested preliminary injunction. The court held that the Army's environmental impact statement met its obligations under NEPA, and that any interference with the stockpiles, which were already in transit, posed serious risks to both people and the environment. Furthermore the court ruled that the transportation of the weapons within the Federal Republic of Germany did not fall within NEPA's scope because the action was pursuant to a presidential agreement

77. *Id.*
78. *Id.* at 1364-65.
79. *Id.*
80. *Id.*
82. *Id.* at 1368.
83. *Id.* at 1366.
85. *Id.* at 755.
86. *Id.* at 754.
between President Bush and Chancellor Kohl. Additionally, the court ruled that the government’s failure to consider the transoceanic shipment segment of the project in the same comprehensive EIS as regarding the eventual incineration did not constitute a NEPA violation.

In the decision, Judge Ezra pointed to the unique nature of the challenged federal action extending from the Federal Republic of Germany to Johnston Atoll. The plaintiffs’ standing was complicated by the geographical nexus requirement of the Ninth Circuit, especially the transoceanic portion of the program. Plaintiff Walter Paulo, a Hawaiian native, stated that “he fished in the vicinity” of the Johnston Atoll and will likely be affected by the Johnston Atoll Chemical Agent Disposal System (JACADS) project.

The court saw this fact as conferring upon Paulo standing to challenge the weapons storage and destruction on the Johnston Atoll, but that he was without standing to challenge the weapons movement within Germany, or across international waters. Plaintiff Greenpeace International claimed members within Germany, and in particular those along the stockpile transport route, would likely satisfy the procedural and geographical nexus test. But despite the group’s claims of members residing throughout the world, the court considered it “impossible [to] conclusively presume” whether any members were geographically in the vicinity or would potentially be affected since the actual shipment route had not yet been determined.

The court noted that despite the complexities in the analysis of standing, in ruling on the motion, it could still rule on whether substantial questions had been raised on the merits and whether the balance of hardships favored granting relief. The first NEPA claim was that the Army’s segmentation of the project and failure to develop a comprehensive EIS violated the Army’s statutory duties. The Court opined that NEPA did not

87. Id. at 757-58. Plaintiffs disputed the existence of an actual agreement. The court, while recognizing that no written agreement was actually executed between Bush and Kohl, still found sufficient evidence to show that Secretary of State Baker did enter an actual agreement with Chancellor Kohl on behalf of President Bush. Id.

88. Id. at 763.

89. Stone, 748 F. Supp 749, 756.

90. Id.

91. Id.

92. Id.

93. Id. at 756-57.


96. Id. at 757.
apply extra-territorially to the movement within Germany and shipment to the Johnston Atoll. This conclusion was based largely on the political question and foreign policy implications which would result from applying "a United States statute to joint actions taken on foreign soil based on an agreement made between the President and a foreign head of state." While it noted the Executive Order 12,114 requirement that federal agencies consider environmental impacts of actions undertaken outside sovereign United States territory, the court pointed out that the assessment requirement only exists when the "foreign nation [was] not participating with the United States and [was] not otherwise involved in the action." The court pointed out that the plaintiffs' reliance on CEQ comments regarding application of NEPA abroad was misplaced. Not only did they predate Order 12,114, but the CEQ worked with the State Department in drafting the Order "in a way sensitive to both environmental and foreign policy concerns." The court did not favorably consider the second NEPA claim that the Army failed to adequately consider alternatives. The court found that the Army's consideration of alternatives was sufficient, even though it recognized that the facility on the Johnston Atoll was, at that time, the only incinerator of its kind capable of destroying the weapons in question. Also, the no-action alternative and interim storage or disposal in the United States, mentioned in the Supplementary Impact Statement(SEIS), were not real options in light of the Presidential agreement and of a law passed by Congress which had specifically prohibited the Army from shipping a similar stockpile from Okinawa to the continental United States. The plaintiffs had pointed to biodegradation or chemical treatment methods as feasible alternatives, but the court found the Army's incorporation by reference of such methods sufficient under NEPA.

97. Id. It is worth noting that the court emphasized the fact that this decision was limited to the specific and unique facts presented by the case. The court felt that under different circumstances, NEPA may require a federal agency to prepare an EIS for an action undertaken abroad, in particular if the action would have direct environmental impacts within the United States, or when there has been a total lack of environmental assessment by the agency or by the foreign country. Id. at 761.

98. Id. at 761.

99. Id. at 763.

100. Stone, 748 F. Supp. 749, 764.

101. Id. at 764.

102. Id. Congress passed Public Law 91-672 to specifically prohibit the movement of the Army's stockpile at Okinawa to the continental United States. In response the Army shipped those chemical munitions to the Johnston Atoll without any Congressional interference. Thus while the law is not a direct ban on such shipments, the Army raised the issue to highlight the similar political problems which could arise from an attempt to bring the European stockpile to the continental United States. Id. at 764 n.20.

103. Id. at 764.
The third NEPA claim, that the Army violated NEPA by failing to supplement the final SEIS in light of alleged new information, was without merit. The information presented apparently was not new, the argument was simply a derivation of the alternatives claim.104

Also, in 1990, the Eighth Circuit Court of Appeals decided a case which had major implications for plaintiffs suing under environmental statutes.105 Defenders of Wildlife and other groups challenged a Department of Interior regulation which provided that the Endangered Species Act did not create a duty for federal agencies funding projects in foreign countries to consult with the Secretary of Interior about the project's likely impacts on endangered species.106 The court found the injury in fact requirement was met on two grounds. First, that the rate of extinction of endangered species was on the rise in countries visited by its members which were also the site of specific agency products. Second, the Secretary's refusal to complete (project review) statutory procedures constituted a violation.107 Judge Gibson held that the organizations had standing to challenge the regulation, and that the consultation requirement in the Endangered Species Act extended to all agency action affecting endangered species, whether within the United States or abroad.108

Though not a NEPA case, Defenders highlights the importance of the judicial interpretation of a statute's legislative history. This case also stresses the importance of a sufficient nexus between the government's activity and the alleged injury to the plaintiff. One of the plaintiffs visited parts of Sri Lanka which were sites of development projects funded by the Agency for International Development (AID).109 Another plaintiff went to Egypt and observed the Nile crocodile habitat which coincided with the huge Aswan High Dam construction project.110 Both plaintiffs noted their intent to return to those areas, and the court found they had standing.111 The court felt that the Defenders members had provided specific facts and not merely use of "unspecified portions of immense tracts of land upon which governmental

104. Id. at 765.
106. Id. at 117-18.
107. Id. at 119.
108. Id. at 125. The court found that the statute defined endangered species without any reference to geographic limitations. The court also noted a section entitled, "International Cooperation" as evidencing a Congressional commitment to worldwide conservation efforts. NEPA also has such a section. It emphasized that final authority with respect to statutory construction lies with the judiciary, which must reject any agency interpretations which it finds contrary to clear congressional intent. Id. at 123.
109. Id. at 120.
110. Lujan, 911 F.2d 117, 120.
111. Id.
activity may or may not occur."112 Another plaintiff, however, did not have standing relating to a construction project in Peru because he only came within a few hundred miles of the area.113

In *Environmental Defense Fund, Inc. v. Massey,*114 the plaintiff environmental group sought to enjoin the National Science Foundation's program of food related and domestic waste incineration in the Antarctic because it had failed to prepare a proper environmental analysis in violation of NEPA, the CEQ Regulations, and Executive Order 12,114.115 The United States District Court made a rather clear statement regarding the extra-territorial application of NEPA by stating it could not "ferret out a clear expression of Congress' intention that NEPA should apply beyond the territorial jurisdiction of the United States."116 The court relied substantially on a 1991 Supreme Court decision that Congressional legislation is meant to apply only within the territorial jurisdiction of the United States, unless a clear contrary intent is shown.117 In construing that case, the court ruled that it had *no choice* but to decide that NEPA was inapplicable to the NSF incineration program in Antarctica.118 In applying Executive Order 12,114, the court noted that, based on case law, executive orders without specific foundation in congressional action are *not* judicially enforceable in private civil suits.119 As a note of caution, however, the court noted its concern with the manner in which the defendant undertook the EIS, and remarked that if it had subject matter jurisdiction under NEPA or Order 12,114, the result may have been different.120

IV. NEPA APPLICATION TO INDIRECT UNITED STATES ACTION ABROAD

The United States is involved in many activities in other countries by nature of its membership in various international organizations. Sometimes these efforts are in conjunction with certain programs of administrative

112. This was a reference to the failed challenge in Nat. Wildlife Fed. v. Lujan, 110 S.Ct. 3177, 3187-89 (1990).
113. *Id.*
115. *Id.* at 1297.
116. *Id.* at 1297. This statement is difficult to reconcile with the passage quoted from the *Laird,* case, 353 F. Supp. at 817-18.
117. *Id.*
118. *Id.* at 1298.
agencies, raising the issue of the extent that NEPA obligations attach to such joint or parallel activities. Also, many of the international organizations now have their own requirements with respect to environmentally sound planning, which are similar but not equivalent to NEPA's requirements. NEPA section 4332(2)(f) expressly refers to international activities by calling on agencies to recognize the worldwide and long-range character of environmental problems and to support [appropriate] initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of [humankind's] world environment.

A. United States Bilateral Assistance

This is the primary type of United States government assistance to foreign governments and institutions.121 It consists of the transfer of financial and/or technical assistance by governmental agencies, most of which is coordinated by the AID, an independent organization within the State Department.122 After a series of AID projects caused unforeseen negative environmental consequences in recipient nations,123 the Agency improved its environmental review procedures along the lines of the NEPA model.124 Even so, NEPA procedures need only be fully implemented if the AID action affects the environment of the United States, the global commons, or areas outside the jurisdiction of any nation.125 In other words, projects having only local effects will be subject to a different standard of review.

AID projects falling within this category are governed by Regulation 16, which differs from NEPA in three main respects.126 First, the Initial Environmental Examination (IEE), in contrast to NEPA's Environmental Assessment (EA) procedure, only requires a brief discussion of foreseeable environmental effects of the action.127 A discussion of alternatives, including the no-action alternative, is not required, nor is any participation by the

122. Id.
123. The Center for Development Information and Evaluation reviewed over 200 AID projects between 1985 and 1986, and reported that 20 percent of the projects had unforeseen environmental impacts, and of these, most were negative and were not adequately addressed. Siew Tuan Chew, Environmental Assessments of Development Projects: A Preliminary Evaluation of AID's Experience, AID EVALUATION OCCASIONAL PAPER 17 (1988).
125. Id.
127. Id.
public required in the IEE preparation process. Second, the scope and content of the IEE, which is to include "the direct and indirect effects of the project on the environment," is much less detailed than the guidance provided by the CEQ Regulations. Finally, the IEE is not circulated for public comment; only the draft EIS receives public input.

B. Multilateral Development Banks

Imposing the relatively stringent requirements under NEPA to projects undertaken by multilateral banks of which the United States is a member is complicated by the differing national views with respect to the environment. Three main factors account for this difficulty: 1) the absence of a national mechanism suitable to the activities of the banks; 2) the inherent infringement on the sovereignty of the recipient nation; and 3) the increased complexity of international development projects. But in some situations the centralized authority of institutions such as the World Bank may actually facilitate the EIA procedure relative to the United States federal bureaucracy.

In response to a series of environmental disasters resulting from some of its projects, the World Bank initiated a new policy of environmentally conscious development in May 1984. When critics claimed that the policy was ineffective and merely a public relations ploy, the Bank issued a directive mandating an EIA for all projects which may have significant environmental impacts. But under the Directive, the EIA requirement did not apply to

128 Id.
129 Id.
132 Id. at 529-35.
133 Id. at 531. In the World Bank project cycle, the EIA process would function as follows. During the identification phase, environmentally trained bank experts conduct a sectoral analysis in cooperation with local experts. In the preparation phase, during which project objectives and timetables are outlined, the identification of potential adverse environmental impacts continues. These first two stages are the responsibility of the borrower. During the appraisal stage, the Bank reviews technical, institutional, economic and financial aspects of the project. At this stage Bank officials balance the short-term resource to use and long-term productivity, and identify any irretrievable commitment of resources. This is meant to result in an environmentally sensitive cost-benefit analysis of the project. Id. at 535-36.
134 World Bank Operational Directive on Environmental Impact Assessment. The Bank also publishes an Environmental Assessment Sourcebook which compiles all of the Bank's environmental policies and guidelines.
projects which can be characterized as *environmentally beneficial*, leaving the determination thereof to Bank officials. In part to address this issue, in 1989, Congress passed the International Development and Finance Act,\(^{135}\) which prohibits American representatives of any international bank from voting for any development project unless an EIA has been performed.\(^{136}\) This would mean a statement following the guidelines set by the United Nations Environment Programme (UNEP), and not NEPA.\(^{137}\)

C. The United Nations

The United States and other developed countries provide most of the funding for the development assistance programs of the United Nations.\(^{138}\) The 1972 United Nations Conference on the Human Environment in Stockholm led to the creation of the UNEP.\(^{139}\) UNEP was developed to create an action plan for the implementation of a set of environmental principles signed by 113 nations, and also to coordinate future United Nations activities concerning the environment.\(^{140}\) UNEP encourages the development and use of the environmental impact assessment mechanism for all of its projects.\(^{141}\)

The significance of the sustainable development issue is reflected in the drafting of the United Nations Convention on the Environmental Impact Assessment in a Transboundary Context.\(^{142}\) The Convention calls for countries to "[establish] an environmental impact assessment procedure that permits public participation and preparation of the environmental impact assessment documentation."\(^{143}\) The content requirements under the Convention bear a strong resemblance to NEPA, and include a description of the project and purpose, reasonable alternatives, the environment affected, the estimation of the significance of impact, mitigation measures, and criteria


\(^{136}\) *Id.* at 323; 22 C.F.R. § 161.7 (1996).

\(^{137}\) *Id.* at 323.

\(^{138}\) *Id.* at 314.

\(^{139}\) See *The Earth Summit: The United Nations Conference on Environment and Development* (UNCED) 3-10 (Graham & Trotman 1992).

\(^{140}\) *Id.*

\(^{141}\) *Id.*


guidelines. The appropriate authorities in "parties of origin" should provide this documentation to "affected parties" for comments within a reasonable time before a final decision is to be made on a proposed activity. Although the Convention is not yet in force, the fact that the EIA serves as the subject of a United Nations sponsored international agreement is strong evidence that the development of an EIA statement will eventually be considered as a general principle of customary international law. Consequently, such an obligation may someday be imputed to countries by nature of developments in the international legal arena.

144. U.N. Convention on E.I.A., supra note 142, app. II, 30 I.L.M. at 814-15: These following requirements are listed in Appendix II, Content of the Environmental Impact Assessment Documentation, which reads:

Information to be included in the environmental impact assessment documentation shall, at a minimum, contain, in accordance with Article 4:

(a) A description of the proposed activity and its purpose;
(b) A description, where appropriate, of reasonable alternatives (for example, locational or technological) to the proposed activity and also the no-action alternative;
(c) A description of the environment likely to be significantly affected by the proposed activity and its alternatives;
(d) A description of the potential environmental impact of the proposed activity and its alternatives and an estimation of its significance;
(e) A description of mitigation measures to keep adverse environmental impact to a minimum;
(f) An explicit indication of predictive methods and underlying assumptions as well as the relevant environmental data used;
(g) An identification of gaps in knowledge and uncertainties encountered in compiling the required information;
(h) Where appropriate, an outline for monitoring and management programmes and any plans for post-project analysis; and
(i) A non-technical summary including a visual presentation as appropriate (maps, graphs, etc.).

145. U.N. Convention on E.I.A., supra note 141, art. 1(ii), 30 I.L.M. at 802. "Parties of origin" are defined in the Convention as Contracting Parties (to the Convention) or "[p]arties to this Convention under whose jurisdiction a proposed activity is envisaged to take place." Id. art. 1(ii).

146. "Affected parties" are defined as Contracting Parties (to the Convention) or "[p]arties to this Convention likely to be affected by the transboundary impact of a proposed activity." U.N. Convention on E.I.A., supra note 142, art. 1(iii), 30 I.L.M. at 806.


148. Article 38(1)(b) of the Statute of the International Court of Justice defines an international custom as "a general practice accepted as law." Statute of the International Court of Justice, art. 38 (1)(b). THE RESTATEMENT (THIRD) OF FOREIGN RELATIONS §102(2) (1987) states: "Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation." Thus state practice is key in determining whether a particular custom rises to the level of international customary law. The significance lies in the fact that neither federal statutes nor executive orders can contradict a self-executing custom, since these become automatically a part of the United States federal common law. Frederic L. Kirgis, Federal Statutes, Executive Orders and Self-Executing Custom, 81 AM. J. INT'L L. 371 (1987).
V. ANALYSIS: MAPPING THE NEPA EXTRATERRITORIAL APPLICATION TERRAIN

The panoply of United States case law, international organization policies, and regional and international conventions presents a very complex picture for analyzing the extraterritorial application of NEPA. Because of disparities in approach, application, interpretation, and enforcement of the various environmental planning policies mentioned in this paper, there may still exist incentives to characterize a given activity so as to bring it within the scope of a desired environmental regime. Some of the nuances of this analysis are presented below.

A. The Potential for De-Internationalization

In the domestic context, the federal action element in a project may take the form of a license requirement, funding restrictions, or some other type of federal participation. If only a minor part of a project falls within federal control, the small handle doctrine states that only impacts stemming from those minor parts are covered by NEPA. Parties would sometimes attempt to structure a project in order to defederalize it, partially or entirely. The courts have not looked favorably on such attempts. Even when an action involves a nonfederal defendant, at least one court has upheld an injunction against a private party, where prior approval of a federal agency was a sine qua non of the initiation and continuance of a non-federal action.

149. The CEQ Regulations read, in relevant parts:

Major federal action includes actions with effects that may be major and which are potentially subject to Federal control and responsibility. Major reinforces but does not have a meaning independent of significantly (1508.27). Actions include the circumstances where the responsible officials fail to act and that failure to act is reviewable by courts or administrative tribunals under the Administrative Procedure Act or other applicable law as agency action.

Actions include new and continuing activities, including projects and programs entirely or partly financed, assisted, conducted, regulated, or approved by federal agencies; new or revised agency rules, regulations, plans, policies, or procedures; and legislative proposals (1506.8, 1508.17). Actions do not include funding assistance solely in the form of general revenue sharing funds, distributed under the State and Local Fiscal Assistance Act of 1972, 31 U.S.C.A. § 1221 et seq., with no Federal Agency control over the subsequent use of such funds. Actions do not include bringing judicial or administrative civil or criminal enforcement actions.


There is no case law regarding attempts to segment an international project involving federal agency participation. But certain activities, for example international construction projects, are potential candidates for segmentation. If a United States court followed the reasoning in the domestic defederalization cases, conflicts could arise from any attempts to apply NEPA to activities in which the United States is not the only participant.

B. Substitutability of Foreign and Multinational Assessments to Meet NEPA Requirements

A related issue in the bilateral project situation is the extent to which EIAs or EISs developed by a foreign government or agency may be substituted for the United States agency's EIAs or EISs. United States courts have already touched upon this issue in two cases. In NRDC v. NRC, the District Court for the District of Columbia noted that the federal agency had cooperated on several specific programs in order to comply with the NEPA section 102(2)(f)’s requirement that agencies “maximize international cooperation” to prevent deterioration of the worldwide environment. The government of the Philippines filed an amicus brief to assure the court that it had "responsibly undertaken to assess and protect the Philippines environment from the risks associated with the import of the nuclear reactor." The brief stated that NRC consideration of impacts in the Philippines would improperly “substitut[e] United States regulatory standards for the Republic’s own,” and that refusal of the license on the grounds raised by petitioners would constitute an unwarranted intrusion into its internal affairs. In Greenpeace v. Stone, the District Court acknowledged the decision of a German court addressing a challenge to the transport of chemical weapons within the Federal Republic. The Administrative Court of Cologne analyzed that claim under two statutes specifically covering chemical weapons transport on German territory. In reviewing the opinion,

154. Id. at 1354.
156. Id.
158. Eric Neumayer v. die BRD, VG Koeln, 4 Kammer, 4 L 1098/90.
159. The rail transport segment of the project was covered by the Verordnung ueber die innerstaatliche und grenzueberschreitende Befoerderung gefaehrlicher Gueter mit Eisenbahnen (GGVE) [Regulation concerning the domestic and cross-border movement of dangerous items by train], v. 1985 (BGBI. I s.1560). The road transport segment was covered by the Verordnung ueber die innerstaatliche und grenzueberschreitende Befoerderung gefaehrlicher Gueter auf Strassen (GGVS), v. 1985 (BGBI. I s.1550).
Judge Ezra noted that the request for injunctive relief was denied by the German court, which found the transport operation consistent with the applicable West German law. He remarked that to impose NEPA's requirements to that operation would "encroach upon the jurisdiction of the [Federal Republic of Germany] to implement a political decision which necessarily involved a delicate balancing of risks to the environment and the public and the ultimate goal of expeditiously ridding West Germany of obsolete unitary chemical munititions." 

It would seem that when an American court is faced with such a scenario, four alternatives exist. The first, when available, would be to find a sufficient ground for applying NEPA which addresses the foreign policy sensitivity problem (e.g. argue that the potential effects on American service persons in the Philippines and Germany require application). The second would be for a court to review, or to order an agency to review, the affected nation's environmental planning procedures and determine whether they are sufficient to satisfy NEPA's requirements. This might at least reduce any negative foreign policy reverberations compared to the outright preemption alternative. It would, however, place a possibly greater administrative burden on the agency (or court) than would ordering the routine NEPA, EIA, or EIS. The third alternative is for the agency to work with the local officials and thereby ensure that NEPA-type standards for statements were met. Some commentators argue that this approach would have positive foreign policy consequences and would enhance the local environmental regime. Detractors argue just the opposite. Such cooperation would be viewed as paternalistic meddling and also point to the increased costs which this approach would entail. Finally, the court could simply defer to the foreign EIA or EIS and follow a presumption of sufficiency approach. A sliding-scale evaluation here would run the risk of insulting foreign nations perceived as maintaining inadequate environmental policies, while complete deference

161. Id.
162. Interestingly enough, this was argued in the Philippines case, but the court stated that "the rule against extraterritoriality [of a statute] is applied here to justify the Commission's refusal to assimilate the American public in America to American armed forces in the Philippines [or in the many other places around the globe where the United States has military personnel]." NRDC v. NRC, 647 F.2d 1345, 1364 (D.C. Cir. 1980). This rationale is somewhat curious in light of the holding in the Defenders case.
could increase the risk of some of the problems, including disasters, which
the statement is meant to aid in avoiding.

C. The Blurring of NEPA

At first glance, it appears that Executive Order 12,114 aims to
occupy the field with respect to the extraterritorial application of NEPA. The
wording of many of the provisions of the Order are troublesome when
applied to actual agency actions abroad. In relation to the actions included
under the order, it is difficult to imagine a situation where a foreign nation’s
cooperação or communication with a United States agency would be so
minimal as to qualify it as “not participating” or “not otherwise involved.”

The discretion left to the agency in determining actions not having a
significant effect on the foreign environment raises questions about what it
must do to backup such a determination. The apparently liberal
substitutability of documents in sections 2-4 raises the possibility of deviation
from the NEPA/CEQ requirements. The lead agency mechanism,
authorization of agency modification regarding contents and timing of the
statement, and the exclusion of “social, economic and other environments”
from consideration all raise the issue of whether this can be done legitimately
by executive order. Since the scope of the Order represents the
government’s “exclusive and complete determination of the procedural and
other actions” of agencies, and does not create a cause of action, it must
be read to the extent it is consistent with NEPA, whose policy goals it is
meant to further.

So far courts have not viewed the Order as preempting application of
NEPA to all federal agency actions outside of the United States. In the
Greenpeace case, the court relied on the NEPA statute itself, and gave little
attention to the Order in the holding or in dicta. Some commentators
attribute this to the lack of a statutory basis for the Order, and the lack of a
framework upon which courts could rely.

Other developments have led to the decreased likelihood that NEPA
will be applied equally, or even at all, in the international sphere. These
include express exemptions from NEPA coverage and the primacy of foreign


165. EXECUTIVE ORDER 12, 114, supra note 16.
166. Order 12,114 perhaps anticipated these issues by its limiting applicability of its provisions
as “permitted by law.” Id.
167. Id. at 3269.
168. Id.
170. Id.
171. Id.
policy considerations in the administrative agency scheme. On both the multinational institution and agency level, commentators warn of the inherent project biases which exist once action on a proposal is taken which may prevent any post facto evaluation. This is particularly problematic given the traditional grand scale on which many of the development projects have been undertaken.

D. Judicial Balancing of Competing Objectives

Post-Executive Order 12,114 courts have tended to rely on a balancing of NEPA’s goals with the particular foreign policy concerns arising from the federal action at hand.172 In particular, when a NEPA plaintiff seeks an injunction, even courts acknowledging environmental concerns may be forced by equity considerations to favor foreign policy implications. The court in *Wisconsin v. Weinberger*173 held:

NEPA cannot be construed to elevate automatically its procedural requirements above all national considerations. Although there is no national defense exception to NEPA . . . the national well-being and security as determined by the Congress and the President demand consideration before an injunction should issue for a NEPA violation. Accordingly, courts have undertaken an evaluation of competing public interests in molding permanent injunctive relief for NEPA violators. A court should tailor its relief to fit each particular case, balancing the environmental concerns of NEPA against the larger interests of society that might be adversely affected by an overbroad injunction.174

Some commentators argue that the global nature of environmental problems necessitate resolution by diplomatic means.175 They argue that extraterritorial application of NEPA would be an attempt to supplant existing international law mechanisms, some of which, such as improved multilateral, development bank environmental policies, stem from successful persuasion, and not unilateral demand.176 There may still be a role for NEPA internationally, since the agreements reached by consensus are often vague

172. Id.
174. Id.
175. Whitney, supra note 164.
176. Id.
and indefinite. Such agreements often take years to reach, and proponents of extraterritorial application point to NEPA as a ready solution.

VI. CONCLUSION

Most industrialized nations already have policies similar to those entailed in NEPA. Thus, it is mainly in the industrialized/donor country-undeveloped/recipient country scenario that the issue of disparate environmental regimes arises. Developing nations are faced with a bit of a conundrum in formulating their development programs. Essentially, only three strategies are available to these countries with respect to compliance with environmental protocols, whether they stem from application of NEPA or some obligation under domestic or international law. These options are to simply ignore any environmental obligations, to borrow in order to afford the added costs of compliance with a regime such as NEPA, or to finance compliance through internal growth. Since environmental standards will have a direct impact on the goods and jobs which would stem from a development project, as well as the level of foreign exchange required, relatively weak environmental regimes may foster robust economic growth. Case law shows that application of NEPA does not necessarily mean that more stringent environmental guidelines become part of the planning process.

The extraterritorial application of NEPA is still unclear. Case law gives more guidance with respect to issues of standing than it does to NEPA’s reach. Executive Order 12,114 did not adequately clarify the situation and raised certain constitutional issues which must be worked out. An outright amendment to NEPA would achieve a definite answer, but in recent years such efforts have been unsuccessful. Consequently, the evolution of NEPA’s extraterritorial reach will probably take the form of continued Congressional tinkering with the CEQ requirements. The EIA Convention signifies that at some point, both the utilization of the EIA mechanism and standards thereof will become a general principle of customary international law, hence binding on all nations. Until that time, however, the courts must perform complex analysis of the competing factors outlined in this paper. This will most likely mean continued deference to the foreign policy views of the State Department and of the Executive Branch over the environmental concerns addressed in NEPA.


178. Id.

UNFULFILLED OBLIGATIONS: THE SITUATION OF THE ETHNIC HUNGARIAN MINORITY IN THE SLOVAK REPUBLIC

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* United States Court of Appeals for the Second Circuit, Office of the Staff Attorney; J.D., 1997, Northeastern University School of Law. I would like to thank Professor Nathaniel Berman, John Young, Julia Domsitz, the United Nations High Commissioner for Refugees and the Marai Sandor Foundation for their assistance and relentless support of this project. This research was made possible due to a Professional Development Fellowship from the Institute of International Education, financed through the United States Department of State.
I. INTRODUCTION

The Slovak Republic is a microcosm of the political and economic transformations occurring in Central and Eastern Europe following the 1989 collapse of the Soviet Union.1 Although the change of political systems in the region occurred quite rapidly, it is clear that democratic states are not born overnight. Slovakia's tribulations underscore the stark choices that confront states of the former Soviet Block: whether to head down the difficult route of building a capitalist democracy or return to Soviet-style principles of a command economy and central political control. As the former communist countries evolve socially, politically, economically and legally, these challenges are coupled with international scrutiny of each state's domestic affairs. The prospect of accession into the European Union (EU) and the North Atlantic Treaty Organization (NATO) has forced former Soviet states to forego sovereign prerogatives and make way for increasing international influences and directives.

Torn between adopting western norms and adhering to familiar comforts of the past, the Slovak government2 has been much more reluctant than its Czech counterpart to adopt a system of pragmatic capitalism and to decentralize state administration.3 The ruling coalition government, headed by Prime Minister Vladimir Meciar, has sent conflicting signals to Western officials regarding the state's aspirations to integrate into the EU and NATO. The government's general commitment to democratic values has also been questioned.

The presence of a substantial Hungarian minority in Slovakia serves as a present day reminder of historical territorial disputes between

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1. The names Slovak Republic and Slovakia are used interchangeably throughout this document and refer to the same entity.

2. References to the Slovak government are to the ruling governmental coalition, not the president. The government is comprised of the Movement for a Democratic Slovakia, a populist party headed by Prime Minister Meciar, the Slovak National Party, a nationalist party, and the Association for Slovak Workers, a party largely representing communist adherents. The Slovak President is Mr. Michal Kovac. See also SLOVAK. CONST., ch. 2, pt. VI, art. 108.
the republics of Slovakia and Hungary. The Treaty of Trianon, which left a substantial number of ethnic Hungarians on the Czecho-Slovak side of the Danube River, is debated within the political arena as if it were written in 1990, not 1920. Misrepresentation of history and the impoverishment of political life have resulted in a civil society where ethnic politics are at the forefront of the national consciousness. The Slovak government has effectively defined Slovak national culture predominantly along ethnic lines. Doctrinal and policy debates have incorporated powerful nationalist interests and, as a result, such concerns are reflected in government policy. One of the three parties comprising the government coalition is manifestly nationalistic and it has had a disproportionate influence on government policy since the legislative elections in the fall of 1994. This nationalist force is a source of many measures aimed directly at reinforcing the Slovak nation in Slovakia, often to the detriment of ethnic minorities.

It is premature to characterize the current legal position of the Hungarian minority as an emergency. Yet, given Slovakia’s unproven economy and unstable political scene, the potential for the eruption of ethnic tensions between the Slovak majority and the Hungarian minority is clear. In the three years since the birth of the Slovak Republic, policies and practices unbecoming of a democratic and ambitious Central European state have surfaced. The legislative measures analyzed in this document have aroused strong emotions and constitute a potential cause for conflict among Slovak and Hungarian citizens, as well as between the Slovak Republic and the Republic of Hungary. Ethnic Hungarians perceive their language and culture as being under attack by the Slovak government. Surveys reveal that a significant number of Slovak citizens fear the

3. For simplicity, the terms ethnic Hungarians and Hungarian minority are used interchangeably to refer to Slovak citizens of Hungarian origin. Where the term Hungarians refers to Hungarian citizens living in Hungary, this will be made clear in the text. The issues presented in this report are of equal importance to the numerous other minorities within the Slovak Republic, as the principles involved are general and universal. The emphasis, nevertheless, is on the Hungarian minority. This focus is in accordance with the current political climate where the issue of minority rights is equivalent to the question of rights for ethnic Hungarians. All other minorities are either well off or poorly organized and geographically dispersed. An example of the first is the Ukrainian minority. An example of the second is the Roma minority.

outbreak of violence similar to that experienced in the former Yugoslavia. Ethnic tensions have dramatically heightened since 1993, with incidents of intimidation, verbal threats, and harassment of ethnic Hungarians increasing in frequency.

The purpose of this study is to assess whether the Slovak government is creating or aggravating a climate that is inimical to the Hungarian minority. This atmosphere may actually be conducive to an ethnic conflict or refugee situation. For this report, international agreements and standards are used to evaluate the situation. No lower standard than those set by the international community should be accepted in the Slovak Republic.

II. THE HUNGARIAN MINORITY IN THE SLOVAK REPUBLIC

The historical presence of Hungarians in what is now recognized as the Slovak sovereign state has strongly influenced present relations between the Slovak majority and the ethnic Hungarian minority. The social status of Hungarians in Slovakia’s southern region has drastically shifted with the relocation of Hungary’s northern border. Tracing the Hungarian presence over the years reveals that Hungarians formed part of the Hungarian Empire until 1918; constituted an ethnic minority in Czechoslovakia through the 1920s and 1930s; and comprised part of a majority group during the Hungarian occupation of southern Slovakia between 1938-1945. After World War II, Hungarians were either forced from the territory of Czechoslovakia or remained within the state and experienced severe discrimination for their affiliation with a foreign power during the war years. Historical factors that led to ethnic and geographic borders that do not correlate continue to serve as the impetus for conflict between ethnic Slovaks and Hungarians living in Slovakia. Mr. Gyozo Bauer, President of the Hungarian cultural organization, CSEMADOK, added:

[m]y father never moved from Samorin [a predominantly Hungarian town located in the south-west of Slovakia], but he lived in five countries due to border changes. No one asked him in his whole life which country he wanted to live in. No one has asked us to this day. It is not my decision and I have no power to change it. I do not wish to change it. All we want is the power to keep our community and our culture alive.⁵

⁵ Interview with Mr. Gyozo Bauer, President of the Hungarian cultural organization, CSEMADOK, in Samorin, Slovakia (July 16, 1996).
The historical volatility in the region has greatly contributed to shaping domestic legislative decisions and foreign policy choices of the government coalition ruling Slovakia today.

A. The History of Hungarians in the Slovak Republic

A brief historical discussion of the region is necessary in order to understand present day ethnic relations in Slovakia. Hungarians, who call themselves Magyars, arrived in Central Europe in the ninth century as one of many tribes from Asia, and they settled on the plains of Central and Eastern Europe.\(^6\) The Hungarians adopted Catholicism around the beginning of the twelfth century and founded a kingdom with frontiers that were to remain largely unmodified until 1918. The Hungarian Kingdom encompassed what is now recognized as Slovakia, which was then referred to as Upper Hungary. Slovaks, who had arrived in the region in the fourth and fifth centuries A.D., were subjects of the Hungarian Kingdom for centuries who were ruled by a predominantly Hungarian nobility. When the Ottoman Empire included large parts of Hungary, the Hungarian capital was moved to Bratislava, then called Pozsony, and ethnically dominated by Hungarians.\(^7\) By the end of the nineteenth century, Slovaks were essentially an illiterate and impoverished people.\(^8\) Ethnic Slovaks were underrepresented in government and plagued by *Magyarization*, the Hungarian government’s plan to force the assimilation of ethnic Slovaks into Hungarian society. Economic life was dominated by ethnic Germans and Jews while political life was dominated by Hungarians.

During the twentieth century, Slovakia’s southern region was governed by numerous sovereigns, including the Austro-Hungarian Empire, the independent Czechoslovak state, the Socialist Republic of Czechoslovakia, and the independent Slovak state. On October 28, 1918, the first Czechoslovak Republic was established. The Treaty of Trianon on June 4, 1920, designated the southern border of Czechoslovakia. Strategic and economic considerations led to a border set partly to coincide with the Danube River, creating a significant Hungarian minority within the new state.\(^9\) In 1938, the Vienna Arbitration Accords again attributed the southern part of Slovakia to Hungary. In 1939, Slovak leaders proclaimed an independent Slovak state. During World War II, Slovakia was under fascist rule, resulting in the Slovak National Uprising against

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6. MAROK ET AL., supra note 4, at 5.

7. *Id.* at 6.

8. In 1914, 27% of Slovaks were illiterate compared with three percent of Czechs. See ANDRÉ & JEAN SELLIER, ATLAS DES PEUPLES DE L’EUROPE CENTRALE (1993).

9. This border was not officially recognized by Hungary until the bilateral friendship treaty between Hungary and Slovakia was ratified in 1996.
Nazi forces in August 1944. After World War II, Czechoslovakia was recreated in the shape of the Socialist Republic of Czechoslovakia (CSSR) to include the Hungarian dominated territory, again partly delineated by the Danube. Following the Prague Spring uprising against the communist regime in 1968, Hungarian troops were among the Soviet forces that entered the CSSR to suppress the rebellion. Some ethnic Hungarian inhabitants welcomed the Hungarian troops as liberators.

In 1990, the Czech and Slovak Federative Republic (CSFR) were formed to the displeasure of Slovak nationalists who hoped for the creation of an independent Slovak state. In 1992, Slovak nationalists won the parliamentary elections and voted to secede from the CSFR. They formed the Slovak Republic now in existence. Resistance to secession existed primarily in the Czech Republic and among ethnic Hungarians in the Slovak Republic. The current Slovak Republic is still delineated in part by the Danube, thus including in some regions a population of more than eighty percent Hungarians. In these regions, Slovaks constitute an ethnic minority. Since the Velvet Divorce, as the separation of the Slovak and Czech Republics has been coined, tensions between ethnic Hungarians and Slovaks have steadily increased in intensity. Mr. Ondrej Dostal, an expert on minority rights in Slovakia, noted that:

[d]ue to the split with the Czech Republic and thanks to the cultivated way of division, the Slovak nationalists have lost their main enemy, which until then used to be Prague. The nationalist part of the Slovak political scene has then logically opted for the Hungarian minority and its political representatives as its new target of confrontation policy making. . . . Slovakia has entered its first year of existence with the burden of an unsolved relationship — [the] relationship with its largest minority.11

10. According to one survey, 81% of ethnic Hungarians opined that they would have voted against separation if a referendum had been held before the division of the CSFR. See FRIC ET AL., supra note 4, at 77.

B. Recent Developments Concerning the Situation of Ethnic Hungarians in Slovakia

In the days of socialist rule, Slovaks and Hungarians coexisted successfully on Slovak territory.\(^{12}\) The fall of the communist regime in Slovakia, however, sounded the reveille for historic inter-ethnic prejudices. In light of possible EU and NATO integration, the Slovak government must develop lasting cooperation with its neighbors as part of the European Stability Pact. Nationalist politics, however, continue to strain bilateral relations between the republics of Hungary and Slovakia, thereby jeopardizing the possibility of western amalgamation.

1. Relations Between Ethnic Slovaks and Hungarians in Slovakia

Hungarians in Slovakia number approximately 600,000, constituting 11.5% of the population.\(^{13}\) Hungarians comprise the ethnic majority in 437 towns and, in another eighty-five communities, they comprise ten to fifty percent of the population.\(^{14}\) These 522 settlements form a compact area running along the southern border of the Slovak Republic, where ninety-eight percent of the Hungarian population in Slovakia live.\(^{15}\) In this area, an average of seventy percent of the local population is Hungarian.\(^{16}\)

Surveys show that Hungarians in Slovakia are universally perceived as a distinct group with a common language, culture, values, and political interests.\(^{17}\) Hungarian political parties generally gather nearly one hundred percent of the votes of ethnic Hungarians. In issues where ethnic Hungarians' interests are at stake, the Hungarian vote is practically unanimous. Over eighty percent of ethnic Hungarians believe that there should be bilingual road signs. Ninety percent think that both the Hungarian and Slovak languages should be used in administration. Sixty percent are in favor of some kind of cultural autonomy. Among Slovaks, on the other hand, the majority is generally against these proposals. Sympathy among Slovaks for Hungarian claims is greater in southern Slovakia (in the ethnically commingled areas) than in northern Slovakia. Alternative schools, those including instruction in both the Slovak and

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12. One survey indicates that this period was the one with the best relations between Slovaks and Hungarians. Approximately 40% of Slovaks and 20% of Hungarians expressed this opinion. See Peter Huncik et al., COUNTERPROOF (1994).
14. Id.
15. Id.
16. Id.
17. See generally supra note 4.
Hungarian languages, are considered useless by fifty percent of the Hungarians but useful by sixty percent of Slovaks. Openness for a neighbor of the opposite ethnicity is also greater in the south than in the north. Two percent of Hungarians and fifteen percent of Slovaks are opposed to this prospect.\(^8\) While in the north, twenty-six percent of Slovaks would dislike having a Hungarian neighbor.\(^9\)

The forecast for future relations varies. According to one survey, more than sixty percent of the population opine that Hungarians and Slovaks will continue to coexist well in Slovakia. According to another study, however, more than forty percent of either nationality think relations may short-circuit into violence similar to that in the former Yugoslavian territory.\(^20\) Even among those who believe that relations between the two ethnic groups are presently good, more than thirty percent expressed such fears.\(^21\) According to a government survey, fifty percent of respondents perceived Hungarians as the greatest threat to the Slovak Republic.\(^22\) Some of the reasons stated for this perception were that the Hungarian nature comprises the traits of “desire to rule,” “eternal restlessness,” “inability to live in peace with other nations,” “do not respect Slovakia,” “hate Slovakia,” and “want more rights than Slovaks.”\(^23\)

Ethnic Hungarians were accused of wanting “a greater Hungary” and of threatening “[Slovak] sovereignty and territory.”\(^24\) Others stated that “they want to Magyarize Slovaks,” “they want to break away,” “they have territorial ambitions,” “they provoke unrest,” “they are ruining good relations,” “they don’t recognize tolerance,” and “I don’t trust them.”\(^25\)

The Slovak government continues to harbor suspicions of Hungarian territorial claims to Slovakia’s southern region. “They would like to have [the territory of southern Slovakia] back, that’s for sure,” asserted Mr. Juraj Zervan, Director of the Department of National Minorities at the Slovak Ministry of Foreign Affairs. “It is the official policy of Hungary to support [ethnic Hungarian] autonomy in neighboring countries, and to then have these areas hold a referendum on succession to Hungary to complete reunification to the motherland. It definitely

\(^{18}\) Fric ET AL., supra note 4, at 73.

\(^{19}\) Id.

\(^{20}\) Huncik ET AL., supra note 4.

\(^{21}\) Id.

\(^{22}\) Rasizmus, Xenophobia, etc., supra note 4.

\(^{23}\) Id.

\(^{24}\) Id.

\(^{25}\) Id.
[constitutes] a destabilizing factor in Europe.\textsuperscript{26} The fear of Hungarian territorial aggression is deeply imbedded in Slovak consciousness and the Slovak government has successfully perpetuated this fear among its citizenry.\textsuperscript{27} According to a 1994 survey, forty-two percent of citizens of Slovak nationality suspect that the "hidden goal of members of the Hungarian minority is a change of borders and annexation of southern areas of Slovakia to Hungary."\textsuperscript{28} In a July 1996 poll, thirty percent of Slovaks agreed with the assertion that the Hungarian minority supports the reunification of Slovakia's southern region with Hungary, while sixty-three percent of Hungarians disagreed with this statement.\textsuperscript{29} This survey reflects the feeling among Slovaks that ethnic Hungarians are not loyal to the Slovak state. This is a difficult accusation to disprove. "I live according to the Slovak Constitution. I work here and pay my taxes. I do nothing against the Slovak government. So, what is the problem? That I speak Hungarian? The question of loyalty isn't proven because I don't cry at the Slovak national anthem," asserts Mr. Gyozo Bauer, President of the Hungarian cultural organization, CSEMADOK.\textsuperscript{30} Mr. Bela Bugar, Chairman of the Hungarian Christian Democratic Party (MKDH), echoed this sentiment. He asserted that the Slovak government "does not say love your country, but love your state. For me, this is ridiculous. I can love a country but I cannot love a state."\textsuperscript{31}

Despite this antagonistic and distrustful atmosphere, violent outbreaks between ethnic Hungarians and Slovaks have been minimal. The most notable incident occurred on May 5, 1996, when a hand grenade exploded outside of the home of Mr. Bugar, a leading member of the

\textsuperscript{26} Interview with Mr. Juraj Zervan, Director of the Department of National Minorities Division, Slovak Ministry of Foreign Affairs, in Bratislava, Slovakia (July 11, 1996).

\textsuperscript{27} It should be noted, however, that Hungarian calls for autonomy in the southern region of Slovakia have resulted in increased skepticism among the Slovak public. The Hungarian political party, Coexistence, has been the most vocal proponent of territorial autonomy. Perhaps as a result, Coexistence Chairman, Miklos Duray, was found to be the most unpopular politician in Slovakia by a January 1996 poll, gathering sixty-four percent of the most negative responses. See Sharon Fisher, 13 OMRI DAILY DIG. II, (Jan. 18, 1996) (visited Oct. 27, 1997) \textless http://www.omri.cz/publications/AD/index.Dhtml\textgreater.

\textsuperscript{28} FOCUS AGENCY, ACTUAL PROBLEMS OF SLOVAKIA: REPORT FROM SOCIOLOGICAL RESEARCH (Dec. 1994).

\textsuperscript{29} Dana Soucova, \textit{V Obciach Juzneho Slovenska Vladnu Dobre Vzt'ahy, Aysak Tretina Obyvatel'ov sa Obava Konfliktu} [Citizens in Southern Slovakia Perceive a Good Relationship, However One-Third of Inhabitants Fear a Conflict]; \textit{See generally} NARODNA OBRODA, July 17, 1996, at 5.

\textsuperscript{30} Interview with Mr. Gyozo Bauer, President of CSEMADOK, in Samorin, Slovakia (July 16, 1996).

\textsuperscript{31} Interview with Mr. Bela Bugar, Chairman of MKDH, in Bratislava, Slovakia (Aug. 1, 1996).
ethnic Hungarian opposition to the Slovak government. Responsibility for the bombing has yet to be determined.\textsuperscript{32} A previous violent attack occurred in May 1995 after a soccer match in northern Slovakia. Several ethnic Hungarians were thrown from a train while traveling home after the match.\textsuperscript{33} Intimidation, threats, and harassment of members of the Hungarian minority are common. Many ethnic Hungarians are afraid to speak Hungarian in public when visiting northern areas of Slovakia for fear of reprisal. At the Hungarian-language high school in the capital city of Bratislava, attending students complain that they are frequently harassed on the street when speaking Hungarian. As one student noted:

> Once my classmates and I were walking down Obchodna Ulica [Shop Street] and we were all speaking Hungarian. Four boys approached us and one of them slapped my classmate and told her to stop speaking Hungarian. I was very frightened. I have heard so many stories from [Hungarian] friends who have been pushed or punched in public because they were speaking Hungarian. . . . Sometimes when I walk to school from the bus station with a friend, people will shout ‘Na Slovensku, po Slovensky! [In Slovakia, in Slovak!]’ at us.\textsuperscript{34}

Other common nationalist slogans include “Mad’ari za Dunaj! [Hungarians to the Other Side of the Danube River!]” and “Jete Slovensky Chlieb! [You Eat Slovak Bread!],” which implies that if one reaps the benefits from residing in Slovakia, such as consuming its agricultural goods, one should not complain about conditions within the state. Dislike of the Hungarian minority is generally higher among Slovak citizens living in the northern region of Slovakia where contact with members of the minority group is minimal.\textsuperscript{35} Relations between Slovaks and Hungarians in the ethnically commingled areas of southern Slovakia are reportedly less antagonistic. One ethnic Hungarian observed:

> In Samorin [a small town approximately twenty kilometers from Bratislava], where approximately thirty percent of the population is Slovak and seventy percent of the population is Hungarian, there are no problems or conflicts between us. The conflicts are mainly political. Political rhetoric

\textsuperscript{32} See generally NARODONA OBRODA, May 6, 1996.

\textsuperscript{33} UNITED STATES DEPT OF STATE, COUNTRY REPORT ON HUMAN RIGHTS FOR THE SLOVAK REPUBLIC 13 (1995).

\textsuperscript{34} Interview with an ethnic Hungarian student, in Bratislava, Slovakia (July 12, 1996).

\textsuperscript{35} See generally HUNCIK ET AL., supra note 4; PAVOL FRIC ET AL., supra note 4, at 76-7.
causes people who do not know any ethnic Hungarians to believe what government officials say about us — that we all want to return to Hungary and that we hate Slovaks. These accusations are not true. In Slovakia, like everywhere, there are extremists on both sides. Luckily this is only a small percentage.36

In the years following the split of the Czech and Slovak Republics, nationalist forces have played an increasing role in Slovak politics. In the fall 1994 elections, seven parties or coalitions of parties won seats, but no party or coalition gained a clear majority. This forced the movement for a Democratic Slovakia (HZDS), a populist party headed by Prime Minister Meciar, to form a coalition government with the Slovak National Party (SNS), a nationalist party. As a result, government policy has been heavily influenced by the SNS over the past two years.37 Nationalist views have been conducive or even instrumental in formulating most of the government measures passed by the National Council of the Slovak Republic (Slovak Parliament) in recent months, which seek to assimilate the Hungarian minority. Nationalist political forces have constructed a watershed between ethnic Hungarian parties and ethnic Slovak parties so that the most important political issue has become ethnicity, rather than concrete issues.38 Extreme solutions to the problems confronting ethnic Hungarians have been suggested, such as: Hungarians should leave Slovakia, they should assimilate into the Slovak nation, or Slovaks in southern Slovakia should assimilate with Hungarians. All of these proposals fail to get widespread support, as more than sixty percent of either nationality opposes them.39 As one ethnic Hungarian commented:

36. Interview with an ethnic Hungarian resident, in Samorin, Slovakia (June 28, 1996).
37. SNS stated on January 4, 1996, that it would like to intensify international cooperation, and that its first step in this direction would be to prepare a meeting with the chairman of the neo-Nazi Austrian Freedom Party, Jorg Haider. Pending items on the legislative agenda of the SNS include the passage of a local election law based on the “proportional principal according to nationality” and the reevaluation of constitutional Articles 15 (which prohibits the death penalty) and 34 (which articulates the rights of ethnic minorities). Sharon Fisher, Slovak Coalition Party to Initiate Constitutional Changes, 141 OMRI DAILY DIG. II (July 23, 1996)(last visited Oct. 28, 1997) <http://www.omri.CZ/publications/DD/index.Dhtml>.
38. An example of how the fear of Hungarian expansion can be used as an argument against all kinds of international cooperation is the Carpathian Euroregion project of 1994. A number of regions in northern Slovakia wanted to cooperate with similar regions in other countries to the north of Slovakia. This was rejected by the government as a step toward a Hungarian takeover of the southern regions. By rejecting this project, the government prevented decentralization.
39. See generally supra note 4, for a list of surveys, which support this position.
[Prime Minister] Meciar often says: 'Those who do not like it here in Slovakia should leave.' Nobody can tell us to leave this land because we were born here, our parents were born here, our grandparents, et cetera. My family has been living on this land for 1100 years. Personally, I am not the type of person who could leave and start a new life somewhere else. I had a chance to leave in 1968, but I decided to stay. I am a local patriot. I will never leave here no matter how badly I am treated by my government.40

Nationalist rhetoric and the implementation of domestic legislation that negatively affects the Hungarian minority has produced distrust of the government among ethnic Hungarians. An ethnic Hungarian resident of Dunajska Streda admitted:

We should have trust in our government, but we don't. How can we when so many new laws, like the State Language Law and the Law on Territorial Division, are passed which are one hundred percent targeted directly against us. It is nearly impossible for a Hungarian delegate in Parliament to pass a bill that attempts to guarantee our rights. So, this is not really a democracy. HZDS and SNS have their people everywhere, in all the decision making positions. This makes our voice silent.41

In response, the Slovak government denies allegations that recently promulgated legislation negatively affects national minorities. Mr. Branislav Lichardus, Slovak Ambassador to the United States, denied alleged ill-effects of the State Language Law, discussed infra, and stated that minority rights in Slovakia were among the highest in Europe. Mr. Lichardus noted that [ethnic Hungarians] can speak their own language, elect their own leaders, attend their own schools, read their own newspapers and attend their own cultural activities.42

Following the split of the Czech and Slovak Republics, ethnic Hungarians have become politically organized. Ethnic Hungarians are represented by three political parties in Slovakia: Coexistence, MKDH, and the Hungarian Civic Party. The parliamentary elections in June 1990 marked the entry of ethnic Hungarian parties into political representation.

40. Interview with an ethnic Hungarian citizen, in Samorin, Slovakia (July 28, 1996).
41. Interview conducted with an ethnic Hungarian citizen, in Dunajska Streda, Slovakia (July 19, 1996).
During the 1994 elections, the three Hungarian parties joined forces, forming a broad coalition and gaining 10.18% of the vote and seventeen seats in Parliament. The legal demands of the Hungarian coalition are articulated in the Komarno Agreement, a document written as the result of the controversial meeting of Hungarian representatives in the southern city of Komarno in 1994. "The Komarno Agreement states the clear legal demands of the Hungarian minority in Slovakia, ranging from local self-government to education. The Slovak government has largely ignored these demands and refuses to address the draft legislation proposed by the Hungarian coalition on these issues," asserts Mr. Bela Bugar of MKDH. "We would need a different government to achieve any of the goals of this document."

Cooperation and communication between HZDS and the Hungarian coalition is minimal. The Slovak government has limited tolerance for political opposition among both Slovaks and Hungarians, and has utilized a variety of measures aimed at stifling dissent. In a July 1996 interview with the Hungarian newspaper, Uj Szö, Mr. Dusan Slobodnik of the Slovak Ministry of Foreign Affairs asserted that the Slovak government had the right to prohibit the existence of the Hungarian Coalition because individual Hungarian parties could form coalitions with other Slovak opposition groups. A majority of legislation drafted by the Hungarian coalition is ignored and never addressed in Parliament. Mr. Bugar added:

The government takes into consideration the demands of the Hungarian coalition and they listen to them only as much as the Council of Europe and other international bodies are able to force them to listen. The demarches [concerning the observance of democratic principles] sent by the European Union and the United States had some results, but as long as the current government continues to maintain the same mind set, it is very difficult to get them to understand democratic rules. This is why we continue to need directives from [the West].

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43. In Slovakia, coalitions of two or more parties must receive at least seven percent of the vote to gain parliamentary representation.

44. Interview with Mr. Bela Bugar, Chairman of MKDH, in Bratislava, Slovakia (Aug. 1, 1996).

45. The same is true of Slovak opposition parties and HZDS.


47. Interview with Mr. Bela Bugar, Chairman of MKDH, in Bratislava, Slovakia (Aug. 1, 1996).
Opposition members of Parliament are not represented on parliamentary committees, a phenomenon that prompted the EU to issue a demarche to the Slovak government in 1995. The European Parliament noted, *inter alia*, its concern that "opposition parties represented in the Slovak [Parliament] are not properly represented in the leading bodies of the Parliament, as is sound democratic practice in all the Member states of the European Union and in other countries with democratic traditions." Mr. Bugar noted:

In a normal parliamentary democracy, there would be a proportional representation in the parliamentary committees. For example, the Hungarian coalition comprises approximately ten percent of Parliament, therefore, we should make up ten percent of the parliamentary committees and should hold positions within these committees. . . . There is not a single vice-chairman or chairman on any parliamentary committee from the opposition. What's more, sometimes a certain party, like the Hungarian coalition, cannot participate during negotiations within a committee. For example, the Security Committee has no Hungarian member. This is also true of the Television Committee, the Radio Committee, and the Secret Service Committee.

After pledging to appoint a Hungarian coalition member to the Special Supervisory Bureau of the Slovak Intelligence Service, Mr. Arpad Matejka of HZDS said that MKDH Chairman, Bela Bugar, and Coexistence Chairman, Miklos Duray, were unacceptable candidates because HZDS holds them responsible for misleading statements made abroad. Substantial changes have not yet been made in the composition of parliamentary committees with regard to adequate representation of opposition members, despite the urging of numerous Western officials.

The Slovak government is engaged in a struggle not only over the extent to which minority rights should be granted, but also over the adoption of basic democratic governing principles. Mr. Laszlo Ollos of Hungarian Civic Party stated:

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48. The European Parliament, Resolution on the need to respect human and democratic rights in the Slovak Republic. EUR. PARL. DOC. (D) (Nov. 16, 1995).
49. *Id.*
Here in Slovakia, there are not left/right parties. There’s democratic and anti-democratic parties. There is a constitutional struggle over what type of political system we want as a nation and, to make things more difficult, there is a large national minority. Slovakia is located in an important geopolitical position, yet the people have a low level of political culture given that we have had little history of a civil political climate. This is a period of Enlightenment here. It is the first influx of Western ideas, culture, political and economic philosophies.¹¹

The EU and the United States have repeatedly urged the Slovak government to put greater emphasis on the toleration of diverse opinions and full support for constitutional rights. Democratic progress and free-market transformation are vital to the acceptance of Slovakia into the trans-Atlantic community and other Western institutions.

Discussion of ethnic Hungarian rights frequently returns to a revision of historic events that have scarred the memories of members of the Slovak government. When confronted with a question about the use of the Hungarian language or access to Hungarian language education in Slovakia, Slovak government officials often reframe the issue as one of ethnic Slovak rights in Hungary. This sentiment is revealed upon the expression of dissent or discontentment among ethnic Hungarians. “We must not forget the forced assimilation of Slovaks into Hungarian society. There were 400,000 ethnic Slovaks in Hungary at one time. Now there are only 110,000. There is only one school for Slovaks in Hungary. There is no reciprocity,” commented Mr. Juraj Zervan of the Ministry of Foreign Affairs.²² Evidence of the Hungarian government’s mistreatment of the Slovak minority is used to justify the Slovak government’s own assimilationist policies toward the Hungarian minority in Slovakia. Mr. Slobodnik evidenced this assumption in a recent newspaper interview:

If Hungary would treat their minorities better and won’t assimilate them as they did in the 1920s and 1930s and will apologize for this activity, we can discuss the issue of our [official language policy] with them. . . . There are no Hungarians in Slovakia that have been assimilated in southern Slovakia.³³

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51. Interview with Mr. Laszlo Ollos, Hungarian Civic Party member and Professor of Philosophy at the Nitra Pedagogical College, in Samorin, Slovakia (July 23, 1996).
52. Interview with Mr. Juraj Zervan, Director of the Department of National Minorities Division, Slovak Ministry of Foreign Affairs, in Bratislava, Slovakia (July 11, 1996).
53. Horvath, supra note 46.
2. The Relationship Between the Slovak Republic and the Republic of Hungary

Hungarian and Slovak history places a strain on present relations between the two states. The end of communism revived historic animosities between the two neighbors, and ethnic politics have taken center stage. As stabilization of bilateral relations is a prerequisite to entry into both the EU and NATO, the two states have attempted to appease Western officials by entering into a friendship treaty. Historic tensions, however, have not subsided with ratification of the treaty, and ethnic politics continue to dominate relations between Slovakia and Hungary.

The issue of the Gabcikovo-Nagymaros Barrage System continues to strain the tenuous cooperation established between the two governments over the past three years. A treaty was signed on September 16, 1977 between the People’s Republic of Hungary and the Czechoslovak Socialist Republic to jointly construct a dam and barrage systems on these two locations. In the late eighties, Hungary suspended construction at Nagymaros primarily on economic grounds. In chronological order, CSSR, the CSFR and the Slovak Republic unilaterally pursued the construction and operation of the systems. On May 19, 1992, Hungary officially terminated the treaty. The termination was partly due to ecological and environmental considerations. In addition, the Hungarian government’s decision to withdraw from the agreement was influenced by the fact that large numbers of ethnic Hungarians on the Slovak side of the Danube River would be displaced by construction of the project. A breach of contract claim is currently pending before the International Court of Justice and will be heard in February 1997 unless the two countries reach an out of court settlement. In the three rounds of negotiations to date, the two states have not come any closer to reaching an equitable settlement.

Between 1990 and 1992, a nationalist regime in the Republic of Hungary prevented closer bilateral contact, and from 1992 onward,


55. MAROK ET AL., supra note 4, at 70.

56. Id.

57. Id.


59. The Hungarian Prime Minister during this period, Mr. Jozsef Antall, claimed that he considered himself the Prime Minister of fifteen million Hungarians, five million more than live
Slovak Prime Minister Meciar was reluctant to negotiate. Tensions between the two states heightened again in 1993 when Slovakia applied for membership to the Council of Europe. Hungary threatened to veto Slovakia’s membership in the Council of Europe, noting that Slovakia had not ratified several international documents aimed at the protection of national minorities. Due to pressure from the EU countries and pledges from the Slovak government that such legislation would be passed, Hungarian representatives abstained from the vote.60

In April 1994, interim Prime Minister Jozef Moravcik met with his Hungarian counterpart at the border towns of Komarno and Komarom to discuss bilateral issues. At this meeting, it was decided that a joint committee should be set up to identify Slovak-Hungarian bilateral problems. Drafting of a treaty commenced, resulting in the Slovak-Hungarian Basic Treaty (SHBT).61 In the treaty, Hungary wanted guarantees providing for Hungarian minority rights in Slovakia, and Slovakia sought confirmation of the inviolability of its borders.

After extensive negotiations, Prime Ministers Meciar and Gyula Horn signed the SHBT on March 19, 1995. Although the Hungarian Parliament ratified the treaty on June 13, 1995, the Slovak Parliament repeatedly delayed ratification of the bilateral treaty until March 26, 1996.62 In order to gain sufficient support for the SHBT in the Slovak Parliament, Prime Minister Meciar’s HZDS party succumbed to the demands of the far-right SNS. The SNS insisted that, in return for the party’s support, a package of hard-line legislation concerning anti-subversion measures, states of emergency, local elections, and education would quickly be addressed by the Slovak Parliament. Indeed, shortly before passage of the SHBT, the Slovak Parliament adopted the Law on the within the territorial boundaries of Hungary. This prompted outrage from the governments of both Romania and Slovakia and perpetuated distrust and fear of Hungarian territorial aggression. See Barry Newman, How to Tether Centuries-Old Hatreds, WALL ST. J., July 17, 1995, at A7.

60. Slovakia became a member of the Council of Europe on June 30, 1993. On January 30, 1996, Slovak Foreign Minister Juraj Schenk, accusations the Council of Europe of using a double standard in evaluating human rights standards, requested that the Council of Europe apply the same standard when evaluating the situation of ethnic minorities in a new or established member country. Slovak Parliamentary Chairman Ivan Gasparovic proposed that the Council of Europe’s Parliamentary Assembly compile a “White Book” on standard ethnic rights to ensure that all member nations are monitored with the same objective criteria. See Sharon Fisher, Slovak Foreign Minister on Council of Europe, 22 OMRI DAILY DIG., II, No. 22 (Jan. 31, 1996) (last visited Oct. 28, 1997) <http://www.omri.CZ/publications/DD/index.Dhtml>.


Protection of the Republic. This anti-subversion legislation, reminiscent of legislation promulgated under the communist regime, provoked a flurry of international criticism. This action overshadowed the long-awaited SHBT ratification and, as a result, the bilateral treaty failed to smooth decades of mistrust and tension between the two states.63

In July 1996, a conference in Budapest titled, “Hungarians and Hungarians Living Abroad,” once again illuminated the deep distrust between the neighboring states. The conference produced a document, signed by Hungarian officials and representatives of the ethnic Hungarian minorities in neighboring states, asserted that autonomy is a basic condition for maintaining the identity of Hungarians beyond Hungary’s borders. By leaving autonomy undefined, the document’s ambiguity led to renewed charges that the Hungarian government was threatening Slovak sovereignty. Slovak officials interpreted the document as a call for territorial self-rule in southern Slovakia. SNS members immediately accused the Hungarian government of “destabilizing the Central European region” by “supporting minorities’ hazardous tendencies toward autonomy.”64 HZDS parliamentarians sent a written appeal to their counterparts in Hungary stressing that “Slovakia has had bad historical experiences from co-existence with Hungarians. In modern times, that was most pointedly shown between 1938-1945 during the occupation of southern parts of Slovakia by Hungary. Slovaks on occupied territories were second-rate citizens, deprived of basic human rights and freedoms.”65 Ethnic Hungarian parliamentarians who participated in the conference were accused of treasonous activity. Mr. Slobodnik of the Slovak Ministry of Foreign Affairs asserted that the document produced at the conference spoiled Slovakia’s relationship with Hungary and violated the SHBT. Mr. Slobodnik accused “[t]he five Hungarian minority representatives [who attended the conference of] commit[ting] a crime by allying themselves with a foreign power . . . .”66 Ms. Edit Bauer, a parliament member from the Coexistence party, attended the conference. She was subsequently

63. Some members of the Slovak Parliament wanted ratification of the SHBT conditional on receiving an apology from Hungary for the occupation of southern Slovakia during World War II. See generally NARODNA OBRODA, Feb. 8, 1996.

64. SNS Parliamentary Vice-Chairman, Martin Antal, stated that the Budapest conference was aimed at “causing national disturbances that would ultimately lead to a re-evaluation of current borders and [was] an effort to resurrect ‘Greater Hungary’ [in violation of the Treaty of Trianon].” SNS Wants to Re-Debate Amended Penal Code in Parliament, DAILY NEWS MONITOR/TASR, July 20, 1996, at 2.

65. The appeal recalled that Hungary has not apologized for Slovak occupation between 1938-1945 and asserted that, given this failure, Slovakia has no assurances that such an event will recur. Slovak Parliamentarians Appeal to their Counterparts in Hungary, DAILY NEWS MONITOR/TASR, July 12, 1996, at 2.

66. Horvath, supra note 46.
accused of treason, and Mr. Slobodnik threatened to remove her parliamentary immunity from prosecution. Ms. Bauer assessed the situation as follows:

[The government] used this accusation to frighten and to threaten us. They know that if you analyze the Budapest document, you cannot find any evidence of treason. They are creating such a hostile environment that people are becoming afraid to speak their minds in public. We are returning to the mind set of the communist era where people can only dissent in private, if at all.

The Hungarian government was quick to respond to Slovak condemnation of the conference. While asserting that the Budapest Document had no legal effect and was not intended to cause friction with neighboring countries, the Hungarian Foreign Ministry denied allegations that they violated the terms of the SHBT and international legal norms. “The Slovak reaction [to the Budapest Document] asserts that autonomy would lead to an ethnically pure region and separatist tendencies which would have a destabilizing effect on the territory, but other European examples refute these accusations,” said Mr. Laszlo Kovacs, the Hungarian Minister of Foreign Affairs.

Nevertheless, the conference provided fuel for an already burning fire. Instead of offering concrete suggestions to the discussion of minority rights, the conference served only to create alarm among those already afraid of alleged Hungarian irredentism.

The Slovak government has been criticized by political opponents and other state governments for limiting political discourse both within and beyond Slovak borders. In a democratic society, individuals have the right to communicate freely with citizens of another state. In the case of the Hungarian minority, this is particularly important, as it allows for the exchange of ideas and information among members of an ethnic group. The importance of cross-border contacts by members of minority groups was specifically acknowledged in the SHBT. SHBT Article 12(2) supports cross-border contact between organizations and individuals. This provision states that:

67. Slovak Parliament members are granted immunity from prosecution or disciplinary sanction without the approval of the Slovak Parliament. SLOVK. CONST. Pt. 5, ch. 1, art. 78, § 2.


In the opinion of the Contracting Parties, the basic form of co-operation between their countries in the cultural, scientific and educational fields is co-operation between institutions, organizations, associations, unions, municipalities and local governments, the groups established on the basis of civic initiatives and co-operation between individuals based on mutual needs and interests. On the basis of the respective agreements and programs, they shall promote initiatives of the state, social and private institutions, organizations and associations and natural persons serving to advance their mutual knowledge and to bring them closer to one another. 70

Given the SHBT’s binding nature upon the Slovak government, respect for members of the Hungarian minority to maintain contacts in Hungary should be supported absent clear and compelling evidence of subversive activity. Respect for cross-border contact is also supported in the Framework Convention on the Protection of National Minorities (FCNM). Article 17(1) states:

The parties undertake not to interfere with the right of persons belonging to national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other states, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage. 71

The Council of Europe’s European Charter on Regional or Minority Languages Article 14(a) also encourages trans-frontier exchanges by “foster[ing] contacts between the users of the same language in the state concerned in the fields of culture, education, information, vocational training and permanent education.” 72

Attendance at a meeting in Hungary where some form of autonomy was discussed does not per se threaten the territorial integrity of the Slovak Republic. Accusing ethnic Hungarian parliamentarians who attended the conference with prosecution for treason hardly serves to foster bilateral dialogue on minority rights. The governments on both sides of the Danube


violated the spirit of the SHBT, and the conference failed to establish a constructive platform upon which a reasonable solution to existing ethnic tensions could be built. Nonetheless, cross-frontier communication should be encouraged on all levels between governments and individuals in order to improve transnational relations and cross-cultural understanding.

III. SYSTEM OF MINORITY PROTECTION

During the past three years, Slovakia has struggled to develop a constitutionally-based legal system. Given its tumultuous history, Slovakia has little historical guidance to direct its efforts to establish a rule of law that equally protects each citizen. Furthermore, as a candidate for membership into both the EU and NATO, Slovakia faces the challenge of satisfying requirements set by the community of western European states. Ethnic Hungarians perceive their rights as being under attack by the Slovak government over the past three years, although the government continues to assert that Slovakia is one of the most generous states in Europe in terms of its protection of national minorities. Mr. Slobodnik of the Slovak Ministry of Foreign Affairs assessed the present situation of the Hungarian minority as follows:

Slovakia has the highest human rights standard in Europe. You can’t find another country where there are minorities and they are treated as well as Hungarians are in Slovakia. Some politicians and journalists from the [Hungarian Coalition] forget how developed Hungarian schools are here in Slovakia. Where else can you find such a good school system? They also have theaters. There are two Hungarian theaters in Komarno and Kosice. So, what are they complaining about?

A. Slovakia’s Obligations Under the International System of Human Rights Protection

In analyzing the legal status of the Hungarian minority in the Slovak Republic, the minority’s rights under the international system of human rights and Slovakia’s municipal law must be evaluated. Slovakia has undertaken the responsibilities of ensuring internationally recognized human rights standards through its ratification of numerous international treaties, declarations and covenants. The effect of these instruments within

Slovak borders, however, remains somewhat ambiguous and ratification of these documents has not resulted in the realization of the rights and freedoms protected therein within the domestic arena.

Slovakia is a state party to most human rights instruments. Several of these documents oblige the Slovak government to take affirmative steps to protect all individuals within its borders and to make changes within its domestic arena to conform with international legal norms. The three most relevant international documents ratified by the Slovak government with regard to the protection of ethnic minorities are the European Convention on the Protection of Human Rights (ECHR) (ratified by Slovakia on March 18, 1992), the International Covenant on Civil and Political Rights (CCPR) (ratified by the Slovak Republic on May 28, 1993), and the FCNM (ratified by Slovakia on June 21, 1995). Despite official proclamations by the Slovak government regarding their adherence to internationally accepted principles of human rights, ratification has not resulted in municipal legislation that equally protects all citizens. In contrast, the current trend of domestic legislation has attracted international criticism and has brought into question, rather than confirmed, Slovakia's commitment to the letter and spirit of the various documents.

Several major achievements of international human rights instruments in Slovakia must be noted. The most important success is the ability of the instruments to affect and direct government policy. Ratification of various international human rights documents from the Council of Europe and the United Nations forced the Slovak government to consider the provisions contained in those documents and find arguments to support facial compliance with their terms. International instruments set limits on the Slovak government's ability to pass restrictive legislation and serve to direct foreign policy decisions. For example, the Slovak government consulted international experts, such as the Organization for Security and Cooperation in Europe's (OSCE) High Commissioner for National Minorities, to review and comment upon draft domestic legislation affecting minorities. An International Law Division within the Slovak Ministry of Foreign Affairs was established within the past year to

74. See generally The relevant international documents ratified by the Slovak Republic include the European Convention on the Protection of Human Rights (ratified by Slovakia on Mar. 18, 1992), the FCNM (ratified by Slovakia on June 21, 1995), and the International Covenant on Civil and Political Rights (ratified by the Slovak Republic on May 28, 1993), the Convention on the Rights of the Child (ratified on Jan. 1, 1993), UNESCO Convention Against Discrimination in Education (ratified on Mar. 31, 1993), the International Covenant on Social, Economic and Cultural Rights (ratified on May 28, 1993), and the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious or Linguistic Minorities.

75. ECHR Protocols 1 through 10 have also been ratified.
evaluate domestic compliance with international obligations. International human rights instruments strongly influence Slovakia’s political climate. Positive pressure has been exerted upon the government by members of the Hungarian minority to ensure state fulfillment of its obligations under ratified human rights documents. Slovak political discourse is consumed by various, and often conflicting, interpretations of the precise obligations embodied in these documents and their relation to municipal law. Despite the lack of consensus, such dialogue is a healthy exercise that encourages Slovakia’s democratic transformation.

The non-realization of the protections granted in the aforementioned documents is a product of the general ambiguity surrounding the role of international instruments within the domestic arena. The Slovak Constitution does not contain a special provision defining the relationship between ratified international documents in general and the municipal legal system. The text of international treaties and documents is published along with all domestic legislation in the Collection of Laws of the Slovak Republic. Because of this fact, Constitutional Court Judge Jan Klucka asserts that the relationship between international and municipal law—based on the monistic principle which grants international law primacy over municipal law and the state constitution in Slovak courts—

Mr. Jozavice of the International Law Department of the Slovak Ministry of Foreign Affairs is less clear about the status of treaties in Slovak domestic law. He opined that:

[t]here is currently no answer to whether or not treaties are self-executing. On one hand, it has been suggested that they are not because it is only through [municipal] law that rights can be proscribed to a citizen. It seems necessary, therefore, to adopt a specific law implementing the stipulation contained in the treaty. On the other hand, this interpretation is in conflict with Article 11 of the Slovak Constitution which stipulates that international treaties take priority over domestic provisions. In fact, international legal documents are treated the same as municipal legislation and published in the Collection of Laws like all other laws of Parliament.

77. Interview with Judge Jan Klucka, Slovak Constitutional Court, in Kosice, Slovakia (July 18, 1996).
78. Interview with Mr. Milan Jozavice, International Law Division of the Ministry of Foreign Affairs, in Bratislava, Slovakia (July 15, 1996).
Chapter 9, Article 153 of the Slovak Constitution also concerns the incorporation of international obligations. Article 153 provides that Slovakia "shall be a successor to all rights and duties ensuing from international treaties . . . ." The question arises, however, as to whether this provision is a de facto ratification of international documents.

While not including any express provision on the authority of international law in general, the Slovak Constitution does provide for the conditional authority of international human rights instruments. Article 11 mandates that before any state authority determines a question involving the fundamental rights and freedoms of citizens, a comparison of international and municipal law must be made to determine which system grants broader rights. If the international document is broader in scope and encompasses greater freedoms, that provision governs the domestic decision. Judge Klucka stated that, in this sense, the role international human rights law plays within Slovak borders is very clear. "There is no autonomous Slovak approach to defining human rights," asserts Judge Klucka. "The courts, and presumably the Parliament, must consider internationally accepted human rights definitions."9 Mr. Branislav Lichardus, Slovak Ambassador to the United States, recently opined that Slovakia "is one of the leading European countries in terms of protection of the rights of ethnic minorities" because "[i]t is one of the few European countries where international treaties on human rights take precedence over its own laws, provided they secure greater rights and freedoms."10 As Mr. Bugar of MKDH noted:

The Slovak government has repeatedly asserted that national minorities living in Slovakia have the highest standard of minority rights in Europe. How can they say this when our legislation violates the Articles of our own Constitution? In Slovakia, the government does not give rights above the Constitution but rather, they take away these guarantees through the promulgation of domestic legislation. So how can they speak about rights above the standard? [Ethnic Hungarians] are not asking for new, additional rights. We only want to maintain what we have

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79. Interview with Judge Jan Klucka, Slovak Constitutional Court, in Kosice, Slovakia (July 18, 1996).

had before. The government is taking away the system of rights we have had for years.\(^{81}\)

One explanation for the present confusion about the role of international law derives from the fact that Slovakia has only been subject to international law for three years. As a result, the large majority of lawyers and judges are unfamiliar with international legal doctrines. Judge Klucka observed:

> There is a need to learn about international standards. We have a forty year legal gap that we now need to fill very quickly. Three years is a short time for judges to gain practical skills in applying international standards. It is necessary for judges to be aware of [European] case-law in order to understand the legal meaning of international human rights provisions. Often there is no Slovak translation of cases or international materials and this prevents a deeper understanding of the legal principles involved.\(^{82}\)

Beyond the need for those working within the legal system to educate themselves about principles of international human rights law, Slovak citizens must familiarize themselves with the system of human-rights protection, as well as their right to take complaints against the government to the European Court of Human Rights. Mr. Ondrej Srebala of the Slovak Center for Human Rights noted that:

> [t]he legal consciousness [of Slovak citizens] has been very damaged by the previous communist era. A certain amount of civic braveness is missing from our citizenry. The quick leap to democracy has caused some people to act childish and to retreat from our new democratic system. Citizens still don’t know how to use democratic legal means. For example, it is considered impolite in Slovakia to make claims to the European Court [of Human Rights]. It is felt that our problems should be dealt with here, not abroad. It will take time for the people to learn that the European Court is also our court.\(^{83}\)

\(^{81}\) Interview with Mr. Bela Bugar, MKDH Chairman, in Bratislava, Slovakia (Aug. 1, 1996).

\(^{82}\) Interview with Judge Jan Klucka, Slovak Constitutional Court, in Kosice, Slovakia (July 18, 1996).

\(^{83}\) Interview with Mr. Ondrej Srebala, Director of the Slovak Center for Human Rights, in Bratislava, Slovakia (July 12, 1996).
Through ratification of the ECHR, the Slovak government has accepted the compulsory jurisdiction of the European Court of Human Rights. The right to individual petition before the European Commission for Human Rights is also recognized. Slovakia has obliged itself to "secure to everyone within their jurisdiction the rights and freedoms" as defined by the ECHR. Ratification of the aforementioned documents must not be used as a pretext for state inaction on a domestic level with regard to the protection of human rights and must not be considered "an accelerated way of establishing [Slovakia's] democratic credentials."85 Regarding the rights of national minorities, no lower standards than those set by the international community should be accepted in the Slovak Republic.

Municipal enforcement of the provisions of international human rights provisions is largely defined by the Slovak Constitutional Court. The 1992 Constitution of the Slovak Republic established a Constitutional Court which possesses the competence to hear appeals of final decisions by central government authorities, local government authorities, and local self-governmental bodies brought by individuals involving violations of fundamental rights and freedoms of citizens.86 Cases can be brought before the Constitutional Court through a variety of means:

1) by one-fifth of the National Council members;
2) by the president;
3) by the government;
4) by any court; or
5) by the Attorney General.87

There have only been six cases where the Slovak Constitutional Court has utilized provisions contained in international human rights documents to formulate its holding. This is out of a total of 2635 total cases heard by the Constitutional Court since 1993.88

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86. SLOVK. CONST. art. 127.

87. SLOVK. CONST. art. 130. Currently, the constitutionality of the Slovak Language Law, as described below, is under consideration by the court.

88. Interview with Judge Jan Klucka, Slovak Constitutional Court, in Kosice, Slovakia (July 18, 1996).
B. Slovakia’s Constitutional Framework for the Protection of National Minorities

While Slovakia must adhere to the principles of international human rights standards, its domestic policy must also comply with the constitution of the Slovak Republic adopted on September 3, 1991. While the Slovak Constitution confers rights unprecedented in the history of Slovakia, these rights are not inalienable as they may be amended by law.\(^9\) The objective to protect individuals within state borders from arbitrary state power is not served by such a constitutional framework. The constitution largely fails to provide any real guarantees that the conferred rights may not be stripped away at the will of a parliamentary majority during times of economic hardship or political unrest.

The preamble to the constitution of the Slovak Republic immediately caused a stir among minority groups in Slovakia. It begins: “We the Slovak nation . . . . .” This expression implies that only ethnic Slovaks are concerned by and awarded rights under the constitution, rather than all people residing within the borders of the Slovak Republic. This impression is confirmed by the following phrase “together with members of national minorities and ethnic groups,” thus relegating national minorities to a secondary position. Ethnic Hungarians objected to the Constitution claiming that minorities cannot be said to have an equal position under the Slovak Constitution.

Chapter 2, Section 4, Article 34 of the constitution articulates the rights of national minorities and ethnic groups. The first two clauses of this article concern rights to be conferred upon minorities, and include provisions for the promotion of cultural heritage and language.\(^9\) The constitution guarantees the right to education and official communication in minority languages.\(^9\) Both of these paragraphs, however, contain the

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89. In the first 54 articles of the Slovak Constitution, guarantees are conferred and then made amendable by law 42 times. See John A. Young, Human Rights and the Slovak Constitution, Promoting HUMAN RIGHTS AND CIVIL SOCIETY IN CENTRAL AND EASTERN EUROPE NEWSLETTER, Apr. 1994, at 9.

90. SLOVK. CONST. art. 34, para. 1 reads:

Citizens of national minorities or ethnic groups in the Slovak Republic are guaranteed the development of particularly the rights to promote their cultural heritage with other citizens of the same national minority or ethnic group, receive and disseminate information in their mother tongues, form associations, and create and maintain educational and cultural institutions. Details thereof shall be fixed by law. (paraphrase). SLOVK. CONST. art. 34, para. 1

91. SLOVK. CONST. art. 34, para. 2 reads:

In addition to the right to learn the official language, the citizens of national minorities or ethnic groups shall, under provisions fixed by law, also be guaranteed: a) the right to be educated in a minority language, b) the right to use a minority language in
restrictive "to be fixed by law" phrases, making these provisions rather feeble constitutional rights. Furthermore, according to the final paragraph of Article 34, the exercise of the enumerated rights "may not threaten the sovereignty and territorial integrity of the Slovak Republic or discriminate against other citizens." This paragraph may provide a legal justification for any law containing discriminatory measures against minorities. A request by ethnic Hungarians for more Hungarian language schools or a plea by Ruthenians for more control of their own cultural affairs could be construed by some as threatening the sovereignty of the Slovak Republic and a parliamentary majority could circumvent and prohibit these attempts. Any measure detrimental to minorities can always be founded in the promotion of the interests of other citizens. Mr. Laszlo Pirovits of Hungarian Civic Party opined that:

[i]t is not at all possible to defend article 34 section 3 of the Constitution of the Slovak Republic[]. The question automatically arises whether the implementation of rights of another citizen, guaranteed by the Constitution, may [threaten the State's sovereignty of territorial integrity]. Since the article concerns individual and not collective rights, it is not in this context defensible at all. This codification is in conflict with the individual article 13, section 3 of the Constitution, according to which the legal definition of constitutional rights and freedoms must apply equally. On the other hand, a threat to sovereignty and territorial integrity of the republic also fulfills the actual essence of a criminal act, which would be the case for every subject. Such a provision violates the essence of the equality of rights before the law[].

Section 34(3) is clearly in conflict with the letter and spirit of Article 34, which is meant to assure the rights of national minorities. The legislative and executive branches of government are thus, under the constitution, free to discriminate against minorities whenever a threat is perceived.

Given the prevalence of restrictive clauses throughout the Slovak Constitution, ethnic minorities are not ensured constitutional guarantees to the use of minority languages and their culture. Rather, the Slovak Constitution establishes a framework of minority protection which can be

official communications, c) the right to participate in decision making in matters affecting the national minorities and ethnic groups. SLOVK. CONST. art. 34, para. 2

92. SLOVK. CONST. art. 34, para. 3 (1993).

chiseled away in times of political or economic strife. In a state where ethnic Slovaks constitute approximately eighty-five percent of the population, the constitution should serve to safeguard ethnic minority rights from the will or tyranny of the majority. Given Slovakia's centralized political system, the potential for constitutional rights being supplanted by restrictive legislation is clear. This risk is particularly acute for minority culture and education, as public spending on these activities is directed from the state. The question is: Which rights are supreme — constitutional or statutory rights? Mr. Jozavice responds that: "In my opinion, the [rights granted in the] constitution should be enforced. It should set forth rights without qualification, without creating room for the legislature to undermine the role of the constitution itself. It suffers detail." A reasonable reading of a state's constitution should lead to a determination that it is the supreme law of the land to be interpreted by a court with jurisdiction over such issues. The framework of the Slovak Constitution makes it unclear as to whether a parliamentary majority may restrict or even completely eradicate freedoms set forth therein.

C. Slovak Municipal Law Under International Human Rights and Slovak Constitutional Analysis

Slovak municipal legislation analyzed below calls into question Slovakia's commitment to democratic principles and internationally accepted human rights standards. Municipal laws are employed to analyze Slovak compliance with bilateral treaties and regional and universal human rights instruments ratified by the Slovak government. In addition, legislation is analyzed utilizing non-binding international documents that demonstrate developing custom within international human rights law.

1. The State Language Law

On November 15, 1995, the Slovak Parliament adopted the Slovak Language Law (The Language Law). This law regulates the use of the State Language (Slovak) in Slovakia and provides for the protection of the language. The law has been perceived by many ethnic Hungarians and international critics alike, as threatening the future existence of the Hungarian language in Slovakia. Critics of the Language Law claim that it takes away the right to use the Hungarian language and other minority languages. It is important to note that, besides language, members of the Hungarian minority in the Slovak Republic do not differ greatly from

94. Interview with Mr. Milan Jozavice, International Law Department of the Slovak Ministry of Foreign Affairs, in Bratislava, Slovakia (July 15, 1996).

95. Zakon Narodnej rady Slovenskej republiky c. 270/1995 o statnom jazyku. [This law entered into effect on Jan. 1, 1996.]
ethnic Slovaks. Ethnic Hungarians do not have any racially distinctive features nor do they adhere to a different religion. It is language that unites members of the Hungarian minority. For this reason, any restriction on the right or opportunity to use the Hungarian language has a great effect on the cultural identity and integrity of the Hungarian community in Slovakia.

When the draft of the Language Law was submitted to the Slovak National Council on October 24, 1995, a justification statement outlining the objectives of the legislation was attached. This justification reveals that the Language Law is partly, if not wholly, intended as a means of getting back at Hungarians for past injustices. For example, the justification asserts that

[...]he Ancient Slovak language (alongside Hebrew, Greek and Latin) became the fourth language of liturgy and diplomacy in Europe. Forced Hungarianization during the time of historic Hungary, as well as between the years 1938 and 1945, when Hungary occupied a large part of Southern Slovakia, inflicted wounds that remain open to this day. 96

Mr. Juraj Zervan of the Ministry of Foreign Affairs asserted that “bilingualism is not usable for our country. It is the responsibility of persons first to feel part of the whole society, rather than to have allegiance to only a certain group.” 97

Passage of the Language Law created a legal vacuum in relation to the use of minority languages. The recent legislation replaces the 1990 Law on the Official Language, a law premised upon the Language Law of the first Czechoslovak Republic of the inter-war years. 98 By replacing the 1990 legislation, the Language Law takes away certain rights concerning minority languages and fails to confer new ones. The disequilibrium created is not balanced by a corresponding law on minority languages. It is obscured where and under what circumstances usage of the Hungarian language is legally permissible. Although the Slovak government assured

96. Text attached to the Draft-law on the state Language as submitted to the Slovak Parliament, Oct. 24, 1995. Translation of this document was provided by the Hungarian Civic Party.

97. Interview with Mr. Juraj Zervan, Director of the Department of National Minorities Division, Slovak Ministry of Foreign Affairs, in Bratislava, Slovakia (July 11, 1996).

98. See Language Law, para. 12: Law 428/1990 (declaring that “[the law] on the official language of the Slovak Republic is made void.” It is significant to note the change from an “official” language to the further reaching concept of a state language. This modification suggests that the Language Law is more encompassing than the Law on the Official Language. This alteration is questionable in a state that is multi-ethnic.
the OSCE High Commissioner for National Minorities that legislation on the use of minority languages would soon follow passage of the Language Law,99 such a measure has yet to even be discussed in Parliament despite persistent urging by all minority communities in Slovakia.100 As the year anniversary of enactment of the Language Law passes, there is still no official government draft for such legislation.101

The Slovak government is considering ratification of the European Charter on Regional or Minority Languages as an alternative to issuing a legislative measure on the use of minority languages.102 This document provides that signatory states will not place obstacles in the way of promoting minority languages. Provisions for the teaching and studying of minority languages at all appropriate levels are also included.103 The Ministry of Culture, however, proposed an alternative to ratification of this Charter. Rather than a specific law on minority language use, the Ministry suggested promulgating a law on the relationship between citizens and state administrative authorities in local offices.104 The proposal would include a provision stating that Slovak is the language to be used in official contacts throughout the state unless a person could prove that he or she was not able to learn Slovak for an objective reason.105 A definition of an objective reason was not provided.

In light of the Slovak government's failure to propose a law on the use of minority languages as it promised last year, many ethnic Hungarians view the Language Law as the first step toward the elimination of Hungarian culture in Slovakia. One ethnic Hungarian resident of Zlaty Klasy noted:

The goal of the Slovak government is first to have us speak Slovak in official settings and then to have us speak Slovak in our schools until eventually Hungarian truly becomes a kuchinska rec [a kitchen language], a language only


100. On June 10, 1996, Czech, Ruthenian, Ukrainian, Hungarian and Bulgarian cultural associations submitted a joint proclamation criticizing the Slovak government for failing to pass a measure regulating the use of minority languages. See generally DAILY NEWS MONITOR/TASR, June 10, 1996.


102. See supra note 72.

103. Id. art. 8.


105. Id.
spoken at home. That is why it is important to use the Hungarian language in a wider context because, if not, we will forget words and eventually adopt the Slovak language. This is what they want, for us to forget our language, and therefore, forget our culture.  

The Language Law has been criticized largely due to its vagueness. The statute's ambiguity provides those who will apply the law the freedom of interpretation. For example, Section 1(2) ("The State Language has a priority over other languages applied on the whole territory of the Slovak Republic") and 1(4) ("The law does not regulate the usage of languages of national minorities and ethnic groups. Usage of those languages is regulated by separate laws") are potentially contradictory. While clause 1(2) states that Slovak has the priority, clause 1(4) states that other languages are not touched by the law. In what sense, then, is the Slovak language supreme?

The Language Law does not regulate languages used in religious ceremonies. Section 1(3) states that "[t]he law does not regulate the usage of liturgic languages. Usage of those languages is arranged by the regulations of churches and religious communities." While the Language Law does not regulate church weddings, it is unclear whether the word "yes" or "I do" in a civil, non-church wedding ceremony can be spoken in Hungarian or whether the Language Law mandates that it be uttered in the state language. On June 26, 1996, when asked by a Hungarian Assembly member of the Council of Europe whether the Hungarian language could be used during official marriage ceremonies, Prime Minister Meciar asserted that marriage ceremonies could take place in any language since the freedom to speak any language is enjoyed by all. This statement implies that, under the Language Law, an ethnic Hungarian could say the Hungarian word Igen [yes] during a civil wedding ceremony. The Ministry of Culture, however, issued a directive stating the opposite conclusion. The Ministry of Culture asserts that the affirmation must be

106. Interview with an ethnic Hungarian resident, in Zlaty Klasy, Slovakia (June 30, 1996).

107. One local official interpreted the law as giving him the right to refuse an ethnic Hungarian to send a telegram in Hungarian. See generally Democracy Seen at Risk in Bratislava, INT'L HERALD TRIB., Dec. 26, 1995.

108. The translation of the Language Law quoted in this report was provided by the American Embassy in Bratislava.

109. Paragraph 2 was added in the final parliamentary debate on the law, which may explain the lack of reflection. This makeshift drafting style hardly makes for legal credibility.

110. Statement of Mr. Vladimir Meciar, Prime Minister of the Slovak Republic, Council of Europe Parliamentary Assembly, (June 26, 1996).
spoken in Slovak.\textsuperscript{111} State interference in one of the most intimate of ceremonies is viewed as a direct attack on Hungarian culture by ethnic Hungarians. Mr. Bugar noted that:

This is how [the government] can provoke ethnic Hungarians. If my daughter wants to have a civil marriage and if the government forces her to use a language other than her mother tongue during such an intimate ceremony, I'm not a radical, but I think I would break the room into pieces.

Section 2(2) demands that each citizen have knowledge of the Slovak language as defined by the Ministry of Culture. This approach places full definitional control with a state organ. The potential for abuse of governmental discretion in this area may result in discrimination against Hungarians who may mispronounce words or may not have as extensive a vocabulary in Slovak as a native speaker.

Section 3(2) makes knowledge of the Slovak language a prerequisite for government employment. Section 3(1) and (2) indicate that all communications constituting official transaction, as well as all communications within government and administration workplaces must be conducted in Slovak.\textsuperscript{112} While not precluding the use of other languages, the wording of Section 3 suggests that supplementary use of Slovak is compulsory in nearly all official matters. Moreover, Section 3(5) states that contact with the administration must be conducted in Slovak.\textsuperscript{113} This section mandates that, in order to use Hungarian during an official

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\bibitem{111} Ministerstvo Kultury Slovenskej Republiky [Minister of Culture of the Slovak Republic], Cislo MK 551/96 - SSJaNP, (Mar. 1, 1996).

\bibitem{112} Language Law Section 3 reads:
[1] In the course of accomplishment of their duties, the state authorities and state organizations, the authorities of territorial self-administration and the authorities of public and legal institutions . . . the state language shall be, by those authorities, used compulsorily on the whole territory of the Slovak Republic. Demonstration of commensurate knowledge of the state language by word of mouth and writing is a qualification for being taken into service, or for entering a similar occupational relationship, as well as a prerequisite for accomplishing work agreed within specified job description at a public and legal authority.

[2] The employees and officials of the public and legal authorities, employees in transport and communications, as well as the armed forces officers, the officers of armed security corps, of other armed forces officers, of other armed corps and fire brigades, shall use the state language in contact on official lines.

\bibitem{113} Slovak Language Law §(3).

\bibitem{113} Slovak Language Law Section 3(5) states that "[w]ritten appeals addressed to the public and legal authorities shall be presented in the state language." Slovak Language Law § 3(5).

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meeting, a Slovak interpreter must be present at all times and minutes must be kept in both Slovak and Hungarian. This requirement will undoubtedly cause problems in congregations where all participants are Hungarian, as is largely the case in municipalities throughout southern Slovakia. Section 3(5) also mandates that citizens would be obliged to submit a copy of every appeal in Slovak, which is an unnecessary obstacle where both the appellant and the officials have Hungarian as their first language.

In response to Section 3(5) of the Language Law, several mayors of towns located in southern Slovakia issued directives allowing for the use of both Slovak and Hungarian in official contacts despite Ministry of Culture claims that such action is illegal. The first local authority to take such action was Velka Maca, a village with approximately eighty-eight percent of its 2600 residents of Hungarian nationality. The declaration, unanimously passed by the local council, allows Hungarian to be used in official contacts, including at local offices, cultural events, doctor’s offices, and stores. Numerous villages and towns in Slovakia’s southern region have since followed Velka Maca’s lead. Mayor Jozsef Szaraz of Cvory nad Zitavou, where four-fifths of more than 5000 people are ethnically Hungarian, refuted allegations that such directives were contrary to the Language Law. Mayor Szaraz asserted that such measures “simply enable the people to communicate in their mother tongue.”

Section 8(5) reads “[i]n proceedings with the public and legal authorities concerning contracts settling the involvement relations [sic], only the wording in the state language is acknowledged.” This section may put ethnic Hungarian lawyers out of business. If two ethnic Hungarian business partners want to ensure the enforceability of their contract in a Slovak court, the Language Law mandates that the document be drafted in Slovak. Section 8(4), states that “[t]he contact of the medical care personnel is conducted, as a rule, in the state language; in case of a citizen or foreigner not having a command of the state language, also in the language in which mutual understanding with the patient is possible.”

In February 1996, four language consultants began working in three regional districts and in Bratislava to supervise observance of the language law, although monetary penalties for violating the law cannot be

114. Pavol Mudry, Slovakia: Ethnic Hungarians Worried By Language Law, INT’L PRESS SERVICE, Mar. 14, 1996. See also Samorin A Okolie/Somorja Es Videke [Samorin and the Surrounding Environment], Vseobecne Zavazne Nariadenie Mesta Samorin O Pouzivani Jazyka Narodnostnych Mensin Na Uzemi Mesto Samorin, Jan. 26, 1996. This is law of the town council of the town of Samorin allowing residents to use either the Slovak or Hungarian languages in official contacts.

115. Id.

116. For further issues upon which the Language Law touches, see sections below concerning legislation regulating education, names, road signs, and mass media.
issued until 1997. On March 12, 1996, the Hungarian daily, *Uj Szo*, published an interview with Dr. Andrej, an official language advisor to the Slovak Ministry of Culture for the Galanta and Dunajska Streda region. Dr. Andrej found that individuals living in these two regions were well-informed about the provisions of the Language Law and usually observed them. He cited only one village where the local chronicles were written only in Hungarian, and warned the village mayor that the village annals would have to be recorded in both Slovak and Hungarian.

Passage of the Language Law, with its stiff monetary penalties and restrictive provisions, has antagonized ethnic Hungarians. The Language Law has been used by Slovak citizens as a means of harassing ethnic Hungarians. In the town of Samorin, two individuals pretending to be language inspectors from the Ministry of Culture threatened local inhabitants with fines due to their public use of the Hungarian language. Although government officials proclaim that such behavior is criminal, no suspects have been detained. "It is as though the government has criminalized our language," complained one ethnic Hungarian. The law excludes penalizing individuals for violating its mandates, but imposes stiff monetary fines on businesses. Business owners could be fined up to 50,000 Slovak crowns (approximately $1650) and business entities could be forced to pay up to 500,000 Slovak crowns (approximately $16,500).

The Language Law launched Slovakia into the international spotlight and provoked questioning of Slovakia's commitment to democratic principles. A United States Congressional Commission on Security and Cooperation in Europe wrote a letter to the Slovak Ambassador to the United States, Branislav Lichardus, stating that the real intent of the Language Law is "not merely to regulate the use of the Slovak language, but to restrict the freedom of speech in Slovakia." Hungarian Ambassador to Slovakia, Mr. Jeno Boros, views the Language Law as the devaluation of multi- or bilingualism. He stated, "There is an old expression in this part of the world that says that the more languages you know, the better person you are. Now you hear a new expression: The more languages you know, the worse Slovak you are."

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118. Interview with an ethnic Hungarian citizen, in Samorin, Slovakia (July 2, 1996).
120. James Morrison, *Selling Slovakia*, WASH. TIMES, Feb. 26, 1996, at A17. This letter was signed by Senators Alphonse D'Amato (NY-R), Frank Lautenberg (NJ-D), and Representatives Christopher Smith (NJ-R) and Steny Hoyer (MD-D).
government asserts that the Language Law is compatible with international human rights standards.\textsuperscript{122} The truth is, however, that not many states have state language laws. Moreover, most of the state language laws in existence take into consideration the protection of minority languages.\textsuperscript{123} In other multilingual states where one language is dominant in numbers and a minority language is found primarily in one region, there are other solutions, such as a special administrative order for that region that do not require regulations to protect the dominant language. In yet other states, minority languages are given equal legal status to the dominant language.\textsuperscript{124} None of these protective measures have been taken in Slovakia.

The Language Law's restrictiveness is contrary to both municipal legal principles and international norms. Most notably, the Language Law's prohibition of the use of minority languages in administrative contacts appears to conflict with both Slovak constitutional guarantees and express provisions contained in binding international instruments. Section 3 of the Language Law blatantly conflicts with the spirit of Article 34 of the Slovak Constitution. Article 34(3) reads:

\begin{quote}
in addition to the right to learn the official language, the citizens of national minorities or ethnic groups shall, under provisions fixed by law, also be guaranteed: a) the right to be educated in a minority language, b) the right to use a minority language in official communications, c) the right to participate in decision making in matters affecting the national minorities and ethnic groups.\textsuperscript{125}
\end{quote}

This article clearly provides for the use of minority languages in administrative contacts. This guarantee, however, is subject to the restrictive "fixed by law" clause. The Language Law's constitutionality has been challenged and the issue is currently pending before the Constitutional Court. Constitutional Court Judge Klucka views the Language Law as creating a legal gap between itself and the constitutional guarantees.\textsuperscript{126} If the constitution is to be given credibility and weight as the founding legal document in Slovakia's legal system, the Constitutional Court should hold that express constitutional guarantees are not to be

\textsuperscript{122} Justification, end of part II.
\textsuperscript{123} France, Lithuania, Belgium and Holland have language laws.
\textsuperscript{124} See, e.g., Finland.
\textsuperscript{125} SLOVK. CONST. art. 34(3).
\textsuperscript{126} Interview with Judge Jan Klucka, Slovak Constitutional Court, in Kosice, Slovakia (July 18, 1996).
limited, restricted, or eradicated by domestic legislation.\textsuperscript{127} The right to use one's mother tongue in administrative affairs is not ensured in Slovakia because of the absence of any law on minority languages.

Minority language rights within the international human rights framework emerged at the beginning of the twentieth century and have increasingly gained recognition as a protected right. In the absence of provisions relating to the protection of minorities in the League of Nations era, a series of treaties were established to secure minority status during the inter-war years. These treaties largely incorporated the principles of non-discrimination and equality, the right to citizenship, the right of minorities to establish their own institutions, and a state obligation to provide an equitable share of financial support toward primary schools in minority languages when there was sufficient demand for such education.\textsuperscript{128} Minority protection treaties during this period were largely patterned after the Polish Minority Protection Treaty of 1919. Article 7 of this treaty provided that "[n]o restriction shall be imposed on the free use by any Polish national of any language in private intercourse, in commerce, in religion, in the press or in publications of any kind, or at public meetings."\textsuperscript{129} This provision was also contained in the Czechoslovakian Minorities Treaty of 1919.\textsuperscript{130} Guarantees contained in the treaties preempted municipal legislation that was contrary to the treaty provisions. Treaty ratification required states to take positive steps to comply with the rights embodied therein.

Beginning with the Charter of the United Nations (Charter), the focus shifted from minority protection granting specific rights to supporting the more general concept of non-discrimination. This concept is equally applicable to all individuals regardless of ethnic majority or minority status. Article 1(3) of the Charter provides for "promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to . . . language . . . " in order to achieve international co-operation.\textsuperscript{131} The Universal Declaration of Human Rights

\textsuperscript{127} This statement should hold true unless the activity clearly threatens the sovereignty or territorial integrity of the state or discriminates against other citizens. See SLOVK. CONST. art. 34, para. 3. The use of the Hungarian language during official contacts does not reach this threshold.

\textsuperscript{128} See FERNAND DE VARENNES, LANGUAGE, MINORITIES, AND HUMAN RIGHTS 26 (1996).


\textsuperscript{130} Id. at 41.

\textsuperscript{131} U.N. CHARTER art. 1, para 3.
(Declaration), in Article 2(1), also states that individuals are entitled to the rights and freedoms included in the Declaration without regard to language.\textsuperscript{132} Language is a ground upon which discrimination is prohibited under the ECHR Article 14.\textsuperscript{133} This principle is again set forth in the CCPR in Article 2(1), and the International Covenant on Economic, Social, and Cultural Rights in Article 2(2).

The European Court of Human Rights in the Belgian Linguistics Case analyzed the general anti-discrimination provision contained in the ECHR.\textsuperscript{134} The applicants were the parents of families in Belgium who applied for schooling on their behalf and on behalf of their children. The gravamen of their complaint was that, as French speakers, they wanted their children to be educated in French despite living in a region classified under Belgian law as Dutch-speaking. By law, schooling had to be conducted in the official language of the region. Thus, the Francophone applicants alleged, the state was discriminating against them by failing to provide schooling in their language in violation of Article 14.\textsuperscript{135} The court held that legal and administrative distinctions that are objective and reasonable are not violative of the ECHR’s anti-discrimination clause. In addition, the justifications must be proportional to the purposes of maintaining such distinctions. In light of this ruling, the Slovak government must have legitimate and balanced objectives for prohibiting the use of the Hungarian language in public administration to comply with Article 14.

International human rights customs with regard to minority language rights have evolved since the Belgian Linguistics Case was decided in 1968. Over the past two and a half decades several provisions have been drafted and ratified that convey to varying degrees the right to use minority languages in public administration. Legal or administrative justifications must not only be non-discriminatory, they must also comply with the terms and conditions of new binding instruments.\textsuperscript{136} The most


\textsuperscript{133}. European Convention on the Protection of Human Rights art. 14 (hereinafter ECHR) reads: “The enjoyment of rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.” See also ECHR art. 5(2) (right to receive information on the reasons for arrest in a language one understands), id. art. 6 (the right to a fair and public hearing), id. art. 13 (the right to an effective remedy before a national authority).


\textsuperscript{135}. The parents also alleged violations of the First Protocol to the ECHR and ECHR Article 8.

\textsuperscript{136}. The specific instruments are discussed in detail below.
significant instruments are the FCNM (1995) and the Recommendation of the Parliamentary Assembly of the Council of Europe No. 1201 (1993) (Recommendation 1201). Both of these documents contain provisions allowing for the use of minority language in contacts with local authorities in regions where substantial numbers of members of a particular minority group reside.

In regions where minority language speakers are heavily concentrated, public authorities should be able to respond to requests and offer services in the minority language. Failure to do so could constitute a violation of the right to non-discriminatory treatment by the state. In southern Slovakia, speakers of the non-state language are numerous and some residents may have limited proficiency in Slovak. This is particularly true for young children or elderly citizens who conducted the majority of their public and private communication in Hungarian. The demographic data of the southern region demonstrates that the vast majority of individuals encountered by public administrators will speak Hungarian as their primary language. Imposition of a state language requirement may lead to greater delays in public services to non-native speakers, higher costs for services if a bilingual public servant is needed, difficulties in communicating information that could result in the loss of benefits or services, and additional costs involved with traveling to an area where bilingual services are available. Local authorities, in line with the non-discrimination mandate of numerous international documents, should provide an increasing number of services in the non-state language where a substantial number of Hungarian citizens reside.

In addition to concerns over discriminatory treatment in public administration, the prerequisite of proficiency in the Slovak language for...
government employment is also disconcert. This may lead to discrimination against members of minorities in employment for government positions. Economic opportunity and success hinges upon one’s proficiency in the state language. As a result, Slovak native speakers will benefit by this provision with regard to access to resources and to public employment opportunities. In Slovakia, the state is a major purveyor of employment, and ethnic Hungarians may be precluded from the opportunities made available by the state solely on the basis of language.

International human rights laws give special consideration to the use of minority languages beyond protections against discrimination. Most notably, the Slovak government has undertaken the obligation to respect minority language usage in the SHBT. SHBT Article 15(4)(b) obliges the Slovak government to respect the principles set forth in Recommendation 1201. In relevant part the Recommendation states that every person shall have the right freely to use his/her mother tongue in private and in public, both orally and in writing. This right shall also apply to the use of his/her language in publications and in the audiovisual sector. In addition, the regions in which substantial numbers of a national minority are settled, the persons belonging to a national minority shall have the right to use their mother tongue in their contacts with the administrative authorities and in proceedings before the courts and legal authorities. By ratifying this bilateral treaty, the Slovak government has committed itself to allow individuals to communicate with administrative authorities in his or her minority language. The requirement of paragraph 3 that “substantial numbers of a national minority” group be present within a geographical location for this right to be invoked is clearly met in the majority of towns throughout southern Slovakia. In some towns and villages ethnic Hungarians constitute more than eighty percent of the population. Given the binding nature of the SHBT, the Slovak government should provide bilingual services in the majority of towns, cities, and villages located in the southern region of Slovakia.

The public use of minority languages is also protected in numerous other international instruments to which Slovakia is a party. The protection of the use of minority languages is unconditionally provided for in the CCPR. CCPR Article 27 states, “[i]n those States in which ethnic,

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140. This prerequisite is contained in section 3(2) of the Language Law.
141. See generally Recommendation 1201 art. 7(1),(3).
142. Id. art. 7(1).
143. Id. art. 7(3).
144. See Statement Issued on the Occasion of the Hungarian Convention in Komarno, by the Hungarian Coalition (Jan. 4, 1994). These figures are based on the 1991 Slovak census.
religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.” The language of Article 27 indicates that a system of minority language usage exceeds allowance during criminal proceedings, as this situation is explicitly covered in Article 14(3). Although unspecific, Article 27 seeks to promote equality between minority and majority speakers. The provision’s terms should apply to official dealings where minority language speakers are at a disadvantage, whether it be in law, administration, or in school. The Human Rights Committee routinely inquires about the situation of minority language schools, publications, court proceedings, television programs, and radio broadcasts when member states make their human rights reports to the Committee to monitor compliance with this article.¹⁴⁵ This questioning evidences the broad scope of Article 27.

FCNM Article 10 contains a provision for the consideration of the use of minority languages in official contacts. Article 10 states:

[1] [t]he Parties undertake to recognize that every person belonging to a national minority has the right to use freely and without interference his or her minority language, in private and in public, orally and in writing.

[2] In areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if those persons so request and where such a request corresponds to a real need, the Parties shall endeavour to ensure, as far as possible, the conditions which would make it possible to use the minority language in relations between those persons and the administrative authorities.¹⁴⁶ These principles are set forth with some hesitation. Mr. Heinrich Klebes, Deputy Secretary General of the Council of Europe, opined that although “the use of the minority language represents one of the principle means by which [members of national minorities] can assert and preserve their identity,” paragraph 2 does not cover all relations between persons belonging to a national minority and public authorities.¹⁴⁷ Paragraph 2 does include communication with administrative authorities, but only if the two

¹⁴⁶ FCNM supra note 71, art. 10.
conditions of *substantial numbers* and a *request* for communication in minority languages are met. This paragraph has been interpreted broadly to include, for example, ombudsmen. This Article was purposefully worded very broadly to grant states a wide degree of discretion. Nevertheless, it urges states to be as generous as possible in this area. As the two requirements of paragraph 2 are met in Slovakia’s southern region, the Slovak government should provide for the use of minority languages in relations with administrative authorities. The refusal of the Slovak government to do so can be characterized as a failure to fulfill its obligations under the FCNM.

In addition to the FCNM and the CCPR, various international human rights documents have supported the use of minority languages in the context of public administration. The Council of Europe’s Vienna Declaration on Human Rights, Appendix II, states:

> We, Heads of State and Government of the members states of the Council of Europe, have agreed as follows, concerning the protection of national minorities: [P]ersons belonging to national minorities must be able to use their language both in private and in public and should be able to use it, under certain conditions, in their relations with the public authorities.149

This principle is again set forth in the Council of Europe’s Recommendation 1134 (1990) on the Rights of Minorities. This Recommendation enumerates general principles that states should apply to respect the existence of national minorities within their borders, specifically addressing principles relating to linguistic minorities. Paragraph 12 articulates that “persons belonging to a linguistic minority shall have access to adequate types and levels of public education in their mother tongue.” Paragraph 13 of Recommendation 1134 states:

> [a]s far as European states are concerned they should . . .

> ii. [t]ake all the necessary legislative, administrative, judicial and other measures to create favourable conditions to enable minorities to express their identity, to develop their education, culture, language, traditions and customs;

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148. *Id.* at 105.

iv. Abstain from pursuing policies aimed at forced assimilation of national minorities, from taking administrative measures affecting the composition of the population in areas inhabited by national minorities, and from compelling such minorities to remain confined in geographical and cultural 'ghettos;'

v. fully implement the provision of Article 27 of the International Covenant on Civil and Political Rights which reads as follows: In those states in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.150

The Report of Experts on National Minorities151 by the OSCE states in paragraph II that "[the participating states] reconfirm that persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all aspects, free of any attempts at assimilation against their will." The experts noted, inter alia, the positive results obtained through the use of education in one's mother tongue, and funding the teaching of minority languages to the general public and in teacher training programs.152 Furthermore, the EU's Resolution on the Languages and Cultures of Regional and Ethnic Minorities153 recommends, in paragraph 9, that: "[M]ember states . . . take social and economic measures including: providing for the use of the regional and minority languages in public concerns [and] providing for consumer information and product labeling in regional and minority languages."

When a state provides protection to its national minorities, a more harmonious relationship can develop between the state and the minority groups found within its borders. Language constitutes the essence of Hungarian culture and community. Supplying language rights to the Hungarian minority may be the most effective means of diffusing ethnic tension in Slovakia. By imposing a state preference for speakers of a


152. Id.

certain language, the potential for discrimination against non-native speakers of the designated language is great. Those who possess Slovak as their primary language have a greater advantage for employment, particularly by the state. Given Slovakia's centralized administration, this advantage is enormous.

The Slovak government must adhere to its obligations under international human rights law. Specifically, the government agreed to provide for the use of minority languages with local authorities in the SHBT. In addition, numerous human rights instruments illustrate that allowance for the minority language usage is a developing custom to be respected by states. The politicization of language in Slovakia is not in response to the inability of minority groups to speak the Slovak language, because this is not a documented phenomenon. Rather, the government's involvement with the regulation of language use derives from the desire to create a common culture in Slovakia by forcing national minorities to abandon their respective cultures and languages in order to fulfill the government's nationalist agenda. The Slovak government must exercise extreme care to balance the right of a state to safeguard the position of the state language and to ensure that the languages of national minorities are protected.

2. Minority Language Education

In 1995, the government launched the idea of alternative education for minority children. The idea behind the plan is to give children, or rather their parents, the opportunity to choose a Slovak, Hungarian or mixed language education. The stated purpose of the project is to provide more subjects to be taught in the Slovak language. This plan was also developed to improve knowledge of the Slovak language among minority children. Under the alternative education plan, Slovak is to be the language of instruction for a certain number of hours each week. Only native Slovak teachers would be allowed to teach certain subjects, such as history and geography. These teachers would be given extra wages in predominantly Hungarian regions. An alternative education class would be established as soon as demand was expressed, even if by only one pupil or parent. At present, ethnic Hungarian children are free to choose an entirely Slovak language school at every stage in their education. About one third of ethnic Hungarian children make this choice.154

Concerns about alternative education have been voiced by members of the Hungarian minority. A prevailing criticism is that alternative education is intended to eventually subdue all pure Hungarian-

language education in Slovakia. The program is perceived as a step toward the gradual assimilation of ethnic Hungarian children and an attempt to liquidate Hungarian schools, thereby decreasing the need for and employment of Hungarian-speaking teachers. Fears are also expressed that undue pressure would be employed to incite parents to choose the alternative education form. Ethnic Hungarians assert that the term *alternate education* is disingenuous, as school budgets may not be increased adequately to provide for an increase in Slovak classes without a decrease in Hungarian school budgets.

The government's response to these concerns has been to reiterate that the educational program is entirely voluntary. This assertion, however, has largely failed to ease the suspicions of ethnic Hungarians. Hungarian distrust of the Slovak government's motives is reasonable given a recent statement by the Minister of Education, Eva Sklavkovska. Ms. Sklavkovska stated that the government objective was to establish at least one Slovak class in all municipalities across the territory of southern Slovakia, a goal independent of actual interest in such classes. A vast majority of Hungarian parents, however, continue to reject the plan. An ethnic Hungarian parent from Samorin expressed:

> [f]or us, there was no question as to whether we would send our children to Hungarian schools. I attended a Hungarian school and so did my husband. I think that, to preserve our cultural identity, the basis of our children's education must be in our mother tongue. Having my children learn Hungarian history and literature is very important and this information is only taught in Hungarian schools. Without Hungarian language education, we would only speak Hungarian at home and our language would become a 'kuchinska rec,' a kitchen language.

The decision for an ethnic Hungarian parent whether to send his or her child to a Slovak or Hungarian school has as much to do with one's opinions about cultural survival and political affiliation, as it does educational choices. Mr. Laszlo Ollos of the Nitra Pedagogical College asks, "[t]he absolute majority of Hungarian parents know that placing their child in an alternative education school isn't only a decision about

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156. See generally DAILY NEWS MONITOR/TASR, Dec. 9, 1994.

157. Interview with an ethnic Hungarian parent, in Samorin, Slovakia (Aug. 15, 1996.)
education, but is also a political act in support of the policies of the current government. Which Hungarian parent is willing to do that?"\textsuperscript{158}

On April 6, 1995, a law giving the Ministry of Education the right to dismiss and appoint school directors was passed. This authority has been exercised to dismiss public education officials and replace them with HZDS and SNS sympathizers. In Hungarian dominated areas, appointed school-directors have been ethnic Slovaks and government-friendly.\textsuperscript{159} Four ethnic Hungarian high school principals were fired after they helped to organize an opposition to the government's alternative education plan. Mr. Laszlo Kovacs, one of the principals who was terminated for his activity, recalled his experience:

It was the government's strategy to wait to announce the [alternative education] plan until the end of the school year because they thought that all of the teachers would be too tired to fight against it. On June 18th [1995], [the Hungarian school principals] received the plan in the mail. The letter told us that a meeting was planned for June 20th to discuss what the plan meant. Well, we all knew what it meant already!

Since I didn't have much time, I got together with three other principals on June 19th and we wrote a statement against the plan. Before the meeting on the 20th, thirteen of the thirty school directors signed the petition against the plan. Mr. Peus [the Director of Secondary Education] read us the plan at the meeting and then [one of the Hungarian principals] read the opposition statement. Mr. Peus was angry and the meeting ended abruptly. The next day, June 21st, I got a letter in the mail telling me that I was fired. Mr. Peus signed the letter. All four of us who drafted the petition were fired. The ironic thing is that I had just received a certificate and money from Mr. Peus five days before the meeting rewarding me for the good job I was doing at the school. They thought that they could scare the public by firing us and the result of this would be that nobody would be against the [alternative education] plan. But it didn't turn out the way that they had planned because a wave of protest swept through

\textsuperscript{158} Interview with Mr. Laszlo Ollos, Professor at the Nitra Pedagogical College and Hungarian Civic Party member, in Samorin, Slovakia (July 23, 1996).

\textsuperscript{159} See generally SME, May 20, 1995.
[southern Slovakia] and people in communities organized against the proposal.

In retrospect, I'm sad that I lost my job, but I still think my sacrifice was necessary because it caused problems for the government. I know that the threats to Hungarian language schools are not finished, but national attention was drawn to the situation after I was fired.\textsuperscript{160}

If the government is using its power to appoint and dismiss school officials in a manner that suggests discrimination against ethnic Hungarian principals, the government is acting contrary to international law. The United Nations Universal Declaration of Human Rights Article 7 states that "all are . . . entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration . . . ."\textsuperscript{161} CCPR Article 19 asserts that "everyone shall have the right to hold opinions without interference."\textsuperscript{162} CCPR Article 18 and ECHR Article 9 guarantee the right of freedom of thought and conscience. These provisions encompass the right to oppose a government policy.

Another major problem facing Hungarian language education is the lack of Hungarian speaking teachers. This problem is due to decrease in university training of teachers in the Hungarian language. In addition, insufficient numbers of recent university graduates are qualified to replace retiring teachers.\textsuperscript{163} The age structure of active teachers is unfavorable because between 1970 and 1989, termed the \textit{Husak Period} after then President Husak, government policy was to phase out the education of teachers at the Hungarian Department of the Nitra Pedagogical College. Today there are approximately 700 Hungarian students at the Pedagogical College. During the Husak Period, this number was decreased to approximately 100 Hungarian students. Mr. Laszlo Ollos of the Department of Philosophy at the Nitra Pedagogical College explained:

\[\text{we will need 1,500 Hungarian teachers to replace the first generation of Hungarian teachers who will soon retire.}\]

\textsuperscript{160} Interview with Mr. Laszlo Kovacs, former principle of the Hungarian High School in Samorin, Slovakia, in Samorin, Slovakia (July 10, 1996).

\textsuperscript{161} \textit{See generally} International Covenant on Civil & Political Rights, May 28, 1993 [hereinafter CCPR].

\textsuperscript{162} \textit{Id.}

\textsuperscript{163} For extensive statistics on Hungarian language education, such as number of pupils/students, availability of schools and teachers, \textit{see} Education in the regions with mixed nationalities (1993); \textit{See also} Gabzdilova, Schools in the Slovak Republic with instruction in the Hungarian language - present status, in \textit{Minorities in Politics}. 

We currently do not have enough Hungarian teachers to replace them all. Yet there is constantly a threat to decrease the number of Hungarian students admitted to the College, as well as threats to decrease the number of Hungarian faculty here. Further decreases will continue to threaten the future of Hungarian education in Slovakia. There can be no Hungarian language education without teachers who can teach in the Hungarian language.  

The total number of Hungarian students accepted at Nitra was reduced from 1009 in 1994-95 to 700 in 1995-96. The Hungarian Department of Nitra Pedagogical College is the only higher educational facility in Slovakia where it is possible to take classes conducted in the Hungarian language. At Comenius University in Bratislava, it is possible to study Hungarian as a foreign language, however, the language of instruction is Slovak and knowledge of the Slovak language is required of all students.  

In September 1996, the Slovak Parliament passed an ominous measure that will further centralize government control over university education. The law increases the Education Ministry's competence to allot subsidies and gives the Education Ministry the right to veto the appointment of professors and assistant professors. Although it is premature to predict the effect of the law on the Hungarian minority, this new law may be employed to nullify the appointment of ethnic Hungarian professors. This suspicion is reasonable given the current political climate in Slovakia and the articulated hostility of the Ministry of Education to Hungarian language education.  

Ethnic Hungarian students are under-represented in Slovak universities. This is a sociological problem that affects members of the

164. Interview with Mr. Laszlo Ollos, Professor at the Nitra Pedagogical College and Hungarian Civic Party member, in Samorin, Slovakia (July 23, 1996).
166. If the minority is considered too small and the effort of founding and maintaining higher level education in the Hungarian language too costly, organized scholarship systems for student exchanges with Hungary can be considered. This would be completely in the spirit of international exchange and cooperation recommended by numerous international agreements. See supra FCNM supra note 71, art. 12 (3).
169. This point is elaborated in Gabzdilova, see MINORITIES IN POLITICS supra note 163.
Hungarian minority and the state because they do not benefit from the total intellectual resources of its citizenry. Reasons given for this under-representation include the lower social and economic standing of ethnic Hungarians, the lack of incentives for Hungarian students to study at Slovak universities, insufficient knowledge of education possibilities, and insufficient proficiency in the Slovak language.

Nationalist interests resulted in the cancellation of a school textbook entitled *Slovakia in the New Century* that was to be published in 1997. Although five of the six members of the oversight committee at the Ministry of Education supported its publication, the history textbook was canceled due to its sections pertaining to the de facto Slovak state in existence between 1939 and 1945 and the Czechoslovak state from 1918 and 1945. Matica Slovenska, a cultural organization aimed at promoting the Slovak nation, successfully opposed publication of the textbook for its inclusion of criticism of the Slovak government’s compliance with Hitler’s regime during World War II and for its failure to include information concerning the abuse and humiliation inflicted on Slovaks by the Czechs during pre-war Czechoslovakia. Mr. Jan Benko, vice-chairman of the history section at Matica Slovenska, explained the organization’s opposition to the textbook: “Slovak history is a fight for national sovereignty and Slovak statehood. National history ... must have its pride. This ‘textbook’ lacks the sense and pride of national history. It therefore cannot be used to educate our children to become patriots. They cannot, they must not, learn from this textbook.”

The Slovak Constitution specifically guarantees the right to be educated in a minority language. This guarantee, however, is weakened by a fixed by law clause that could limit or restrict this constitutional right. Furthermore, exercise of the rights granted in Article 34 of the constitution may not “threaten the sovereignty of the Slovak Republic or discriminate against other citizens.” The provision granting the right to be educated in one’s minority language should not be categorized as a threat to Slovak sovereignty. As long as education in the Slovak language continues to be

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170. Only 2.1% of ethnic Hungarians have university degrees, as compared with 6.5% of Slovaks and 8% of the Ukrainian minority (due to positive discrimination during the communist era).

171. See MINORITIES IN POLITICS, supra note 163, at 170-71.


173. Id.

174. SLOVK. CONST. art. 34(2)(a). In addition to the right to learn the official language, the citizens of national minorities or ethnic groups shall, under provision fixed by law, also be guaranteed: (b) the right to be educated in a minority language.

175. Id. art. 34(3).
supported by the Slovak government, the maintenance of Hungarian language school will not lead to discrimination against other citizens. Under the constitution, therefore, the Slovak government should continue to support and finance Hungarian language education at its present level.

Numerous provisions of international documents concern the education of national minorities. Under the League of Nations system, several treaties contain paragraphs specifically providing for the use of minority language instruction. The Polish Minorities Treaty of 1919, as well as similar treaties in Czechoslovakia, Yugoslavia, and Rumania, provide that minorities "shall have an equal right to establish, manage, and control at their own expense, charitable, religious and social institutions, schools and other educational establishments with the right to use their own language and exercise their religion freely therein." This paragraph obliged states to establish minority language schools in areas inhabited by minorities and to finance these institutions on a proportional basis. In Treatment of Polish Nationals in Danzig, the Permanent Court of International Justice examined Article 9 of the Polish Minorities Treaty. This article ensured that adequate primary instruction facilities would be provided to non-Polish speaking nationals. The court held that such a provision represented the right of "minorities, the members of which are citizens of the state, to enjoy . . . amongst other rights, the equality of rights . . . in matters relating to primary education." The Permanent Court again reinforced the provision of minority language education in the Advisory Opinion on Minority Schools in Albania. The Court held:

[p]rovisions will be made in the public educational system in towns and districts in which [there] are resident a considerable proportion of Albanian nationals whose mother-tongue is not the official language, for adequate facilities for ensuring that in the primary schools instruction shall be given to the children of such nationals, through the medium of their own language, it being understood that this provision does not prevent teaching of

176. See supra note 121.
177. Id. at 96.
179. Id. at 9.
180. Advisory Opinion on Minority Schools in Albania, 1935, P.C.I.J. (ser. A/B) No. 64, 3, at 21. This opinion examined the validity of an Albanian law aimed at abolishing all private schools operating within the state.
the official language being made obligatory in the said schools.\textsuperscript{181}

In the \textit{Belgian Linguistic Case},\textsuperscript{182} the European Court of Human Rights held that ECHR, Protocol 1, Article 2 did not impose an affirmative duty on states to ensure, at their own expense, or subsidize education of a particular type. Article 2 only implies the right to “avail themselves of the means of instruction existing at a given time.”\textsuperscript{183} Article 2, therefore, concerns the freedom of education, not a social or cultural right to education. Furthermore, the Court concluded that it is not per se discrimination on the basis of ethnicity under Article 14 to limit the number of languages in which instruction is given in state sponsored schools.

The holding of the court in the \textit{Belgian Linguistics Case} is pragmatic. It has been asserted that it would be unrealistic to mandate that a state provide full funding for every linguistic minority, regardless of their numbers, schooling in their respective minority language. A pure minority language educational system could be an unruly drain on state resources and may result in decreasing the cumulative quality of education on a national level. However, these adverse consequences may not hold true in Slovakia, where the Hungarian minority is heavily concentrated in one region. This demographic situation eases the hardships relating to the provision of minority language schooling. Since 1968, when the \textit{Belgian Linguistics Case} was decided, the right to minority language education has been codified in numerous international human rights documents. It is possible that the \textit{Belgian Linguistics Case} would be decided differently in light of the increasing emphasis placed upon the protection of linguistic and cultural rights within the international legal framework.

The most relevant statement on minority language education is Recommendation 1201 both because of its explicit discussion of minority language education and its binding nature upon the Slovak government. Recommendation 1201 was contained in the SHBT. The Slovak government is thus obliged to respect the provisions contained in this document. Recommendation 1201 Article 8(1) states:

\begin{quote}
[e]very person belonging to a national minority shall have the right to learn his/her mother tongue and to receive an education in his/her mother tongue at an appropriate number of schools and of state educational and training
\end{quote}

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\textbf{181.} \textit{Id}. & \\
\textbf{182.} See supra note 134. & \\
\textbf{183.} \textit{Id.} at 31. & \\
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\end{table}
The Slovak government did not issue any reservations limiting the effect of this provision. Although the legal obligations under Recommendation 1201 have been debated,\(^{184}\) the Slovak government explicitly negotiated the terms of the SHBT and should be held to the obligations created therein. Under Recommendation 1201’s terms, educational opportunities in the Hungarian language should not be curtailed, particularly in the southern region of Slovakia where the Hungarian minority is concentrated.

In addition to Recommendation 1201, the FCNM includes state mandates to provide minority language education. FCNM Article 12(1) articulates that state parties “shall, where appropriate, take measures in the field of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority.” The language of this provision reflects the importance attributed to the education of national minorities about their respective cultures and identities. FCNM Article 12(2) asserts that state parties “shall inter alia provide adequate opportunities for teacher training and access to textbooks, and facilitate contacts among students and teachers of different communities.” FCNM Article 12(3) obliges that states “undertake to promote equal opportunities for access to education at all levels for persons belonging to national minorities.” Education is a means through which individuals advance socially, intellectually, and economically. Given evidence of the disproportionate representation of ethnic Hungarians in higher education, the Slovak government, to comply with the dictates of Article 12, should take active steps toward closing this gap in educational achievement.

FCNM Article 14 specifically addresses the importance of an individual belonging to a national minority group to learn his or her minority language. Paragraph 1 states that parties to the signatory states “undertake to recognize that every person belonging to a national minority has the right to learn his or her minority language.” Paragraph 2 sets forth the conditions under which education is to be provided in minority languages. The clause asserts that:

[i]n areas inhabited by persons belonging to national minorities traditionally or in substantial numbers, if there

\(^{184}\) See supra note 61, Recommendation 1201 art. 8(1).

\(^{185}\) See generally (Opinion on the Interpretation of Article 11 of the Draft Protocol to the European Convention on Human Rights Appended to Recommendation 1201 of the Parliamentary Assembly, Venice Commission), CDL-INF (96) 4, Mar. 22, 1996. This opinion is discussed in greater detail in the section on Slovakia’s territorial division legislation, infra.
is sufficient demand, the Parties shall endeavor to ensure, as far as possible and within the framework of their education systems, that persons belonging to those minorities have adequate opportunities for being taught the minority language or for receiving instruction in this language.\textsuperscript{186}

Similar to FCNM Article 10(2), Article 14(2) includes the condition that \textit{sufficient demand} from persons belonging to a national minority be expressed before instruction in minority languages is provided. This phrase, however, is left undefined. Beyond purely demographic consideration of whether \textit{sufficient demand} for Hungarian language schooling exists, political tensions in the region and the historic presence of Hungarian speakers in southern Slovakia are also relevant factors to be considered in this determination.\textsuperscript{187} The words \textit{as far as possible} indicate that the allocation of state expenditure to minority language institutions is contingent upon the state's financial resources. The FCNM provisions dealing with minority language education and instruction are worded flexibly to allow individual states to determine the appropriate level of funding in light of its particular circumstances. Mr. Heinrich Klebes of the Council of Europe commented that:

\begin{quote}
[t]he alternative referred to in [Paragraph 2] "opportunities for being taught the minority language or for receiving instruction in this language" — are not mutually exclusive. Even though Article 14 paragraph 2 imposes no duty upon states to do both, its wording does not prevent the state Parties from implementing the teaching of the minority language as well as the instruction in the minority language. Bilingual instruction may be one of the means of achieving the objective of this provision. The obligation arising from this paragraph could be extended to pre-school education.\textsuperscript{188}
\end{quote}

Article 14(3) recognizes that knowledge of the official language is a factor of social cohesion and integration.\textsuperscript{189} Overall, the wording is tentative and evidences unease at the prospect of recognizing the right to minority language education. This hesitancy is largely derived from the

\begin{footnotes}
\item[186] See FCNM supra note 71, art. 14, para. 2.
\item[187] See DE VARENNES, supra note 128, at 205.
\item[188] See DE VARENNES, supra note 128.
\item[189] “Paragraph 2 of this article shall be implemented without prejudice to the learning of the official language or the teaching in this language." See FCNM supra note 71, art. 14(3).
\end{footnotes}
need to balance the desire to integrate minority groups into the society of
the state concerned and the need to preserve minority culture and
language.190

Beyond the obligations contained in Recommendation 1201 and the
FCNM, numerous international instruments embody the growing trend in
human rights law to provide, to a varying degree, the right to education in
one's mother tongue. The Convention Against Discrimination in
Education Article 519 states that:

[i]t is essential to recognize the right of members of
national minorities to carry on their own educational
activities, including the maintenance of schools and,
depending on the educational policy of each state, the use
or the teaching of their own language . . .

Furthermore, the Convention on the Rights of the Child Article 29
provides that:

1. State parties agree that the education of the child shall
be directed to . . .

(c) the development of respect for the child's parents, his
or her own cultural identity, language and values, for the
national values of the country in which the child is living,
the country from which he or she may originate, and for
civilizations different from his or her own . . .192

The Council of Europe's European Charter for Regional of
Minority Languages also provides for minority language education in
Article 8.193 Article 8 offers several options for the allocation of education
in the relevant regional or minority language at the pre-school, primary
school, secondary level, technical and vocational education, university and
adult educational level. Section (g) and (h) of this article provide for the
training of teachers in minority languages and for the teaching of minority

190. Notably, the ECHR is silent on this issue.
U.N.T.S. 93.
193. See generally European Charter for Regional of Minority Languages, Council of
history and culture. Provision for minority language instruction is again contained in the EU’s Resolution on the Languages and Cultures of Regional and Ethnic Minorities. This Resolution recommends, in paragraph 5, that:

[Member states . . . carry out educational measures including: arranging for pre-school to university education and continuing education to be officially conducted in the regional and minority languages in the language areas concerned on an equal footing with instruction in the national languages, . . . giving particular attention to the training of teaching staff in the regional or minority languages and making available the educational resources required to accomplish these measures, promoting information and resources on educational opportunities in the regional and minority languages . . . .

Education in one’s mother tongue, particularly during primary schooling, is one of the most effective ways of teaching young children. If a child speaks Hungarian at home and enters a Slovak-only language school upon the age of six, foreign language education could produce negative affects on the child. In areas of Slovakia where ethnic Hungarians comprise the vast numerical majority, a child is continually exposed to the Hungarian language in the home, on the streets, and in local shops. Entering into an educational institution that teaches in the state language may logically produce feelings of anxiety, inferiority, and discomfort. UNESCO studied the impact of foreign language education and concluded that “[t]o expect [a child] to deal with new information or ideas presented to him [sic] in a familiar language is to impose on him a double burden, and he will make slower progress.” This view was reinforced in the South West Africa Case (Second Phase), where Judge Tanaka of the International Court of Justice commented that “if we consider education . . . we cannot deny the value of vernacular as the medium of instruction[.]”

195. Id. para. 5.
197. 284 South West Africa Case, 1966 I.C.J. 6. (July 1966) Several studies have been conducted which support the conclusion that non-mother tongue education correlates with poor educational results, psychological inferiority, and may even provide a basis for ethnic tension. See generally Steven Rosnbaum, Educating Children of Immigrant Workers: Policies in France and the USA, 29 AM. J. COMP. L. 429, 455 (1981); Karl A. Deustach, THE POSTAL
Alternative education should be considered an additional educational opportunity for ethnic Hungarians. As higher education in the Slovak Republic is available almost exclusively in the Slovak language, ethnic Hungarians must develop knowledge of the state language in order to pursue advanced careers. By widening the selection of educational options available for ethnic Hungarians, the alternative education plan could provide benefits to the minority community. The projected benefits of alternative education can only be reaped if the element of choice is extant in the system. Otherwise the alternative education plan, together with positive discrimination in favor of ethnic Slovak teachers and pressure on pupils to incline towards more Slovak options, constitutes a blatant attempt to assimilate children of the ethnic Hungarian community into the Slovak nation.¹⁹⁸

It is a difficult task for the Slovak government to create an educational system that will satisfy the needs of both Hungarians and Slovaks in ethnically commingled areas. While Hungarians must be offered an education in their own language, they should also be given the possibility to learn sufficient Slovak to prepare them for university studies and for coexistence in a multilingual state. Although the importance of learning Slovak should not be underestimated, Hungarian language schools on all levels must be made available to all who wish a unilingual, Hungarian education.¹⁹⁹ The desirable level of Slovak mastery is a question to be answered by each individual (or parent) for his or herself.²⁰⁰ The role of minority language education in Slovakia should not be underestimated. Multilingual abilities must be viewed as an asset in Slovakia. The policy of the Slovak government should be one of generosity towards the Hungarian minority. This is particularly true given Slovakia’s commitments under international law. As language is the primary distinctive feature of ethnic Hungarians, education in the Hungarian language is vital to the preservation of Hungarian cultural identity.

¹⁹⁸ FCNM art. 5(2) states: “Without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation.” See FCNM supra note 71, art. 5(2)

¹⁹⁹ See, e.g., the possibilities for the Swedish minority in Finland to study law or medicine in the Swedish language.

²⁰⁰ See Justification supra note 122. “The state . . . is required to establish the conditions for, and must strive to insure that, every citizen be able to master the language in which he can make himself understood in the entire territory of the state[.]”
3. Territorial Divisions

In July 1996, despite wide criticism and a presidential veto, the Slovak parliament passed a controversial territorial division measure that geographically and administratively reconfigured the country’s political map. The law expands the number of districts from thirty-four to seventy-nine and increases the number of regions from four to eight. In addition, parliament approved a measure that reorganizes state administration at the regional and district level, mandating that a state administrator be appointed in each region. This administrator then appoints an administrator for each district. Each district state administrator can then appoint all of the members of the district state administrative board.²⁰¹

The territory division law stretches the regions of Slovakia from north to south, thus weakening the voting power of the Hungarian minority by splitting Slovakia’s southern region, where most ethnic Hungarians reside, into several new and smaller districts. The territorial division plan leaves an ethnic Hungarian majority in only two of the seventy-nine newly approved districts.²⁰² Successful passage of the territorial arrangement plan resulted in the center of gravity of each of the regions being placed in central Slovakia, longitudinally. Ethnic Hungarians must now travel to distant locations to conduct administrative business. In addition, there is a greater likelihood that ethnic Hungarians will encounter officials who do not speak Hungarian. This is in contrast to the bilingual abilities of most officials in southern Slovakia.

While government officials assert that the reorganization measures are a means of giving more administrative power to local authorities, opposition politicians criticize the plan as reminiscent of communist-style central rule where party members regulate local affairs. Rather than direct election of local officials by the local population, this regime allows regional and district heads to be appointed by the state government. Refuting the government’s claims of local empowerment, Democratic Left Vice-Chairman Peter Weiss remarked that “[d]ecentralization is when the state transfers a part of its powers to elected municipal governments and makes sure those are adequately financed from taxes collected in the region.”²⁰³ Ethnic Hungarians believe that the territorial reorganization is a

²⁰³ Id. Opposition parties speculate that the territorial arrangement may serve to secure a HZDS victory in the upcoming elections in 1998. At the HZDS Congress held in March 1996, Mečiar articulated the benefits of changing the Slovak electoral system from a proportionate system to that of a majority system, thereby creating two leading political rivals in an effort to stabilize the Slovak political scene.
gerrymandering device aiming to create new districts to ensure HZDS and SNS victories in future elections.

This legislative measure may be a response to increasing calls for ethnic Hungarian cultural, educational, and territorial autonomy. Following the first government proposal for altering the territorial arrangement in January 1994, ethnic Hungarians held a controversial meeting in the southern city of Komarno. This meeting resulted in demands for a territorial division plan based on ethnic composition. The Hungarian proposal aimed at decentralizing the state by delegating more power to regional and local authorities in predominantly Hungarian as well as Slovak regions.\(^{204}\) The Slovak government assessed the proposal as a step in the direction of a secession of majority Hungarian territories. Territorial self-rule would grant “autonomy for a region that would very quickly join the Hungarian mother state. The creation of a greater Hungary is the dream of ethnic Hungarian politicians . . . .” asserted Zdenka Anettova of the Slovak cultural organization, Matica Slovenska.\(^{205}\)

Government resistance to full autonomy stems from the fact that in all areas where Hungarians constitute an ethnic majority, ethnic Slovaks are a minority. To hand over all decision making power to local authorities, therefore, is not politically feasible. The current Slovak government is likely to resist requests for any form of autonomy because it would decentralize HZDS’s centralized political control. The prospect of local self-government in southern Slovakia prompted the Slovak government to counter the influence of elected representatives by replacing government officials with SNS party members throughout the region. Such activity has reversed the results of democratic elections.

The Hungarian political parties all, to varying degrees, support greater decision making power for minorities; be it in the shape of decentralization or a form of minority autonomy. Coexistence, which has taken the most radical stand on the issue, supports the creation of self-governing territorial units. MKDH strives to ensure “autonomy in the minority culture and education.”\(^{206}\) In 1994, however, MKDH rejected the concept of territorial autonomy in favor of cultural autonomy. Mr. Gyula Bardos, a MKDH parliament member stated:

\[\text{In the current confrontational atmosphere, many political representatives see autonomy as something evil, negative,}\]


\(^{206}\) Information provided by MKDH.
or even dangerous, jeopardizing the territorial integrity of the Slovak Republic . . . Some people claim that autonomy, or self-administration, is a tool to join the territory of southern Slovakia to Hungary. This is a lie. We are not questioning the borders, we do not want to join anyone. We only want decisions about us not to be made without us. In theory, according to the Constitution, we have the right to participate when matters concerning national minorities and ethnic groups are being decided. But in practice, there are no laws and regulations that would guarantee us effective participation in the decision making and control process.207

The Hungarian Civic Party has taken a far less radical stance on the issue of autonomy than the other parties. The Hungarian Civic Party recommends decentralization efforts and plebiscites to decide the names of towns, a very contentious issue that is discussed in greater detail below. Ethnic Hungarian parties, by promoting this issue, have become suspect even in the eyes of the more moderate political parties and are therefore finding it difficult to have any kind of cooperation with the other parties on a national level.208 The cause of the Hungarian minority, ironically, has been harmed by the more radical positions held by members of the Hungarian coalition. The most commonly suggested form of self-government is the simple decentralization of power in Slovakia, both in Slovak and Hungarian regions. Functional self-government in matters of culture and education is another suggested form of autonomy. Functional self-government would allow Hungarian schools to be operated by Hungarian boards, while Slovak schools would stay under Slovak control.

Ratification of the SHBT re-agitated the debate on self-government for ethnic Hungarians. The SHBT contained a binding provision regarding local or autonomous authorities. SHBT 15(4)(b) states: "[The State Parties] shall apply . . . as legal obligations . . . Recommendation of the Parliamentary Assembly of the Council of Europe No. 1201 (1993), respecting individual human and civil rights, including the rights of persons belonging to national minorities." Recommendation 1201 Article 11 stipulates that:

[I]n the regions where they are in a majority, the persons belonging to a national minority shall have the right to


have at their disposal appropriate local or autonomous authorities or to have a special status, matching the specific historical and territorial situation and in accordance with the domestic legislation of the state.

The treaty was passed by the Slovak parliament only because the ratified version included a restricting clause limiting the effect of Recommendation 1201 Article 11. The restricting clause stated that:

[t]he Government of the Slovak Republic emphasizes that it has never accepted and has not enshrined in the treaty any formulation that would be based on the recognition of the principle of collective rights for the minorities and that would admit the creation of autonomous structures on ethnic principle. It insists that it has agreed to mention the Recommendation of the Parliamentary Assembly of the Council of Europe No. 1201 (1993) exclusively with the inclusion of the restricting clause: 'respecting individual human and civil rights, including the rights of persons belonging to national minorities.'

Memorandum and addendum issued unilaterally by a government pertaining to the interpretation of a bilateral treaty does not have any effect under international law. Nevertheless, the interpretation clause has a significant effect on political culture in Slovakia. The pronouncement serves to reinforce the absolute opposition of the government to any accommodation for the self-governance of the Hungarian minority.

Recommendation 1201 Article 11 was the subject of study in March 1996 by the Venice Commission, a group of experts appointed by the Council of Europe. The Commission concluded that Article 11 should be interpreted very cautiously and that the right of national minorities to local or autonomous authorities "is possible only in the presence of a binding instrument of international law." Article 11 does not support a collective right to local self-government, but rather asserts the right of individual members of a national minority group to exercise the rights provided in association with others. Article 11 neither defines the three


means of autonomy enumerated, "local or autonomous authorities or to have a special status," nor proscribes a model for fulfilling obligations created therein. Although Recommendation 1201 may not entitle the Hungarian minority to autonomous authorities, the direction of the Recommendation is clear. Recommendation 1201 seeks to encourage state parties to allocate sufficient power to local authorities in regions heavily populated by members of national minority groups. This allocation would result in the interests of national minorities being reflected in government. By implementing legislation that takes elective control of local representatives out of the hands of the local population, the Slovak government has acted in violation of the spirit of Recommendation 1201.

While the right to local autonomy is not settled under international law, the right to effective participation in a civil society is widely accepted. Ethnic Hungarian calls for autonomy have been in response to the perceived deterioration of minority voting power and representation in government. This situation could be remedied through other means, such as by passage of a law that truly decentralizes state administration. The FCNM, while not providing a legal right to local autonomy, does guarantee the right to effective participation of members of national minority groups in public affairs. FCNM Article 15 states: "The Parties shall create the conditions necessary for the effective participation of persons belonging to national minorities in cultural, social and economic life and in public affairs, in particular those affecting them." Although no reference is made to local authorities, the territorial arrangement now in effect in the Slovak Republic denies ethnic Hungarians of this right. FCNM Article 16 also concerns the minority participation in government. This article states that, "The parties shall refrain from measures which alter the proportions of the populations in areas inhabited by persons belonging to national minorities and are aimed at restricting the rights and freedoms flowing from the principles enshrined in the present framework convention." The Explanatory Report accompanying the FCNM lists as examples of such measures not just "expropriations, evictions, and expulsions," but also "redrawing administrative borders with a view to restricting the enjoyment of such rights and freedoms." Redrawing the regions and districts of Slovakia has infringed on the right to effective participation in public affairs. The effectiveness of Hungarian participation in public affairs is diminished if administrative contacts are conducted in a

211. See FCNM supra note 71, art. 15.
212. Id.
213. Id. art. 16.
language other than one's mother tongue and far from their homes. None of the measures recommended to state parties by the FCNM Explanatory Report to enhance minority participation have been taken in Slovakia.215

The principle of effective participation of members of national minority groups is further referenced in IPNM Article 21. This article provides that: "in accordance with the policies of the states concerned, states will respect the right of persons belonging to national minorities to effective participation in public affairs, in particular in decisions affecting the areas where they live or in the matters affecting them." The effectiveness of Hungarian participation at all levels of government is diminished by the territorial division law's prohibition against the election of regional state administrators, local district administrators, and the district state administration board members. By forcing members of the Hungarian minority to travel farther distances to reach the administrative center of their respective regions, Hungarian's interests are less likely to be represented or acknowledged because of the increased distance from predominantly Hungarian territories. These results are in contrast to Recommendation 1201, the FCNMs provisions, and the IPNM.

The role of local and regional authorities is particularly important in a state emerging as a democracy after decades of centralized, communist rule. The principles encompassed in the European Charter of Self-Government, while not binding on the Slovak Republic, should be instructive.216 This Charter outlines a framework to be followed in establishing forms of local self-government. The preamble stresses that:

[I]ocal authorities are one of the main foundations of any democratic regime; [c]onsidering that the right of citizens to participate in the conduct of public affairs is one of the democratic principles that are shared by all member states

215. Parties could promote . . . inter alia the following measures:
-consultation with these persons, by means of appropriate procedures and, in particular, through their representative institutions, when Parties are contemplating legislation or administrative measures likely to effect them directly;
-involving these persons in the preparation, implementation and assessment of national and regional development plans and programmes likely to effect them directly;
-undertaking studies, in conjunction with these persons, to assess the possible impact on them of projected development activities;
-effective participation of persons belonging to national minorities in the decision making processes and elected bodies both at national and local levels;
- decentralised or local forms of government.
See Klebes, supra note 1, at 101.

of the Council of Europe; [c]onvinced that it is at the local level that this right can be most directly exercised; [c]onvinced that the existence of local authorities with real responsibilities can provide an administration which is both effective and close to the citizen; [a]ware that the safeguarding and reinforcement of local self-government in the different European countries is an important contribution to the construction of a Europe based on the principles of democracy and decentralization of power; [a]sserting that this entails the existence of local authorities endowed with democratically constituted decision making bodies and possessing a wide degree of autonomy with regard to their responsibilities, the ways and means by which those responsibilities are exercised and the resources required for their fulfillment . . . .

Article 3(1) defines the concept of local self-government as follows: "Local self-government denotes the right and the ability of local authorities, within the limits of the law, to regulate and manage a substantial share of public affairs under their own responsibility and in the interests of the local population." The options outlined in the Charter are particularly appropriate for the states of Central and Eastern Europe. Implementing measures aimed at increasing local democracy, by redistributing the historic powers held by the central government to regional or local authorities, would enhance the right of minorities to participate in local government. Slovak sovereignty would continue to be respected under this scheme. This Charter provides a framework within which states can arrange local authorities to maximize the participation of members of national minority groups while preserving the young state's territorial integrity. Enhancing the role of local authorities in the southern territory of Slovakia would grant ethnic Hungarians a greater ability to express and promote their group identity.

The Council of Europe's Congress of Local and Regional Authorities of Europe (CLRAE) adopted Resolution 250 (1993): "on the adoption of local and regional self-government in Central and Eastern European countries." In order to facilitate the development of local and regional democratic institutions, CLRAE made several recommendations.

217. Id., preamble.
218. Id. art. 3(1).
219. Id. art. 5.
220. COUNCIL OF EUROPE'S CONGRESS OF LOCAL AND REGIONAL AUTHORITIES OF EUROPE RES. 250 (1993)[hereinafter CLRAE].
Some of the actions CLRAE encouraged include: 1) respecting the autonomy of local and regional authorities, 2) supporting cooperation among local and regional authorities, 3) promoting the election of regional authorities, and 4) financing these institutions at such a level as to facilitate their effectiveness. The Slovak government has not implemented any of these suggestions. In fact, measures directly contrary to these suggestions are currently operating to resist decentralization.

The EU's Resolution on the Languages and Cultures of Regional and Ethnic Minorities recommends that:

\[\text{[m]ember states ... carry out administrative and legal measures including: providing a direct legal basis for the use of regional and minority languages, in the first instance in the local authorities of areas where a minority group does exist, ... requiring decentralized central government services also to use national, regional, and minority languages in areas concerned ...}\]

The Council of Europe's Recommendation 1134 also includes the right of national minorities to "participate fully in decision making about matters which affect the preservation and development of their identity and in the implementation of those decisions ... ." Furthermore, the Report of Experts on National Minorities by the OSCE states in paragraph II that: "[The participating states] reconfirm that persons belonging to national minorities have the right freely to express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all aspects, free of any attempts at assimilation against their will." The Experts noted, inter alia, the positive results obtained through the use of 1) local and autonomous administration including territorial autonomy, 2) decentralization, and 3) advisory and decision making bodies in which minorities are represented.

The impact of the territorial division legislation has yet to be assessed, but because the territorial delineation makes Hungarians the minority in the overwhelming majority of districts, negative consequences are soon to become apparent. The territorial division plan clearly
diminishes the presence of Hungarian voters in all districts, but in addition, the plan also reduces the strength of the minority's ability to request changes in other administrative services, such as the provision of bilingual information. Wherever a minority constitutes a substantial percentage of the population, its members shall have the right to use their own language, dictates the FCNM. This condition is no longer fulfilled in a single district due to the geographic manipulation of local districts under the territorial division legislation. Thus, the question must be asked whether the Slovak government is deliberately attempting to circumvent its obligations under the FCNM.

Some form of local self-government in southern Slovakia would serve to ease ethnic tensions and perhaps restore a degree of faith in the Slovak government to ethnic Hungarians. By refusing to consider this alternative, the government has further agitated the minority population with its hard-line resistance. Genuine democracy is premised upon the participation of all individuals in the decision-making processes of society. Minorities exercise their basic rights at the local level, therefore, the importance of adequate representation of national minorities cannot be dismissed by the government. Articulation of the special concerns of the ethnic Hungarian population, therefore, is vital to maintaining a democratic state that respects all members of its society.

4. The Law on Names

According to Slovak grammar, female surnames add the suffix “-ová” in the nominative case. Hungarian grammar does not contain a similar directive, therefore, any measure that imposes the “-ova” ending is a highly sensitive issue among Hungarian women. Such a mandate is viewed as a means of Slovakizing Hungarian names. On July 7, 1993, a Law on Names and Surnames was passed by the Slovak Parliament. Adding the “-ova” ending to one's last name was made compulsory for Slovak citizens under the 1993 law, regardless of ethnicity. In addition, the law prohibited the registration with authorities of non-ethnic Slovak Christian names. Traditional Slovak names such as the first name “Jan” could be registered as an official birth name, but the Hungarian counterpart, “Janos,” could not. This version of the law was in force until 1994, when the interim Moravcik government, under pressure from the Council of Europe, drafted changes in the law making the female gender suffix optional and including a provision accepting Hungarian Christian

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225. For example, Mr. Kovacs versus Mrs. Kovacsova.
names. The proposal was voted and approved by Parliament on May 27, 1994.\(^{226}\) This law remains in force in the Slovak Republic.\(^{227}\)

Protection of ethnic names is pronounced in Recommendation 1201 Article 7(2), which articulates that: "[e]very person belonging to a national minority shall have the right to use his/her surname and first name in his/her mother tongue and to official recognition of his/her surname and first names." The provisions contained in Recommendation 1201 are directly binding on the Slovak government as they are incorporated into the SHBT. As a result, the use of ethnic first and last names must be ensured and protected by the Slovak government. In addition, state obligations under the FCNM are clear with regard to the recognition of ethnic names and surnames. FCNM Article 11(1) states that "[t]he Parties undertake to recognize that every person belonging to a national minority has the right to use his or her surname (patronym) and first names in the minority language and the right to official recognition of them, according to modalities provided for in their legal system." The right to use traditional first names from the minorities' cultural sphere is likewise ensured by this article. The IPNM also confirms official recognition of ethnic names. Article 11 asserts that: "[a]ny person belonging to a national minority shall have the right to use his/her surname and first names in his/her language and the right to official acceptance and registration of such surname and names." Furthermore, the EU's Resolution on the Languages and Cultures of Regional and Ethnic Minorities recommends that member states "officially recognize surnames . . . expressed in a regional or minority language."\(^{228}\)

The CCPR contains, in Article 17, protection against arbitrary or unlawful interference in one's private life. The United Nations Human Rights Committee has held that this article protects the right to choose one's own name.\(^{229}\) The Committee supported its conclusion by analyzing the importance of one's name to the preservation of his or her identity. In line with this ruling, ethnic Hungarian traditional names should be respected and allowed.

\(^{226}\) On the occasion of the vote, the representatives of HZDS and SNS left the assembly hall in protest.

\(^{227}\) The Language Law also contains a provision concerning the use of Slovak names. Section 3(6) states that "[e]very citizen of the Slovak Republic has a right to alter, free of charge, his first name and his family name into a Slovak orthographic form." Language Law of Slovak Republic § 3(6). (The reverse administrative procedure is not free of charge).

\(^{228}\) See supra note 221.

The provisions protecting the right to use traditional names are not written in discretionary language; they do not contain restricting clauses. Thus, under international human rights law, gender suffixes cannot be imposed on citizens of a state. Linguistic minorities cannot be forced to obey grammatical rules of the majority language. Respect for Hungarian Christian names is not dependent on the state's resources, but rather on the state's willingness to recognize the cultural diversity within its society. The Hungarian language largely uses the same characters as the Slovak alphabet and minor adjustments can easily be made to accommodate for any differences. This accommodation involves little or no expense to the government, but would be a symbolic gesture of deference to the minority. The state has an unequivocal obligation under international law to provide legislation (or administrative procedures) to grant the usage and state recognition of minority language first names and surnames, including the optionality of gender suffixes.

5. Bilingual Road Signs

Cities, towns and villages throughout southern Slovakia have different names in Hungarian than in Slovak as a remnant of when Hungary controlled the region. According to ethnic Hungarians inhabiting this territory, location names should be posted in both the Slovak and Hungarian languages. Currently, bilingual language road signs are posted across southern Slovakia.

With the birth of the Slovak Republic in January 1993, measures were taken to eliminate Hungarian or bilingual road signs. The Ministry of Transportation issued a decree entitled, "Elimination of the Deficiencies in the Vertical Road Signs," under which all bilingual road signs in Slovakia were to be replaced by Slovak language postings by July 31, 1993. Protests ensued in the form of memoranda, demonstrations, and obstruction of traffic in Hungarian-dominated villages. The Ministry claimed that the decree promoted the normal supervision of road signs and was in full accordance with Council of Europe recommendations. The measure was also allegedly intended to ensure the standardization of road signs throughout Slovakia to comply with EU standards.

In 1993, the Council of Europe recommended that a law be adopted to guarantee the posting of bilingual road signs. On January 28, 1994, a law concerning bilingual road signs in communities with large percentages of minorities was defeated in Parliament by just three votes. The law was redrafted to include a provision that communities with over twenty percent of the population belonging to a minority should post

230. The motive was also forwarded that the Hungarian language road signs constituted a hazardous distraction.
bilingual signs. A law on bilingual road signs drafted by the interim Prime Minister Moravcik was eventually passed by the Slovak Parliament. This law is referenced in the Language Law's Article 3(3)(d):

\[\text{[i]n the state language \ldots official names of municipalities and their districts, denomination of the streets and other public places, other geographical names, as well as the data in the layout of the state map works, including the land-registry maps, are conducted; denomination of municipalities in other languages are regulated by a separate law \ldots.}\]

By this language, the existing law on the use of bilingual road signs and place names should not be overruled by the Language Law's provisions.

Recommendation 1201, as included in the SHBT, contains a provision on this issue. Article 7(4) asserts that "[i]n the regions in which substantial numbers of a national minority are settled, the persons belonging to that minority shall have the right to display in their language local names, signs, inscriptions and other similar information visible to the public." This articulation of when and under what circumstances Hungarian traditional names and signs can be displayed must be adhered to in light of the binding nature of this document upon the Slovak government. Members of the Hungarian minority are heavily concentrated along the southern border of the state. Therefore, the substantial numbers requirement is clearly met throughout this region.

The right of linguistic minorities to bilingual road signs is also enshrined in the FCNM Article 11(3). This article asserts:

\[\text{[i]n areas traditionally inhabited by substantial numbers of persons belonging to a national minority, the Parties shall endeavor, in the framework of their legal system, including, where appropriate, agreements with other States, and taking into account their specific conditions, to display traditional local names, street names and other topographical indications intended for the public also in the minority language when there is a sufficient demand for such indications.}\]

The substantial numbers mentioned in this article are not specified. However, in certain areas of Slovakia where the Hungarian population surpasses twenty to eighty percent, the condition is clearly fulfilled.

232. Id. art. 3(3)d.
233. See generally FCNM supra note 71, art. 11(3).
Sufficient demand is another unclear provision. Surveys indicate that this condition is fulfilled. In one survey, ninety-six percent of ethnic Hungarians stated that they wanted bilingual road signs.\textsuperscript{234}

In addition to the SHBT's Recommendation 1201 and the FCNM, the IPNM recognizes the right of members of national minority groups to the posting of bilingual local names. Article 14 provides that: "[i]n conformity with their national legislation states may allow, where necessary through bilateral agreements with other interested states, the displaying of bilingual . . . local names . . . in areas where the number of persons belonging to a national minority reaches . . . a significant level." Again, the significant level of persons belonging to a national minority requirement is clearly met in the southern region of Slovakia. The posting of bilingual signs is mandated by the bilateral friendship treaty ratified by Slovakia and Hungary.

The EU's Resolution on the Languages and Cultures of Regional and Ethnic Minorities recommends that member states "officially recognize[s] . . . place names expressed in a regional or minority language."\textsuperscript{235} Furthermore, in paragraph 9, the Resolution provides for the "use of regional languages for road and other public signs in street names."\textsuperscript{236} As Slovakia is seeking entry into the EU, adherence to these principles is necessary to being granted member status. It is, therefore, recommended that Slovakia continue to abide by the Resolution's recommendations.

The issue of road signs is thus one of the few contentious issues where the situation of the Hungarian minority has been settled in accordance with international agreements, albeit through the arduous negotiations of a previous government. In light of the binding nature of Recommendation 1201, and its express provision relating to this issue, the Slovak government should continue to respect the posting of bilingual public signs. In addition, such action is supported by the FCNM, the IPNM, and the EU's Recommendation on the Languages and Cultures of Regional and Ethnic Minorities.

6. Mass Media

Perhaps the most alarming aspect of Slovak public life is continuing government control of the mass media. Since the 1994 parliamentary elections, the Slovak government has urged all media outlets to report in an objective and neutral manner, namely, to limit government

\textsuperscript{234} See Peter Huncik et al., Counterproof 106 (1994).
\textsuperscript{235} See supra note 220
\textsuperscript{236} Id. para. 9.
criticism. Two media oversight organizations, which many journalists charge monitor and suppress anti-government media, have been established: the Mass-Media Council and the Slovak Information Agency. This policy has resulted in an antagonistic relationship between the government and the press.

Prime Minister Meciar has utilized the courts to stifle expression and has replaced the heads of the state television, radio, and news agency with his own political allies. In November of 1996, a Slovak court ordered the leading Slovak opposition newspaper Sme, to apologize to and pay cabinet ministers approximately $242,000 for publishing an article criticizing the eighteen cabinet members. The Slovak government has been diligent in replacing individuals within media organizations who are not explicitly friendly to HZDS with its own sympathizers. For example, the appointed director of the Slovak Television (STV), the state-operated television network, immediately canceled three popular programs with political satires. He stated that television "cannot continue to be used to offend the nation . . . [or] national institutions." Slovak Radio and TASR (a news agency) have been subjected to the same kind of censorship.

A graphic example of political interference with the development of a free and independent press occurred in November 1996. Ms. Tatiana Repkova was removed as editor-in-chief and publisher of Narodna Obroda, an independent daily newspaper. Her termination occurred after the newspaper published a Russian report stating that Prime Minister Meciar was ill with a brain tumor. Narodna Obroda's owner, the VSZ steel mill, meddled with the newspaper's editorial content and published an apology to the Prime Minister without Ms. Repkova's knowledge or consent. VSZ's directors and major shareholders of VSZ have close ties to the Prime Minister, and the Slovak Minister for Transportation is one of VSZ's owners. When Ms. Repkova sought assurance for VSZ that there would be no further interference with the newspaper, she was dismissed as editor and publisher. She was not given any reason for her termination.

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239. Id.


Ms. Repkova's replacement was recently employed by the pro-government regional daily, Luc.242

Slovakia's long-awaited media bill passed through the government's legislative council in March 1996. If passed by Parliament in its current form, the media bill would severely limit press freedom and cause great financial hardship on the independent press. Monetary penalties for violation of the law's provisions would be a maximum of one million Slovak Crowns (approximately $33,220).243 The bill also requires journalists to reveal their sources, a practice that is contrary to western norms. In addition, the bill prohibits the publication of material that "in a hidden or open way offends Slovak statehood, state symbols, [or] . . . nationality."244

The Slovak government has utilized a variety of means to maintain substantial control over the media. Television, for example, has remained largely within government control.245 STV has been criticized for canceling several popular political satire programs and for serving as a government mouthpiece.

Radio licenses and newspapers are slowly passing into the hands of government supporters. While privatization efforts continue, the government has been criticized for favoring government sympathizers in its privatization scheme.246 For example, the Board of Radio and Television Broadcasting recently granted Radio Koliba a broadcast license. The co-owner, Mr. Fedor Flasik, is reputed as having close ties with HZDS and was one of the main organizers of the 1994 HZDS election campaign.247 More recently, this agency was granted a television license to replace the frequencies freed by STV's second channel.248

The operation of Radio Free Europe was also threatened by the Slovak government. On January 10, 1996, Slovakia's Board for Radio and TV Broadcasting Chairman announced that Radio Free Europe would lose


243. Id.


245. There is a private cable channel, VTV. Four out of the five owners of this channel are loyal to the HZDS. Markisa is another private channel.


its license, if it did not improve its news reporting within thirty days. The openly admitted reason for threatening to cancel Radio Free Europe's license is because the station is not perceived as reporting favorably to the government. Director-General Dusan Kleiman of the SLOVAKIA Press Agency alleged:

[t]he news reporting presented by this radio station is unbalanced and non-objective. It is almost entirely dominated by critical and negative material. This way of informing the public diverges from the nature of a mass media institution, which Radio Free Europe makes itself out to be, as it is obviously performing the propaganda purposes of certain political circles not leaning favorably towards the current government and Slovakia.249

Journalists have also reported that they are being followed by the secret police.250 Other journalists have been prosecuted for their reports251 or have lost their positions shortly after expressing independent views.252

In February 1995, Prime Minister Meciar announced that there were too many newspapers in Slovakia, and that their number should be diminished by a tax increase.253 The ensuing proposal would have increased taxes for newspapers with foreign ownership. This provision would have produced dire effects on opposition newspapers, which are commonly owned by foreign agents. In response to this proposal, two-thirds of Slovak daily newspapers254 simultaneously published a blank front page bearing the title, Anxiety.255 Perhaps as a result of this protest, the measure failed to be approved by the Slovak Parliament.


253. In spite of the alleged shortage of funds for media matters and the stated superfluity of newspapers, the government has provided funding for an entirely new daily, the Nova Zmena Mladych. This newspaper received somewhere between fifteen and fifty million Slovak Crowns from the government. The newspaper's Editor-in-Chief was a former editor of Zmena, a weekly widely criticized for anti-Semitic articles, and as his deputy was a former spokeswoman of the SNS. The paper quickly established itself as staunchly nationalist, "anti-European" and faithful to the government. This newspaper has since gone out of print. See generally THE PRAGUE POST, Jan. 12, 1996.

254. See generally DEUTSCHE PRESSE-AGENTUR, Mar. 6, 1995.

255. See NEWSWEEK, July 17, 1995.
As of May 1995, Slovenska Republika, a daily newspaper partly owned by HZDS and highly loyal to the same receives funds designated for the minority press to publish supplements directed at minorities in minority languages. This supplement often does not represent the interests of the minority population. The allocation of public funds to a reputed nationalist newspaper for coverage of issues affecting national minorities is surprising, as it is unlikely that minority members read this paper. The government ministries frequently support the Slovenska Republika by regularly publishing advertisements in the daily.

Slovaks and ethnic Hungarians alike believe Slovak government policies in this field are inappropriate. After only three months in office, Prime Minister Meciar's government received a petition signed by over 100,000 Slovaks, which accused the government of violating freedom of speech. In a recent survey, 51.4% of the respondents expressed distrust for Slovak Television. The question as to whether the government should control the activities of mass media was answered in the negative by 71.4% of the respondents.

The mass media issue is of concern to the Hungarian minority in two ways: generally, a free press serves democracy and civil rights of Hungarians and Slovaks alike; and specifically, the entities taking over the media are manifestly nationalist and anti-Hungarian. Actions directed against free mass media are making it increasingly difficult for Hungarian spokespersons to express their views officially and to receive fair coverage. Anti-Hungarian declarations receive full coverage and serve to aggravate the ethnic relations. For example, on the eve of the December parliamentary session that could have ratified the SHBT, STV repeatedly broadcasted a documentary, titled Bloody Christmas, on Hungary's occupation of southern Slovakia during World War II, cutting several times to an interview with Mr. Miklos Duray, Chairman of the Coexistence party. MKDH Chairman Bela Bugar noted:

\[\text{[t]he coalition government has successfully created an anti-Hungarian atmosphere among the people of Northern Slovakia who don't have any contact with members of the Hungarian minority . . . In Liptovský Mikulas [a northern}\]

257. See DEUTSCHE PRESSE-AGENTUR Mar. 9, 1995.
259. Id.
260. There are, of course, Hungarian language or bilingual newspapers. Out of 871 Journals, dailies, weeklies and monthlies, 25 belong to this category. See Adresar Periodik a Vidavatel'ov Slovenskej Republiky 1995, Novinarski Studijny Ustav, Bratislava 1995.
Slovak town], it was clear that sixty-five of the seventy people in attendance at my speech left the room with the feeling that "My God. So that is what the Hungarians want. Now we don't have to be afraid of the Hungarians anymore." [Slovak citizens living in Northern Slovakia] don't know us. They are manipulated by Slovak television and radio. It is through radio and television that northern Slovak citizens hear about ethnic Hungarian. All they receive is a biased image of us.241

The confusion among the Slovak citizenry reflected in Mr. Bugar's statement derives largely from the fact that disputes involving the Hungarian minority are routinely featured in Slovak newspapers and on television and radio. For example, when the Hungarian minority living in Velky Kapusany wanted to build a memorial to commemorate the arrival of Hungarians in the Carpathian Basin 1,100 years ago, the event was characterized as an act of separatism and turned into a media spectacle. This issue was also debated in a session of Parliament.252 In response to the erection of a Hungarian monument on Slovak soil, the Slovak Parliament approved a bill in July 1996 regulating state symbols. The measure prohibits the public display of the Hungarian flag in Southern Slovakia except during official visits by Hungarian officials.263 Turning relatively benign events into national political issues only serves to perpetuate fears and stereotypes of the Hungarian minority. "Every week there is a different issue: towns erecting Hungarian monuments, President Kovac visiting Hungary, and the document from the conference in Budapest in July of 1996. This strategy is employed to get the Slovak public to regard us as troublemakers, an internal enemy," concluded Mr. Gyozo Bauer of CSEMADOK.264

The Language Law also regulates members of the Hungarian minority's ability to broadcast Hungarian language programming. Section 5 of the Language Law seemingly precludes all broadcasting of programs in languages other than Slovak. Section 5(1) states that "[r]adio and television broadcasting is, on the whole territory of the Slovak Republic, conducted in the State language." This general preclusion exempts

261. Interview with Mr. Bela Bugar, MKDH Chairman, in Bratislava, Slovakia (Aug. 1, 1996).
262. See generally No Agreement in Kapusany, PRAVDA, June 18, 1996, at 2.
264. Interview with Mr. Gyozo Bauer, President of CSEMADOK, in Samorin, Slovakia (July 16, 1996)
broadcasting in the languages of national minorities by specific legislation. The ambiguity of the Language Law, however, may provide a pretext for interpretations detrimental to minority rights, as the current leadership of STV is manifestly nationalist and anti-Hungarian. By specific legislation, the broadcasting of minority language programs is permissible. The Slovak Television Act of 1993 asserts that "Slovak Television provides also for implementation of the interests of nationalities and ethnic minorities living in the Slovak Republic through [sic] the television broadcasting in their mother tongues." The Radio and Television Broadcasting Operation Act of 1993 commits the operators of media outlets to "produce or let produce a significant part of the programs broadcast so that the cultural identity of the nation, nationalities and ethnic groups of the Slovak Republic could be preserved and developed . . . ." The content, perspective, and quality of minority language programs are not ensured by this legislation.

The Language Law regulates media aimed at young audiences in Section 5(2). This section outlaws the production and broadcasting of children's television programs in any language other than Slovak. Language Law Section 5(2) reads: “[a]udio-visual works of art intended for children up to twelve years of age must be dubbed into the state language.” This provision, although primarily aimed at Czech television programs, negatively affects Hungarian children as television is an important means of instruction in the pre-school years and thereafter. Currently, there are no Hungarian language children's programs besides those accessed via Hungarian national television channels.

The Convention on the Rights of the Child Article 17 states that “[s]tate Parties shall . . . encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group. . . .” This encouragement is clearly not present in Slovakia. In fact, such activity is precluded by Language Law Section 5(2). Children of Hungarian nationality are forced to learn Slovak in order to understand television programs. While this is a legitimate governmental objective, the Slovak government should provide options for Hungarian children and their parents. Under the Language Law, not even a local channel would be able to broadcast children's programs in the Hungarian language. The Language Law provision precludes Hungarian children from hearing their language spoken on Slovak television. The Slovak Republic cannot, given the Language Law, fulfill its obligation of encouraging the mass media to


provide for the needs of ethnic Hungarian children as mandated in the Convention on the Rights of the Child.

Television is an important means for the development of children's culture and cultural education. FCNM Article 5(1) states that the "Parties undertake to promote the conditions necessary for persons belonging to national minorities to maintain and develop their culture . . . ." This provision includes consideration for minority children. The prevailing policy in Slovakia is an effective means of assimilation of Hungarian minority children into the Slovak nation. Article 5(2) provides that: "without prejudice to measures taken in pursuance of their general integration policy, the Parties shall refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation." Furthermore, FCNM Article 9 ensures that national minorities not be discriminated against in their access to the media. This article prohibits governmental hindrance of the creation or use of the printed media, radio or television by persons belonging to national minorities. Due to the restrictiveness of the Language Law, all of these referenced obligations are in question.

A free media in a democratic society operates independent of government directives and pressures. It serves to objectively inform the public of current events and proposed government policies. These objectives are severely hampered by a government that strictly scrutinizes and punishes media outlets that are deemed unfriendly. Through use of the courts, questionable privatization methods, and political appointments to important media positions, the Slovak government has effectively stifled the media's ability to objectively educate the Slovak public about domestic events. This control negatively affects the Hungarian minority. Government interests reflected in the media often contain anti-Hungarian biases. As a result, Hungarians are perceived as dangerous by Slovak citizens. The restrictiveness of the Language Law also operates to preclude the broadcasting of minority language programs, a service that is vital to the preservation of Hungarian culture in Slovakia. The Slovak government must respect the operation of a free press within its state, even if the media reports are unfavorable to government policy. In addition, minority language programs and media services should be honored as a means to respect the cultural diversity present within Slovakia.

267. See FCNM supra note 71, art. 5(2).
7. Minority Culture

A striking aspect of Slovak government policy toward the state’s national minorities is its failure to support minority culture, particularly Hungarian. This area is one of the most crucial to the survival of Hungarian cultural identity within Slovak borders. Over the past three years, funding for Hungarian culture has plummeted from 140.5 million Slovak crowns to zero. This situation resulted from changes in the state funding mechanism for cultural activities. In 1995, the Slovak government decided to grant decision making power over minority culture to the Pro Slovakia fund. Pro Slovakia, on a case-by-case basis, reviews applications for funding from the various cultural organizations in Slovakia and determines funding allotments based on specific proposals. As a result, the budget for Hungarian cultural organizations has been drastically reduced and the vast majority of proposals have been denied by Pro Slovakia.

The board of trustees of Pro Slovakia is appointed by the Ministry of Culture and the identities of the trustees are kept secret. The government justifies the members secrecy by asserting that this set-up prevents undue pressure from being exerted upon trustees. Pro Slovakia has been criticized for favoring cultural organizations that promote the Slovak culture at the expense of national minority culture. Pro Slovakia granted 20.7 million Slovak crowns to the dailies Slovenska Republika and Hlas ludu, a regional newspaper, for supplements aimed at ethnic minorities. Members of minorities are less likely to be interested in these newspapers, which have reputations for being staunchly Slovak nationalist and government-faithful newspapers. A further 6.8 million Slovak crowns were allocated to a project intended to make Slovak culture popular among minorities. Funds to minority culture, therefore, are being used to a great extent to promote Slovak culture among minorities.

The centralized Hungarian cultural organization is CSEMADOK. This organization has traditionally distributed its lump sum budget from the government to finance smaller Hungarian cultural societies throughout Slovakia. Last year, the Ministry of Culture refused to allocate any money for CSEMADOK, accusing the organization of failing to report

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268. A measure labeled unlawful by the Hungarian Coalition Parties, according to Slovak laws on the distribution of powers.
269. Interview with Mr. Gyozo Bauer, President of CSEMADOK, in Samorin, Slovakia (July 16, 1996).
271. Interview with Mr. Gyozo Bauer, President of CSEMADOK, Bratislava, Slovakia (July 16, 1996).
how its finances were spent during the past budgetary year. Mr. Gyozo Bauer, the President of CSEMADOK, explained:

[t]his accusation is only a front for the government’s refusal to support our organization. We submitted all of our reports to the Ministry of Culture and to the OSCE High Commissioner for National Minorities to prove the government’s accusation is false. If it was true, why haven’t I been arrested and tried in a court of law for theft? No government official has asked us for any paperwork or money. They only bring up this issue when asked why they do not fund Hungarian culture. The government is extremely afraid of CSEMADOK. We have a fifty year history here. We survived the time when it was illegal to even speak Hungarian . . . . It is the government’s policy to first destroy the centralized organization because then there would be no one to support the 500 community projects in the villages.

The lack of government support for Hungarian culture has forced organizations like CSEMADOK to rely on private support. Some finances are obtained from Hungarian non-governmental organizations in Hungary and other states. This support has prompted the Slovak government to accuse Hungary of interfering with Slovakia’s internal affairs. This situation places ethnic Hungarian cultural societies in a precarious position. The minority cannot rely on Slovak financial support for their cultural activities, nor can they solicit funds from abroad without accusations of threatening Slovak sovereignty. Mr. Arpad Ollos, former mayor of Dunajska Streda, stated:

[w]hen Hungarians from Slovakia make contacts with individuals or groups in Hungary, it is not a fight against the Slovak state . . . Each time we make contact [with Hungary], we are accused of nationalism. We are not part of Hungary. The border will stay the same. These facts are not questioned. We only want to be able to make and maintain contacts with Hungary and not be accused of being traitors.

272. Id.
273. Id.
274. Interview with Mr. Arpad Ollos, former mayor of Dunajska Streda, in Dunajska Streda, Slovakia (July 11, 1996).
The Slovak government's failure to support Hungarian culture in Slovakia is contrary to guarantees contained in the Slovak Constitution, as well as provisions enumerated in numerous international standards. Slovak Constitution Article 34(1) asserts that "citizens of national minorities or ethnic groups in the Slovak Republic shall be guaranteed their full development, particularly the rights to promote their cultural heritage, . . . and create and maintain . . . cultural institutions." If the Slovak government supports cultural programs that promote Slovak cultural identity, it has an obligation to also promote the cultural heritages of the various minority groups within Slovak borders. To act otherwise would be counter to the letter and spirit of the Slovak Constitution.

The FCNM's preamble states that a component of a truly democratic society is respect for the cultural identity of each citizen. State parties should "create appropriate conditions enabling individuals belonging to a national minority to express, preserve, and develop this identity[.]" FCNM Section II, Article 4(2) articulates the duty of a state party to promote "full and effective equality" in cultural life between ethnic minorities and the ethnic majority. Article 5(1) further obliges the state party to "promote conditions necessary for persons belonging to national minorities to maintain and develop their culture, and to preserve the essential elements of their identity, namely their . . . traditions and cultural heritage." The EU's Resolution on the Languages and Cultures of Regional and Ethnic Minorities recommends in paragraph 8 that member states "ensur[e] that representatives of groups that use regional or minority languages are able to participate directly in cultural facilities and activities . . . ." The Council of Europe's Vienna Declaration on Human Rights, Appendix II, states: "We, Heads of State and Government of the member states of the Council of Europe, have agreed as follows, concerning the protection of national minorities: . . . States should create the conditions necessary for persons belonging to national minorities to develop their culture, while preserving their religion, traditions and customs." A system that fails to support the vast majority of Hungarian cultural activities, including folk dance troupes, literature, theater and choruses, cannot be said to fulfill this undertaking. Encouraging these cultural activities certainly do not threaten the Slovak nation. Such activities can be pursued and still be compatible with the government's general integration policy. By recognizing the importance of maintaining

275. See SLOVAK. CONST. art. 34(1).
276. See FCNM supra note 71, preamble, para. 7.
277. See supra note 221.
278. Id. at 303.
Hungarian cultural heritage, Slovakia will fulfill its commitment to promote a spirit of tolerance and cooperation among ethnic groups.

8. The Law on Foundations

The role of foundations and non-governmental organizations (NGOs) is a vital component to the maintenance of a civil and democratic society. The importance of such organizations cannot be underestimated, as they serve to direct public policy, review and comment on legislation, and create a dialogue between the government and the public. The existence of NGOs allows individuals to play an important role in all spheres of public life by participating in the task of building a civil society.

In this arena, as with the private media, the Slovak government has been reluctant to develop this independent sector. The emergence of NGOs is perceived as a thorn in the side of the government’s agenda. The position of NGOs in Slovak society has been stunted by the recently enacted Law on Foundations.279 After being once vetoed by President Kovac and widely criticized by EU, United States, and United Nations officials, this legislation was again passed by the Slovak Parliament in July of 1996. This measure imposes strong governmental control over NGOs and includes substantial monetary thresholds for qualification as a recognized NGO. The basic start-up capital requirement is 10,000 Slovak crowns (approximately $320). This amount must be increased to 100,000 Slovak crowns within six months in order for an organization to remain a recognized foundation. The equivalent of $3200 in capital, this requirement is an difficult threshold in a country with a per-capita income of $2600. This requirement is applicable regardless of the size, purpose, or needs of the organization. In addition, the Law on Foundations requires that all foundations register with, and receive approval from, the Slovak Ministry of Interior. The law also includes a prohibition against a foundation’s use of its resources to finance any political party activities or financial support for a political movement.

While this law does not exclusively touch upon Hungarian organizations, foundations play a large role in the solution of minority problems given the absence of governmental activity in this area.280 For example, the work of the Sandor Marai Foundation, a Hungarian foundation, would be hindered by both the financial burdens of the law and the provisions that indirectly limit permissible criticism of the government.


280. The organs and policies in place for solutions of minority issues in the CSFR have been removed in the Slovak Republic.
The Sandor Marai Foundation has developed training centers on ethnic conflict resolution for ethnic Hungarian, Roma and Slovak communities. As Mr. Peter Huncik, President of the Sandor Marai Foundation, asserted:

[The Law on Foundations has very serious implications for our foundation. The [Sandor Maria Foundation] not only works on trying to dissipate ethnic tensions, but also supports Hungarian educational and cultural activities. We publish an annual 'Global Report on Slovakia' which analyzes the country's progress in twenty-two different fields including minority relations, privatization, education, and the environment. None of these activities are supported by the government and, if the government is able to increase their control over foundations, these activities could be limited. But even more serious a problem is the fate of smaller foundations doing vital community work that are located outside of the cities. They will not be able to survive the financial requirements of the new law. The only purpose [of the law] is to control foundations because we were getting too strong and playing too large a role in society. So, the government had to step in and try to keep us dependent. It is the typical Bolshevik, paternalistic behavior that we have endured for so long.

The fact that the power to define what constitutes a political cause rests with a governmental body may produce dire effects on several developing cultural and social advocacy organizations. For example, a conference organized by an environmental foundation concerning clean air, an awards ceremony developed by a Ruthenian organization, or a symposium on domestic violence by a women's organization may be found to be a political, and therefore prohibited act. This could inhibit the democratic rights of individuals participating in NGOs by limiting the ability of the public to express its views on social and political issues. In addition, the approval requirement by the Slovak Ministry of Interior may lead to the elimination of foundations that the government perceives, for one reason or another, as undesirable. Given the antagonistic climate between the Slovak government and ethnic Hungarian organizations, this power may be wielded in a discriminatory manner.

FCNM Article 17(2) prohibits state parties from interfering with the right of individuals to participate in local, regional, national and international non-governmental organizations. This negative limitation on the government's activity is not to be dismissed. Although the Law on
Foundations does not prohibit the establishment of NGOs outright, it certainly has the potential effect of limiting their presence and activities.

9. Draft Legislation

a) The Law on the Protection of the Republic

The Law on the Protection of the Republic was first passed by the Slovak Parliament in March of 1996 and provoked immediate international criticism. This measure, which would amend the Criminal Code, imposes stiff penalties for organizers of public rallies if the event is deemed to be aimed at subverting the constitutional system, territorial integrity or defense capability of the country. Under the law, Slovak citizens could face up to two years in prison if found guilty of "disseminating false information abroad damaging the interests of the republic." For example, the offense of participation in public demonstrations with the intent to overthrow the state carries a twelve year prison sentence.

These amendments were broadly drafted and fail to articulate with sufficient specificity what constitutes a violation. For example, under Article 91 it is unclear who defines what constitutes "undermining the country . . . ." Although the measure was passed by the Slovak Parliament, it was vetoed by President Kovac in April 1996 and returned to Parliament. In May 1996, Prime Minister Meciar said that debate on the amendments would be delayed indefinitely because a "wider democratic discussion" was needed to ensure the law's compliance with international human rights conventions. This assessment is certainly true, as the potential for arbitrary interpretation and abuses appear to be substantial and could result in criminal prosecution based on political beliefs. HZDS placed the amendments on the parliamentary agenda this fall. Parliamentary Chairman Ivan Gasparovic told the press on the eve of the new parliamentary session that although he had abstained from voting for the measure in March, if he had "known what would happen later during the [July] Budapest conference [where ethnic Hungarian autonomy

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281. Officials from the EU and the United States Department of State expressed concern that the law could restrict freedom of speech, assembly and expression. The day after the amendments were passed, an EU delegation met with Slovak Foreign Minister Juraj Schenk to lodge a formal expression of concern about the measure. See Joe Cook, Slovak Law Threatens Human Rights, THE GUARDIAN, Apr. 12, 1996, at 013.


283. Id.

284. Id.

285. See generally PRAVDA, May 9, 1996.
was proposed] . . ., [he] would have probably pushed the 'yes' button." 286
Despite Mr. Gasparovic’s support, the amendments were again removed
from the legislative agenda. 287 After a milder version of the penal code
amendments was passed in December of 1996, President Michal Kovac
again vetoed the measure in light of continued opposition and the bill has
since failed to gather sufficient support in Parliament to override the
presidential veto. 288

The freedoms of speech, assembly, and expression are deeply
embedded principles of democracy and are codified in numerous
international human rights instruments. The Universal Declaration of
Human Rights proclaims that “[e]veryone has the right to freedom of
thought, conscience and religion, . . . the right to freedom of opinion and
expression, . . . the right to freedom of peaceful assembly and
association.” 289 These rights are also recognized in the ECHR (Articles 9
through 11), and the CCPR (Articles 18, 19, 21, and 22). These
established rights are also referenced with particular regard to national
minorities. FCNM Article 9 specifically discusses the right of freedom of
expression held by persons belonging to a national minority. This right is
to be exercised “without interference by public authorities and regardless
of frontiers.” 290 If passed without substantial alterations, the Law on the
Protection of the Republic will inhibit many forms of democratic political
demonstrations and manifestations.

While the protection of freedom of speech, assembly, and
expression is a concern for all members of Slovak society, it is particularly
crucial for ethnic minorities, especially Hungarians who are perceived as a
political threat. It is unclear under these provisions whether actions such
as a public manifestation or the call for the resignation of the Prime
Minister by a Hungarian political party could be construed as an “effort to
subvert the constitutional system.” While this analysis is somewhat
premature given the uncertain future of this legislation, 291 examination is

286. Sharon Fisher, Slovak Parliamentary Chairman Defends Controversial Legislation,


288. Sharon Fisher, Slovak Parliament Rejects Penal Code Amendment, 30 OMRI DAILY

289. See supra note 132.

290. See FCNM supra note 71, art. 9(1).

291. On December 17, 1996, the penal code amendment was again passed by the Slovak
Parliament. Although this measure omitted the penalty for “spread[ing] false information
prospective in the event that a majority of the Slovak Parliament believes that such legislation is necessary.292

D. Slovakia’s Prospects for EU and NATO Accession

The Slovak government has been actively pursuing admission into the EU and NATO since the state’s inception in 1993. Slovakia became a member of the Visegrad Club, four states considered to be next in line for EU membership, and had the outspoken ambition to become a member of NATO. Following secession from Czechoslovakia, the Slovak government set out to establish good relations with its neighboring states in an effort to gain Western favor. Within the framework of the European Stability Pact, Slovakia negotiated treaties on friendly relations and cooperation with four of its neighbors, the Czech Republic, the Ukraine, Hungary, and Poland. Despite these advancements, the coalition government has not proven its commitment to basic democratic principles.

The reluctance of the Slovak Republic to form a dependable alliance with its southern neighbor, together with disrespect of its Hungarian minority, centralization efforts, slow and questionable privatization methods,293 and an unproven economy count among the possible reasons why Slovakia should slip on the list of countries next in line for entry into the EU, NATO, and other western-oriented abroad,” opposition and trade representatives protested the law, claiming the measure continued to infringe upon basic freedoms. Mr. Jan Slota, Chairman of the SNS, stated that he was “very happy” with the measure’s passage and asserted that the “integrity of the young Slovakia is jeopardized by some representatives of the Hungarian coalition and opposition.” Slovak President Michal Kovac vetoed the controversial law on the protection of the republic on Dec. 31, 1996. Since this time, the amendments have not gained sufficient support to pass through the Slovak Parliament. See Sharon Fisher, Opposition Protests Slovak Penal Code Amendment, 243 OMRI DAILY DIG II, (Dec. 18, 1996); See also Sharon Fisher, Slovak President Vetoes Penal Code Amendment, 1 OMRI DAILY DIG. II (Jan. 2, 1997) (last visited Oct. 28, 1997) http://www.omri.CZ/publications/DD/index.Dhtml; Sharon Fisher, Slovak Parliament Rejects Penal Code Amendment, 30 OMRI DAILY DIG. II, (Feb. 12, 1997) (last visited Oct. 28, 1997) <http://www.omri.CZ/publications/DD/index.Dhtml>.

292. On July 20, 1996, the Central Board of the SNS held a meeting in Zilina where it promised to use all legislative possibilities to re-debate the anti-subversion law. See generally SNS Wants to Re-debate Amended Penal Code in Parliament, DAILY NEWS MONITOR/TASR, July 20, 1996, at 2.

293. On November 21, the Slovak Constitutional Court held that legislation transferring control over privatization from the government to the National Property Fund was illegal. The National Property Fund had been criticized for selling state property through direct sales, frequently at prices well below market value. Sales were largely kept secret. Under the 1994 legislation, the government, the Supreme Supervisory Office and the courts had no control over the National Property Fund. All of the board members of the National Property Fund were representatives of the ruling government coalition. See Sharon Fisher, Slovak Constitutional Court Rules on Privatization, 227 OMRI DAILY DIG. II (Nov. 22, 1996) (last visited Oct. 28, 1997) <http://www.omri.CZ/publications/DD/index.Dhtml>.
organizations. Political stability in Slovakia was seriously jeopardized in the summer of 1996 when HZDS coalition partners threatened to leave the partnership over disputes for control of the country's largest state insurance company, Slovenska Poistovna. The SNS and the Association of Slovak Workers threatened to derail the country's privatization process after their supporters were purged from Slovenska Poistovna's board of directors. The crisis was resolved when HZDS made concessions granting one opposition parliament member a position on the parliamentary commission that supervises the Slovak Intelligence Service. Demands have also been made to put opposition members on the parliamentary committees governing television and radio, something EU officials have stressed for some time.294 "A strong government in a strong democracy needs a strong opposition," asserted Mr. Werner Hoyer, plenipotentiary for EU matters, on his visit to Slovakia in June of 1996.295 The government's unwillingness to tolerate political dissent continues to be a frequently voiced concern of many Western diplomats.

Slovakia currently possesses the status of an associate member of the EU296 and has completed the EU's questionnaire, both of which are prerequisites for the upcoming EU expansion scheduled to begin in 1998.297 Slovakia's future membership in the EU, however, is in jeopardy. Criticism of the coalition government's policies and practices have come from numerous sources. EU Foreign Affairs Commissioner Hans van der Broek called on Slovakia to "further develop and strengthen democratic institutions and to respect ethnic minority rights and freedom of speech."298 Since Prime Minister Meciar won elections in 1994, the EU has delivered two diplomatic notes warning of the need for observance of human and political rights.299 The United States has also issued a demarche urging the

government to put a greater emphasis on the toleration of diverse opinions. United States Ambassador Ralph Johnson recently stated that if Slovakia sought admission into the EU and NATO, the state must be democratic “not only in its electoral process, but also in its laws, their implementation, and its preservation of individuals rights, including the right to disagree without being considered an enemy of the state.”\textsuperscript{300} German Chancellor Helmut Kohl also questioned Slovakia’s chances of early admission into the EU stating that he “deeply regret[s] that Slovakia’s internal development is very harmful with regard to [early EU admission].”\textsuperscript{301} Chancellor Kohl also added that Slovakia’s chances “have not gotten better, they’ve gotten worse.”\textsuperscript{302}

Despite Western criticism, support for EU integration continues to rise among the Slovak public. A December 1995 poll revealed that 59.4% of Slovak citizens supported EU integration, up from 58.8% in June 1995.\textsuperscript{303} Slovakia’s efforts to be among the first former communist nations to join the EU have been impeded by tensions between ethnic Hungarians and Slovaks, Bratislava and Budapest. These tensions have not been placated by ratification of the SHBT as EU officials had hoped.

NATO accession has also been imperiled by actions of the coalition government. The United States recently delivered a severe blow to Slovakia’s chances of admission into NATO by refusing to include the country on a list of new democracies to be given $60,000,000 in financial aid to facilitate NATO enlargement.\textsuperscript{304} Prime Minister Meciar explained on Slovak Radio on July 26, 1996 that Slovakia’s omission could partly be attributed to the “many untruths [being] said about us abroad.”\textsuperscript{305} Prime Minister Meciar dismissed the United States’ position, asserting that the absence of Slovakia’s inclusion on the congressional resolution was not on account of Slovakia’s internal political situation, but rather because the nation’s housing accommodations and shopping facilities do not meet the standards of the generals’ wives.\textsuperscript{306} NATO membership is contingent upon improvements in Slovakia’s respect for democratic values, respect for


\textsuperscript{301} See generally \textit{SNS on Kohl’s Remarks on ORF}, DAILY NEWS MONITOR/TASR, July 18, 1996, at 4.


\textsuperscript{303} See generally DAILY NEWS MONITOR/TASR, Jan. 10, 1996.

\textsuperscript{304} Ben Barber, \textit{Slovakia Ignored as NATO Grows}, WASH. TIMES, Sept. 7, 1996, at A14.

\textsuperscript{305} Tom Hundley, \textit{Slovakia’s Shifty Leader Irritates the West}, CHI. TRIB., July 28, 1996, at 4.

\textsuperscript{306} Id.
human rights, and the protection of minorities. One survey found support for Slovakia's entry into NATO among Slovaks to be 42.5%, up from 38.5% in June of 1996. However, opposition to integration was also significant and surveyed at 21.9%.  A United States congressional aid asserted that Slovakia is subject to heightened scrutiny as one of the first post-communist states being considered for NATO membership. Entering the alliance is contingent upon the state's ability to settle neighborly disputes and domestic conflicts.

Despite the steady increase in public support, opposition members of Parliament have questioned whether the government truly desires Western integration. Slovakia occupies a strategically significant segment of Europe being located between the expanding West and the newly democratic Soviet states and Russia. If Hungary, the Czech Republic and Poland join NATO as expected, Slovakia will abut the western alliance's eastern frontier, sandwiched between the amalgamated additions. One possible reason for Slovak resistance to Western integration is that it may threaten Slovakia's relations with Russia. Slovakia and Russia are substantial trading partners, with Russia ranking second in terms of imports to Slovakia and seventh in terms of Slovakia's exports. Failure to construct a comprehensive program to fulfill EU and NATO accession requirements, coupled with the government unwillingness to accept the terms of integration, have provoked scepticism. MKDH Chairman Bela Bugar assessed that "[w]hen it comes to foreign policy or foreign integration, all the parliamentary groups should represent the same interests. There is no consensus but they have not even tried to make consensus in this field." Prime Minister Meciar, in the Russian daily Trud, stated that the aim of Slovak foreign policy was to balance its relations with the East and the West. He asserted that western integration would not force the Slovak government to "unconditionally agree with the West on everything." Despite speculation, Prime Minister Meciar

309. Id.
311. Interview with Mr. Bela Bugar, Chairman of MKDH, in Bratislava, Slovakia (Aug. 1, 1996).
continues to profess the ultimate goal of NATO expansion. He blamed his opposition for the current questioning by the international community about the prospects of Slovakia entering NATO among the first wave of new post-Cold War democracies. The Prime Minister also accused “certain individuals, who are driven by their personal traumas” of sending negative information about the state abroad and thereby threatening Slovakia’s chances for early integration.\textsuperscript{313} HZDS supports a public referendum on NATO and EU membership. Such a measure is prompted by the frequent questioning of the benefits of Western integration posed by HZDS junior coalition partners, the SNS and the Association of Slovak Workers.\textsuperscript{314}

In the event that Slovakia is denied admission to both the EU and NATO while its neighbors accede to Western integration, minority rights in Slovakia could be further threatened. The ethnic Hungarian minority may become increasingly vulnerable because of the following reasons: 1) the government coalition will no longer have Western pressure to adhere to international human rights standards; 2) the country will be somewhat alienated by the West and may further solidify its eastern allegiances; and 3) politicians may attempt to use the Hungarian minority as a scapegoat in the event of the state’s denial of EU and NATO admission. Many Hungarian political leaders have already made these predictions. Mr. Bugar stated:

[i]t is possible that if Slovakia is not integrated into the West, and the internal economic situation continues to worsen, members of the SNS or HZDS will try to escalate tensions between ethnic Hungarians and Slovaks in an attempt to distract attention away from the real issues, such as a failed economic policy. It is in our [ethnic Hungarian] interests to be integrated into the EU and NATO. . . . If we are integrated, this means that we have fulfilled the five basic requirements of NATO, one of which is solving the minority issue. . . . This is what we want.\textsuperscript{315}

This sentiment prompted over 500 ethnic Hungarians to converge on the town of Komarno in southern Slovakia to announce an open letter to EU


\textsuperscript{315} Interview with Mr. Bela Bugar, MKDH Chairman, in Bratislava, Slovakia (Aug. 1, 1996).
and NATO countries entitled, *Democracy is Endangered* which highlighted questionable measures of the Slovak government.\(^{116}\) Statements like this prompted the government to accuse Hungarians of spreading disinformation abroad, thereby jeopardizing Slovakia's chances of integration.

It is clear that Slovakia has not attained the democratic threshold necessary to permit the state's accession into the EU and NATO. This conclusion is supported by the government's relentless control over media institutions, its questionable privatization methods, its disrespect for national minorities, and its failure to stabilize relations with Hungary. If Slovakia is hastily integrated into NATO, a revision of the Turkish-Greek conflict is possible. While the SHBT is a significant step towards placating tensions between the Hungarian and Slovak governments, it should only be considered one step down the rocky path toward building a friendly and trusting alliance. The Slovak government must adhere to its present obligations under international human rights law to protect its minority groups. Until the Slovak government sets the tone for tolerance, rather than division, towards the Hungarian minority, it is unlikely that a positive relationship between Slovakia and Hungary will be secured.

### IV. CONCLUSION AND RECOMMENDATIONS

The historical context underlying present relations between the Hungarian minority and the Slovak majority has resulted in an exaggerated awareness of the need to safeguard Slovak ethnicity in the young republic. Protection of the Slovak nation is a sensitive and important government prerogative. The Slovak government's authority to take measures to defend its sovereignty and territorial integrity is not questioned. These interests, however, must be balanced by protections for all Slovak citizens regardless of nationality. The legislative measures analyzed in this report have furthered the interests of ethnic Slovaks while leaving persons belonging to a national minority vulnerable. Such initiatives are contrary to the letter and spirit of international agreements ratified by the Slovak government. As a multi-ethnic state, the Slovak government must resist urges to place the Slovak nation before the interests of national minority groups residing within its borders. All Slovak citizens must be treated in a fair and equitable manner.

Ethnic problems arise when individuals are discriminated against, denied their freedom of expression, or prohibited from exercising their cultural and linguistic practices. The Slovak government, while ratifying

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international instruments aimed at securing the rights of minorities on the one hand, is simultaneously taking steps that increase ethnic tensions with the other. The government's willingness, on occasion, to manipulate ethnic tensions for political gain has cast doubt on its commitment to protect minority rights. Legislation restricting the use of the Hungarian language, decreasing support for Hungarian language education and cultural activities, and disrupting local representation in political life has resulted in resentment and discord among the Hungarian minority.

It must not be forgotten that as the Slovak government struggles to build a national identity from heterogeneous elements, the selection of a state language may be an important symbol and a practical necessity. From the point of view of the Hungarian minority, however, the selection of the Slovak language as the state language places members of the minority at a distinct disadvantage. It seems incumbent upon the state to ensure that this disadvantage is eliminated as far as possible. Language is the primary feature that unites the Hungarian minority in Slovakia. While uniting members of the Hungarian minority, language may also prove to be extremely divisive as it pits Slovak speakers against those whose mother tongue is Hungarian. Disrespect for minority languages has fanned the centuries-old flames of discontent, and language, unfortunately, has become the rallying cry for ethnic tension.

Many of the problems analyzed in this report may be attributed to weak drafting skills or lack of precedents that in due course will fill out the lacunae. Legal and institutional protection for the rights of minorities in Slovakia remain weak, specifically, the fragility of democratic institutions and the constitutionally-based rule of law generally. The Slovak government has promised that other laws are forthcoming, albeit at a modest pace, that may modify the contents of the legislation in question. In light of nationalistic tendencies prevalent in Slovakia, recently promulgated legislation presents a disquieting picture of Slovak life. Rather than implementing the philosophies of decentralization and transfrontier cooperation, antediluvian notions such as continued centralization of state power and disrespect for the value of national minorities continue to dominate Slovak political life. If the ruling coalition truly strives to integrate into both the EU and NATO, extensive effort needs to be made to resolve domestic disputes. Efforts need to be made not only in the arena of minority relations, but also in all areas of society where conflicting opinions arise.

The Slovak government must abide by its obligations under international and national law to protect the human rights of members of the Hungarian minority, specifically, to:
1) Respect the Hungarian minority’s constitutionally guaranteed rights, contained in Article 34, to “promote their cultural heritage,” “receive and disseminate information in their mother tongues, form associations, and create and maintain educational and cultural institutions,” “be educated in a minority language,” “use a minority language in official contacts,” and “participate in decision making in matters affecting” them. These constitutional rights should not be limited, restricted or eradicated by domestic legislation, as the free exercise of these rights does not threaten Slovak sovereignty or territorial integrity;

2) Promulgate legislation, as promised, defining the permissible use of minority languages in the Slovak Republic. This measure should be in accordance with the state’s obligations under the SHBT, Recommendation 1201, the FCNM and the ECHR. In light of the geographical concentration of the Hungarian minority in southern Slovakia, special consideration should be given to the use of the Hungarian language in administrative contacts throughout this region. This accommodation will protect members of the Hungarian minority from possible discriminatory effects caused by the Language Law’s prohibition on the use of minority languages in this context;

3) Establish a commission, comprised of minority representatives, to monitor the implementation of the Language Law to guarantee that its provisions are not fulfilled in a discriminatory manner;

4) Modify its alternative education plan to ensure that acceptance of bilingual education is truly voluntary;

5) Support, facilitate and provide for education in the Hungarian language, an adequate number of classes for Hungarian students at all levels, ensure that teachers are properly-trained to teach in the Hungarian language; and enable a sufficient number of Hungarian students to attend the Nitra Pedagogical College to receive teacher training;

6) Develop a program aimed at increasing minority enrollment in universities;

7) Amend legislation authorizing the government appointment of district administrators and the district’s state administration board to allow for the election of these local representatives;
8) Amend the territorial division legislation to more adequately decentralize government control of local affairs and increase the participation of the Hungarian minority in government. These amendments should reflect suggestions contained in the Explanatory Report to the FCNM, the European Charter of Self-Government and the CRLAE Recommendation 250;

9) Respect the use of traditional Hungarian Christian names;

10) Respect the posting of bilingual public signs, especially signs indicating historic place names;

11) Allocate spending on minority culture in a proportional and non-discriminatory manner;

12) Reduce the statutory mandates on financial thresholds created by the Law on Foundations to better facilitate growth in this sector;

13) Make substantial changes to the Law on the Protection of the Republic to ensure that the freedoms of speech, association and expression are protected in accordance with international human rights principles;

14) Adopt an affirmative plan to recruit more members of the Hungarian minority into government positions to ensure the adequate and fair representation of all Slovak citizens. This recommendation is particularly important in the ministries of Education and Culture;

15) Allow members of the Hungarian Coalition access to parliamentary committees, particularly the committee on radio and television, state security, and culture;

16) Strengthen legal mechanisms for protecting the legal rights of the Hungarian minority, including making revisions, where necessary, to facilitate the ability of citizens to challenge government decisions, including those of local authorities;

17) Implement an educational program for judges aimed at incorporating international human rights standards into court decisions;

18) Take additional measures to guarantee the independence of the judiciary;
19) Take affirmative actions to reduce tensions between minorities and the Slovak majority. Efforts should be made to introduce educational programs on minority rights, minority history and culture, and human rights standards. Human rights training programs should be provided for the police, government officials, local authorities, and teachers;

20) Establish a commission, comprised of government, opposition and minority representatives, to investigate anonymous threats, and physical and verbal harassment to journalists and opposition political leaders;

21) Abandon its attempts to deprive democratically elected officials of their positions;

22) Refrain from misusing its authority to replace political opponents with government sympathizers; and

23) Distance itself from extremist views, whether they be nationalist, xenophobic, or anti-Hungarian.

It is incumbent upon the Slovak government to set the tone of respect for members of national minorities. Rather than provoke ethnic division and unrest, the Slovak government should serve as a model for a tolerant and civil atmosphere. Claims of Hungarian irredentism should not be used to vilify the Hungarian minority in Slovakia. Territorial claims have repeatedly been refuted by the Hungarian government. In addition, representatives of the Hungarian minority in Slovakia have repeatedly stated that they do not want to reunify with Hungary. What ethnic Hungarians do want is the right to live free from discrimination in Slovakia. In closing, Mr. Bugar's words are appropriate:

We only want the right to remain Hungarian. This is the ethnicity and language of our parents, grandparents and great-grandparents. Hungarians in this region have a very good habit which has worked for centuries. The more they beat us, the more we protect ourselves and organize to resist their attacks. [Many people] fear this situation now. There is an old Hungarian idiom: You can't catch a sparrow with a gun. This holds true for us now."

317. Interview with Mr. Bela Bugar, Chairman of MKDH, in Bratislava, Slovakia (Aug. 1, 1996).
NAMIBIA OPINION REVISITED: A GAP IN THE CURRENT ARGUMENTS ON THE POWER OF THE SECURITY COUNCIL

Tadashi Mori*

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I. INTRODUCTION

This article discusses the interpretation of Article 25 of the United Nations Charter that was offered by the International Court of Justice in its advisory opinion of June 21, 1971 (Namibia Opinion). It is a topic that is unfortunately overlooked by the current arguments concerning the power of the revived Security Council. The end of the Cold War has liberated the United Nations from the confrontation between the West and the East, and has freed the Security Council from the functional paralysis that the veto power of its permanent members had forced upon it. The activities

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of the revitalized Security Council, which have been activated not only quantitatively but also qualitatively, have pushed the question of the limitations on the Council's power under Chapter VII of the United Nations Charter into "the forefront of attention" of international lawyers. While numerous articles have discussed this question from various points of view, little attention has been given to the interpretation of Article 25 of the Charter.

II. NAMIBIA OPINION, ARTICLE 25, AND THE POWER OF THE SECURITY COUNCIL

In the Namibia Opinion the International Court of Justice stated that in addition to the powers specifically granted to the Security Council in Chapters VI, VII, VIII, and XII, which are enumerated in Article 24, paragraph 2, of the United Nations Charter, the Council has general implied powers in paragraph 1 of the same Article, stemming from its

3. BOUTROS BOUTROS-GHALI, AN AGENDA FOR PEACE 7-12 (ed. 1995).
7. Article 24, paragraphs 1 and 2, of the United Nations Charter provides,
responsibility for maintaining international peace and security. In support of this position the Court cited the Secretary General's statement of January 10, 1947, which was submitted to the Security Council. That statement pronounced that

[t]he powers of the Council, under Article 24, are not restricted to the specific grants of authority contained in Chapters VI, VII, VIII, and XI. The Members of the United Nations have conferred upon the Security Council powers commensurate with its responsibility for the maintenance of peace and security. The only limitations are the fundamental principles and purposes found in Chapter I of the Charter.

Furthermore, the Court stated that Article 25, which provides decisions of the Security Council with legal binding effect upon Member States, applied not only to decisions taken under Chapter VII but also to those taken under the general implied powers. In other words, the Court admitted that the Security Council had general mandatory powers, which are implied from its responsibility to maintain international peace and

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1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.

2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII.

U.N. CHARTER art. 24., paras. 2-3.

8. This is theoretically justified by implied powers doctrine, according to which international organizations can deduce powers necessary for discharging their objects from their duties when such powers are not explicitly provided in the constituent documents. See, e.g., Manfred Zuleeg, International Organizations, Implied Powers, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW, 312 (1984); Manuel Rama-Montaldo, International Legal Personality and Implied Powers of International Organizations, 44 BRIT. Y.B. INT'L L. 111-55 (1970). The International Court of Justice has admitted this doctrine. For example, in the Reparation Case, it stated, "[T]he rights and duties of an entity such as the [United Nations] Organization must depend upon its purpose and functions as specified or implied in its constituent documents and developed in practice." Reparation for Injuries, 1949 I.C.J. 180 (Advisory Opinion of Apr. 11) (emphasis added).


10. Id.

11. U.N. CHARTER art. 25.

security.¹³ Those general implied powers give the Security Council the authority to impose any obligation upon Member States, so long as the Council acted for such purposes.

Little attention has been paid to the Namibia Opinion in this context. Instead, current arguments only focus on what the Security Council can decide under Chapter VII of the United Nations Charter. The Security Council increased mandatory sanctions after the end of the Cold War.¹⁴ These mandatory sanctions have been justified "under Chapter VII of the United Nations Charter."¹⁵ This justification precludes an argument proposing that Article 25 applies to the Council’s decisions. Thus, it has been found unnecessary to discuss what decisions can be made outside Chapter VII with legal binding effect.

However, if the interpretation of Articles 24 and 25 offered by the International Court of Justice is accepted, current arguments concerning the limitations on the Security Council’s exercise of authority under Chapter VII would become futile. An action taken pursuant to the Council’s direction could be vindicated by its general mandatory powers even if one could contend that the Council’s action could not be justified by its power under Chapter VII.

Arguments concerning the Lockerbie Incident provide a good example of this point. Three years after the explosion of Pan American Flight 103, on December 21, 1988, the Security Council adopted resolution 748 (1992), which determined that "the failure by the Libyan Government . . . to respond fully and effectively to the requests in resolution 731 (1992) constitute[d] a threat to international peace and security"¹⁶ and decided that, "[a]cting under Chapter VII, . . . the Libyan Government must now comply without any further delay with . . . resolution 731 (1992) regarding the requests" for extradition of the alleged suspects of Libyan nationality.¹⁷ Although this incident has raised animated arguments concerning the limitations of the Council’s power under Chapter VII and the justiciability of the Council’s activities,¹⁸ very
few of these arguments pay attention to the issue of general mandatory
powers of the Security Council. Most fail to recognize that the general
mandatory powers would justify the Council's sanction on Libya, even if
any limitations of the power under Chapter VII exist.

Among the few scholars who have discussed the relationship
between the Council's general mandatory powers and its power under
Chapter VII, three standpoints emerge. Professor Bothe contests the
interpretation of Article 24 offered by the International Court of Justice.
He contends that the predominance of the great powers in the system of
international peace and security is legitimated by the fact that the power of
the Council is defined very strictly, that is, the Council has only specific
powers as defined by Article 24, paragraph 2. Since Bothe denies the
existence of the general implied powers of the Security Council, naturally
he would also deny the Council's general mandatory powers, which are
premised upon the existence of the general implied powers. Professor Gill
basically accepts the interpretation of the International Court of Justice but
contends that, where the Council's authority is defined by specific
provisions in the Charter, the Council's general powers "should not be
construed in such a way as to violate or exceed the allocation and
limitation of authority contained in specific provisions of the Charter." Professor White definitely supports the position of the Court and
contends that the current Security Council resolutions imposing mandatory
sanctions should be adopted under "the Council's general mandatory
powers, as identified by the World Court in the Namibia [sic] case rather
than under Chapter VII." None of these views are satisfactory. First, Professor Bothe's
perspective neglects the fact that the general implied powers of the
Security Council are widely accepted by the international community. Second, Professor Gill's view is inconsistent because the Security
Council's powers cannot be limited to those things specifically listed in the

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20. Id.

21. Gill, supra note 4, at 70.


23. Id. at 66.

chapters granting its powers and at the same time be expanded to include implied powers.

Moreover, both Professors Gill and White do not examine the validity of the Court's interpretation. Both of them premise the Court's interpretation without questioning it. The advisory opinion of the International Court of Justice is not binding, and even the decision of the Court has no precedential value in a strict sense.\(^{25}\) This means that the Court's opinion can be relied upon only when it is in accordance with existing international law.\(^{26}\) Thus, study on the Court's interpretation is essential in discussing the relationship between the Council's general mandatory powers and its power under Chapter VII.

In discussing whether the majority of the International Court of Justice validly interpreted Article 25 of the Charter, this article examines whether the Court's own reasoning is sustainable (Section II); whether the Court's opinion can be supported by certain other doctrines (Section III); and finally, whether the Court's interpretation has been accepted by the Member States of the United Nations (Section IV).

III. MAJORITY OPINION OF THE INTERNATIONAL COURT OF JUSTICE

The majority opinion of the International Court of Justice in the Namibia Opinion explores two premises in determining whether Security Council resolution 276 (1970) is mandatory.\(^{27}\) First, the Court examines the legal basis of the resolution and, second, the binding effect of the decision.\(^{28}\) That is to say, the Court distinguishes the legal basis for adopting such a resolution from the legal effect that the resolution may have. This distinction should be noted. As for the legal basis of the resolution, the Court relies upon the general implied powers of the Council. This is necessary for discharging the responsibility of maintaining international peace and security, which is vested in the Council under Article 24, paragraph 1, of the Charter.\(^{29}\) As to the legal effect of the resolution, or in other words, what makes the implied powers mandatory, the Court contends that Article 25 not only applies to enforcement measures adopted under Chapter VII of the Charter but also to the

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25. Statute of the International Court of Justice, art. 59. However, it is usual for the International Court of Justice to follow its preceding judgments and opinions.

26. Judicial decisions shall be applied by the International Court of Justice "as subsidiary means for the determination of rule of law." Statute of the International Court of Justice, art. 38, para. 1(d) (emphasis added).

27. Strictly, the Court admits the mandatory nature of paragraphs 2 and 5 of the Security Council resolution. Namibia Opinion, 1971 I.C.J. 52.

28. See id. at 51-54.

29. See id. at 52.
decisions of the Security Council adopted in accordance with the general implied powers.\textsuperscript{30}

It is true, as mentioned above, that the Security Council's general implied powers regarding Article 24, paragraph 1, of the Charter have been generally accepted. However, this does not necessarily mean that the Security Council can take any type of action, even though this means that it can act upon any appropriate occasion.\textsuperscript{31} That is, even though the general implied powers empower the Security Council to act in any appropriate occasion, this does not necessarily mean that, on such occasion, it can issue binding decisions directly based upon such general powers. This is the reason why the majority opinion explores two premises in reasoning that the Security Council has general mandatory powers. Since the majority's first premise is generally accepted, the second premise is the focus of this paper. That is, the focus of this paper is to discuss whether Article 25 applies to those decisions of the Security Council which are adopted in accordance with the general implied powers under Article 24, paragraph 1.

The reasoning of the majority on this point is rather simple. The Court shows a strong presumption that the declarations made under Article 24 would bind all the Member States, rejects two refutations of the presumption, and, consequently concludes the legal binding effect of resolution 276.\textsuperscript{32}

First of all, a strong assumption is granted to the legal binding effect of resolution 276 which is adopted in accordance with the general implied powers without showing any grounds but by stating that

\cite{Note30} that it would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, on behalf of all member States, those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it. When confronted with such an internationally unlawful situation, Members of the United Nations would be expected to act in consequence of the declaration made on their behalf.\textsuperscript{33}

Second, the Court rejects the contention "that Article 25 of the Charter applies only to enforcement measures adopted under Chapter VII

\begin{footnotesize}
\begin{enumerate}
\item See \textit{id.} at 52-53.
\item See \textit{id.} at 293 (dissenting opinion of Judge Fitzmaurice).
\item \textit{Namibia Opinion}, 1971 I.C.J. at 52.
\item \textit{Id.} at 52.
\end{enumerate}
\end{footnotesize}
of the Charter"\textsuperscript{34} for the following reasons: (a) no words define "the decisions of the Security Council" in Article 25, as those merely in regard to enforcement action under Chapter VII, and the only words confining such decisions are "in accordance with the Charter;"\textsuperscript{35} (b) Article 25 is placed not in Chapter VII but in Chapter V, which deals with the functions and powers of the Security Council in general;\textsuperscript{36} and, finally, (c) Article 25 would be unnecessary if it only related to decisions regarding enforcement actions under Chapter VII, since Articles 48 and 49 provide binding effect for such decisions.\textsuperscript{37}

Furthermore, the Court refutes the contention that resolution 276 does not purport to impose any legal duty upon the Member States as it is couched in exhortatory language, on the grounds that i) "the terms of the resolution to be interpreted," ii) "the discussions leading to it," iii) "the Charter provisions invoked," and iv) "in general, all circumstances that might assist in determining the legal consequences of the resolution" have to be taken into account to determine the binding effect of the Security Council resolution.\textsuperscript{38} That is, the decisive factor is not the language used in the resolution, but the Council's intention, which can be inferred from "all circumstances."\textsuperscript{39}

Two issues should be separated in examining the Court's reasoning. The first issue is whether this reasoning is sufficient to refute the contention that Article 25 applies only to enforcement measures adopted under Chapter VII. The second issue is whether the reasoning is adequate enough to prove that Article 25 applies to any decisions adopted in accordance with the general implied powers of the Security Council. The Court's reasoning as to the first issue is convincing. Article 25 would be unnecessary \textit{if it only relates to decisions regarding enforcement actions under Chapter VII}. However, this does not lead to the conclusion that Article 25 applies to any decisions based upon the Council's general implied powers. In other words, negating the view that Article 25 applies only to enforcement measures adopted under Chapter VII does not necessarily refute the contention that Article 25 applies \textit{only to decisions adopted in accordance with specific provisions in the Charter}, including Articles other than Chapter VII, such as Article 34 and Article 94, paragraph 2.

\textsuperscript{34} \textit{Id.} at 52-53.
\textsuperscript{35} \textit{Id.} at 53.
\textsuperscript{36} See \textit{id.}
\textsuperscript{37} See \textit{id.} at 54.
\textsuperscript{38} \textit{Namibia Opinion}, 1971 I.C.J. at 54.
\textsuperscript{39} \textit{Namibia Opinion}, 1971 I.C.J. 52.
In light of the possibility that under Article 25 the powers of the Security Council are limited by the specific Charter provisions, the basis of the majority opinion of the Court becomes unstable. First, "[i]f . . . Article [25] were automatically to make all [sic] decisions of the Security Council binding, then the words ‘in accordance with the present Charter’ would be quite superfluous." Second, the fact that Article 25 is placed in Chapter V of the Charter does not mean that it applies to all decisions adopted in accordance with general implied powers. Article 25 is placed in Chapter V as a general provision, which provides a binding effect with decisions adopted in accordance with specific provisions including those other than Chapter VII. Third, Articles 48 and 49 complement Article 25, and the latter is still significant as a general provision.

On the other hand, the rejection of the second refutation is not meant to prove the legal binding effect of the resolution itself. According to the Court’s reasoning, the Security Council’s intention is a decisive factor in determining what declaration made in accordance with the general implied powers would have legal binding effect. However, it is only when the Council has the general mandatory powers that the Council’s intention would matter. Here, the Court presumes the Security Council’s general mandatory powers again.

In conclusion, although the Court effectively refutes the contention that Article 25 applies only to enforcement actions under Chapter VII, its reasoning is not enough to prove that the Article applies to any decisions adopted in accordance with the general implied powers of the Security Council. It is the strong presumption that "[i]t would be an untenable interpretation to maintain that, once such a declaration had been made by the Security Council under Article 24 of the Charter, . . ., those Members would be free to act in disregard of such illegality or even to recognize violations of law resulting from it" that nevertheless leads the Court to the latter conclusion.

However, such a presumption by the Court is not shared by all. Indeed, this view emphasizing institutional effectiveness of the Security Council’s general mandatory powers again.

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40. Id. at 293-94 (dissenting opinion of Judge Fitzmaurice).
42. See Namibia Opinion, 1971 I.C.J. at 52.
43. Institutional effectiveness has been relied upon by the International Court of Justice to provide an international organization with "those powers which, though not expressly provided
Council is strongly criticized as making the Council's power essentially unlimited, thus enabling the Council to impose any obligation upon Member States against their will.\textsuperscript{44} According to the majority opinion, the Security Council could impose any obligation upon Member States by asserting that it is discharging its responsibility for the maintenance of international peace and security, since it is easy to represent any controversial international situation as involving a latent threat to peace and security.\textsuperscript{45} As Judge Gros contends, the majority opinion is "to turn the Security Council into a world government,"\textsuperscript{46} a result that is most likely unacceptable to many of the Member States, which are part of an international community whose main actors are still independent sovereign states.\textsuperscript{47}

In other words, the Council's emphasis on the institutional effectiveness of the Security Council comes into conflict with state sovereignty, which is an issue emphasized by some dissenting opinions.\textsuperscript{48} Institutional effectiveness and state sovereignty are equally crucial since both of them relate to fundamentals of the international society. Basic units of the international community are sovereign states, and yet, on the other hand, the function of the Council is to maintain peace and security of the international community. It is true that state sovereignty is somehow limited by the establishment of the United Nations, but this does not lead to the conclusion that institutional effectiveness always supersedes state sovereignty. Thus, any attempt to deduce a conclusion from a certain value is bound to be futile, for it leads to the sterile confrontation between

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in the [constituent documents], are conferred upon it \textit{by necessary implication as being essential to the performance of its duties}.” Corfu Channel, 1949 I.C.J. 182 (Apr. 9) (emphasis added). See \textsc{Ian Brownlie, Principles of Public International Law} 690 (4th ed. 1990).


45. \textit{See Namibia Opinion, 1971 I.C.J at 294 (dissenting opinion of Judge Fitzmaurice).}

46. Id. at 340 (dissenting opinion of Judge Gros).


48. \textit{See Namibia Opinion, 1971 I.C.J. at 294-95 (dissenting opinion of Judge Fitzmaurice); Id. at 341 (dissenting opinion of Judge Gros); Id. at 147 (separate opinion of Judge Onyeama).}
two absolute values. Therefore, apart from such axiology, a more fruitful discussion can be had by examining how states regard the scope of binding decisions of the Security Council.49

IV. GENERAL MANDATORY POWERS DOCTRINE

This section examines whether the interpretation offered by the majority opinion can be sustained from another perspective. Having analyzed the reasoning of the majority opinion, this section examines the alleged basis of the general mandatory powers doctrine, which contends that the Security Council has general and almost unlimited powers to issue binding decisions if it acts in maintaining international peace and security. The alleged basis of this doctrine, other than those discussed above, are travaux préparatoires (preparatory documents) of the United Nations Charter and practices of the Security Council.

A. Travaux Préparatoires (Preparatory Documents)

Some scholars50 base their contention on the fact that, at the San Francisco Conference, an amendment proposed by Belgium was voted down.51 That amendment would have required that any obligation of the Member States, under Article 25 to carry out the Security Council’s decisions, be restricted to those decisions adopted under Chapter VII52 of the Dumbarton Proposal53 be expressly stated. Indeed, the Secretary General’s statement reads, “[t]he rejection of this [Belgian] amendment is clear evidence that the obligation of the Members to carry out the decisions of the Security Council applies equally to decisions made [under the general implied powers] under Article 24 and to the decisions made

49. See A. C. Arend, Chapter III: A Methodology for Determining an International Legal Rule, in LEGAL RULES AND INTERNATIONAL SOCIETY (unpublished manuscript, on file with author).


51. The Belgian proposal was to add the words “taken under Chapter VIII” after the words “Security Council” in paragraph 4, section B, chapter VI, which provided as follows: “All members of the Organization should obligate themselves to accept the decisions of the Security Council and to carry them out in accordance with the provisions of the Charter.” The United Nations Dumbarton Proposals for a General International Organization, Doc.1, G/1, 3 U.N.C.I.O. Docs. 9 (1945).


53. Id.
under the grant of specific powers.” However, this understanding is too simplistic and it is untenable to conclude so from this fact.

First, the Belgian proposal received a favorable vote of a majority of the delegates that attended and voted at the meeting, despite it being voted down due to the lack of the necessary two-thirds majority. Moreover, the Belgian amendment was not intended to modify the text substantially, but to make explicit that the decisions of the Security Council, which Member States have an obligation to accept, referred solely to its powers under Chapter VIII of the Dumbarton Proposal. In addition, one of the sponsoring countries, the United Kingdom, suggested that the amendment was not necessary, since the decisions of the Security Council were specified by the phrase, “in accordance with the provisions of the Charter.”

Furthermore, some governmental official reports on the San Francisco Conference support the view that the binding decisions of the Security Council must be based upon the specific Charter provisions. For example, the United States report on the result of the San Francisco Conference clearly states that it is to be noted that the members of the Organization agree to carry out the decisions of the Security Council in accordance with the present Charter. Thus, the precise extent of the members’ obligation under Article 25 can be determined only by reference to other provisions of the Charter, particularly Chapters VI, VII, VIII, and XII. Moreover, the Canadian official commentary on the Charter emphasizes that the view that Member States assume obligations under


56. See id. at 394.

57. Id. Indeed, the British delegation suggested the Security Council can issue binding decisions only under Chapters VIII and XII (Chapter XVII of the current Charter) of the Dumbarton Proposal. Id. Other than these two countries, the Soviet Union argued against the Belgian amendment because the proposal would restrict the Council’s power undesirably but Canada contended that paragraph 4 should be interpreted as relating exclusively to chapter VIII of the Dumbarton Proposal. Id. at 394-95.

58. See The Charter of the United Nations for the Maintenance of International Peace and Security, Submitted by the President of the United States on July 2, 1945: Hearings on Senate, Before the Comm’n on Foreign Relations, 79th Cong., 1st Sess. 81 (1945) (report to the President on the Results of the San Francisco Conference by the Chairman of the United States delegation, the Secretary of State, June 26, 1945) (emphasis added).
Article 25 only when other specific provisions provide so was accepted at the Conference.\textsuperscript{59} This analysis on \textit{travaux préparatoires} (preparatory documents) shows that inferring from these \textit{travaux préparatoires} (preparatory documents) that the Security Council has general mandatory powers is invalid.\textsuperscript{60} The record strongly suggests that the prevailing view was that the binding decisions of the Security Council must be based upon the specific provisions of the United Nations Charter.\textsuperscript{61}

\textbf{B. Practices of the Security Council}

Other scholars\textsuperscript{62} claim that the Security Council has general mandatory powers, based on the analysis of several practices. However, these practices, such as the question of the Statute of the Free Territory of Trieste, the Palestine question, the Congo question, the Indonesian question, the Cashmere question, the Greek frontier incidents question, the Iranian question, and the South African question, are not relevant to the present issue\textsuperscript{63} and no conclusion regarding the general mandatory powers can be drawn from these practices.\textsuperscript{64}

1. The Question of the Free Territory of Trieste\textsuperscript{65}

The Permanent Statute for the Free Territory of Trieste, one of the instruments relating to the establishment of Free Territory of Trieste, which was decided under the proposed peace treaty with Italy, provided that the integrity and independence of the Free Territory should be assured

\begin{itemize}
\item \textsuperscript{60} Kwenig, supra note 41, at 274; Higgins, supra note 44, at 278; Jacqué, supra note 41, at 1089.
\item \textsuperscript{61} See Ruth B. Russell & Jeannette E. Muther, A History of the United Nations Charter 665 (1958); Goodrich et al., supra note 24, at 208; Kwenig, supra note 41, at 275-77.
\item \textsuperscript{63} Jacqué, supra note 41, at 1089-92.
\item \textsuperscript{64} See, e.g., Goodrich et al., supra note 24, at 208; Kwenig, supra note 41, at 265; Sonnenfeld, supra note 44, at 122; A. J.P. Tammes, Decisions of International Organs as a Source of International Law, 94 R.C.A.D.I. 299 (1958-11).
\item \textsuperscript{65} See 2 Repertory of Practice of United Nations Organs 41-42 (1955).
\end{itemize}
by the Security Council. The Statute raised a discussion regarding the authority of the Council to assume the responsibilities relating to the Free Territory and regarding the obligations of Members of the United Nations in consequence of the decision by the Council to assume those responsibilities. This case is viewed as a decisive precedent since, in this discussion, the Secretary General of the United Nations submitted a statement expressing the view that “the obligation of the Members to carry out the decisions of the Security Council applies equally to decisions [based upon the general implied powers] . . . under Article 24 and to the decisions made under the grant of specific powers.”

However, this case only relates to the Security Council’s general implied powers under Article 24, not to its mandatory powers under Article 25. It was not made clear as to “what countries would be bound by the obligations to ensure the integrity and independence of the Free Territory.” Furthermore, it should be emphasized that the territory was not under any sovereignty and that the responsibility of the Security Council was consented to by all the signatories to the proposed Peace Treaty. In other words, this decision “is not one where the principle of the sovereignty of States . . . is at stake.”

2. Palestine Question

This case related to the implementation of the Plan Partition with the Economic Union for Palestine. In the Plan, the General Assembly requested the Security Council to assume responsibility for the Plan’s execution. Consequently, the question was raised whether the Council had the power to accept such responsibility. This case is definitely irrelevant since the Security Council rejected the Assembly’s request. However, Professor Jorge Castañeda regards this as one of the precedent-setting cases of general mandatory powers of the Security Council.

67. U.N. SCOR, supra note 54, at 45.
68. See Jacqué, supra note 41, at 1090-91.
69. U.N. SCOR, supra note 54, at 57 (statement of Australian delegation).
70. Id. at 58 (statement of French delegation).
71. See 2 REPERTORY, supra note 65, at 22-24.
72. CASTAÑEDA, supra note 62, at 73.
3. Congo Question, Indonesian Question, and Cashmere Question

These cases are also irrelevant to this issue. All of these related to the resolutions, which requested a cease-fire. Thus, Article 4073 of the Charter is regarded as their authority, and, indeed, in the latter two cases a cease-fire came into effect only after the parties concerned accepted them.74 Therefore, these questions did not involve the issue of general mandatory powers of the Security Council.

4. Greek Frontier Question

The issue raised in this case was whether Article 25 applied to the decisions of the Security Council to conduct an investigation under Article 34.75 That is, the decision was not based upon the general mandatory powers of the Security Council but was based upon a specific provision of the Charter, Article 34 in Chapter VI.

6. Iranian Question and South African Question

In these cases, the Security Council did not issue any binding decisions upon Member States. As for the Iranian question, the controversial issue was whether the Security Council could remain seized of the dispute even after the complaint was withdrawn by the submitting state, Iran.76 Although the Council decided to continue the discussion on the dispute, this decision did not impose any obligation upon Iran or any other Member States. As to the South African question, Security Council resolution 134 (1960), requesting South Africa to “abandon its policy of apartheid and racial discrimination,” which Professor Castañeda77 contends is a binding decision, was not regarded as such by the Security Council.

73. Article 40 of the Charter provides, “[i]n order to prevent an aggravation of the situation, the Security Council may, before making the recommendations or deciding upon the measures provided for in Article 39, call upon the parties concerned to comply with such provisional measures as it deems necessary or desirable.” U.N. CHARTER art. 40.

74. As for the Indonesian question, the Council indicated the Commission on Indonesia should assist the parties in reaching agreements for cease-fire. (U.N. SCOR, 4th Sess., 421st mtg. at 5 (1949). As to the Congo question and the Cashmere question, see Jacqué, supra note 41, at 1092.

75. See 2 REPERTORY, supra note 65, at 45. Article 34 of the Charter provides, “[t]he Security Council may investigate any dispute, or any situation which might lead to international friction or give rise to a dispute, in order to determine whether the continuance of the dispute or situation is likely to endanger the maintenance of international peace and security.” U.N. CHARTER art. 34.

76. See 2 REPERTORY, supra note 65, at 19-20.

77. CASTAÑEDA, supra note 62, at 75.
In conclusion, none of these alleged practices of the Security Council support the contention that Article 25 of the Charter applies to any decisions adopted under the Council's general implied powers. In some of these cases, no binding decision was taken and, in others, the legal basis of the binding decision can be found in a specific Charter provisions.

V. RESPONSE TO THE COURT'S OPINION

As indicated by the foregoing analysis, the reasoning behind the majority opinion in the Namibia Opinion and the general mandatory powers doctrine is untenable. Next, the responses of states to the Court's opinion is examined to discover whether the opinion has been accepted by the Member States of the United Nations.

Although South Africa was offended by the Court's opinion, the Security Council, in resolution 301 (1971), agreed with the Court's conclusion. However, in the resolution, the Council did not refer to the Court's reasoning. Indeed, some Council members severely contested its reasoning concerning Article 25 of the Charter in the discussion on the Namibia Opinion.

The United Kingdom and France strongly criticized and even denied the Court's interpretation of Article 25 of the Charter. According to both states, Article 25 only applies to the decisions under Chapter VII of the United Nations Charter. The delegate of the United Kingdom stated,

[T]his part of the majority opinion [which asserts that certain resolutions adopted by the Security Council were legally binding] seems . . . to be open to the most serious legal objection . . . . And, as a matter of law, my Government considers that the Security Council can take decisions generally binding on Member States only when the Security Council has made a determination under Article 39 that a threat to the peace, breach of the peace or

79. Delegate of France stated, "[T]he Security Council is empowered to take decisions binding on all States. But such decisions are limited to cases of a threat to the peace, breaches of the peace or aggression." U.N. SCOR, 26th Sess., 1588th mtg. at 2-3. See also U.N. SCOR, 26th Sess., 1598th mtg. at 2.
80. These two permanent members of the Security Council abstained from voting on Resolution 301 (1971).
act of aggression exists. Only in these circumstances are
the decisions binding under Article 25.\textsuperscript{81}

Moreover, some other countries, such as Japan,\textsuperscript{82} Italy,
Belgium,\textsuperscript{83} and the United States,\textsuperscript{84} also put up a question on the
interpretation. As the delegate of Italy clearly stated, "[T]he Court
offered a far-reaching interpretation of Articles 24 and 25 of the Charter
— an interpretation which is highly controversial and, I must say, not
shared by my Government."\textsuperscript{85}

Italy's criticism of the Court's reasoning was not necessarily in
contradiction with their agreement with the conclusion of the opinion. The
states could rely upon the illegality of South Africa's presence in Namibia
to accept the Court's conclusion. As in previous resolutions regarding this
issue,\textsuperscript{86} the Security Council, in the resolution 301 (1971), emphasized the
illegality of the South Africa's presence in Namibia, not referring to the
reasoning advanced by the majority opinion. Indeed, in resolution 301
(1971), the Security Council stated,

The Security Council,

4. Declares that South Africa's continued illegal
presence in Namibia constitutes an internationally wrongful
act and a breach of international obligations and that South
Africa remains accountable to the international obligations
or the rights of the people of the Territory of Namibia;

\textsuperscript{81} U.N. SCOR, 26th Sess., 1589th mtg. at 5-6. \textit{See also} U.N. SCOR, 26th Sess.,
1598th mtg. at 3.

\textsuperscript{82} Delegate of Japan stated, "[W]e do not fully agree with all of the reasoning,
particularly with regard to some interpretations of the Charter, underlying the Court’s opinion . .

\textsuperscript{83} Delegate of Belgium stated, "[W]e feel that the Security Council can adopt decisions
mandatory for all Member States of the United Nations only when, in conformity with chapter
VII of the Charter, it has found that there is a threat to the peace, a breach of the peace or an act
of aggression." U.N. SCOR. 26th Sess., 1594th mtg. at 5-6.

\textsuperscript{84} Delegate of the United States stated, "Our acceptance, of course, does not necessarily
imply approval of all the Court's reasoning. We note in this connection concern about the
Charter interpretation which has been expressed by several members of this Council." U.N.
SCOR. 26th Sess., 1598th mtg. at 3.


\textsuperscript{86} \textit{See} S.C. Res. 269 (1969), para. 4; \textit{The Situation in Namibia}, S.C. Res. 276 (1970),
para.2.
5. Takes note with appreciation of the advisory opinion of the International Court of Justice of 21 June 1971;

6. Agrees with the Court’s opinion, as expressed in paragraph 133 of its advisory opinion.87

VI. CONCLUSION

The end of the Cold War has revitalized the activities of the Security Council and consequently activated the discussions on the issue of the limitations on the Security Council’s power under Chapter VII of the United Nations. However, the Namibia Opinion has the potential for ruining such arguments due to the majority opinion’s contention that the Security Council has general mandatory powers. If, as the International Court of Justice stated, Article 24, paragraph 1, of the United Nations Charter grants the Security Council the general implied powers and Article 25 provides a legally binding effect with decisions based upon such general powers, the Security Council does not have to rely on Chapter VII when it imposes sanctions. The general mandatory powers would empower the Council to take any action so long as it asserts that it is acting pursuant to its responsibility to maintain international peace and security.

Among the few scholars who have referred to the relationship between the Security Council’s general mandatory powers and its powers under Chapter VII, even fewer have examined the validity of the Court’s interpretation in the Namibia Opinion. However, since the advisory opinions of the International Court of Justice have no precedential value in a strict sense, the authority of the opinion depends upon the soundness of its reasoning. Thus, the Namibia Opinion should be fully examined from this viewpoint.

The Court’s interpretation of Article 25 of the Charter is not sustainable. Its own reasoning is untenable. First, the Court’s reasoning does not by itself prove that Article 25 applies to any decisions based upon the general implied powers. However, its reasoning in refuting the contention that Article 25 only applies to enforcement measures adopted under Chapter VII of the Charter is sound. Second, the Court’s presumption that the Security Council has general mandatory powers leads to the sterile confrontation between two absolute values, the institutional effectiveness and the state sovereignty. Moreover, the reasoning behind some other doctrines are also untenable. First, travaux préparatoires

(preparatory documents) of the Charter do not support the conclusion that the Security Council has general mandatory powers to the extent claimed. Second, practices of the Security Council are irrelevant to the issue discussed here. Furthermore, the Court’s interpretation of Article 25 has not been accepted by Member States of the United Nations, especially the members of the Security Council.

In conclusion, the proposition that the Security Council has general mandatory powers, as admitted by the International Court of Justice in the *Namibia Opinion*, is not sustainable and, indeed, is not accepted by states. In other words, the existence of general mandatory powers cannot be based upon the *Namibia Opinion*. Since the general mandatory powers is found untenable, *limitations*, on the Security Council’s power under Chapter VII, are not superseded by the *general mandatory powers*, which are essentially unlimited.

Hopefully, this analysis fills the gap in the current arguments on the power of the Security Council. The common understanding that the Security Council’s mandatory powers could not be deduced from its general implied powers should be the starting point of a fruitful discussion on the limitation on the Security Council’s power, thereby surmounting the sterile debate between legalists, insisting upon state sovereignty, and hard-headed realists, insisting upon the institutional effectiveness of the United Nations Security Council.\(^8\)

MUST RUSSIA RETURN THE ARTWORK STOLEN FROM GERMANY DURING WORLD WAR II?

Steven Costello*

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I. INTRODUCTION

In February 1995, the Pushkin museum in Moscow exhibited sixty-three paintings, including paintings from German private and museum collections prior to World War II.1 One month later, the Hermitage in St. Petersburg exhibited seventy-four paintings, of which almost all were owned by the German government or its citizens before the war.2 These exhibits have created friction between Germany and Russia because these works of art can be considered cultural property. Under the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, a country’s cultural property includes works of art.3 Since the German paintings in the Hermitage and Pushkin museums were forcibly wrested from Germany during and after World War II, there is the question of whether these cultural objects can be returned to Germany.

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2. Id.

To understand the present problem, one must return to the point where the controversy began. Near the end of World War II, as the Red Army plowed through the German Reich, *trophy brigades* were created for the sole purpose of taking as many objects of value from Germany as they could. As a result of looting, it is estimated that some 2.5 million artworks, ten million books, including Gutenberg Bibles, and gold from the unearthing of Troy was taken back to Russia. Also, much of the German art fell into the private hands of Soviet soldiers and generals. Soviet soldiers were allowed to take a certain amount of baggage from Germany, while Soviet generals were allowed to take train carloads of spoils home with them. For many years Stalin kept the stolen German art hidden, but this widescale looting by the Russians in Germany was never a well kept secret. There was even a certain degree of acknowledgement on the part of the Soviets, when in 1955, some 1.5 million items were returned to East German museums. Although there is relief that these artworks survived the war, the art’s return to the international spotlight has created the problem of whether under international law the artworks should be returned to their rightful owners in Germany.

The fact that the Russian museums and government are in possession of paintings which were taken from Germany during and after World War II poses questions that this article will attempt to answer. First, what treaties between Russia and Germany address the question of the possible return of the art to Germany? Next, what international agreements or conventions could the Germans use to initiate the return of German artistic or cultural property? Also, can one hold Russia to the treaties created by its former entity, the Union of Soviet Socialist Republics? Finally, there is the problem of what to do if German cultural property is bought by United States nationals or galleries from the Russian black market.

II. **BILATERAL AGREEMENTS BETWEEN GERMANY AND THE FORMER SOVIET UNION**

In 1990, the Treaty of Good-Neighborliness, Partnership and Cooperation was signed in Bonn. The Treaty addressed the issue of the

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4. *Who Owns This Art?*, PROVIDENCE J. BULL., May 9, 1995, at 12A.
8. Hughes, *supra* note 5, at 64.
return of cultural property taken during the war with both parties agreeing that “lost or unlawfully transferred art treasures which are located in their [German or Russian] territory will be returned to their owners or their successors.” In 1992, after the fall of the U.S.S.R., a cultural agreement was signed which also stipulated that German cultural property in Russia should be returned to Germany. Therefore, it has been recently acknowledged by the Russian government that German cultural property taken during and after the war should be returned.

With the present internal instability of the Russian government, however, the immediate return of the stolen artworks to Germany does not appear likely. In March 1995, the Russian Parliament reviewed a draft law declaring that the art taken from Germany during and immediately after World War II, would be the “sole property of the Russian Federation.” In April 1995, the Russian parliament took a step further by adopting a resolution imposing a moratorium for the return of cultural items which were transferred during the years of the Great Patriotic War.

These acts of the Russian Parliament are not widely opposed by the Russian populace since the legislature’s acts are not inconsistent with the feelings of many Russians, especially those Russians who fought the Germans or lived under the Nazi occupation of Russia. As a result of World War II, Russia had over forty million people killed or wounded, had 3000 of its cities destroyed, hundreds of its museums looted, over 1000 of its Orthodox churches razed, millions of its books stolen, and hundreds of thousands of its works of art taken. Many Russians feel that the possession of these German cultural objects is part of compensation for the horrors the country experienced in its war against the Third Reich.

The present German government views any stall in the restitution of their cultural objects as unacceptable. The Germans feel that theirs is a different government now, and point to the fact that over fifty billion Deutschmarks in aid have already been given to Russia. As to the restitution of Russian objects stolen by the Nazis, some 500,000 objects were returned to the Soviets by the British and Americans after finding

13. See Tape of Conference on Russian Museum Exhibits Art Taken From Nazi Germany, supra note 10.
stolen objects in their sectors of occupied Germany. This shows Russia has received some restitution of cultural objects taken by the Nazis.\textsuperscript{15}

The 1990 and 1992 agreements between Germany and Russia stipulated that Russia should return the German art objects. In certain situations there has been some restitution with respect to German cultural objects still in Russia. One example of this restitution was the recent return of 13,500 books from Moscow's library to the Berlin library.\textsuperscript{16} Considering the Russian Parliament's present actions, the feelings of the Russian people, and the past historical experiences of World War II, enforcement of these agreements is unlikely. Therefore, the German government should next look to multilateral treaties to see if international law proscribes a return of Germany's cultural objects.

III. MULTILATERAL CONVENTIONS AND TREATIES WITH REGARD TO CULTURAL PROPERTY

As far back as 1899, there have been agreements which address the importance of safeguarding a nation's cultural property. The following multilateral treaties encompass stipulations on the illicit trade of cultural objects and the responsibility warring nations have to one another's cultural property.

The 1899 Convention with Respect to the Laws and Customs of War on Land, signed by both the German and Russian Empires, applies to the issue of the Russian possession of German artwork. Under Section III, regarding military authority over hostile territory, "pillage is formally prohibited."\textsuperscript{17} Also, "private property cannot be confiscated."\textsuperscript{18} The Convention went on to categorize that property of "religious, charitable, and education institutions, and those of arts and science, even when State property, shall be treated as private property."\textsuperscript{19} This 1899 Convention helped to create a guide to subsequent treaties with respect to cultural property.

The 1907 Convention on Respecting the Laws and Customs of War on Land replaced the 1899 Convention, but kept the Section III articles regarding an occupying nation's authority over an occupied state.\textsuperscript{20} Unfortunately, World War II proved that the tenets of the 1899 and 1907

\begin{itemize}
\item 15. Gambrell, \textit{supra} note 1.
\item 16. Foster, \textit{supra} note 6.
\item 17. Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, art. 47, 32 Stat. 1803, 1822, T.S. No. 539.
\item 18. \textit{Id.} art. 46.
\item 19. \textit{Id.} art. 56.
\end{itemize}
Hague Conventions' articles prohibiting the pillaging and confiscation of private property were not followed.

After World War II, the 1954 Convention for the Protection of Cultural Property in the Event of Armed Conflict was enacted, supplementing the 1907 Convention. Both the U.S.S.R. and F.R.G. are signatories to the Convention. The Hague Convention notes that “damage to cultural property means damage to the cultural heritage of all mankind.”21 The 1954 Convention also stipulates that “jurisdiction to try offenses against cultural property is not limited to the government of the offender.”22 The problem with the 1954 Convention regarding the present issue of Germany trying to regain its artwork is that the Convention does not discuss the question of restitution.23

The 1970 Convention for Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property was promulgated by the United Nations Educational, Scientific, and Cultural Organization, and is referred to as the UNESCO Convention.24 The UNESCO Convention prohibits member countries from importing cultural property stolen from a museum and states that a member country should take steps to return property taken from another state, provided that the bona fide purchaser receives just compensation.25 Russia continues to be a signatory to the Convention, however, the Federal Republic of Germany is not a signatory.

In 1972, the Convention for the Protection of the World Cultural and Natural Heritage adopted the UNESCO rules and created a system for the collection and organization of important cultural and natural heritage properties.26 This Convention, however, limits objects of cultural heritage to monuments, groups of buildings, and natural heritage.27 The 1972 Convention does not appear applicable to the return of German artwork since it seems to be a request that nations inventory their cultural heritage

23. Fox, supra note 21, at 248.
24. Fox, supra note 21, at 248.
and submit the information to the United Nations in hopes of safeguarding a nation's cultural property in the future.

Most recently, in June 1995, a final draft of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Items was produced. The purpose behind this Convention is to promote international claims regarding the restitution of stolen cultural objects. This Convention would allow both government and private claimants to bring causes of action to the courts of a country where the contested artwork is located. Unfortunately, the Convention applies only to those cultural objects which are stolen after the Convention enters into force. In the drafting of the UNIDROIT Convention, one of the main concerns was the issue of retroactivity. After much discussion, the drafters followed the rule of treaty interpretation and concluded that UNIDROIT would remain nonretroactive. However, the Convention acknowledged that prior takings of cultural property were not absolved by the nonretroactivity of the Convention. Article 10(3) states that illegal takings before this Convention are not now legitimized and that States or people should continue to make claims other ways for the return of prior stolen cultural objects. The UNIDROIT Convention would appear a favorable instrument for the Germans to use since it affords States and their nationals ways to regain stolen cultural items. The Convention, however, does not provide the legal impetus to demand restitution of the German cultural objects taken during World War II.

In 1993, the United Nations General Assembly directly addressed the question of the restitution of cultural property to its country of origin. The General Assembly declared that such restitution contributes to the strengthening of international cooperation. The General Assembly went on to state that member states should concede bilateral agreements to return cultural properties to their countries of origin.

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29. UNIDROIT Convention, supra note 28, art. I.
31. UNIDROIT Convention, supra note 28, art. X.
32. See id.
33. UNIDROIT Convention, supra note 28, art. X(3).
35. Id.
36. Id.
In conclusion, there appears in the preceding treaties a common theme that one country may not rob another country of its cultural property. Since the 1899 Hague Convention, subsequent conventions have included articles prohibiting the looting of a country's cultural property. By robbing a nation of its cultural property in times of war, aggressor countries are not only stealing, they are depriving and even destroying a country's roots, its history. The German artwork which Russia has stored in the many vaults of the Hermitage is a reflection of what Germany has given artistically to the community of nations.

IV. TREATY OBLIGATIONS OF THE RUSSIAN FEDERATION AS SUCCESSOR TO THE U.S.S.R.

With the dissolution of the U.S.S.R on December 25, 1991, the immediate question was whether the Russian Federation could be held to treaties prior to that date which involved the U.S.S.R. as a party.\(^\text{37}\) Russia attempted to answer this question in its note to the United States government on January 13, 1992, that Russia continues to perform the rights and fulfill the obligations following from the international agreements signed by the U.S.S.R.\(^\text{38}\) The General Consul of Russia has also stated that Russia is the continuation of the U.S.S.R.\(^\text{39}\)

The Vienna Convention on Succession of States in Respect of Treaties, which was opened in 1978 but is not yet in force, declares that if a predecessor state continues to exist, it is "generally bound by the treaty rights and obligations in force prior to the break-up of the state."\(^\text{40}\) Under the Restatement of Foreign Relations Law, the predecessor state continues to be bound by the treaty rights and obligations in force prior to the break-up of the state.\(^\text{41}\) Russia seems to fall into the category of a predecessor state, as it has taken the position that it is the continuation of the former Soviet Union and will fulfill the treaty obligations of the former Soviet Union.\(^\text{42}\)

Since Russia has proclaimed itself the continuation of the Soviet Union, under a continuity theory, any treaty that was in force for the entire territory of the predecessor state is presumed to continue in force for each


\(^{38}\) Id.


\(^{40}\) Id.

\(^{41}\) RESTATEMENT (THIRD) ON FOREIGN RELATIONS § 210 (1987).

\(^{42}\) Williams, *supra* note 39, at 36.
separating state." Prior historical examples of the continuity theory involve the 1903 secession of Panama from Colombia and the 1830 secession of Belgium from the Netherlands. In both cases, Colombia and the Netherlands were held to their bilateral treaties, while the seceding states of Panama and Belgium were allowed a clean slate. Under a clean slate theory, new states "wipe their individual slates clean and choose whether or not to join treaties brought by their predecessor states." Thus it would appear that the states that broke away from the U.S.S.R.: the Baltic states, the Ukraine, Belarus, and the Caucasus states, would not be bound by the treaties of the former U.S.S.R. Russia, however, as the continuation of the U.S.S.R., would appear bound by the treaties of the former Soviet Union. In accordance with this interpretation, Switzerland, considering Russia to be the continuity of the former U.S.S.R., has merely "replaced the designation of U.S.S.R. with Russia on all multilateral treaties for which it was a depository."

The United States State Department's view of the break-up of states found that with the dissolution of the U.S.S.R., "the stability of legal rights and obligations are, on balance, better served by adopting a presumption that treaty relations remain in force," and acknowledged the prior treaties of the U.S.S.R. as binding on Russia. The Department of State then took into account the fact that Russia retains much of the territory of the former U.S.S.R., contains the majority of the former U.S.S.R.'s population, resources, and armed forces, and occupies the same seat of government (Moscow) as the former U.S.S.R. The conclusion was that the State Department found that Russia has inherited the legal identity of the former Soviet Union, and could retain the memberships the U.S.S.R. had in international organizations.

Therefore, as the continuation of the Soviet Union, Russia appears to be bound to the bilateral and multilateral agreements the Soviet Union made prior to its 1991 break-up.

V. WHAT TO DO IF GERMAN ARTWORK APPEARS ON UNITED STATES TERRITORY?

Immediately after World War II, the Russians were not the only occupying power that acquired German artworks. Some 202 paintings

43. Id. at 2.
44. Id. at 11.
45. Id. at 2.
46. Id. at 18.
47. Id. at 21.
were shipped from Germany to the United States after the war.\textsuperscript{49} What followed was a twelve city United States tour of the paintings, which finally ended in 1949 after American art historians and museums condemned the tour as being no better than the Nazi’s actions of looting Europe’s museums.\textsuperscript{50} Today, in the event that German artwork stolen by the Russians appears on United States soil, there is case and statutory law that could favor restitution of the paintings to Germany.

The cases of \textit{Kunstammlungen zu Weimar v. Elicofon} and \textit{Deweerth v. Baldinger} both dealt with Germans trying to recover paintings taken by American soldiers during the occupation of Germany.\textsuperscript{51} In \textit{Kunstammlungen}, two paintings were stolen from a German castle by American soldiers.\textsuperscript{52} Eventually, the paintings ended up in the hands of an art collector who years later discovered the German origins of the paintings.\textsuperscript{53} When a German museum discovered that the paintings were in the hands of the American art dealer, they sued for the paintings’ return. At trial, the art dealer argued that the statute of limitations had run. The Second Circuit Court of Appeals, however, applied the “demand and refusal” rule, whereby the statute of limitations would start to run after the museum had requested the art dealer return the paintings, and ruled that the paintings must be returned to Germany.\textsuperscript{54}

The \textit{Deweerth} case involved the stealing of a Monet painting from a home in Bavaria where American soldiers were being housed.\textsuperscript{55} The court in \textit{Deweerth}, however, held for the bona fide American purchaser, due to the fact that Ms. Deweerth did not use reasonable diligence in attempting to locate her missing painting.\textsuperscript{56} The reason behind the requirement of reasonable diligence on the part of the victim is to protect future good-faith purchasers and to encourage the original owners to actively seek out their stolen property.\textsuperscript{57}

Besides case law, the National Stolen Property Act “criminalizes the knowing transportation, sale, or receipt in interstate or foreign commerce stolen artwork.”\textsuperscript{58} Under this statute, Germany would have to

\begin{itemize}
\item \textsuperscript{49} Gambrell, \textit{supra} note 1, at 88.
\item \textsuperscript{50} \textit{Id}.
\item \textsuperscript{51} Deweerth \textit{v. Baldinger}, 836 F.2d 103 (2d Cir. 1987); \textit{Kunstammlungen zu Weimar v. Elicofon}, 678 F.2d 1150 (2d Cir. 1982).
\item \textsuperscript{52} \textit{Kunstammlungen}, 678 F.2d at 1152.
\item \textsuperscript{53} \textit{Id}. at 1153.
\item \textsuperscript{54} \textit{Id}. at 1161.
\item \textsuperscript{55} \textit{Deweerth}, 836 F.2d at 105.
\item \textsuperscript{56} \textit{Id}.
\item \textsuperscript{57} Margules, \textit{supra} note 26, at 618.
\item \textsuperscript{58} National Stolen Property Act, 18 U.S.C. §§ 2314-15 (1988).
\end{itemize}
“acknowledge the ownership rights to the cultural property and have existing domestic legislation prohibiting the export, transfer, removal, or excavation of the cultural property at issue.” Therefore, in the event that an American art dealer obtains a German painting from a Russian national, and knows that the property had been stolen, Germany would have recourse to try to obtain the cultural property.

With the collapse of the Soviet Union and the stagnation of the present Russian economy, it would not be surprising if Russian citizens and museums try to turn the German artwork they have into hard currency. It would thus be advantageous for the Germans to keep watch over the American art market, since many of the German cultural objects in Russia may cross from the Russian black market into American galleries, museums, and private collections. By remaining diligent in tracing the movement of artwork into the American marketplace, American law could be used to expedite the return of German artwork rather than waiting for Russia to fulfill its bilateral and multilateral agreements.

VI. CONCLUSION

Legally, the Federal Republic of Germany should be allowed to receive the artwork taken by the Russians during and after World War II. The 1990 bilateral treaty between the U.S.S.R. and Germany stipulates that each country should return the cultural objects that rightfully belong to the other nation. Multilateral treaties that both countries are signatories to, such as the 1899, 1907, and 1954 Hague Conventions also include provisions that the taking of a country’s cultural property by an occupying power is illegal. Treaties such as the 1970 UNESCO Convention and the 1995 UNIDROIT Convention continue the spirit of the Hague Conventions by requiring that countries aggressively combat the trade of stolen cultural property, and return the stolen property to the country of its origin. Finally, even the United Nations has promulgated a resolution declaring that countries should return stolen cultural objects to their country of origin.

Whatever rights the Germans may have legally under international law, the emotions regarding the paintings remain an issue. One cannot over emphasize the vast destruction caused by World War II, which is why it is so hard for many Russians to acknowledge that they may have to return the paintings to Germany. By returning the paintings to Germany, Russia would be seen as admitting that the taking of the German artwork was wrong. But how can Russia acknowledge its own guilt under the fact that tens of millions of its citizens died and thousands of its own treasures

59. Margules, supra note 26, at 621.
were destroyed as a result of the Nazi invasion of Russia? Perhaps the future will hold some compromise culminating in the return of the paintings to Germany. For as the generation of those Russians who experienced the “Great Patriotic War” die out, the remaining generations of Russians may learn to see that returning Germany’s artwork will not be an acknowledgement of guilt, but will help to close a painful chapter in the history of World War II.
ANALYSIS OF THE HAMBURG RULES ON MARINE CARGO INSURANCE AND LIABILITY INSURANCE

Eun Sup Lee*

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I. INTRODUCTION

There has been an increasing interest on the effects of the United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) on the double insurance problem which arises whenever a proposal to modify a carrier's liability regime is under discussion.¹ The Hamburg Rules can

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¹ The Hague Rules were so controversial in the United States that it took Congress 12 years to enact them. The Visby Amendments have given us a quarter century of controversy, with no end in sight. The Hamburg Rules have been controversial practically since the United Nations first began to work on them. The most prominent of the arguments that have reappeared
potentially alter not only the price of insurance relevant to international trade but also the insurance-purchasing behavior among parties involved in international trade. Sets of propositions have been introduced explicating whether and how the Hamburg Rules would affect insurance practices among cargo owners, that is, mostly international traders and cargo carriers.

Supporters of the Hamburg Rules have argued that adopting them will decrease double insurance and overall insurance costs. Opponents assert that these costs are lower under the Hague or the Hague-Visby Rules than under the Hamburg Rules. However, neither side rests on empirical evidence. Virtually every time might be about "the insurance argument." Michael F. Sturley, Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby, and Hamburg in a Vacuum of Empirical Evidence, 24 J. MAR. L. & COM. 1, 120 (1993).


3. Examples of opponents' arguments against the Hamburg Rules are as follows. First, for an argument that there is no reason to believe that cargo damage would be any less common under the Hamburg regime, see John A. Maher & Joan D. Maher, Marine Transport, Cargo Risks, and the Hamburg Rules: Rationalization or Imagery?, 84 DICK. L. REV. 183, 202 (1980). Second, for an argument that the adoption of the Hamburg Rules would lead to unnecessary and expensive litigation due to more confusing and less clear provisions, see George F. Chandler, A Comparison of COGSA, the Hague/Visby Rules, and the Hamburg Rules, 15 J. MAR. L. & COM. 233, 237 (1984); Birch F. Reynardson, The Implications on Liability Insurance of the Hamburg Rules, in THE HAMBURG RULES 1-2 (Lloyd's of London Seminar Sept. 28, 1978); J.P. Honour, The P. & I. Clubs and the New United Nations Convention on the Carriage of Goods by Sea 1978, in THE HAMBURG RULES ON THE CARRIAGE OF GOODS BY SEA, 239-40 (Samir Mankabady ed. 1978). Some Hamburg Rules opponents even seek to generalize these assertions to contend that any change in well-established laws will lead to uncertainty and higher expenses. See Herber, supra note 2, at 81, 91-92. Third, for an argument that the Hamburg Rules would increase overall costs by exacerbating a needless double insurance expense, especially due to higher costs in liability insurance than marine insurance, see, e.g., Thomas Chenal, Uniform Rules for a Combined Transport Document in Light of the Proposed Revision of the Hague Rules, 20 ARIZ. L. REV. 975 n.144 (1978); UN COGSA, supra note 2, at 235 (comments of the
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Evidence to support its arguments. Hence we cannot draw any conclusions about their ostensible superiority or inferiority unless we analyze the problem systematically with reliable information. First, the Hamburg Rules have not yet been generally adopted as a common rule, and the Hague and Hague-Visby Rules are applied in different ways in different countries. Second, cargo insurance premiums are not based on risk statistics because reliable statistics often are not available. Instead, the premium is set according to the account (whether it is a large or small policy, whether the insured is a new client, etc.) and according to the underwriter’s own intuition. Even if insurance costs increase, competitive carriers will be able to absorb the increased costs internally rather than shifting them to the shipper. This is because insurance cost is not a major factor in rating total freight, which can be absorbed through more reasonable management than before. With this reality in mind, it is hard

Japanese representative). Fourth, there is also concern that carriers may use the Hamburg Rules as an excuse to increase rates even if their P&I calls do not increase. For such a concern, see, e.g., Zamora, supra note 2, at 394, 395; Robert Hellawell, Less-Developed Countries and Developed Country Law: Problems for the Law of Admiralty, 7 COLUM. J. TRANSNAT’L L. 203, 212, 216 (1968). See Sturley, supra note 1, at 147.


5. There are four main types of individual rate plans used in business insurance contracts:
1) the experience rating plan;
2) the retrospective rating plan;
3) the schedule rating plan; and
4) the judgment rating plan.

Of these, usually it is the judgment-rating plan that is adopted in marine cargo insurance, which involves rating mainly according to the judgment of underwriter and not so much according to any statistical rationales. The judgment rating plan is justifiably the most unscientific of the four main plans commonly used.

6. Basically, the cost of liability insurance does not seem to consume any substantial portion of total freight. According to a report by the United States Department of Transportation, United States shipping companies’ net cost of liability insurance amounts to about 0.15% of total freight receipts, and total cost of liability insurance (including claim amounts and premium) amounts to about 2.05% of total freight receipts. Another report relates that the total operating cost of liners is estimated from 8% to 25%, or 3-5% of average liner freight. Therefore, the effect of a 6-8% increase in the cost of liability insurance on liner freight rate comes to only about 0.2% (.03 x .06) or 0.4% (.05 x .08). If the insurance cost portion of total liner freight is assumed to be 10% and this cost is increased by 15%, its effect on total liner freight comes to 1.5%. Reynardson, supra note 3, at 16. It has also been asserted that the question of whether carriers raise their freight rates to cover their increased P&I insurance costs
to generalize the effects that these three rules have on overall insurance
costs. Double insurance will be burdensome to the cargo owner in the
end, and this will dampen the vitality of international trade and the efficient
allocation of international resources. Therefore, the liability between the
carrier and the shipper should be distributed in a way to minimize double
insurance — keeping in mind in any case that it will be hard to avoid the
double insurance problem because both the liability insurer and the cargo
insurer must pay administrative costs or current expenses. We should
evaluate the distribution of liability between the carrier and the shipper
from this point of view.

With these difficulties in mind, this paper will examine the
theoretical effects of the application of the Hamburg Rules on both liability
insurance and cargo insurance and then explore potential implications by
means of face-to-face interviews with concerned parties. This article will
not attempt to provide definitive answers to these questions, for that would
require greater statistical groundwork than what is currently available.

II. CARGO INSURANCE UNDER THE HAMBURG RULES

Sea carriage depends on two types of insurance, namely cargo
insurance and carrier's liability insurance. These are similar in that they
both cover risks on loss or damage during sea carriage. They are different
with respect to the contracting parties and the risks to the insured. Liability
insurance covers carrier liability for loss or damage during carriage, while
cargo insurance covers economic losses resulting from loss or damage to
the goods. However, they constitute an overlapping system of insurance
in the sense that they cover the same goods. Costs related to claims
investigation, administration, and litigation likewise overlap in these two
different types of policy. Though not widely recognized, the overlapping
insurance problem existed before the Hamburg Rules were concluded.

Almost all cargo loss or damage is ultimately paid either by the
cargo insurer or the carrier's liability insurer (to be precise, either type is
paid by four parties, including the cargo interests and the carrier). The
uncertainty about compensation for loss or damage to shipped cargoes
during the voyage may be eliminated by having the carrier assume absolute
liability. Another alternative is having the shipper assume all liability for

will depend on the particular competitive situation of the carrier. That is, although one cannot
generalize, it may be that there are many cases where carriers will not raise their rates to
recapture the entire increase in P&I costs. Under such conditions, on the whole, the shift in
burden from cargo insurers to P&I insurer should, in itself, have little effect on world shipping.
See Robert Hellawell, Allocation of Risk Between Cargo Owner and Carrier, 27 AM. J. COMP.
L., 357, 366-67 (1979); Hellawell, supra note 3, at 211-16.

7. There is one case in which cargo insurance covers third-party liability. This is
provided by the Collision Clause of the Institute Cargo Clauses of 1982.
loss or damage. However, it is unlikely that such a method would be accepted as practical.\(^8\)

To complicate matters further, even though shifting the risk to each of the two contracting parties would eliminate dual insurance, it does not always result in savings against total costs, whether from the point of view of the cargo owner or from that of the total society. If the cargo owner bears responsibility for all cargo damage, cargo insurance becomes more important than liability insurance, and hence liability insurance could be eliminated. This could result in savings in the P&I costs of administration, claims investigation, and subrogation recoveries, as well as P&I calls. However, it is uncertain whether the cargo owner is benefited by such cost saving, since it depends on changes in the freight rate and cargo insurance premium. One important issue relevant to this question may be whether carriers will be able to pass on the costs of P&I insurance to shippers through higher freight rates. Predictions are divided regarding this. Opponents of the Hamburg Rules generally assert that carriers must pass on any cost increase if they are to stay in business.\(^9\) Supporters, on the other hand, consider the issue more complicated and argue that carriers may not pass on higher costs.\(^10\) "Comparing the relative expense of cargo insurance and P&I insurance undoubtedly requires empirical evidence, for there are plausible reasons why either could be found less expensive."\(^11\)

On the other hand, if the carrier bears responsibility for all cargo damage and possible decrease in costs\(^12\) turn out to be more than the

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8. The insured bill of lading attempted by OCL (Overseas Container, Ltd.) and ACT (Associated Container Transportation, Ltd.) was not successful because the large cargo owners rejected it. That was due to the fact that the savings in premiums resulting from insuring large goods through cargo insurance was greater than that resulting from the insured bill of lading. See G. Tantin, *Les Documents de Transport Combiné*, 15 EUR. TRANS. L. 377-78 (1980). That is, insured bill of lading would provide all shippers with standard coverage at an average cost, and large shippers do not like this. They prefer to arrange insurance coverage consistent with the needs of the particular business activity involved and thus to obtain advantages regarding claim settlements, premiums and other benefits that insurers offer important customers or that a customer with a good claims record may want. It has been suggested that a more practical way to approach this problem would be to develop understandings between cargo insurers and shipowner-liability insurers whereby formulae are agreed upon in advance for the allocation of loss in specified categories of claims, with non recourse agreements backing up those formulae so that the cargo insurer will not attempt to recover from the liability insurer amounts in excess of what would be provided therein. It has also been indicated that costs would be incurred in investigating the claims and in assessing quanta. At least the costs of litigation would be reduced, however, and in this way one of the main potential disadvantages of the adoption and application of the Hamburg Rules would be avoided or mitigated.

9. See supra note 3.

10. See supra note 2.

11. Sturley, supra note 1, at 147.

12. It is asserted that as cargo insurance is a highly competitive business, premiums would go down as payments from P&I clubs increase simply because the cargo insurance companies' net
increase in costs in P&I calls and freights, it is theoretically plausible that cargo owners will have some benefits under that regime. However, even if cargo owners have such benefits, there is no practical way for them to select the range of coverage to take advantage of favorable premiums. Additionally, a number of problems can arise because cargo owners have to make claims directly to liability insurers for loss or damage. In short, there is no reason to expect that the covered risks of the cargo insurer will be reduced substantially.

Consequently, some degree of double insurance is unavoidable under the Hamburg Rules. This fact is apparent upon examination of the provisions of the Rules that follow, although there may be no practical problem for the shipper to be compensated for loss or damage from the carrier according to the provisions of the Hamburg Rules.

A. Basis of Liability

Carrier liability under Article 5(1) of the Hamburg Rules\textsuperscript{13} is based on the principle of presumed fault or neglect. This provision is heavily influenced by the language used in conventions concerning the international transport of cargo by air,\textsuperscript{14} rail,\textsuperscript{15} and road\textsuperscript{16} carriage. According to this payments will go down. Selvig, supra note 2, at 316; Hellawell, supra note 6, at 366-67. Regarding the cost of recourse actions which should be taken into account in rating premiums, the simplification of the liability regime in the Hamburg Rules is said to be likely to facilitate recourse to such an extent that one may even expect an actual reduction in recourse cost. It has also been indicated that cargo companies are hardly expected to seek recourse in cases where the cost will be unreasonably high. Selvig, supra note 2, at 316. In addition, it has been asserted that if the ratio of claims administration to recoveries is increased (mainly due to the increase in recourse actions between two insurers), it would be temporary, reflecting only the inevitable period of uncertainty, which occurs whenever any new measure is introduced, whether it be a statute, a convention or a technological advance. C. C. Nicoll, Do the Hamburg Rules Suit a Shipper Dominated Economy?, 24 J. MAR. L. & COM. 1, 176-77 (1993).

13. Article 5(1) provides that:

[the carrier is liable for loss resulting from loss or damage to the goods, as well as from delay in delivery, if the occurrence which caused the loss, damage or delay took place while the goods were in his charge as defined in Article 4, unless the carrier proves that he, his servants or agents took all measures that could reasonably be required to avoid the occurrence and its consequences.

UN COGSA, supra note 2.

The former part of Article 5(1) gives strict liability to the carrier, while the latter part permits the carrier an exclusion by requiring him to take all measures that could reasonably be required to assure safe delivery. In the clause above, the exact level of care required of the carrier is open to future determination, since the language "took all measures that could reasonably be required" is novel in the area of carriage of goods by sea. Hellawell, supra note 6, at 358.

14. Articles 18-(1) and 20-(1) of the Convention for the Unification of Certain Rules Relating to International Carriage by Air October 12, 1929 478 U.N.T.S. 371 [hereinafter The Warsaw Convention]. The Warsaw Convention applies only to international carriage, which is defined as that taking place between two contracting states, or occurring within a single
clause, the carrier is not liable for loss resulting from loss or damage to the goods unless the occurrence which caused the loss or damage took place while the goods were in his charge. Compensation from the carrier is uncertain if it is impossible to explain the cause of such loss or damage because there is no provision for determining who is responsible for liability in such a case. Moreover, there is a certain amount of ambiguity in Article 5(1) as to whether the shipper is responsible for proving that the cause of the loss took place while the goods were under the carrier’s custody, or whether the carrier is responsible for proving that the cause of the loss had arisen before the goods were in his custody when the clean bill of lading was issued.

The carrier is not liable for any loss if there is no fault or negligence on his part or on the part of his servants or agents according to the principle of fault or neglect. However, some level of cargo damage is nearly inevitable in sea carriage, even where the carrier has taken all measures that could reasonably be taken to avoid it. Some level of cargo damage might be considered almost an inevitable price of international commerce, even though the level of damage is still subject to some degree

contracting state if there is an agreed-upon stopping place outside it. *Id.* art. 1(1), (2). With respect to the basis of liability, the carrier under the Warsaw Convention is presumed liable upon simple proof of damage or loss to the cargo, in line with the general rule. *Id.* art. 18(1). The major exceptions to liability, and the air carrier’s major defense, are contained in Article 20(1).

15. Articles 27-(1) and 27-(2) of the International Convention Concerning the Carriage of Goods by Rail (May 9, 1980) [http://www.unicc.org/unece/trade/cotif/cotif09.htm] [hereinafter CIM]. The scope of the CIM may be summarized in terms of three criteria: (1) the convention applies only to international carriage between at least two contracting states; (2) the shipment must be covered by a single transport document, in the approved form, which covers the entire carriage; and (3) the shipment must be carried only on lines registered on official lists. *Id.* art. 1(1). The convention applies from the time the goods are accepted for delivery until the time of delivery. *Id.* art. 27(1). The liability system under the convention has been assessed to be based on absolute liability, strict liability (droit strict) or liability *ex recepts* (system of liability without fault). Zamora, *supra* note 2, at 424, which is provided in Article 27(1). Under the CIM there are two classes of exceptions to liability. Under one class of exceptions, termed *non-privileged exceptions*, the burden of proof is on the carrier to establish that one of these exceptions caused the damage or loss. CIM, *supra* note 15, arts. 27(2), 28(1). Under the other class of exceptions, termed *privileged exceptions*, the carrier’s burden of proof is applied favorably. *Id.* art. 27(3). That is, the carrier needs only show that the loss or damage could have been caused by one of these risks, in which case it shall be presumed that the damage or loss was so caused.

16. Articles 17-(1) and 17-(2) of the Convention on the Contract for International Carriage of Goods by Road (Geneva, May 19, 1956) [http://www.anase.irv. uit.no_trade/law/doc/UN. CMR. Road.Carriage.Convention.1956.html10/21/97] [hereinafter CMR]. The CMR applies to every contract for the carriage of goods by road in vehicles for reward, when transport takes place between two countries, at least one of which is a contracting country, which can be applied by contractual agreement when it would not be applied by default. *Id.* art 1(1). The basic feature of the regime is a presumption of liability against the carrier once the cargo owner has established the fact of the loss or damage. *Id.* art. 17(1). The carrier’s liability depends on the exceptions available to the carrier to rebut the presumption against it. *Id.* art. 17(2).
of control. If carriers were willing to take all necessary precautions, we
could have international commerce with little to negligible cargo damage.
But possibilities of loss or damage still remain due to other causes, such as
by inherent vice or nature, latent defect, unavoidable fire, third parties’
cargo, war, strikes, etc. Precautions may far exceed the value of almost
any cargo carried by sea. Thus, contracting parties make a conscious
decision to tolerate some level of cargo damage in order to save in the
overall costs of the enterprise operation.

We recognize that there are vague provisions about the placement
of liability in the Hamburg Rules. Some losses are inevitable. Substantial
losses during sea carriage are commercially predictable. Therefore, cargo
owners might bear some of the risk under the Hamburg Rules as they do
under the Hague-Visby Rules, and they will need to purchase cargo
insurance just the same. 

**B. Period of Liability**

The carrier’s period of liability under the Hamburg Rules (Article
4) is based on the port-to-port criteria, which impose a duty of care on the
carrier while he is in charge of the goods, from receipt to delivery. It
replaces the old tackle-to-tackle limitation of carrier liability. However,
cargo should be delivered to the departing port or inland depot and stored
at a place of storage before it is under the custody of the carrier. If the
cargo insurance covers all risks from warehouse to warehouse, the cargo
insurer compensates the cargo owner for loss or damage regardless of the

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17. Inherent vice or nature of the goods is covered under a cargo insurance policy by the
special or expressed clauses — including, for example, the rust clause, the standard coal clause,
the livestock clause, or the clause involving risks of rats and/or vermin — which require the
insurer’s due diligence or reasonable measures to avoid such risks for the indemnification from
the insurer.

18. Even under cargo insurance there are exclusionary risks such as willful misconduct of
the assured, delay (delay is excluded even if the delay is caused by a peril insured against),
ordinary wear and tear, ordinary leakage and breakage, inherent vice or nature of the subject
matter insured, and rats/vermin, under the United Kingdom’s Marine Insurance Act of 1906 and
under the Institute Cargo Clauses (A) of 1982. See Section 55(2) of the Marine Insurance Act of
1906; Clause 4 of the Institute Cargo Clauses (A). In current practice there is also the category
of cargo loss or damage for which neither the carrier nor the cargo insurer is liable, such as loss
or damage caused by the purely inherent vice or nature of the cargo or willful misconduct of the
assured.

19. In cargo insurance, which is developed in accordance with the various demands of the
insured, the duration of risk regulated in the United Kingdom’s Marine Insurance Act of 1906
from loading at the departure port to discharging at the destination port — is expanded by the
transit clause or the warehouse-to-warehouse clause. For example, in the Institute Cargo Clauses
of 1982 (Clause 8), the duration of risk is from the time the goods leave the warehouse or place
of storage at the place named in the policy for the commencement of the transit to the time the
goods are to be delivered to the consignees’ warehouse or other final warehouse or place of
storage at the destination named therein.
carriage section in which the loss or damage occurs, or even if the cause of loss or damage cannot be proved. Without cargo insurance, the cargo owner may encounter difficulty in attempting to show that the cause of loss or damage occurred while the cargo was in the carrier's custody. Therefore, under the Hamburg Rules, cargo insurance is still necessary, although the carrier's period of liability is extended. 20

C. Package Limitation

Much discussion has taken place about the increase in the monetary limit of liability under the Hamburg Rules. The Hamburg Rules provide for a nominal increase of about twenty-five percent in the monetary limit by comparison with the Hague-Visby Rules. 21 However, it is unimportant to the cargo owner or carrier whether the carrier's limits of liability in international conventions are high enough or are excessively low because the limitation exists merely to create some certainty in commercial relations. 22 Moreover, the shipper can be provided compensation that is considered sufficient, over and above the limitation of the carrier's liability, in accordance with the specific provisions of the agreement with

20. The carrier's liability under the Hamburg Rules may be said to be strengthened when one considers the fact that the probability of occurrence of loss or damage from the stage of receipt of the cargo for transportation to the stage of shipment is high compared to other stages of transportation. But in some countries (e.g., the United States or France) the carrier's extended period of liability has been realized to incorporation into the bill of lading. Such an extension of the carrier's period of liability is helped less by the Hamburg Rules than the Hague or Hague-Visby Rules.

21. The Hague Rules have a limit of £100 per package or unit, which has led to wide variation in calculating the limitation figure. The Hague-Visby Rules, as amended by the 1979 Protocol, provide for a limit of 666.67 SDR per package or 2 SDR per kilo, whichever is greater. Under the Hamburg Rules the limits are 835 units of account per package or other shipping unit or 2.5 units of account per kilogram of gross weight of the goods, whichever is greater. This nominal increase of about 25%, which could hardly be interpreted as generous to cargo owners, is assessed to represent a substantial reduction in the limits of a carrier's liability in real terms when inflation is taken into account. This is said to be contrasted with the much more generous levels fixed by the other conventions, for example, the CMR, whose Article 23 provides for a limit of 8.33 SDRs per kilogram (together with all the costs of carriage). A. J. Waldron, The Hamburg Rules: A Boondoggle for Lawyers?, J. BUS. L. 313-14, n.41 (1991).

22. See C. W. H. Goldie, Effect of the Hamburg Rules on Shipowners' Liability Insurance, 24 J. MAR. L. & COM. 113 (1993). The package limitation was asserted not to be substantially meaningful due to one of the following reasons. First, the limit of liability in terms of real values has nearly always varied greatly among Hague Rules countries. Extremes are exemplified by Spain with a low of $62 and Switzerland with a high of $1455 per package. These differences are due themselves to the fact that legislation in most Hague Rules countries has fixed the amount in national currency and monetary developments during the past 40 to 50 years have resulted in quite different outcomes for the currencies of the various countries. Second, the concepts of package and unit, one element of the limit of liability, has also been understood in different ways. This has greatly affected the actual limit to be applied in particular cases. Selvig, supra note 2, at 321.
the carrier. The shipper simply has to choose between the security of having full recovery guaranteed from the carrier who agrees to cover such costs with higher freight or the purchase of excess cargo insurance, and the greater risk entailed by keeping within standard liability limits. Considering that compensation from the carrier is commonly delayed and compensation procedures are somewhat complicated, the shipper would do well to insure the goods by purchasing cargo insurance for prompt and full compensation. In light of this, the necessity to insure goods by means of cargo insurance will continue to exist regardless of the expansion of the carrier's liability limitation.

D. Other Clauses

Where fault or neglect on the part of the carrier, his servants, or agents only causes part of the loss, damage or delay in delivery, the carrier is liable only to the extent that it is attributable to such fault or neglect. In such a case it will tend to take considerable time to investigate the loss

23. Cases are common in which claims clearly exceed the limitation figure, which was defined as a mere reflection of relative economic power between the two interests, the carriers and the shippers, more than of commercial need. It seems inevitable that the courts will find a way to break the limitation in order to provide the claimant with what is considered to be adequate compensation. See Goldie, supra note 22, at 114. One method whereby United States courts circumvent the limitation has been to insist that the shipper be given a fair opportunity to declare the true value of the goods when it is higher than the package limitation. Blank square clauses in bills of lading, published tariffs giving the shipper a choice of valuations, and incorporation by reference to the short-form bill of lading of the terms of the long-form bill of lading (which refers to COGSA) have been accepted by American courts as fair opportunities. The principle of a fair opportunity to declare has arisen in Canada also. Another method has been to define the package as a smaller and smaller unit by ruling that each package in the container, rather than the container itself, is a package. This legislative approach, which has been called the judicial response to an anachronistic law, is described in GUIDO CALABRESI, A COMMON LAW FOR THE AGES (1982) and by many other authors cited in WILLIAM, TETLEY, MARINE CARGO CLAIMS 866-67 (3d ed. 1988). Also, when the carrier commits a deviation, most United States courts do not apply package limitations according to the doctrines of deviation and fundamental breach. See, e.g., Constructors Técnicos, S. de R. L. v. Sea-Land Service, Inc., 945 F.2d 841, 844-45, 1992 AMC 1284, 1289 (5th Cir. 1991); Ingersoll Milling Machine Co. v. M/V Bodena, 829 F.2d 293-301, 1988 AMC 223, 234 (2nd Cir. 1987), cert. denied, 484 U.S. 1042 (1988); English Electric Co. v. S.S. Nancy Lykes, 706 F.2d 84-89, 1987 AMC 1351, 1358 (2nd Cir. 1987); General Electric Co. v. S.S. Nancy Lykes, 706 F.2d 80, 86-88, 1983 AMC 1947, 1957-59 (2nd Cir. 1983), cert. denied, 464 U.S. 849 (1983); Nemeth v. General Steamship Corp., 694 F.2d 609, 612-13, 1983 AMC 885, 889 (9th Cir. 1982); Calmapip Engineering West Hemisphere Corp. v. S/S Yafo, 590 F.2d 633, 638, 1984 AMC 839, 846 (5th Cir. 1979). But see Atlantic Mutual Insurance Co. v. Poseidon Schifffahrt Gmb.H., 313 F.2d 872, 874-75, 1963 AMC 665, 668-69 (7th Cir. 1963), cert. denied, 375 U.S. 819 (1963). In continental countries, in contrast with common law countries, the limitation clause has not been applied to damage caused by the intent or gross negligence of the carrier, but rather the question of whether the carrier may limit liability for damage caused by such fault of his servant or agent has been solved in different ways. Selvig, supra note 2, at 321.

or damage to ascertain the carrier’s portion of liability, even though the carrier is proved liable for a substantial part of the total loss incurred. Therefore, even though the carrier indemnifies cargo interests, it will not necessarily be an advantage to the shipper who is interested in rapid reimbursement. For a prompt return, it would be more efficient for the shipper to receive indemnification from the cargo insurer and then to transfer the claims against the carrier to the cargo insurer.25

The universality of the new standard of carrier’s liability and burden of proof is undercut by special rules about losses to fire.26 In the case in which it is interpreted as shifting the burden of proof back to the shipper, the above clause makes it practically impossible for the cargo owner to establish the source of the fire during the voyage because the carrier may be the only party knowledgeable of any accidents that have occurred during the voyage.

In view of this, the cargo owner still needs to insure goods by means of cargo insurance against loss or damage arising from fire in order to guarantee compensation. Thus, the necessity to insure goods through marine cargo insurance would not be mitigated under the Hamburg Rules during the period of enforcement, even though it would be reduced more or less in the long run under the condition that prompt and full compensation from the carrier is secured, such as from the cargo insurer.

III. LIABILITY INSURANCE UNDER THE HAMBURG RULES

To date, the matter of double insurance has mainly been discussed under the assumption that the Hamburg Rules would strengthen the liability

25. In practice, a loan receipt could be applied, which is an arrangement between the shipper and his insurer whereby the latter lends the shipper the amount of the loss caused by the carrier’s negligence, in consideration of the shipper’s agreement (a) to take suit against the carrier at the expense and direction of the insurer, and (b) to pay over any eventual recovery to the insurer. This loan receipt, rather than subrogation receipt, is often used by American underwriters so that the claim is technically and theoretically unsettled and yet the underwriter, under the terms of the loan receipt and the insurance policy, may sue in the name of the insured.

William Tetley, Who May Claim or Sue for Cargo Loss or Damage?, 17 J. MAR. L. & COM. 2, 171-72 (1986).

26. Article 5.4(a) of the Hamburg Rules provides that the carrier is only liable for the loss of, or damage caused to, goods, or delay in their delivery, caused by fire if the claimant proves that the fire arose from the fault or neglect of the carrier or his servants or agents. The failure to employ the formula “all measures that could reasonably be taken,” as in the case of other loss or damage and specifying instead fault or neglect as the criterion for liability gives rise to the question of whether the effect of Article 5.4(a) is purely to reverse the burden of proof or has a more substantive effect upon the standard of the carrier’s care.
Now this article will examine the effects that strengthening a carrier's liability has on liability insurance and costs. There has also been a great deal of discussion on the increase in monetary limits of carrier liability, as well as on the potential increase in the amount of litigation that is likely to arise due to ambiguity in the provisions and the removal of the lists of exceptions under the Hamburg Rules. The latter will affect shipowner's liability insurance demand and cost.

Irrespective of whether the increased package limitations discussed above should be of any concern, it is unlikely that any such increase will have a dramatic effect on shipowner's liability insurance under the Hamburg Rules. There have been many disputes in the courts related to this, but interpretations of the relevant clauses in the Hague Rules have been continuously invoked to settle them for seventy years. It seems likely, therefore, that the volume of litigation involving the interpretation of the clauses will increase insofar as the principle of interpretation changes according to changing circumstances.

But it is not enough to show that there will be an increase in litigation because of the adoption of the Hamburg Rules. Under the Hamburg Rules, the carriers are primarily anxious about restrictions on the...
defenses which are available to them by removal of the catalogues of exception of the Hague-Visby Rules. Shipowners have little opportunity to prevent or manage risk during the voyage in most countries, and companies, and the extent to which shipowners do indeed have control over short deliveries or damage to shipped cargoes during a given voyage varies from country to country and among carriers’ companies.

In spite of the fact that the defenses available to the carrier through the exception catalogues have tended in practice to be interpreted restrictively under the Hague or Hague-Visby Rules, the removal of those defenses under the Hamburg Rules might weaken the shipowner’s position because the court will not consider the exceptions. Hence, an increase in carrier liability through the removal of exceptions would result in an increase in demand for carrier liability insurance. Nevertheless, it is not likely that an increase in carrier liability due to a removal of exceptions under the Hague-Visby Rules will result in an equivalent increase in the liability insurance premium. Carrier liability insurance covers many kinds of risks, and one cannot predict with any confidence that an increase in some cost factors will be fully reflected in the total cost of liability insurance.

From the point of view of pure economics, the P&I club could be assessed to be more efficient and prone to undertake cost-saving measures.

30. For example, some companies whose risk management operations are run by a skilled, well-educated staff and crew will more easily be able to prevent short delivery or damage to goods during a voyage, while companies that fail to manage risk efficiently will have much more difficulty doing so. So if we want to assess the effect of the application of the Hamburg Rules, we should do it country by country and company by company. See Goldie, supra note 22, at 112.

31. According to the Hague Rules:
this means that in many countries it is increasingly difficult for the carrier to prove the exercise of due diligence in making the ship seaworthy, and it is even more difficult for him to rely on some of the exceptions listed in Article 4 Rule 2, and it is also more difficult for him to rely on (b) Fire, (c) Perils of the Sea, (i) Act or omission of the shipper, etc., (m) Inherent vice, (p) Latent defects, or (q) Any other cause arising without the actual fault or privity of the carrier, his servants or agents.

Id.

32. Id. at 113-14.

33. Cargo liabilities are reported to amount to between 1/3 and 2/5 of all claims made. Selvig, supra note 2, at 317. The Hamburg Rules' effect on liability insurance has been assessed to be too limited because the portion of actual accidents out of the risks insured by the P&I clubs was reported to be not so large (that is, 30%) and because the provisions of the Hamburg Rules are related to cargo liabilities among many kinds of liabilities. Reynardson, supra note 3, at 1. Thus, if the claim amount is increased by 10% to 20%, the total claim amount paid to carriers will be increased by 3% to 6%.
than the profit-pursuing cargo insurance companies.\textsuperscript{34} Hence, it is possible that carriers may be insured more inexpensively through a P&I club than if insured through a cargo insurance company, especially in a world of perfect information and zero transaction costs.\textsuperscript{35} Granted, it is very difficult to predict the effect of the Hamburg Rules on the total cost of insurance without some empirical support, but it is highly doubtful that activation of the Rules will bring about any increase in total insurance costs as opponents have asserted, if the shift from marine cargo insurance to carrier liability insurance is a smooth one.

To summarize, this article has examined the effect of the Hamburg Rules on liability insurance in this section. While the effect on increased demand seems somewhat substantial, the liability insurance premium does not seem quite so dramatic. Nevertheless, we cannot draw any definitive conclusions about this without better information.\textsuperscript{36}

\textsuperscript{34} Some investigations made in 1979 showed that the portion of total claims that constitutes the operating cost of the P&I club is estimated to be 3.5%, Reynardson, \textit{supra} note 3, at 4, and 85% to 90% of the total premium is estimated as constituting actual claims. Selvig, \textit{supra} note 2, at 316. According to one United States report about 50% of cargo insurance companies' premium receipts was estimated as constituting claim amounts, while about 33% went to general operating costs. The rest constituted company profits. Cargo Liability Study, \textit{FINAL REPORT, PREPARED BY OFFICE OF FACILITATION, OFFICE OF THE ASSISTANT SECRETARY FOR ENVIRONMENT, SAFETY, AND CONSUMER AFFAIRS, UNITED STATES DEPARTMENT OF TRANSPORTATION, 65} (June 1975). In the case of the European cargo insurance companies, 75% of total premium receipts was estimated as constituting claim amounts, 20% as general operating costs, and 5% as profits. N. Kihlbom, \textit{The Hague Rules and the UNICTRL Draft, SCANDINAVIAN INS. Q. 32, 34} (1977).

\textsuperscript{35} \textit{See} Sturley, \textit{supra} note 1, at 125. There are some contrary assertions that P&I insurance is generally more expensive than cargo insurance. \textit{See, e.g.}, Chenal, \textit{supra} note 3, at 915, n.144; M. J. Shah, \textit{The Revision of the Hague Rules on Bills of Lading Within the UN System: Key Issues in the Hamburg Rules on the Carriage of Goods by Sea}, at 11, n.5 (1978); Hellawell, \textit{supra} note 3, at 367. \textit{See also} comments by Germany, \textit{VII Yearbook} 218-19; comments by Sweden, \textit{id.} at 230-31; International Maritime Committee, \textit{id.}, at 249; International Union of Marine Insurance, \textit{id.}, at 257; comments by Japan, \textit{id.}, at 221-22. One reason is that cargo insurance spreads the risk of a major catastrophe broadly, among all the cargo insurance companies or underwriters involved on the navigation, while P&I insurance concentrates that risk on a single policy. \textit{See, e.g.}, N.R. McGilchrist, \textit{The New Hague Rules, LLOYD'S MAR. & COM. L. Q. 260} (1974). Another is that first-party property insurance is more economical than third-party liability insurance. \textit{See, e.g.}, U.N. COGSA, \textit{supra} note 2, at 235 (comments of the Japanese representative). From the point of view of risk combination and diversion, insurance companies' underwriting methods and premium imposition are more efficient and scientific than those of the P&I club, considering the relatively large volume of underwriting and long-established experience of the underwriters. But it is not reasonable to conclude that liability insurance is costlier than cargo insurance if we consider this point alone and do not consider the total operating costs of the two industries.

\textsuperscript{36} There are two examples of empirical studies on the effect of the Hamburg Rules on liability insurance. One was done by the forwarder associations of the United Kingdom and the other by C. W. H. Goldie. The major freight forwarder associations of the United Kingdom made the new standard clauses about the carrier's liability. Instead of the actual principle of non liability, according to which the shipper is responsible for proving the carrier's negligence, these
IV. EXPLORATION OF THE EFFECT OF THE HAMBURG RULES: FIELD PRACTITIONERS’ EXPECTATIONS

The purpose of this exploration is to introduce an understanding of the effects of Hamburg Rules from the perspective of business practitioners involved in international trade, that is, international traders as cargo interests and carriers. A more complete understanding of the effects of Hamburg Rules is likely to be obtained by scrutinizing both theoretical explication and field practitioner opinion. Because the main purpose of the Hamburg Rules is to regulate the business practices of carriers involved in international trade, opinions from the field should be regarded at least as important as what academicians theorize.

Firsthand information from industry practitioners was collected by means of a series of face-to-face interviews with personnel working for either trading companies or shipping companies located in Korea. Interviewees included company presidents, directors, and other authorities in charge of their firms’ decisions concerning insurance and carriage contracts regulating the importation and exportation of goods. In order to obtain both broad and in-depth information, a set of unstructured, open-ended questions was presented in each of the 231 one-on-one interviews.

Clauses adopt the new limitation of liability, which has substantially been strengthened. This means that the carrier’s liability has been more strengthened than it would have been under the Hamburg Rules. However, it has been observed by the business world that freight rates have not gone up and the major freight forwarders have not been required to pay higher premiums for liability insurance than under the previous system. M. D. Booker, European Shippers View on the Hamburg/Visby Controversy, Paper Presented to the Shippers National Freight Claims Council at its 13th National Conference at New Orleans (Mar. 4, 1987), cited by United Nations Conference on Trade and Development, supra note 33, at 34. On the other hand, C. W. H. Goldie examined the possible impact of the Hamburg Rules on liability insurance in 1993. His study showed that the effect of the Hamburg Rules on shipowner’s liability insurance would not be notably dramatic. Goldie, supra note 22, at 115-16.

37. As an example from this empirical study, Korea was assumed to lie between the shipping developed countries like the United States and the shipping developing countries like those that have yet to ratify the Hamburg Rules. That would place Korea at around the tenth largest country in volume of foreign trade and the twelfth largest in volume of shipping space in the world. Consequently, Korea’s adoption or rejection of the Rules may or may not be indicative of the decisions of other countries. But the effect of the Rules on marine cargo insurance and shipowner’s liability insurance in Korea would be even less indicative of broader trends created by the Rules than the question of their adoption. Perusing the results of the interviews, we should consider the general state of the circumstances surrounding Korea’s insurance and shipping industries with those of other advanced countries. For example, in Korea, marine cargo insurers usually use the premiums made in other insurance-advanced countries as benchmarks in setting their rates rather than using completely independent criteria. Almost all Korean shipping companies have very weak competitive positions compared to shipping-advanced countries, and it may be somewhat restrictive for them to estimate freight according to the market mechanism. These factors may obstruct our ability to generalize concerning the general effect of the Hamburg Rules on marine cargo insurance and the shipowner’s liability insurance.
with trading company authorities and fifty with shipping company authorities. These questions included:

1) whether the Hamburg Rules are likely to change the informant’s firm’s insurance purchasing behavior;
2) whether the Hamburg Rules are likely to affect the premiums of the insurance the informant’s firm purchases; and
3) how the informant’s firm would respond or is responding to the changes brought about by the Hamburg Rules.

Interviews were conducted during the period from August 1993 to August 1996.

Informants were evaluated based on the adequacy of their knowledge of and willingness to provide the information. All informants were familiar with the Hamburg Rules and the potential effects of the Rules on their businesses. In Korea, carrier liability has been strengthened substantially by the modification of the International Sea Carriage Law in 1992, which incorporated ideas from the Hague-Visby Rules and, to a lesser extent, from the Hamburg Rules. Informants were aware of the implications of those modifications, which had significantly increased carrier’s liability marine cargo. In addition, all informants were willing to provide information. During the interview period, the author was in charge of Advanced Management Programs at Pusan National University, where the authorities of the affronted trading and shipping companies had been educated. A one-on-one interview, lasting an average of about forty-five minutes, was conducted in either a seminar room or in the author’s office at the University.

The procurement of information from two major parties involved in international trade helped clarify the field practitioners’ perceptions of the Hamburg Rules and the expected influences by the Rules on their insurance-related businesses. Considering the diversity of propositions that are provided in the literature on the issue, the opinions of these business practitioners were surprisingly similar. Findings are summarized based upon the interviews with the traders and then with the carriers. Finally, the information from both categories of informant is integrated to discuss the overall effects of the Hamburg Rules on marine cargo insurance and shipowner’s liability insurance.

A. Traders’ Responses

The Hamburg Rules will not change cargo insurance practices. More than ninety percent of informants representing trading companies expressed a need to insure the goods they export and import regardless of
increased carrier liability on those shipped goods. Trading companies in general seem to trust insurance companies rather than either shipping companies or P&I clubs to provide prompt and full compensation for lost or damaged goods. Surprisingly, most trading companies are reluctant to contact shipping companies to make claims for the loss or damage of their goods incurred during voyage. Shipping companies in most cases were reported to be substantially unresponsive in compensating the shipper for lost or damaged goods, even when causes are clearly attributable to the carrier. Trading companies seem to be motivated to resort to insurance companies rather than to shipping companies. The working relationship with an insurance company resulting from accumulated transactions provides international traders with not only trustworthy relief but also fringe benefits such as discounted insurance premiums. Thus, because international trading companies perceive cargo insurance as a better alternative than the compensation plan available at shipping companies, an increase in carriers’ liability imposed by the Hamburg Rules would not significantly alter the practice of marine cargo insurance among international traders.

As far as the possible change in cargo insurance premium is concerned, trading companies do not expect such a change in the foreseeable future. Quite contrary to what many academicians have proposed, business practitioners believe that cargo insurance premiums would be minimally, if at all, affected by the increase in carriers’ liability on shipped cargo. Informants representing trading companies expected, judging from their business experiences, that because cargo insurance premium levels are determined by a multiplicity of factors, changes in a
single factor (that is, increased carriers' liability) would not be strong enough to have an immediate effect on the premium level. A number of informants added that it will take substantial time (at least ten years) before the increase in carrier liability decreases the premiums on marine cargo insurance.

B. Carriers' Response: Cost-Saving, not Freight Increase

Informants representing carrier companies also provided information regarding the potential impact of the Hamburg Rules on their businesses. According to them, the Hamburg Rules would have a strong influence on their businesses in terms of how they impact on shipowner's liability insurance. The increased carrier responsibility imposed by the Rules would raise their costs because they will have to purchase more liability insurance, and these additional costs, in turn, would alter their business practices.

Many carrier company respondents indicated that they have attempted to absorb the increased costs through cost-saving strategies rather than by raising freight. These informants further explained that, due to intensive competition among carriers, most Korean carriers are discouraged from attempting to raise freight to make up for the increased costs incurred by increased liability coverage. They would rather save in other areas by resorting to reengineering, mark-up reduction, and service reduction. Contrary to opponents' objections to the Rules that one finds in the literature, therefore, the Hamburg Rules may not directly affect freight levels, at least in the near future. In summary, the increase in carrier liability by the Hamburg Rules is likely to result in market expansion for the liability insurance industry and an increase in P&I calls. However, freight levels are not likely to increase in the foreseeable future.

C. Overall Effects of the Hamburg Rules on the Insurance Industry

The effects of the Hamburg Rules on marine cargo insurance and shipowner's liability insurance, inferring from the interview data, needs to be evaluated from both long-term and short-term perspectives. In the long term, the Hamburg Rules have the potential to induce a restructuring of insurance practices among parties involved in international trade. International traders are likely eventually to take advantage of the reduced burden under the condition that they come to trust shipping companies to render prompt and full compensation for lost or damaged goods. They will not have to insure cargo as much as they do now. We can consequently predict some shrinkage in the cargo insurance market in the long run. On the other hand, increased carrier liability will result in the
expansion of the liability insurance market, increasing the carriers’ costs. Eventually, freight levels will have to go up.

On the other hand, the Hamburg Rules are not likely to affect the insurance industry in general in the foreseeable future. Current business practices are not providing a viable ground for the Rules. International traders, in particular, expressed resistance to the idea of pacing up their business practices with the changes imposed by the Rules. Their insurance purchasing behavior seems to be more influenced by existing business customs than the new liability regime imposed by the Hamburg Rules. Regardless of the increased liability on carriers, international traders are likely to insure the goods they import and export. The Rules are not expected to affect the Cargo insurance either. The area in which the Hamburg Rules have an immediate influence seems to be the liability insurance market. Facing increased liability, carriers will have to purchase more liability insurance. A majority of carriers, however, will not be able to charge additional freight because of intensive competition in the industry. Freight levels will consequently not be directly affected by the Hamburg Rules in the short term.

Overall, the Hamburg Rules may have a detrimental effect on world trade in the short run due to the increased possibility of double insurance. As long as international traders hesitate to rely on carrier compensation plans, a cargo of shipped good has a greater chance of being insured by both traders and carriers. The Hamburg Rules thus need to be understood at best as not affecting and at worst as even exacerbating the current practice of double insurance in the short term.\(^4^0\)

V. CONCLUSION

Resolving the problem of insurance costs depends on a number of empirical conclusions. Consider, for example, the argument that cargo

\(^{40}\) Besides the effect of the Hamburg Rules on marine cargo insurance and shipowner’s liability insurance, the general economic benefits of the Hamburg Rules from the view point of the shippers were recognized by the parties concerned in the interviews, viz., maximum amounts of compensation from the carrier would increase. Recovery would be permissible when the shipowner’s negligence is the (proximate) cause of the loss, or for delay. Greater care of cargo by the carriers or their agents could be expected. This observation is very similar to cargo interests’ contentions of other advanced countries like the United States, except with regard to the matter of the cargo insurance premium. For example, William J. Augello, the Executive Director, for the Transportation Claims & Protection Council, pointed out that the Hamburg Rules would reduce the cost of international trade by lowering the cost of cargo insurance, in addition to the above benefits. Augello also charged the marine insurance industry with opposition to Hamburg because they feared a reduction in cargo premium revenue, contrary to their own apocalyptic objection that the Hamburg Rules would constitute a “brand new regime of international law governing ocean liability, requiring years of litigation to clarify issues.” Betz, supra note 28, at 52-54.
insurance costs will drop if the carrier is more liable for losses. In theory, this should occur because the cargo insurer will recover a greater share of its payments from the carrier through subrogation. The cargo insurer, knowing that its net payments will be lower, could charge lower premiums, while the liability insurer could charge higher premiums. However, there are still two questions to be answered. First, how much decrease and increase will there be? Second, how quickly will the reduced and increased premiums take effect? Not only is it unclear whether the Hamburg Rules significantly shift the risk of loss from cargo interests to the carrier, but most shippers would still prefer to purchase cargo insurance even if the carrier were fully liable for all cargo damage.

In light of the foregoing theoretical review and qualitative exploration, it is unlikely that the Hamburg Rules will have the dramatic effect on the double insurance problem by efficiently and economically shifting the shipper's risk from the cargo insurer to the shipowner's liability insurer in the near future. Instead, if the Hamburg Rules impose such heavy liability on the carrier, this will increase what are perceived as wasteful double insurance expenses from the standpoint of the total economic system, but it will not affect freight directly for a substantial time. Moreover, it will take considerable time for the Hamburg Rules to realize its potential to affect the double insurance problem even though they strengthen carrier liability in the end, and it is for this reason that cargo owners have to trust shipping companies to render prompt and full compensation. In short, the gap between the ideal of the Hamburg Rules and actual business practices will continue for some time to come.
THE WORLD BANK AND HUMAN RIGHTS: INDISPENSABLE PARTNERSHIP OR MISMATCHED ALLIANCE?

Halim Moris*

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I. INTRODUCTION

The recent escalation of human rights abuses around the world has led many to question the effectiveness of the current methods used to enforce and/or monitor human rights around the globe.\(^1\) As a result, many states, as well as non-government organizations, are slowly realizing that the use of economic aid as a weapon against human rights abuses may be

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1. As Patricia Stirling accurately states:

   In the past ten years, human rights tragedies have abounded. To comprehend the seriousness of the situation and the urgent need for some type of effective enforcement of core human rights, one need only consider such tragedies as the tribal slaughters in Rwanda, the atrocities in the former Yugoslavia and the thousands of demonstrators gunned down by government forces in Burma. The alarming frequency of horrific violations of fundamental human rights illustrates the overall ineffectiveness of current methods of protection. An effective alternative is obviously needed, one that is capable of garnering universal support and which has quick and effective mechanisms for enforcement,

the most effective enforcement mechanism to date.² And what financial institution would be better suited to carry out that mission than the International Bank for Reconstruction and Development (World Bank or IBRD).³ The suitability of the World Bank stems from various factors.

2. See, e.g., United States International Financial Institutions Act, 22 U.S.C. § 262d(f) (1988) (instructing United States Executive Directors of the World Bank "to oppose any loan, any extension of financial assistance, or any technical assistance to any country," whose government is engaged in a pattern of gross violations of internationally recognized human rights unless the assistance "is directed specifically to programs which serve the basic human needs of the citizens of such country"). The Act further provides, in part:

Section 701(a) [T]he United States Government, in connection with its voice and vote in the International Bank for Reconstruction and Development, the International Development Association, the International Finance Corporation, the Inter-American Development Bank, the African Development Fund, and the Asian Development Bank, shall advance the cause of human rights, including by seeking to channel assistance toward countries other than those whose governments engage in . . . 1) a) consistent pattern of gross violations of internationally recognized human rights, such as torture or cruel, inhumane, or degrading treatment or punishment, prolonged detention without charges, or other flagrant denial to life, liberty, and the security of person. b) Further, the Secretary of the Treasury shall instruct each Executive Director of the above institutions to consider in carrying out his duties: 1) specific actions by either the executive branch or the Congress as a whole on individual bilateral assistance programs because of human rights considerations: 2) the extent to which the economic assistance provided by the above institutions directly benefits the people in the recipient country . . . (c) The Secretaries of State and Treasury shall report annually to the Speaker of the House of Representatives and the President of the Senate on the progress toward achieving the goals of this title, including the listing required in subsection (d). (d) The United States Government, in connection with its voice and vote in the institutions listed in subsection (a), shall seek to channel assistance to projects which address basic human needs of the people of the recipient country. The annual report required under subsection (c) shall include a listing of categories of such assistance granted, with particular attention to categories that address basic human needs. (e) In determining whether a country is in gross violation of internationally recognized human rights standards, as defined by the provisions of subsection (a), the United States Government shall give consideration to the extent of cooperation of such country in permitting an unimpeded investigation of alleged violations of internationally recognized human rights by appropriate international organizations including, but not limited to, the International Committee of the Red Cross, Amnesty International, the International Commission of Jurists, and groups or persons acting under the authority of the United Nations or the Organization of American States.

Id. § 701(a).

In addition, see Staff Writer, India - Human Rights: Group Urges Action On Child Labor, INTER PRESS SERVICE, Sept. 16, 1996, at 1 (the Human Rights Watch Urges the Suspension of Economic Aid to India Due to Abused Children in the Indian Labor Market); see also Peter R. Baehr, Concern for Development Aid and Fundamental Human Rights: The Dilemma as Faced by the Netherlands, 4 HUM. RTS. Q. 39, 42 (1982) (outlining the Dutch government’s use of civil and political rights as a precondition for development aid).

First, the World Bank is owned by the governments of 177 countries, and any decision by the World Bank in the area of human rights will be seen as a multi-lateral decision, and as such, will carry greater weight than a unilateral decision by one specific nation state. Second, unlike the International Monetary Fund, the World Bank does have the authority to provide direct loans and financial assistance to nation states for the purpose of development and that, in turn, means that the World Bank can exercise greater power in the area of human rights than can the International Monetary Fund. Finally, in recent years, due to the widening gap between poor and rich countries, in addition to the World Bank’s ever-increasing financial strength, the bank loans to developing countries are now considered “the primary source” of foreign capital, making the World Bank a potential champion of human rights.

4. WORLD BANK, 1996 ANN. REP. 3. The World Bank’s assets, funds and properties are owned by member countries in the form of shares and stocks. Countries who contribute more money to the Bank will have more ownership rights in the World Bank. Id.

5. Some commentators argue that a multi-lateral decision to suspend aid to a country that violates human rights is far more effective than a unilateral decision, and that there is an inherent weakness in unilateral decisions to suspend aid since an aid donor’s formal statement that an aid recipient violated human rights, followed by the subsequent withdrawal or suspension of aid, can insult the criticized government publicly, and thereby damage bilateral relations. As a result, aid donors are unlikely to raise human rights issues in such a manner, particularly with countries of political, economic, or strategic importance.


6. The International Monetary Fund’s primary purpose was “to maintain an orderly system of receipts and payments between nations” by maintaining a stable exchange rate of currency. The International Monetary Fund does not provide loans for the purpose of development, as the World Bank does. See Balakrishnan Rajagopal, Crossing the Rubicon: Synthesizing the Soft International Law of the I.M.F. and Human Rights, 11 B.U. INT’L L. J. 81, 87 (1993). For the difference between the International Monetary Fund and the World Bank, see Joseph Gold, The Relationship Between the International Monetary Fund and the World Bank, 15 CREIGHTON L. REV. 499, 501-03 (1981).

7. This is based on the theory that a country who needs a loan, or economic aid, is likely to seek the help of the World Bank first, since the World Bank offers direct loans. The International Monetary Fund, on the other hand, will only assist that country by helping them to repay their debt to creditors on a timely basis. See BARTRAM S. BROWN, THE UNITED STATES AND THE POLITICIZATION OF THE WORLD BANK 3 (Kegan Paul International ed. 1992).

8. In 1996, the World Bank distributed loans to developing countries in excess of $13,000,000,000,000. See WORLD BANK, 1996 ANN. REP. § 6.

9. Victoria E. Marmorstein, World Bank Power to Consider Human Rights Factors in Loan Decisions, 13 J. INT’L L. & ECO. 113, 118 (1978). The reasons for the increasing reliance of developing countries on the World Bank, for loans, is due to the fact that the World Bank loans are not only given at a very low interest rate (which averages 5%), but there is also a nominal service charge of only 0.75%, and there is a generous grace period before which any payment is expected typically 10 years. That makes developing countries more apt to borrow from the World Bank than from an open market, which imposes more stringent terms for
But despite the apparent suitability of the World Bank as a monitor and/or enforcer of human rights across the globe, a growing number of nation states and international scholars now strongly oppose the notion of using the World Bank to monitor and/or enforce human rights. These opponents argue that using the World Bank for human rights purposes not only contradicts the World Bank’s own mandate and violates certain principles of international law, but it is also highly impractical and potentially detrimental to the World Bank and its members. This is due to the fact that the World Bank would subsequently lose its prestigious financial status, thereby becoming a mere political tool used to achieve non-economic objectives.

The following note will explore the various arguments made as to the legality or illegality of using the World Bank to defend human rights, and it will also examine the World Bank’s historical practices within the context of human rights. The main purpose of this note, however, is not to assess the strengths and/or weaknesses of the various arguments made. Rather, it is to highlight those arguments in an effort to aid the reader in forming his or her own view on the issue. As for my personal view on the issue, it will be expressed at the end of this note. I have divided this note into four general sections. First, an overview of the World Bank and its operating mechanism. In the second section, I will explore the various arguments asserted against using the World Bank to monitor and/or enforce human rights around the world. Section three deals with the various arguments asserted in favor of the World Bank playing such a role. And in the fourth and final section, I will examine the World Bank’s actual practices in the area of human rights from the time of its inception.

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11. See BROWN, supra note 7, at 53-86; Lutz, supra note 10, at 60-63.
II. THE WORLD BANK: AN OVERVIEW

The World Bank was established in 1944 by the United Nations Monetary and Financial Conference. The original purpose of the World Bank was to reconstruct war-torn Europe. But with the introduction of the Marshall Plan in 1947, the World Bank was now free to shift its resources to developing countries. The World Bank is comprised of four different agencies known as The World Bank Group. The World Bank Articles of Agreement states that one of the World Bank's official purposes is


13. BROWN, supra note 7, at 4.

14. The World Bank Group is comprised of the International Bank for Reconstruction and Development [hereinafter IBRD], the International Development Association [hereinafter IDA], the International Finance Corporation [hereinafter IFC], and the Multilateral Investment Guarantee Agency [hereinafter MIGA]; see Articles of Agreement of the International Bank for Reconstruction and Development, opened for signature Dec. 27, 1945, 60 Stat. 1440, T.I.A.S. No. 1502, 2 U.N.T.S. 134; Articles of Agreement of the International Development Association, done Jan. 26, 1960, 11 U.S.T. 2284, T.I.A.S. No. 4607, 439 U.N.T.S. 249; Articles of Agreement on the International Finance Corporation, done May 25, 1955, 7 U.S.T. 2197, T.I.A.S. No. 3620, 264 U.N.T.S. 117. Each one of those agencies plays a role in carrying out the World Bank’s objective of encouraging development in the third world, and each of those agencies was established on, or subsequent to 1945, when the World Bank’s Articles of Agreements were opened for signature. The first agency established was the IBRD, which is the main branch of the World Bank. It was established in 1945, and its purpose was to provide direct loans to countries in need.

The International Development Association (IDA) was created in 1960 due to the perceived inability of the IBRD to respond to a growing group of underdeveloped countries in need of a more liberal type of development fund. The IDA was designed to provide assistance for the same purposes as the IBRD, but primarily to the poorer developing countries and on terms that would bear less heavily on their balance of payments than would IBRD loans. IDA assistance is, therefore, concentrated on the very poorest countries—those with an annual per capita gross national product of $610 or less (in 1990 dollars). More than forty countries (mostly in Africa) are eligible under this criterion. By contrast, IBRD loans are directed toward developing countries at more advanced stages of economic and social growth. Whereas money distributed by the IBRD is deemed a loan, funds paid out by the IDA are called credits.

The other two institutions in the World Bank Group are the International Finance Corporation and the Multilateral Investment Guarantee Agency. The IFC was established in 1956 to assist the economic development of less-developed countries by promoting growth in the private sector of their economies and helping to mobilize domestic and foreign capital for this purpose. Membership in the IBRD is a prerequisite for membership in the IFC, which totals 146 countries. Legally and financially, the IFC and the IBRD are separate entities. The IFC has its own operating and legal staff, but draws upon the World Bank for administrative and other services.

The MIGA was established in 1988 with the following mandate: to encourage equity investment and other direct investment flows to developing countries through the mitigation of non-commercial investment barriers. To carry out this mandate, MIGA offers investors guarantees against non-commercial risks; advises developing member governments on the design
to assist in the reconstruction and development of territories of members by facilitating the investment of capital for productive purposes, including the restoration of economies destroyed or disrupted by war, the reconversion of productive facilities to peacetime needs and the encouragement of the development of productive facilities and resources in less developed countries.\textsuperscript{15}

The vice president and general counsel of the World Bank explained that the official purpose of the World Bank encompasses such varied subjects as the alleviation of poverty, the fulfillment of basic human needs for nutrition, safe drinking water, education, health and housing, the concern for the settlement of people affected by large development projects (including the tribal people), the role of women in development, and preserving the environment.\textsuperscript{16}

The World Bank's capital is raised by selling shares of the World Bank to nation states that are members of the Bank.\textsuperscript{17} The World Bank's decision to provide, or to not provide loans to a particular developing country is the responsibility of the World Bank's Board of Executive Directors.\textsuperscript{18} The Board of Executive Directors consists of twenty-two directors, and five of those twenty-two directors are appointed by the five member states having the largest number of shares of capital stock.\textsuperscript{19} The Board of Executive Directors uses a weighted majority voting system in rendering its decision, where the weight of each executive's vote will be determined by the number of shares owned by the particular nation state

and implementation of policies, programs and procedures related to foreign investments; and sponsors a dialogue between the international business community and host governments on investment issues. By June 30, 1992, the convention establishing MIGA had been signed by 115 countries, of which 85 had also become members. See LAWYERS COMMITTEE FOR HUMAN RIGHTS, THE WORLD BANK: GOVERNANCE AND HUMAN RIGHTS 7 (1993).


17. IBRD Articles of Agreement, art. VI, 3, 11 U.S.T. at 2296-97, 439 U.N.T.S. at 270. Currently, there are 177 member states in the World Bank. See generally WORLD BANK, 1996 ANN. REP.

18. IBRD Articles of Agreement, supra note 17, art. V, § 3.

19. Id. Currently, the five member states having the largest number of shares in the Bank are the United States, Japan, Germany, France, and the United Kingdom. WORLD BANK, 1996 ANN. REP.
which he or she represents. Currently, the United States exercises more than eighteen percent of the total voting power of the Board of Executive Directors, "nearly three times the amount exercised by the next largest share holder, Japan." The World Bank became a specialized agency of the United Nations in 1947, this by virtue of an agreement between the World Bank and the United Nations. Under this agreement, the World Bank is required to take note of the obligations assumed by members of the United Nations and to have "due regard for decisions of the Security Council under Articles 41 and 42 of the United Nations Charter."  

20. See supra note 17.  

21. See Wirth, supra note 10, at 695. "This weighted voting formula has never been very popular with the developing countries since, in effect, it institutionalizes within the World Bank the inequality between the economically strong countries and the economically weak ones." BROWN, supra note 7, at 6. It is worth noting that the United States of America had an inconsistent track record with regard to its position on the issue of linking economic aid with human rights violations. For example, in 1965 the United States opposed the granting of any aid to the Republic of South Africa and the government of Portugal for their human rights abuses. However, the United States has consistently voted in favor of granting economic aid to China, despite China's well documented human rights abuses. See UNITED STATES NATIONAL ADVISORY COUNCIL ON INTERNATIONAL MONETARY AND FINANCIAL POLICIES: INTERNATIONAL FINANCE, ANNUAL REPORTS TO THE PRESIDENT AND CONGRESS FOR FISCAL YEARS WORLD BANK, 1980-1987; 1965, 1994, 1995, 1996 ANN. REP.  

22. The Bank is a specialized agency established by agreement among its member governments and having wide international responsibilities, as defined in its Articles of Agreement, in economic and related fields within the meaning of Article 57 of the Charter of the United Nations. By reason of the nature of its international responsibilities and the terms of its Articles of Agreement, the Bank is, and is required to function as, an independent organization," The Agreement Between the United Nations and the International Bank for Reconstruction and Development, Nov. 15, 1947, art. 1(2), 16 U.N.T.S. 346 (hereinafter Agreement); see also Agreement Between the United Nations and the International Bank for Reconstruction and Development on Relationship Between the United Nations and the International Finance Corporation, 265 U.N.T.S. 314 and Agreement between the United Nations and the International Development Association, 394 U.N.T.S. 222 for similar agreements related to IFC and IDA respectively.  

23. Agreement, supra note 22, art. VI (1). This Agreement further highlights the reciprocal obligations between the World Bank and the United Nations. For example, article IV of the agreement provides that:  

1. The United Nations and the Bank shall consult together and exchange views on matters of mutual interest. 2. Neither organization, nor any of their subsidiary bodies, will present any formal recommendations to the other without reasonable prior consultation with regard thereto. Any formal recommendations made by either organization after such consultation will be considered as soon as possible by the appropriate organ of the other. 3. The United Nations recognizes that the action to be taken by the Bank on any loan is a matter to be determined by the independent exercise of the Bank's own judgment in accordance with the Bank's Articles of Agreement. The United Nations recognizes, therefore, that it would be sound policy to refrain from making recommendations to conditions of financing by the Bank with respect to particular loans or with respect to terms or conditions of financing by the Bank. The Bank recognizes that the United
In 1979, in response to an "acute balance of payments crisis in the late 1970s among borrowing member countries," the World Bank officially implemented what is known as "structural adjustment loans." These structural adjustment loans are loans that are attached with policy-based conditions aimed at forcing the borrowing countries to conform to certain Bank policies and practices in their internal and/or external affairs. Despite the question of the legality of the structural adjustment loans, by 1992 the Bank's structural adjustment loans constituted twenty-seven percent of the Bank's total loans.

Today, the impact of the World Bank extends far beyond financial aid to developing countries. Not only has the World Bank "assumed the role as true leader in policy making for smaller and newer international and regional development banks(such as the African Development Bank, the Asian Development Bank, and the Inter-American Development Bank"), but also the Bank is "recognized as the intellectual leader and influences policy changes . . . ."

Nations and its organs may appropriately make recommendations with respect to the technical aspects of the reconstruction or development plans, programs or projects.

Id.

24. Diana E. Moller, Intervention, Coercion, or Justifiable Need? Legal Analysis of Structural Adjustment Lending in Costa Rica, 2 SW. J.L. & TRADE AM. 483, 501 (1995). However, some scholars have argued that the World Bank, since its inception, has always put conditions on its loans, and that the structural adjustment loans have always been a part of the Bank's policy. See PAUL A. MOSELY, AID AND POWER: THE WORLD BANK AND POLICY-BASED LENDING 25-27 (1991).


26. See Levinson, supra note 10, at 49-50. A full discussion of the legality of the structural adjustment loans of the World Bank will be handled infra section II and section III. If the World Bank is to become an active player in the area of human rights, it would most likely do so by using structural adjustment loans to enforce and/or monitor human rights, and thus, the question of the legality of structural adjustment loans is, in essence, the same question as to the legality of the World Bank's involvement in the area of human rights.

27. WORLD BANK, 1992 ANN. REP. at 19.

28. McAllister supra note 12, at 702. Most of the regional development banks have articles of agreement similar in scope to the World Bank, and most of those regional banks implement similar policy-based loans as does the World Bank. These regional development banks face that same question as to the legality of the structural adjustment loans which they extend to developing countries. See John Linarelli, The European Bank for Reconstruction and Development and Post-Cold War Era, 16 U. PA. J. INT'L BUS. L. 373 (1995) (highlighting the legal challenges faced by the European Bank for Reconstruction and Development, including structural adjustment loans).
III. THE CASE AGAINST USING THE WORLD BANK TO ENFORCE AND/OR MONITOR HUMAN RIGHTS

According to those who voice discomfort and discontent over the idea of tying World Bank loans to human rights, such action is not only illegal (as it violates international law), but it is also both impractical and potentially detrimental. Each of these arguments will be explored separately.

A. Using the World Bank to Enforce and/or Monitor Human Rights is an Illegal Act that Violates International Law

In the eyes of those opposed to the World Bank acting as enforcer and/or monitor of human rights, such a role is illegal under international law on various grounds. These grounds include the violation of the Bank’s own Articles of Agreement; the violation of international law prohibiting coercion in any form including economic coercion, the violation of the principles of sovereign integrity and sovereign equality; and finally, the violation of the recipient states’ right to development. Each of these arguments will be examined separately.

1. Using the World Bank to Enforce and/or Monitor Human Rights Violates the Bank’s Articles of Agreement

When making loans to developing countries, the World Bank actually violates its own Articles of Agreement in considering human rights factors, according to the opposition. Under the Bank’s Articles of Agreement, the Bank’s main purpose is “to promote the long-range balanced growth of international trade and the maintenance of equilibrium in balances of payments by encouraging international investment for the development of the productive resources of members, thereby assisting in raising productivity, the standard of living and conditions of labor in their territories.”

Further, Article IV of the Bank’s Articles of Agreement expressly prohibits the Bank from taking on such a role. It states that:

the Bank and its officers shall not interfere in the political affairs of any member; nor shall they be influenced in their decisions by the political character of the member or members concerned. Only economic considerations shall be relevant to their decisions, and these considerations

shall be weighed impartially in order to achieve the purpose stated in Article I.\textsuperscript{30}

Article III of the Bank's Articles of Agreement states that: the Bank shall make arrangements to ensure that the proceeds of any loan are used only for the purposes for which the loan was granted, with due attention to considerations of economy and efficiency and without regard to political or other non-economic influences or considerations.\textsuperscript{31}

Because of these provisions in the Bank's Articles of Agreement, opponents argue that, "the World Bank is clearly and unequivocally prohibited from making or denying loans based upon a country's performance in terms of its human rights record, no matter how atrocious that record may be."\textsuperscript{32} That is because the human rights issues are not only beyond the Bank's stated purpose, but also because they are viewed as political issues that the Bank is prohibited from considering in its loans decisions.\textsuperscript{33}

2. Using the World Bank to Enforce and/or Monitor Human Rights is a Form of Coercion Prohibited by United Nations' Charter

Using economic aid to force recipient countries to comply with and/or respect human rights is a form of coercion prohibited by international law. Many developing nation states argue that the Bank's use of economic aid in order to force compliance with human rights norms clearly violates the United Nations Charter, as well as international law, due to its coercive nature.\textsuperscript{34} These nation states cite Article II, paragraph 4 of the United Nations Charter, which states that "all members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any manner inconsistent with the purposes of the United Nations."\textsuperscript{35} Here, they argue, the Bank's use of economic aid over developing nations who are in desperate need of such aid, amounts to an economic use of force and

\begin{itemize}
  \item 30. \textit{Id.} art. IV, § 10. Despite this express language that prohibits the Bank from considering non-economic factors in its loan decisions, in the early 1980's the Bank implemented what are known as Structured Adjustment Policies. These are ideology based loans aimed at forcing developing countries to comply with certain ideologies. For a history of the Structured Adjustment Policies, see Henry S. Bienen & Mark Gersovitz, \textit{Economic Stabilization, Conditionality, and Political Stability}, 39 INT'L ORG. 729 (1985).
  \item 31. \textit{Id.} art. III, § 5b.
  \item 32. Levinson, \textit{supra} note 10, at 56.
  \item 33. IBRD Articles of Agreement, \textit{supra} note 17, art. III, § 5b
  \item 34. \textit{BROWN}, \textit{supra} note 7, at 53-59.
  \item 35. U.N. CHARTER, art. II, para 4.
\end{itemize}
coercion that is prohibited by the United Nations Charter. These nation states further argue that a prohibition against coercion by means other than armed attacks, such as economic force, was implicitly affirmed by the International Court of Justice in its opinion in Nicaragua v. United States. In that case, the court recognized that an illegal use of coercive force need not take the extreme form of an armed attack, but could take “other less grave forms.” And that economic coercion, in the form of withholding aid from developing countries who do not comply with the Bank’s human rights policy, falls within the scope of the less grave forms standard set by the International Court of Justice in Nicaragua v. United States. Thus, the Bank’s use of economic force (in the form of withholding aid to developing countries) does indeed constitute an illegal use of coercive force prohibited by international law.

3. Using the World Bank to Enforce and/or Monitor Human Rights Violates the Principle of Sovereignty

Imposing the World Bank’s human rights ideology on recipient nations constitutes an illegal violation of the principle of state sovereignty, in addition to violating the United Nations’ Charter. Many of the aid recipient countries argue that the act of linking economic aid to the human rights policies of the recipient countries infringes on the sovereignty of those countries, while also constituting unlawful interference with their domestic affairs. And that form of interference is forbidden by the United Nations’ Charter, which expressly prohibits any interference in the domestic affairs of member states, while mandating respect for the sovereign integrity of those states. They further argue that a state’s economic policy is clearly within the state’s sovereign power, and that international law (for the most part) acknowledges that each state has a right to decide what economic policy it will follow in its domestic setting and in its dealings with other states. Therefore, tying economic aid to a human rights policy will only serve to hinder and infringe on the states’ ability to pursue a particular economic policy, both domestically and internationally. In addition, within the context of various United Nations’

38. Id. at 101; BROWN, supra note 7, at 58.
40. See U.N. CHARTER, art. 1, § 2; art. 2, § 1; art. 2, § 4; and art. 2, § 7.
41. BROWN, supra note 7, at 66.
resolutions and declarations, developing countries have stressed the
importance of their sovereign integrity, as well as their condemnation of
any attempt to interfere with such sovereignty vis-a-vis economic means. Thus, any attempt by the World Bank to impose its human rights agenda on recipient countries through the use of economic aid not only violates the sovereign integrity of those countries, but is also an act which is prohibited by international law.

4. Using the World Bank to Enforce and/or Monitor Human Rights
Violates the International Principles of Equality

Using the World Bank to enforce and/or monitor human rights in
developing countries violates the legal principle of sovereign equality. The
United Nations' Charter explicitly states that one of the fundamental
principles of international law and United Nations membership is "the principle of sovereign equality of all members." But since only
developing countries are in need of economic aid from the World Bank,
this will mean that only developing countries will be subject to human

42. See United Nations, General Assembly, Report of the Regional Meeting for Asia of the
World Conference on Human Rights, Final Declaration of the Region Meeting for Asia of the
[hereinafter Bangkok Declaration] ("The Ministers and representatives of Asian States, meeting
at Bangkok from 29 March to 2 April 1993 ... discourage any attempt to use human rights as a
conditionality for extending development assistance."). In contrast, it should be noted that the
Vienna Declaration and Program of Action of the World Conference on Human Rights contained
no provisions concerning development aid conditioned on human rights. United Nations,
General Assembly, Vienna Declaration and Program of Action of the World Conference on
President, acknowledged the sovereignty of developing nations when he stated that the World
Bank worked "in close partnership with its developing members -- which number well over a
hundred separate, sovereign, culturally diverse societies . . . ." WARREN C. BAUM & STOKES
Finally, the 1966 Declaration on the Inadmissibility of Intervention in the Domestic Affairs of
States and the Protection of Their Independence and Sovereignty states that:

1. No state has the right to intervene, directly or indirectly, for any reason
whenever, in the internal or external affairs of another state. Consequently, armed
intervention and all other forms of interference or attempted threats against the
personality of the State or against its political, economic and cultural element are
condemned.

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

6. All states shall respect the right of self-determination and independence of
peoples and nations, to be freely exercised without any foreign pressure . . .


43. U.N. CHARTER, art. 2 (1).
rights scrutiny of the World Bank, and that, in turn, violates the principle of sovereign equality and equal treatment among nation states.

5. Using the World Bank to Enforce and/or Monitor Human Rights Violates the Developing Countries’ Right to Development

Finally, the World Bank’s withholding of economic aid, due to human rights abuses, is illegal since it violates the recipient nation’s right to economic development. Recipient states argue that they are entitled to the right of development, which has “progressed from its status as an international norm, recognized by repeated non-binding United Nations’ resolutions, to the status of an evolving general principle of international law.” The recipient states further argue that the World Bank and the

44. Developing countries point out that human rights abuses are just as prevalent in developed countries as in developing countries, and that using the World Bank to enforce human rights will only mean that developing countries will be subject to the scrutiny of the Bank, while developed countries will be free to abuse human rights as they wish, unmonitored. Some of the examples given illustrating human rights abuses in developed countries are: In Australia, Aborigines comprise about 1.8% of the total Australian population, approximately 300,000 individuals, who are not only under-represented in the political process, but also ill-treated. See Theresa Simpson, Claims of Indigenous People to Cultural Property in Canada, Australia, and New Zealand, 18 HASTINGS INT’L COMP. L. REV. 195, 204-205 (1994); Australian PM Pledges Better Aborigine Treatment, Reuter Libr. Rep., Dec. 10, 1992, available in LEXIS, Nexis Library, World File. For historical view of the Australian’s treatment of Aborigines, see RICHARD BROOME, ABORIGINAL AUSTRALIANS: BLACK RESPONSE TO WHITE DOMINANCE, (1788), (George Allen & Unwin 1982).


In the United States, despite their alleged autonomy, Native Americans are not only discriminated against, but for the most part, severely under-represented in the American democratic process and deprived of basic human rights. For a history and evaluation of the status of Native Americans, see STUART LEVINE AND NANCY OESTREICH LURIE, THE AMERICAN INDIAN TODAY, (Everett Edwards, Inc. Florida, 1968); DALE VAN EVERY, DISINHERITED: THE LOST BIRTHRIGHT OF THE AMERICAN INDIAN (1966).

45. Moller, supra note 24, at 493. The World Bank senior counsel acknowledged that the right to development is a “third generation” human right. See Aly Abu-Akeel, World Bank Perspectives, 15 CAL. W. INT’L L.J. 552-3 (1985). However, some scholars argue that third generation human rights are considered soft rights and differ from the “traditional” human rights included in the International Declaration of Human Rights because they include such rights as the rights to development, environment, peace, and participation. See Rajagopal, supra note 6, at 84 n.11, 96. The recipient countries cite a number of international instruments in support of their assertion that they are entitled to the right of development. Among these instruments is Article 1, paragraph 3 of the U.N. Charter that states that the purpose of the United Nations is “to achieve
donor nations not only have an obligation to extend economic aid for the economic exploitation that took place during the colonization period, but also that any withholding of aid that is justified on grounds of human rights is a violation of the recipient countries' right to develop. Finally, the recipient nations argue that tying economic aid with human rights is a

international cooperation in solving international problems of an economic, social, cultural or humanitarian character . . . .” U.N. CHARTER, art. I, para 3; The International Covenant of Economic, Social and Cultural Rights, which articulates the right of development in various articles such as the right to work and to work in “just and favorable” conditions, id. art. 7; the right to social security, id. art. 9; the right to enjoy the highest attainable standard of physical and mental health, id. art. 12; the right to an education, id. art. 13; and everyone’s right to enjoy cultural life and the benefits and applications of scientific progress id. art. 15. In particular, article 11 recognizes the right “of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and the continuous improvement of living conditions and the fundamental right to be free from hunger.” U.N. CHARTER art. 11.

Under Article 4, State Parties “may subject such (economic, social, and cultural) rights only to such limitations as are determined by law only in so far as this may be compatible with the nature of these rights and solely for the purpose of promoting the general welfare of these rights.” See ICESCR, Dec. 16, 1986, art. 4, 993 U.N.T.S. 3. (1966); Universal Declaration of Human Rights, Dec. 10, 1948, G.A. Res. 217 A (III), U.N. Doc. A/810, at 71, arts. 17, 22-26 (1948), (recognizing such rights as the right to own property, to work and receive just pay, to receive social security, and to receive free education). Article 25 specifically states that “everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . .” Id.

In addition, the United Nations’ Declaration on the Right to Development states in part that:
1) The human person is the central subject of development and should be the active participant and beneficiary of the right to development.
2) All human beings have a responsibility for development, individually and collectively, taking into account the need for full respect of their human rights and fundamental freedoms as well as their duties to the community, which alone can ensure the free and complete fulfillment of the human being, and they should therefore promote and protect an appropriate political, social and economic order for development.
3) States have the right and duty to formulate appropriate development policies that aim at the constant improvement of the well-being of the entire population and of all individuals, on the basis of their active, free and meaningful participation in development and in the fair distribution of the benefits resulting therefrom.

See The United Nations’ Declaration on the Right to Development, UNGA Res. 41/128, art. 2. (1986).

46. For a full analysis of this argument, see Seymour J. Rubin, Most Favored Nation Treatment and the Multilateral Trade Negotiations: A Quiet Revolution, 6 INT'L TRADE L.J. 221, 225 (1980-81) (presenting the developing nations' argument that special treatment is needed for their weakened economies due to long periods of dependency and the effects of colonialism); "Consessional aid from the rich, often demanded as a matter of right, is regarded by developing nations as an inadequate recompense for past injuries." Rubin, infra note 54, at 87.

47. Id.
conspiracy by the World Bank and the developed countries, aimed at depriving recipient nations of the right to genuine development.\(^4\)

**B. Using the World Bank to Enforce and/or Monitor Human Rights is Detrimental to the Parties and the Process**

Recipients of the World Bank aid argue that tying the Bank’s economic aid to human rights is detrimental to all parties involved, namely the recipient nations,\(^4\) the donor nations,\(^5\) and the World Bank itself.

As for the recipient countries, the argument is made that the World Bank’s withholding of economic aid, due to human rights abuses, is likely to hurt the people rather than the governments,\(^6\) and that due to the dependency those countries have on the World Bank loans, withholding of those loans (for human rights reasons) will likely cause economic stagnation in those countries. That, in turn, will cause an increase in human rights abuses since there is a positive correlation between poverty and human rights abuses.\(^7\) That is the greater the level of poverty in a particular country, the greater the possibility that human rights abuses will be found in that country. In addition, recipient countries argue that

\(^{48.}\) See The Brandt Comm’n (Independent Comm’n on Int’l Development Issues), *North-South: A Program for Survival* (1980) (assessing the thesis that the ills of the developing nations stem from their exploitation by developed nations). Under this view, if the terms of a structural adjustment loan cause significant economic suffering, deprive an individual of adequate food, clothing, housing, employment, or subject the individual to inadequate living conditions, the terms of the loan are in violation of the individual’s right to development. Moller, *supra* note 24, at 497. The developing nations seek to end their dependency on the developed world through fundamental structural changes in international institutions and political power structures. See Mark Ewill Ellis, *The New Industrial Economic Order and General Assembly Resolutions: The Debate over the Legal Effects of General Assembly Resolutions Revisited*, 15 CAL. W. INT’L J. 647, 648 (1985) (discussing the South’s attempts to structurally change international organizations); R. Rothstein, *Global Bargaining: Unciad and the Quest for a New Int’l Econ. Order*, 15, 240-80 (1979) (defining this dispute in the context of the positions of the developing countries and the developed countries).

\(^{49.}\) By recipient nations we mean those nations that receive loans and economic assistance from the World Bank.

\(^{50.}\) By donor nations we mean those nations that donate money to the World Bank in exchange for shares.

\(^{51.}\) See Human Rights Watch, *World Rep. XVI, XVIII* (1994). Perhaps the most vivid example of this is the economic blockade against Iraq which was proven to be detrimental to the Iraqi people. It has been estimated that about one million Iraqi children have died since 1990 when an economic blockade was put on Iraq after the Gulf war. See Carol Hartman, *Sanctions Don’t Hurt Saddam in Iraq: Nearly One Million Children Have Died Because of Sanctions since 1990, Says a UW-Madison Professor*, WISC. ST. J., 1997, at 1C; Dilip Hiro, *Iraq: Oil income, Too Little, Too Late?*, INTER PRESS SERVICE (1997), at 1.

economic development is necessary before human rights can be fully developed and protected, and that "civil and political rights are robbed of significance unless there preexist social and economic human rights. . . . [A] necessitous man is not a free man." Thus, the recipient nations argue, withholding development aid will only hurt people and slow down the journey of economic recovery which is destined to lead to full enjoyment of human rights.

As for the donor countries, the argument is made that withholding economic aid from developing countries, due to violations of human rights, will be detrimental to donor countries as well. The argument goes as follows: Economic aid to developing countries (who are known for having large, untapped markets and an abundance of natural resources) serves to stimulate the economies of those developing countries, and that, in turn, enables developed countries (who are donor countries), to infiltrate the markets in developing countries. Withholding any aid will have the opposite effect, and the donor countries will lose potentially large markets, and that, in turn, will affect the economy of the donor countries and cause its stagnation.

Furthermore, due to the fact that there is a limited number of large donor countries with significant voting power in the World Bank, developing countries will likely view any decision to suspend aid as a decision articulated by those countries, and thus, they will likely refuse to deliver natural resources to donor countries, which in turn, could hurt the economies of the donor countries.

Advocates of this argument point to a recent example to support their stand. They state that despite the atrocious human rights' abuses in China and the well-publicized massacre in Tianenmen Square, the World Bank and the United States have nevertheless positioned China as the highest aid recipient country, due to the potential economic benefits to be had once the large Chinese market is infiltrated. As for the World Bank itself, arguments have been made that there will be disastrous effects on the World Bank if it tries to tie human rights with development loans. Put simply, allowing the World Bank to examine other non-economic factors (like human rights) in its loan decisions will transform the Bank from a

53. HUMAN RIGHTS WATCH, WORLD REP. XVI, XIII (1994) (examining and responding to the argument that economic development is a prerequisite to a full human rights protection).


55. For an overview of this argument, see Okuizumi, supra note 5, at 391-95.

56. Id.

57. Id. at 393. Despite the obvious human rights abuses in China, it still enjoys the status of the most favorite trade partner with the United States. See Mike Jendrzejczyk, Human Rights and Most Favorite Nation for China, 1996 WL 10165077; China also is the 1996 highest recipient of World Bank aid. See WORLD BANK, 1996 ANN. REP., § V.
respected international financial institution to a political institution that is likely to be used as a political weapon for purposes of political gains. We cannot ignore the fact that the World Bank is a development financing institution, and it should not become a tool for political games among its members; that would be to the detriment of all its members. And there is a limit to institutional elasticity, i.e. the extent to which institutions are created and still used for other purposes in order to get them to perform human rights functions, especially when these functions are accomplished at the expense of their manifest functions. Institutions simply cannot do everything we think they are capable of, if this requires them to move too far from their manifest mandate.

C. Using the World Bank to Enforce and/or Monitor Human Rights is Impractical

Opponents of the idea of the World Bank’s involvement in human rights argue that such an idea is impractical on several grounds. First, they point to the irony of having an institution like the World Bank, which itself is being accused of violating human rights, suddenly become a human rights enforcer and/or monitor. And, in that the World Bank has a “history” of funding projects that involve human rights abuses, “the likelihood is high that human rights abuses will continue to occur in at least some World Bank projects.” An example of this is the World Bank’s financing of the Kedung Ombo Dam project in Indonesia, which led to extreme human rights abuses in the form of forced resettlement by the Indonesian government, and the financing of family planning programs in

58. Lutz, supra note 10, at 61-63.

59. Id. The argument further continues that there cannot be a stretch of World Bank objectives to include non-economic factors such as human rights, since that will undermine the Bank’s effectiveness as an international economic institution, and that there is a limit as to the “institutional elasticity” of the Bank, and that limit operates to maintain the Bank’s credibility in the world’s financial affairs. Id.


61. Id. at 489-97.

62. Michael Reisman, Through or Despite Governments: Differentiated Responsibilities in Human Rights Programs, 72 IOWA L. REV. 391, 395 (1987). In 1985 the World Bank approved a loan for $156 million to the Republic of Indonesia for the construction of the Kedung Ombo multipurpose dam. The total project cost $283 million. The Kedung Ombo dam, officially completed on January 14, 1989, produces 22.5 megawatts of electricity a year, stores sufficient water to irrigate between 57,000 and 62,000 hectares during the dry season, and prevents floods during the rainy season. The dam project required the resettlement of 5,390 families in 37 villages, or about 25,000 people. The dam inundated 4,363 hectares of privately-owned land, 1,500 hectares of national forest and 304 hectares of land the Indonesian government owned, for a total of 6,167 hectares. On January 14, 1989 the Indonesian government declared the Kedung Ombo dam officially completed and closed its gates, yet a large number of people remained in
developing countries, which led to human rights abuses in the form of coercing young families not to have children.\textsuperscript{63}

the area to be submerged by rising waters in the months to come. Estimates of the people remaining ranged from almost 9,000 to more than 12,000. The people who refused to evacuate did so chiefly because they felt that the Indonesian government had failed to compensate them properly for their land. They felt that the government either had set too low a price, had not negotiated properly, or had refused to allocate land to them which was comparable in size and quality and close in proximity to the land they lost.

The Indonesian government engaged in a program of intimidation to force those who remained in the area to leave. Some intimidation took the form of physical abuse of those who refused to accept the government's compensation. One reputed victim of such abuse reported his story to the Indonesian weekly magazine Tempo as follows:

[The old man, a grandfather] received an order to report to the local military headquarters. He was filled with fear. And with good reason: the five soldiers who interrogated him roughed him up. “My head was jerked back,” the father of seven children said. Next, a soldier slapped him in the face. This little drama...he said, took place in front of and was witnessed by the government district head. . . . After he was slapped . . . [his] courage failed. He immediately put his thumb print on a release form and signed over his house and surrounding lot of 2,700 square meters for monetary compensation of 1.5 million rupees . . . . Some intimidation took the form of death threats and threats of extended prison sentences: Local government officials frightened villagers who refused to accept compensation by telling them they would be killed under a government program for eliminating hardened criminals, or put in jail for 13 years. Coupled with the death threats, units of the Indonesian security agency BAKORI would go in the middle of the night to the homes of those who refused to sign over their land, awaken them by pounding on their doors, order them outside to answer questions, and then force them to sign compensation agreements. For a full account of what happened in the Kedung Ombo Dam project.

\textit{Id.}

Between the years of 1980 to 1986, the World Bank has financed an estimated 144 projects around the globe that caused various forms of forced settlement of the locals. \textit{See} Charles Escudero, \textit{Involuntary Resettlement in the World Bank Assisted Project} 18-21 (1988).

The World Bank has admitted that it made mistakes in regards to its resettlement policies and the human rights abuses associated with it. \textit{See} Shahid Husain, Vice President of Operations Policy for the World Bank, Operations Policy Note 10.08, Operations Policy Issues in the Treatment of Involuntary Resettlement in Bank-Financed Projects (Oct. 10, 1986) [hereinafter Policy Note 10.08]. “The Bank has sometimes not applied the policy and its related operational procedures with adequate rigor, and issues have remained regarding the resettlement policies, laws and practices of borrowers.” \textit{Id.} para. 3. “Supervision by the Bank of the implementation of resettlement operations must be made more effective.” \textit{Id.} para. 6. Policy Note 10.08 stresses that the Bank has the duty not to make those mistakes: “it is essential that the Bank’s own approach set an example of how these (resettlement) issues should be addressed and that Bank policies be applied to Bank-financed operations faithfully and effectively.” \textit{Id.} para. 3. “It is not acceptable to leave unexplored or unimplemented reasonable measures to prevent those dislocated from becoming temporarily or permanently impoverished.” \textit{Id.} para. 5. “It is essential that the Bank’s supervision of resettlement work be both diligent and effective.” \textit{Id.} para. 9.

63. In Indonesia, for example, the World Bank “has supported five consecutive population projects, totaling 211.8 million U.S. dollars,” and these projects were characterized as including “coercive practices” for population control. For a full account of those projects and their impact on human rights, see \textit{In the Name of Development}, \textit{supra} note 62, at 105-34.
Second, it is impractical to use the World Bank to enforce and/or monitor human rights since neither the Bank nor its staff have the necessary experience to perform such a complex role. The World Bank is staffed mainly by economists. "They are there to play with numbers; they are not there to make policy . . . . [I]t is a forlorn hope to expect that economists will become sensitive to human rights issues." The World Bank is not well-equipped, nor does it possess the expertise to play the role of human rights advocate.

Finally, it is impractical to use the World Bank to enforce and/or monitor human rights abuses since the Bank lacks an effective monitoring and enforcement mechanism. Once the Bank has given a loan to a developing country, there is an "absence of a meaningful monitoring system." The World Bank's own 1992 report concluded that "little is done to monitor the ultimate impact of Bank projects on recipient countries." For all of the above-mentioned reasons, opponents of the World Bank's involvement in human rights argue that the World Bank should disentangle itself from human rights issues.

IV. THE CASE FOR THE WORLD BANK'S MONITORING AND/OR ENFORCING HUMAN RIGHTS ACROSS THE GLOBE

Proponents of the idea that the World Bank should play an active role in human rights point out that such a role is legal, beneficial and practical.

A. Using the World Bank to Enforce and/or Monitor Human Rights is Legal

Proponents argue that using the World Bank to enforce and/or monitor human rights is legal for various reasons. To begin with, although Article IV of the World Bank's Articles of Agreement prohibits the Bank from considering political factors in its loan decisions, "an analysis of the Bank's articles reveals that it is empowered to incorporate human rights

64. Lutz, supra note 10, at 52.
65. Id.
67. Cahn, supra note 10, at 183.
68. Id.
69. Id. (citing World Bank, Portfolio Management Task Force, Effective Implementation: Key to Development Impact (July 24, 1992) (Discussion Draft)). This report clearly highlights the Bank's failure to implement effective monitoring mechanisms once the loans were given. See id. at IV.
70. IBRD Articles of Agreement, supra note 17, art. IV, § 10.
factors into lending policies[.] Indeed, human rights fall beyond the purview of article IV's political activity provision." That is because human rights not only political activities, but also some human rights have been recognized as jus cogens by various international players, including the International Court of Justice, international scholars, and the United Nations. That, in turn, means that the World Bank "cannot hide behind Article IV of its Articles of Agreement, and avoid human rights issues in its loan decisions. In addition, as a specialized agency of the United Nations and the Bank, the World Bank is obligated to cooperate with the United Nations in the area of human rights. The relationship agreement between the World Bank and the United Nations sets forth certain mechanisms to achieve cooperation between the Bank and the United Nations to implement the United Nations' objectives, including respect for

71. Marmorstein, supra note 9, at 124.
72. "When we are talking about a much more constructive approach to human rights, we have to come back and argue quite clearly that human rights are not political, that they are matters of international law." Lutz, supra note 10, at 54.
73. In Barcelona Traction, Light & Power Co., Ltd., the I.C.J. referred to the fundamental nature of human rights by stating that,

75. The preamble of the U.N. Charter states that "we the peoples of the United Nations (are) determined . . . to reaffirm faith in fundamental human rights . . ." U.N. CHARTER preamble. Article 55 of the Charter also states that "the United Nations shall promote: . . . universal respect for, and observance of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion." Id. In addition, the United Nations has drafted a large number of declarations and resolutions that stressed the fundamental nature of human rights, among these the 1951 Convention Relating to the Status of Refugees, the 1952 Convention on the Political Rights of Women, the 1959 Declaration on the Rights of the Child, the 1963 Declaration on the Elimination of All Forms of Racial Discrimination, the 1966 International Covenants on Economic, Social, and Cultural Rights and on Civil and Political Rights, the 1971 Declaration on the Rights of Mentally Retarded Persons, the 1975 Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, and the 1981 Declaration on the Elimination of All Forms of Intolerance and of Discrimination Based on Religion or Belief. UNIFO, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS OF THE UNITED NATIONS: 1948-1982 (1983). See MARK W. JANIS, INTRODUCTION TO INTERNATIONAL LAW 248-49 (1993).
76. Marmorstein, supra note 9, at 130-33.
human rights.\textsuperscript{77} The World Bank's refusal to consider human rights factors in its loan decisions will mean that the Bank not only breached its agreement with the United Nations, but also violated international law. Also, the United Nations' Charter explicitly states that "in the event of a conflict between the obligation of the members of the United Nations under the present charter, and its obligation under any other international agreement, its obligation under the present charter shall prevail."\textsuperscript{78} That, in turn, means that the World Bank's donor states are obligated by the United Nations' Charter to disregard any obligation under the Bank's Articles of Agreement, which conflict with the objectives and goals of the United Nations, and since one of the most important goals of the United Nations is to promote the respect for human rights and to stop human rights abuses around the globe, the donor states of the World Bank are obligated to consider human rights factors in any loans made by the Bank to developing countries.\textsuperscript{79} This is due, in part, to the fact that World Bank's donor states, as well as all other state members of the World Bank, act as states, not as representatives, of the World Bank.\textsuperscript{80}

In addition, proponents argue, the World Bank's considerations of human rights factors in its loan decisions does not amount to interference with the sovereign integrity of the borrowing states. That is because the

\textsuperscript{77} Id. at 132. The U.N. IBRD Relationship Agreement, provides the mechanism for cooperation on the human rights front. For example, Article II of the Agreement provides:

1) Representatives of the United Nations shall be entitled to attend, and to participate without vote in, meetings of the Board of Governors of the Bank. Representatives of the United Nations shall be invited to participate without vote in meetings especially called by the Bank for the particular purpose of considering the United Nations point of view in matters of concern to the United Nations.

2) Representatives of the Bank shall be entitled to attend meetings of the General Assembly of the United Nations for purposes of consultation.

3) Representatives of the Bank shall be entitled to attend, and to participate without vote in, meetings of the committees of the General Assembly, meetings of the Economic and Social Council, of the Trusteeship Council and of their respective subsidiary bodies, dealing with matters in which the Bank has an interest.

IBRD Articles of Agreement, supra note 17, art. II.

Article V states: [t]he United Nations and the Bank will, to the fullest extent practicable and subject to paragraph 3 of article 1, arrange for the current exchange of information and publications of mutual interest, and the furnishing of special reports and studies upon request. Id.

\textsuperscript{78} U.N. CHARTER art. 48 (2).

\textsuperscript{79} Escott, supra note 66, at 166.

\textsuperscript{80} See IBRD Articles of Agreement, supra note 17, art. I.
principle of obligations erga omnes allows even states which are not directly affected by human rights abuses to respond to those abuses. The principle of erga omnes provides that a state which violates peremptory human rights norms is accountable to all other states, and thus cannot claim that its human rights policies are within its exclusive domestic jurisdiction. This is because human rights abuses directly injure not only individual victims of the abuse, but also all of the states in the international community, and those states have the right and the obligation to stop such abuse.

Also, the World Bank's utilization of human rights factors in its loan decisions does not amount to economic coercion, as recipient states may argue. A coercive act is defined as an illegal use of force, but here, "the suspension or withdrawal of aid is not an illegal act." It is an act that aims to pressure human rights violators to comply with international law that mandates compliance with respect to human rights. The International Court of Justice explicitly affirmed that the suspension of economic aid is not an illegal act that breaches international law. Furthermore, some scholars warn that interpreting the use of economic aid as coercion, or as an illegal use of force will have detrimental ramifications, since those who are subject to the suspension, or withholding of that aid might then claim the right to initiate the use of force in self-defense. This would only serve to lower the threshold of violence in international relations.

Furthermore, the World Bank's consideration of human rights factors in loan decisions does not violate the recipient countries' rights to development, as those states may argue. The right to development, like the right to self-determination, is a right given to human beings, not to states. And while recipient states could argue that state development will,

81. Okuizumi, supra note 5, at 375.
82. Id. The same idea was articulated by the International Court of Justice in its opinion in the Barcelona Traction case, where the court held that human rights abuses concern all states, and once the international community acts to stop such abuse, the abusing state cannot object to such an act under any legal grounds embodied in international law. See Barcelona Traction, Light and Power Co., Ltd. (Belg. v. Spain), 1970 I.C.J. 3, 33 (Feb. 5).
83. Okuizumi, supra note 5, at 375.
84. Id.
85. The Court was "unable to regard such action on the economic plane as is here complained of (cessation of economic aid) as a breach of the customary law." Military and Paramilitary Activities (Nicar. v. U.S.), 1986 I.C.J. 4, 126 (June 27).
87. The right to development has been interpreted as being a right of people, not of states, and such right embodies the following beliefs: 1) The realization of the potentialities of the human person in harmony with the community should be seen as the central purpose of
in turn, result in the satisfaction of the individual’s right to development (since economic prosperity will trickle down to individuals), such an argument will not stand since “countries have, in fact, achieved reasonably satisfactory growth rates without simultaneously attaining reasonably satisfactory standards of living for the majority of the population.” Even if the notion of a state’s right to development was accepted, still, “human rights should never be sacrificed to development. Rather, development should serve to promote and protect rights — economic, social, cultural, civil, and political. Respect for human rights will facilitate development by bringing about a society in which individuals can freely develop their own abilities.” A real and sustained economic development is not possible without respect to human rights.

Finally, proponents argue that the World Bank, by virtue of its own nature, has the legal power to consider human rights factors in its lending decisions. Not only does the World Bank's own Articles of Agreement allow the Bank to consider non-economic factors in its lending decisions, such as human rights factors, when “special circumstances” arise, such as, arguably, gross violations of human rights, but also the World Bank, like any domestic bank, must consider various non-economic factors in determining the credit-worthiness of a country, factors such as “country risk” and “country stability,” thereby, “a poor human rights situation which threatens the internal stability could be a significant factor in country risk analysis.” The greater a country’s instability because of development; 2) The human person should be regarded as the subject and not the object of the development process; 3) Development requires the satisfaction of both material and non-material basic needs; 4) Respect for human rights is fundamental to the development process; 5) The human person must be able to participate fully in shaping his own reality; 6) Respect for the principles of equality and non-discrimination is essential; and 7) The achievement of a degree of individual and collective self-reliance must be an integral part of the process. Report of the Secretary General on the Right to Development, U.N. Comm. on Hum. Rts., 35th Sess., at 7-13, U.N. Doc. E/CN.4/1334 (1979).


89. Okuizumi, supra note 5, at 384-85.

90. Stirling, supra note 1, at 12.

91. Levinson, supra note 10, at 49-50. The World Bank’s own Articles of Agreement provide that the Bank could consider non-economic factors in its loan decisions when there are special circumstances warranting such action. See World Bank Articles of Agreement, art. 5.

92. Marmorstein, supra note 9, at 127-28.
human rights abuses, the greater the risk the Bank will have to take in deciding to extend loans to that country. Thus, the World Bank has the implied power to consider human rights factors in its lending decisions, as does any domestic bank when it considers the risk factors of a particular borrower.

B. Using the World Bank to Enforce and/or Monitor Human Rights is Both Practical and Beneficial

Proponents argue that considerations of human rights factors by the World Bank, in its lending decisions, is beneficial since such considerations will "enable the Bank to ensure that its resources do not assist governments to circumvent human rights-motivated economic sanctions, or contribute themselves to human rights deprivations." In addition, such considerations will have the profound, tangible benefits of "alleviating present suffering, and paving the way for future improvement" in the area of human rights. Furthermore, proponents argue that such considerations will be beneficial for the World Bank itself in that they will change the static nature of the Bank and inspire the Bank to consider and participate in the relevant issues of the time, such as human rights. "The Bank will need to make adjustments and accommodations to changed circumstances in order to remain relevant to the problems and needs of its members."

In addition, proponents argue that it is practical to use the World Bank to monitor and/or enforce human rights. This is due not only to the fact that the World Bank has tremendous influence on developing countries (as a result of its lending ability), but also because "there is a growing realization that the solutions to global-economic problems are inextricably linked with the remedies to many human rights violations," and that the multilateral, and the universal nature of the World Bank will go a long way toward complying with various United Nations resolutions which mandate that human rights issues "be examined globally."

93. Id. at 135.
95. BROWN, supra note 7, at 246.
96. Id.
97. Rajagopal, supra note 6, at 83.
V. THE WORLD BANK’S ACTUAL PRACTICES IN THE AREA OF HUMAN RIGHTS

Examining the history of the World Bank’s actions in the area of human rights reveals an inconsistent pattern of practice. In mid 1960, the United Nations General Assembly issued two resolutions requesting that the World Bank deny economic loans to the government of South Africa, in light of its apartheid policy, and to the government of Portugal, due to the human rights abuses which were occurring in the Portuguese colonies. However, the World Bank refused to comply with the two resolutions, claiming that it was “precluded from considering human rights factors in loan decisions.” In 1972, the World Bank cut off loans to the Allende government in Chile, citing among other reasons, violations of human rights by the Allende government. Despite the objection/abstention of the United States, the World Bank continues to approve loans

(1980) (stressing the importance of viewing human rights abuses as a global problem that mandates a global solution).


100. Marmorstein, supra note 9, at 114. The Bank justified its refusal on the grounds that, [T]he Bank’s Articles provide that the Bank and its officers shall not interfere in the political affairs of any member and that they shall not be influenced in their decisions by the political character of the member or members concerned. Only economic considerations are to be relevant to their decisions. Therefore, I propose to continue to treat requests for loans from these countries in the same manner as applications from other members...I am aware that the situation in Africa could affect the economic development, foreign trade and finances of Portugal and South Africa. It will therefore be necessary in reviewing the economic condition and prospects of these countries to take account of the situation as it develops. Statement of IBRD President Woods to Executive Directors on March 29, 1966, in statement of IBRD General Counsel to U.N. Fourth Committee, 21 U.N. GAOR, C.4 1645th mtg. 317-18 (1966), reprinted in 13 M. WHITEMAN, DIGEST OF INTERNATIONAL LAW 728 (1968).

to countries which are well-known to have committed gross violations of human rights. 102

Yet the World Bank is also funding world-wide projects that have a direct impact on human rights across the globe. 103 These projects range from giving Pakistan and Somalia loans in order to create work opportunities for refugees104 to providing loans in order to promote the equal treatment of women in third-world countries. 105

VI. ANALYSIS AND CONCLUSION

With the increasing realization of the importance of economic factors in international relations, human rights advocates are now focusing on the notion that economics may be the most effective enforcement mechanism for human rights to date. In the eyes of many, using the World Bank is, potentially, the ultimate weapon against the persistent violations of human rights around the globe. But the probability of the World Bank becoming an effective enforcer of human rights is plagued by various legal and non-legal obstacles, as noted above. An effective utilization of the World Bank's power to monitor and/or enforce human rights will depend, for the most part, on the Bank's ability to overcome these obstacles. Yet, there are concrete steps which the Bank could take in an effort to overcome these obstacles while becoming an active player in the arena of global human rights.

First, the Bank could amend its Articles of Agreement to clearly provide for the legal authority which the Bank needs in order to consider human rights factors in its lending decisions. Second, the Bank could create a sub-agency with sufficient human rights experience. This sub-agency would be given the task of evaluating human rights conditions in borrowing countries. In addition, this task force could be given the responsibility of examining the potential impact that withholding and/or withdrawing loans (for human rights violations) would have on the people residing in those borrowing countries. Third, the Bank should adopt a consistent policy of lending that would allow withholding and/or withdrawing loans for human rights violations, regardless of who the borrowing country is and what economic impact that withholding and/or withdrawing would have on the international economic order or international market. Finally, the Bank should abstain from funding


103. For a list of these projects, see Shihata, supra note 3, at 48-66.

104. Id. at 60.

105. Id. at 57-59.
projects that have the potential for human rights violations in any form, including forced resettlement or coerced family planning.

By considering some or all of the above-mentioned suggestions, the World Bank could become a visible player in the area of human rights, a role which the Bank is not only well-qualified to play, but more significantly, a role which the Bank has an obligation to play. At present, the World Bank is considered a failure when it comes to effectively advocating for human rights. In addition, more and more people are becoming enlightened as to the Bank’s persistent practice of providing loans and economic assistance to countries notorious for gross and systematic human rights violations. With this in mind, it would not be unusual for citizens to interpret the Bank’s actions as an implied blessing and an outright encouragement of human rights violations in those countries, a perception which the Bank, itself, would undoubtedly argue. Becoming a well-established human rights advocate would not only eliminate the possibility of such interpretation, but also has the potential of saving many lives and stopping many forms of human misery around the globe.

Finally, by becoming a human rights advocate, the World Bank will be able to refine and soften its rigid image in the eyes of the international community, an image that was expressed by the former Bank director, A. W. Clausen, when he said that “[t]he World Bank is not the Robin Hood of the international financial sector, nor the United Way of the development community. The World Bank is a hardheaded, unsentimental institution that takes a very pragmatic and nonpolitical view of what it is trying to do.”

The World Bank has the promise of becoming the most dynamic human rights enforcer ever, a role that will undoubtedly benefit the Bank itself. Yet whether the Bank can effectively utilize such potential is a question only the World Bank can answer, and so far the World Bank has not responded.

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106. Hutchins, supra note 60, at 514 (quoting ALDEN W. CLAUSEN, BANKING ON THE POOR 236 (1983)).
SELF-DETERMINATION: AN AFFIRMATIVE RIGHT OR MERE RHETORIC?

Halim Moris*

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I. INTRODUCTION

Yves Beigbeder, an international scholar, once asked, “If self-determination is an internationally recognized principle, why does it not apply to the people of West Iran, East Timor, Tibet, Kashmir and other territories, as it has been applied to other colonial territories?” Today, there are an estimated 140 minority groups around the globe, asserting their right to self-determination. Yet despite powerful rhetoric on behalf

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1. YVES BEIGBEDER, INTERNATIONAL MONITORING OF PLEBISCIetes, REFERENDA AND NATIONAL ELECTIONS: SELF-DETERMINATION AND TRANSITION TO DEMOCRACY 145 (1994).

2. The most noticeable of these groups are the Koreans, Vietnamese, Ibos, South Sudanese, Taiwanese, Somalis, Kurds, Armenians, Germans of Romania, Scots, Catalans, Basque, Bengalis, Northern Irish, French Canadians of Quebec, Welsh, Lebanese, Tibetans, Bretons, Lapps, Sicilians, Corsicans, Frisians, Walloons, German-speaking inhabitants of
of nation states, as well as the United Nations, in support of the right to self-determination, "no state has recognized a right to self-determination for a group within its own territory." This "paradox of self-determination" has lead internationalists to question the true meaning of self-determination in the post cold war era. The question often asserted is whether the principle of self-determination actually grants an affirmative right to minorities and indigenous people to determine their own destiny, or is it merely a case of "a noble word being abused?"

This paper will attempt to answer this question, placing special emphasis on current state practices in this area. The paper will be divided into two parts: 1) an overview that will focus on the development of the principle of self-determination in the area of international law, and 2) an analysis that will attempt to address the question posed, with particular focus on current state practices.

II. AN OVERVIEW OF SELF-DETERMINATION


5. For those indigenous people, the right of self-determination is said to include the right of internal sovereignty, as well as "the right and power of indigenous peoples to negotiate with States on an equal basis the standards and mechanisms that will govern relationships between them." U.N ESCOR, 45th Sess., Commission on Human Rights, U.N. Doc. E/CN.4/1989/22, at 10 (1989). On the other hand, minorities are defined as:

[a] group numerically inferior to the rest of the population of a state, in a non-dominant position, whose members being nationals of the State possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, of only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion, or language.

Francesco Capotorti, Study on the Rights of Persons Belonging To Ethnic, Religious and Linguistic Minorities, UN Doc. E/CN.4/Sub.2/384/Rev.1, UN Sales No. E.78.XIV.1 (1979). Regarding those minorities, the right of self-determination is said to encompass the right to a representative government, or even the right to secede, if such group of minorities possesses certain criteria. See infra, Part II (B) (2). For the purpose of this paper, the words indigenous and minorities will be used interchangeably.


Woodrow Wilson was responsible for elevating the principle of self-determination to an international level when, in 1916, he included it in his fourteen points. Thereafter, while the League of Nations did not explicitly mention the principle of self-determination in its covenant, scholars agree that self-determination was “implicitly embodied in spirit in the mandate system of the League of Nations as a sacred trust of civilization . . . .” In 1945, self-determination gained strong support from various nation states who were under colonial rule, and it was eventually incorporated into the United Nations Charter. By the 1960s, the citing of the principle of self-determination had become common-place, appearing everywhere from the International Court of Justice advisory opinions, to the charters of


8. President Woodrow Wilson, address before the League to Enforce Peace (May 27, 1916), reprinted in 53 CONG. REC. 8854 (May 29, 1916). “We believe these fundamental things: First, that every people has a right to choose the sovereignty under which they shall live . . . .” Id.

9. The League of Nations covenant implicitly acknowledges the principle of self-determination when mandates are “able to stand by themselves under strenuous conditions of the modern world.” LEAGUE OF NATIONS COVENANT art. 22, para. 1.

Also, in the Aaland Island Case, a committee of jurists appointed by the League of Nations recognized the existence of the principle of self-determination. However, they found that such a principle does not include the right to secede and separate from the state. Gregory J. Ewald, The Kurd’s Right to Secede Under International Law: Self-Determination Prevails Over Political Manipulation, 22 DENV. J. INT’L L. & POL’Y 375, 378 (1994).


11. The United Nations Charter provides that one of the purposes of the United Nations is “to develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples . . . .” U.N. CHARTER art. 1, para. 2. Article 55 tracks the language of article 1 in requiring member nations to promote higher standards of living, international and cultural cooperation, and universal respect for human rights and fundamental freedoms. U.N. CHARTER art. 55. Implicit reference to the principles of equal rights and self-determination can also be found in article 73 requiring member nations to assume responsibilities for administering territories whose people have not yet attained a full measure of self-government, and to recognize that the interests of the inhabitants of such territories are paramount. U.N. CHARTER art. 73. Finally, article 76 (b) embraces the idea of self-determination in trusteeship systems. “One of the basic objectives of the trusteeship system is to promote the progressive development of the inhabitants of the trust territories towards self-government or independence, taking into account the freely expressed wishes of the peoples concerned.” U.N. CHARTER art. 76 (b).

12. Namibia, 1971 I.C.J. 16 (June 21); Western Sahara, 1975 I.C.J. 12 (Oct. 16); Portugal v. Australia, 1995 I.C.J 90 (June 30). The Portugal v. Australia case, also known as the East Timor Case, marks the first post colonial case that dealt with the issue of self-determination outside the colonial context. Although the International Court of Justice found that it had no jurisdiction in this case, the court acknowledged that self-determination is a binding principle of international law, a principle which the court described as irreproachable.
regional organizations, to a significant number of major international conventions. Today, the right to self-determination is considered jus cogens, and a part of customary international law that imposes binding obligations on all nation states. It is considered not simply a principle of international law, but rather an affirmative right of all peoples. It is seen as a prerequisite to any genuine enjoyment of any of the human rights. But despite notable recognition of the right to self-determination, there is still a great deal of disagreement among states, and among international scholars, as to the scope and parameters of the right to self-determination, as well as who, exactly, is entitled to such a right.

For some, the right to self-determination is limited strictly to those individuals who are under colonial rule or foreign occupation. This is known as external self-determination, and it gives those under the


aforementioned circumstances the right to conduct their own affairs without any foreign interference. Yet for others, the right to self-determination is not limited to those under colonial rule or foreign occupation, but rather, it is given to all peoples, including minorities and indigenous people who live within the boundaries of an existing nation state. This is known as internal self-determination, which gives minorities and indigenous people the right to determine their own destiny. However, there is disagreement as to the scope of the right to internal self-determination given to minorities and the indigenous. Some argue that the right to internal self-determination encompasses the right to secede. Others assert that the right to internal self-determination is merely the right of minorities and indigenous peoples to have a representative democratic government chosen through a legitimate political process. For the purpose of this paper, we will examine both the right to secede and the right to internal sovereignty in our analysis of internal self-determination.

III. ANALYSIS

A. External Self-Determination

External self-determination is the right of the people to be independent and free from outside interference. This right stems from the United Nations Charter, which forbids nation states from interfering with the territorial integrity of other nation states.


22. Iorns, supra note 16, at 273; The idea of interpreting internal self-determination to mean a representative Democratic government came from the United Nations Declaration on Friendly Relations, which declares, in part, that any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent states conducting themselves in compliance with the principle of equal rights and self-determination of peoples . . . and thus possessed of a government representing the whole people belonging to the territory without distinction to race, creed or colour.


24. U.N. CHARTER art. 2.
This right was further embellished by the United Nations Declaration on the Granting of Independence to Colonial Countries and People, stating that "the subjection of peoples to alien subjugation, domination, and exploitation constitutes a denial of fundamental human rights; it is contrary to the United Nations Charter, and is an impediment to the promotion of world peace and cooperation." The same notion was affirmed in various other United Nations resolutions. The right to external self-determination is applicable to both the traditional colonial context and to any foreign domination of one state over another. This paper will explore both applications.

1. Traditional Colonial Context

While the external right to self-determination was extremely popular during the 1960s and 1970s (in Asia, Africa, and Latin America), today, claims of a right to external self-determination in the colonial context are virtually nonexistent. This is due not only to the formal termination of colonization as we know it, but also to the fact that today, "virtually all territories on earth are within the jurisdiction of some sovereign state." Another contributing factor to the current decline in the number of claims of a right to external self-determination in the colonial context is the notion that most of the former colonies have accepted the boundaries as their own legitimate boundaries, despite being drawn arbitrarily by their former colonial masters. This notion was expressed by the Prime Minister of Ethiopia at the Addis Ababa Summit Conference of 1963, where the Organization of African Unity was established, when he said, "It is in the interest of all Africans today to respect the frontiers drawn on the maps, even though they were drawn by the former colonizers."

Today, claims of a right to external self-determination in reaction to the effects of the traditional form of colonization are virtually nonexistent. However, when we take into consideration the factors of foreign domination, as well as interference by one state over another, suddenly the number of these claims begins to escalate.

28. Fox, supra note 18, at 752.
2. Foreign Domination

Today, unlike claims of external self-determination in a traditional colonial context, there is a rise in external self-determination claims originating from foreign domination of one state over another. However, the definition of foreign domination has been expanded to include nontraditional forms of domination. Today, foreign domination can be seen militarily (such as when troops of one country are stationed in another country), economically (when one country or group of countries economically dominates another), and culturally (a concept known to social scientists as cultural imperialism), where one country's culture is imposed on another.

On the militaristic front, claims of a right to external self-determination were recently made by various countries, including: Lebanon, which resents the presence of Syrian and Israeli troops on its soil; Panama, which rejected the presence of American troops there; and the inhabitants of the Japanese island of Okinawa, who demanded the American troops stationed there to leave, following the rape of a twelve-year-old Japanese girl.

On the economic front today, various third world countries are beginning to voice concern over their lack of external self-determination due to the economic domination by the developed countries. This sentiment was, perhaps, most eloquently expressed by Gert Rosenthal,
General Secretary of the United Nations Economic Commission for Latin America, when he stated:

I think that in any relationship between weak and strong, strong have assets on their side; this occurs at the national level in distributive matters and it occurs in international relations among economically strong and economically weak countries, and it occurs in the world order. . . . Latin America and the Caribbean have to take their destiny in their own hands and resign themselves to the fact that we live in an inequitable world and that we have to function in this world . . . .

This foreign economic domination, various states argue, can take numerous forms: a very high level of debt, ideologically-based conditional loans by the International Monetary Fund and the World Bank, or a monopoly over technological advances by the developed countries. A current example of economic domination by monopoly over technological innovation can be witnessed in Japan's domination over its neighbors in Southeast Asia, via its strategic control of technology infiltrating that region.

On the cultural front, periodically there are claims of a lack of external self-determination because of cultural domination of one country over another. A right to cultural self-determination can be traced back to various international treaties, including the International Covenant on


35. Id. at 20. Today, for example, Latin American countries pay as much as 40% of their income annually to service their debt owed to developed countries. On the other hand, Africa's total debt owed to developed countries has increased by 700% between 1979 and 1984. See Africa's Submission to the Special Assembly of the U.N. General Assembly on Africa's Economic and Social Crisis, at 66 U.N. Doc. A/AC. 229/2 (1986).

36. Various developing countries have argued that the policies of the International Monetary Fund and the World Bank, of attaching restrictive conditions on loans advanced to those developing countries, a policy known as structured adjustment programs, only serves to undermine their right to economic self-determination. As one author puts it, "The loss of national economic control has been accompanied by a growing concentration of power without accountability in the international institutions, like the IMF and the World Bank for poor countries, foreign control has been formalized in structural adjustment programs" JEREMY BRECHER & TIM COSTELLO, GLOBAL VILLAGE OR GLOBAL PILLAGE: ECONOMIC RECONSTRUCTION FROM THE BOTTOM UP 31 (1994). For evaluation of IMF and World Bank loan policies, see JOHN DICKEY MONTGOMERY, FOREIGN AID IN INTERNATIONAL POLITICS: AMERICA'S ROLE IN WORLD AFFAIRS SERIES (1967).

Economic, Social, and Cultural Rights\textsuperscript{38} and the International Covenant on Civil and Political Rights.\textsuperscript{39} For example, article 27 of the International Covenant on Civil and Political Rights provides that “persons belonging to . . . minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”\textsuperscript{40} Today, claims of a right to cultural self-determination are being made by various groups, including the French-speaking Walloons of Belgium, who assert that their culture is distinctly different from that of the Dutch Flemings,\textsuperscript{41} and the German-speaking inhabitants of Alsace-Lorraine (France), who feel justified in asserting a cultural self-determination right based on the fact that language is one of the most significant elements of any culture.\textsuperscript{42}

While these claims of a right to external self-determination because of foreign domination (whether militarily, economically, or culturally) are on the rise, they often fall on deaf ears. The international community, in practice, has not acted beyond the mere reassertion of the right of people to be free from foreign domination, except on rare occasions.\textsuperscript{43}

\textbf{B. Internal Self-Determination}

Perhaps more than any other aspect of the principle of self-determination, internal self-determination has aroused the greatest level of

\begin{footnotesize}
\begin{enumerate}
\item [40] Id.
\item There are an estimated one million German-speaking persons living in Alsace-Lorraine, France, whose claim of self-determination is based, for the most part, on the fact that they communicate in a foreign tongue. See Deutsche Presse Agentur, \textit{Unification Makes German Language A Hot Commodity}, \textit{SEATTLE TIMES}, Mar. 28, 1993, at AS; Rone Tempest, \textit{For Alsace-Lorraine, Fear of Germany is a Thing of the Past Europe: The region has been fought over in three wars. Now, its citizens say they’re content to be on the sidelines as the Continent is reshaped}, \textit{L.A. TIMES}, Apr. 12, 1990, at 11.
\item Perhaps one of the most vivid exceptions is the international community’s reaction to Iraq’s invasion of Kuwait, which could be classified as foreign domination by militaristic means. \textit{See S.C. Res. 660, U.N. SCOR, 45th Sess. at 1, U.N. Doc. S/Res/660 (1990).} Where the U.N. Security Council found Iraq guilty of aggression in its occupation of Kuwait. However, an argument can be made that the situation in Kuwait is different, since the Iraqi presence there was an outright annexation, rather than a mere attempt to dominate militarily.
\end{enumerate}
\end{footnotesize}
debate among nation states and international scholars. Today, the vast majority of claims for self-determination are based on internal self-determination. The viability of that internal right to self-determination has clearly been enhanced by the transition to majority rule in South Africa, and by progress toward resolution of the Palestinian question, not to mention the recent plebiscite in Quebec, or the call for the establishment of an independent, all-black nation in North America by the head of the Nation of Islam, Louis Farakhan.

But despite the high number of claims for internal self-determination, controversy persists over the true definition of internal self-determination. The two most common responses are that first, the right to internal self-determination is merely the right to have a representative, democratic government. Second, internal self-determination encompasses the right of minorities and indigenous people to secede from an already existing state, and form their own independent state.

1. Internal Self-Determination As The Right To Have A Representative Government

The practice of assuming that where one finds internal self-determination one will certainly find a representative government stems from various international treaties. For example, article 25 of the International Covenant on Civil and Political Rights provides that:

[e]very citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2, and without unreasonable restrictions: a) To take part in the conduct of public affairs, directly or through freely chosen representatives; b) To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be by secret ballot, guaranteeing the free expression of the will of the electors; c) To have access,
on general terms of equality, to public service in his country. 49

But despite the argument among those who assert that the internal right of self-determination is limited to the right of having a representative government, there still exist both theoretical and practical limitations to the notion of limiting internal self-determination to having a representative government.

On a theoretical level, there is disagreement as to what a representative government truly means. Various nation states have argued that a representative government does not necessarily connote a western-style form of democracy, and thus, these nations argue that their own form of government is the true, representative government. 50 For example, the Russians have argued for over seventy years that a true, representative government is a Communist form. Also, various African nations have argued that a representative government "need not be a democratic one." 51 On the other hand, East Asian countries believe that "western-style democracy is not applicable to East Asia." 52 Furthermore, a large number of international scholars agree that a western-style form of government "has not emerged as a binding, international law, but it appears to be moving in that direction." 53

Second, even if nation states accepted the notion that a western-style government is the only way to achieve a truly "representative government," 54 still, the western-style democracy is based on the idea that decisions are made by a majority vote, which means that "the interests of the minority too often are overridden by the interests of the majority." 55 Therefore, since internal self-determination is often asserted by minorities, having a democratic form of government does not necessarily guarantee those minorities a genuine right to internal self-determination. Today, the world over, minorities who are living under a supposedly democratic government are still being deprived of the right to have a representative government, thus denying them the right to internal self-determination.

50. Iorns, supra note 16, at 274.
51. Id.
52. See Kim Dae Jung, A Response to Lee Kuan Yew: Is Culture Destiny? The Myth of Asia's Anti-Democratic Values, 73 FOREIGN AFF. 189 (1994). Former Prime Minister of Singapore, Lee Kuan Yew, had argued that a western form of democracy had failed in East Asia.
54. Id. at 310.
55. Id.
Three cases in point can be found among the Aborigines of Australia, the Koreans in Japan, and the Native Americans in the United States.

Yet even if we were able to overcome these theoretical limitations on the right to internal self-determination as entitlement in a representative government, some practical limitations still exist that would serve to undermine such a right. First, in order to achieve a truly representative government that is the basis for internal self-determination, there must be free and fair elections which would enable the people, especially minorities, to elect a representative government. While the United Nations, on numerous occasions, has stressed the importance of free and fair elections, nation states have managed to develop various techniques to

56. Aborigines comprise about 1.8% of the total Australian population, approximately 300,000 individuals, who are not only under-represented in the political process, but also ill-treated. See Theresa Simpson, Claims of Indigenous People to Cultural Property in Canada, Australia, and New Zealand, 18 HASTINGS INT'L COMP. L. REV. 195, 204-05 (1994); Australian PM Pledges Better Aborigine Treatment, REUTER LIBR. REP., (Dec. 10, 1992) available in LEXIS, Nexis Library, World File. For historical view of the Australian’s treatment of Aborigines, see generally RICHARD BROOME, ABORIGINAL AUSTRALIANS: BLACK RESPONSE TO WHITE DOMINANCE 1788-1980 (1982).


58. Despite their alleged autonomy, Native Americans in the United States are not only discriminated against, but for the most part, severely under-represented in the American democratic process. For a history and evaluation of the status of Native Americans, see VINE DELORIA, AMERICAN INDIAN POLICY IN THE TWENTIETH CENTURY (1985).

ensure that their elections are anything but fair and free, especially to the minorities who are living within the boundaries of those states.

First, there is the technique of manipulating the voters' eligibility, so as to exclude those whom the government does not want to vote. For example, Cambodia designed its election laws in such a way that they denied its minority Vietnamese settlers the right to vote. This was accomplished by requiring, among other things, that at least one parent be born in Cambodia. This very same technique was implemented by the Namibian government to exclude South Africans residing there from voting.

Second, there is the technique of forced movement of people in order to manipulate an election. This can take many forms. In Bosnia-Herzegovina, the complete expulsion of potential voters from the territory, known as ethnic cleansing, was utilized. Other forms include moving the potential voters into another territory in the country in order to stack voter rolls, which occurred in Morocco, and murdering potential voters, as has occurred in Rwanda.

The third technique used by states to prevent minorities from electing a representative government is by allowing ballot fraud, such as allowing people to vote more than once, destroying ballot boxes, and threatening those who attempt to vote. Perhaps the best example of recent ballot fraud was during the Haitian election in June 1995. Despite the active role which the United Nations plays in monitoring these elections,

solution to Afghan crisis based, inter alia, “on the free exercise of the right to self-determination by the people, including free and genuine elections”).

60. Fox, supra note 18, at 764.
61. Id. at 762.
62. Id. at 767.
63. Id.
65. The Haitian's June municipal election was riddled with ballot fraud on a very grand scale. Ballot boxes disappeared, people were registered to vote more than once, and the local police intimidated voters. See The Americas: Carter Center Criticizes Haiti's Election, S.F. CHRON., July 22, 1995, at A12; Haiti's Elections Were Riddled with Fraud, THE LONDON INDEP., July 22, 1995, at 11.
66. The United Nations has played an active role in monitoring various recent elections in countries like Haiti, Mexico, Cambodia, El Salvador, Nicaragua, Romania, Zambia, and Namibia. For a summary and evaluation of recent election monitoring missions by the U.N.
there still remains an embarrassingly large number of minorities throughout the world who are deprived of the opportunity to participate in genuinely fair and free elections.

Finally, even if these minorities were able to overcome all of the above mentioned obstacles and were able to freely and fairly participate in the election of a representative government, there is no guarantee that such government would act according to their will.

2. Internal Self-Determination as the Right to Secede

In the post cold war era, virtually all claims of a right to self-determination assert the right to secede, whether those claims were made by Chechnyans, Southern Sudanese, Quebecois, or Kurds. Nation states are quick to point out that minorities do not have the right to secede, since secession would not only violate their territorial integrity guaranteed them by the United Nations Charter,\(^6\) but would also be violative of the doctrine of Uti Posseditis Juris. Adopted by the International Court of Justice in Bukrina Faso v. Republic of Mali,\(^6\) Uti Posseditis Juris requires the respect of the pre-established borders and frontiers. On the contrary, proponents of the right to secede argue that the territorial integrity of a state, as well as the pre-established borders and frontiers, have been arbitrarily drawn by colonial powers without regard to the ethnic minorities living within them.\(^6\) Proponents also insist that a genuine enjoyment of human rights must include the right to secede, since “it is for people to determine the destiny of the territory, not [for] the territory [to determine] the destiny of the people.”\(^7\)

However, those in favor of the right to secede also point out that not every group of minorities has such a right, and that each group must possess the following characteristics in order to qualify for the right to secede:

1. a pattern of systematic discrimination or exploitation against a sizable, self-defined minority; 2. the existence of a distinct, self-defined community or society within a state, compactly inhabiting a region, which overwhelmingly supports separatism; 3. a realistic prospect of conflict

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69. Cass, supra note 2, at 32.

70. Cass, supra note 2, at 24 (quoting Judge Dillard in his separate opinion in the Western Sahara Case, 1975 I.C.J. 12, 114 (Oct. 16)).
resolution and peace within and between the new [and] old state as a result of the envisaged self-rule or partition; and 4. the rejection of compromise solutions on the part of the central government.\textsuperscript{71}

These requirements, however, discriminate against the large number of minority groups not in possession of them. For example, Coptic Christians living in Egypt will not qualify since they are scattered in small numbers across Egypt. Thus, they lack the second requirement of compactly inhabiting a region.\textsuperscript{72} Also under these requirements, Quebecois, and similar groups, will be deprived of the right to secede since they lack the first requirement of "systematic discrimination or exploitation." This is due to the fact that their claim to secession is based solely on common language and culture.

But even if a particular group possesses all of the criteria required for secession, such a group would still have to overcome one more major obstacle, namely, international recognition. While it has been accepted that there are no binding rules in international law that create an obligation for an existing state to recognize the appearance of a new state. On the contrary, recognition that may be considered premature may qualify as a tortious act against the lawful government; it is a breach of international law.\textsuperscript{73}

However, there are some internationally accepted standards that define when an entity becomes entitled to recognition as a state. For example, the Montevideo Convention on Rights and Duties of States cites four criteria for recognition. First, a defined territory; second, a permanent population; third, an organized government; and finally, the capacity to conduct foreign relations.\textsuperscript{74} In addition, the I.C.J. has set forth additional criteria which must be fulfilled in order for a new state to achieve recognition.\textsuperscript{75} But meeting all of these criteria does not necessarily

\begin{itemize}
\item \textsuperscript{71} Lloyd, supra note 7, at 432.
\item \textsuperscript{72} There are an estimated six million Coptic Christians living in Egypt, constituting ten percent of Egypt's population, who face constant discrimination and exploitation by the Muslim majority. See Edward Wakin, A Lonely Minority: The Modern Story of Egypt's Copts (1963); Mae Ghalwash, Minority Large, But Invisible and Maligned, New Orleans Times-Picayune, Feb. 29, 1996, at A17.
\item \textsuperscript{74} Montevideo Convention on Rights and Duties of States, Dec. 26, 1933, 165 L.N.T.S. 19, art. 1.
\item \textsuperscript{75} These additional criteria were established by the court, in its advisory opinion regarding the interpretation of the U.N. Charter, article 4, paragraph 1. The court stated that for the newly emerging entity to be recognized by the United Nations, such entity must "1) be a
guarantee recognition. Rather, the decision to recognize a new state, in practice, is often a political decision, often made without regard to the new state's legal qualifications. As one scholar puts it:

The majority of states blend both law and politics into their decision to recognize a secessionist movement. In fact, from the empirical evidence that exists, a strong argument can be made that subjective political considerations far outweigh objective legal ones when states decide how to react to a secessionist claim of independence. There is little evidence that governments shape their response to civil war adversaries by reference to legal rules and procedures but rather shape policy mainly on the basis of calculations of prudence and military necessity. Because recognition often has a direct impact on whether a secessionist movement actually becomes a new and lasting state, it should not be surprising that other states try to use the tool of recognition to produce a favorable outcome.

History provides a great deal of support for the notion that the recognition of a new state is, for the most part, a political and self-serving decision. For example, consider “how the Soviet and American positions on the right of Eritrea to secede flipped after a pro-western government in Ethiopia was replaced by a Marxist one.”

In more recent context, some argue that had the Quebecois chose to secede from Canada (during their recent plebiscite in October 1995), the United States would have had to seriously consider the question of whether or not it would recognize Quebec as a sovereign state. “The United States' recognition of a sovereign Quebec will depend more upon the American national economic interest than on the legal basis for extending recognition; the United States is apt to seek Quebec's accession on renegotiated terms.”

Against that theoretical background, it is beneficial to explore the current state practice with regard to recognition of a secessionist movement. While the number of secessionist movements across the globe is considerable (which seem to generate tremendous sympathy within the

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77. Id. at 533.

international community), international recognition was awarded recently to a mere two cases: the Baltic States and the States of the former Yugoslavia.

In 1991, the United States of America formally recognized the Baltic States as independent states. Other countries soon followed suit. During that same year, the three Baltic nations were admitted as new members of the United Nations. However, the recognition of the Baltic States was not perceived as a trend-setting event, whereby the international community would suddenly be willing to recognize secessionist movements. Rather, the recognition of the Baltic States was described by President George Bush as "a special case." This is due to the fact that those Baltic States were independent states and members of the League of Nations before they were annexed by the Soviet Union in the 1920s. Thus, the recognition of the Baltic States is merely "a recognition of a limited secession right applicable to illegally annexed territories, rather than a general right of secession." The same analysis will also be applicable to the international recognition of the former Soviet Republic in central Asia, since those republics were also independent states prior to the Soviet annexation that occurred shortly after the Bolshevik revolution.

The second recent act of recognition of a secessionist movement by the international community is the case of Yugoslavia. The European Community formally recognized Croatia and Slovenia on January 16, 1992. Four months later, the United Nations accepted the Republics of Slovenia, Croatia, and Bosnia-Herzegovina as official members. For some, such recognition is particularly significant because, outside the colonial context, it represents the first time that a wide-spread international

79. The Iraqi Kurds, for example, gained tremendous sympathy from the international community during and after the Gulf War. However, such sympathy fell far short of formal recognition as an independent, new state. See S.C. Res. 688, U.N. SCOR, 46th Sess., 2982d mtg., reprinted in 30 I.L.M. 858 (1991) (condemning Iraq's actions against the Kurds, and sympathizing with the Kurd's struggle); Staff Writer, U.S. May Seek Autonomous Kurdish Region, CHI. TRIB., May 5, 1991, at 19.


84. Id. at 321.


state practice has favored secessionist movements still engaged in armed struggles for independence. For others, however, such recognition is not necessarily a recognition of secessionist movements per se. On the contrary, it is international recognition of "state dissolution rather than secession." Such a distinction is crucial, since international recognition of a new state will depend, for the most part, on the question of whether this new state has emerged as a result of the disintegration of an old state, or merely as a result of a meritorious secessionist movement attempting to secede from an already existing state. While the Arbitration Commission on Yugoslavia seems to acknowledge that Yugoslavia was actually dissolving, not that the republics were seceding, some scholars insist that because this dissolution was marked by many unilateral declarations of independence, and given the fact that the socialist republic of Yugoslavia was brought to an end by only Serbia and Montenegro, rather than by a conference of all republics (as was the case with the Soviet Union), this process can be better described as a series of secessions.

Thus, while there is no clear answer as to whether the new, emerging states in the former Yugoslavia have emerged as a result of a disintegration of an old state, or simply as a result of genuine secessionist movements that were successful in gaining independence, the international community remains divided as to when a particular secessionist movement is entitled to recognition.

Finally, even if the secessionist movement were able to gain independence and international recognition, there still remains the very real possibility that the former parent state will try to exercise control over the newly independent secessionist movement. "A secessionist movement cannot be successful in its internal aim if the parent state retains control over substantial military forces within the secessionist state, and insists on having effective control over its policies and laws, even if such control is only exercised sparingly." A case in point is that of the former Soviet Republics in central Asia. Despite their new-found independence, Russia is still in control, both militarily and economically. This situation has lead

87. Eastwood, supra note 83, at 322.
88. Id. at 328.
91. Frankel, supra note 76, at 528.
some scholars to question whether secession is truly the ultimate prize in the fight for self-determination.\footnote{Gidon Gottlieb, \textit{Nations Without States}, 73 FOREIGN AFF. 100 (1994).}

**IV. CONCLUSION**

The right of self-determination has long been recognized as an indisputable prerequisite to any genuine appreciation and enjoyment of human rights. It is a positive, legal obligation established by customary international law, multinational and bilateral treaties, including the United Nations Charter, in addition to various advisory opinions articulated by the International Court of Justice. It has been advocated for by leaders of great stature, such as Woodrow Wilson, to more obscure minority groups, such as the South Sudanese. Yet, despite the popularity of the principle of self-determination, a great deal of ambiguity as to its scope and breadth continue to undermine its true effectiveness as an affirmative right for those who are searching for a means by which to determine their own destiny and future.

For those who assert external self-determination as a means for achieving freedom from foreign domination, their screams consistently fall on deaf ears. State practice has barely recognized self-determination in the context of economic or cultural domination of one state over another. At the same time, the end of the colonization era has brought with it an end to all self-determination claims in the colonial context.

For those who assert internal self-determination as the right to have a representative government, despite some encouragement from the international players, they continue to be short changed. Nation states argue their own form of government is the only true example of a representative government, or create tremendous obstacles intended to prevent those minorities from electing their own representative government, such as the forced movement of potential voters, election fraud, or even mass murders.

However, those who asserted that internal self-determination entitled them to the right to secede faced the most challenging obstacles of all. They not only had the obligation to demonstrate that they fit the definition of a secessionist movement, but they also had to provide enough political and economic incentives to other international players to achieve recognition. Even after recognition has been granted, there is no guarantee that the mother state will not try to control them once again.

Recent state practice indicates that international recognition of secessionist movements takes the form of \textit{sympathy}, rather than true
diplomatic recognition. Over the years, a number of secessionist movements were able to secede, but failed to gain recognition. Examples include Biafra, in Nigeria, and Katanga, in Congo. But for those fortunate enough to earn this recognition (namely the Baltic States and former Yugoslavian Republics), they are classified as special cases. This distinguishes them from the classical secessionist movements. For example, the Baltic States were once recognized as independent states before the Soviet annexation. In addition, the former Yugoslavian Republics were, perhaps, recognized not as a secessionist movement, but as new states that emerged as a result of the disintegration of an old state.

Today, thousands of people are killed in their search for the illusive goal of self-determination. From Chechnya to South Sudan, and from Yugoslavia to Kurdistan, their search has lead them to a dead-end road full of obstacles, resentments and a lack of recognition. But these people continue to put their lives on the line, hoping that those nobel words of self-determination amount to much more than political rhetoric. So they continue to die, hoping that maybe, there is a genuine right of self-determination.

93. On May 30, 1967, Biafra was able to secede from Nigeria and declare itself the republic of Biafra. While few African states recognized the republic of Biafra, the U.N. and most of the international community refused to grant recognition to the republic of Biafra. This lack of recognition, as well as a bloody civil war, caused the Biafran government to surrender to the Nigerian government and end its secession on January 12, 1970. For a history of the Biafran movement, see Eastwood, supra note 84, at 307-10.

94. The Katanga region of Congo declared its independence from Congo on August 4, 1960. The leader of the Katangan movement, Tshombe, asked for both international recognition and U.N. membership. However, such request was denied. No state recognized Katanga as an independent state. The Security Council issued resolutions calling for the military assistants to the Congolese government to take back the Katangan region; Eastwood, supra note 84, at 304-07.
HEALTH-CARE ACCESS FOR THE ELDERLY OF INDUSTRIALIZED NATIONS: FALLEN AND CAN’T GET UP?

Joann Babiak

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I. INTRODUCTION

Citizens of industrialized nations regard health-care as a right. Japan, Canada, and England have developed and funded national health programs in keeping with this entitlement philosophy. The United States government, though stopping short of providing every citizen health-care access as a right,1 has entitled various groups through federally funded programs. But industrialized nations are no longer filled with ranks of young workers ready to drive the economic engines that fund national health-care services.

1. See Harris v. McRae, 448 U.S. 297, 317 (1980). See also BARRY R. FURROW ET AL., HEALTH LAW § 12-1 at 537 (1995) (noting that some state constitutions, for example, Article I of New Jersey’s Constitution, may raise health-care to the level of a right for state citizens).

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Demographic changes in industrial nations reveal huge increases in the number of elderly members of society. As current workers prepare for retirement, young people must assume the ever more burdensome task of funding national health-care programs. In the face of a shrinking labor pool and increasing numbers of retirees, the monumental objective of obtaining sufficient cash flow to maintain the health-care programs is unrealized.

Industrialized nations have tailored their health-care programs in response to the changing socioeconomic landscape, but their actions provide too little too late. Financial cutbacks and organizational restructuring change access patterns for every consumer. However, as costs continue to escalate and populations age, policy considerations targeting the elderly begin to creep into the service delivery equation. The health-care considerations implemented by industrialized nations affect elderly consumers in increasingly important ways as the ranks of adults over age sixty-five continue to swell.

This paper describes the health-care options provided to elderly consumers in four industrialized nations: the United States, Japan, England, and Canada. The options designed to improve elder care provide only weak supports which will collapse as the dramatic surge in the number of elderly consumers overwhelms meager and often disorganized organizational structures and services. Discussion in Part II introduces various demographic and social phenomena, which necessitate strategic development of health-care policies targeted to address elder needs. Part III describes the health-care systems in effect in the United States, Japan, England, and Canada and addresses the various policy decisions nations have advanced regarding elder peoples' access to health-care. Philosophical arguments about the ethics of service-delivery rationing are explored in Part IV.

II. DEMOGRAPHIC TRENDS AND SOCIAL PHENOMENA AND THEIR EFFECTS ON THE FOCUS OF HEALTH-CARE

Although the emergence of large numbers of adults over the age of sixty is not limited to industrialized nations, the aging of western society carries with it profound social and economic ramifications. Worldwide, the percentage of total population older than sixty-five has increased from

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2. Lloyd Bonfield, Was There a Third Age in the Pre-industrial English Past? Some Evidence from the Law, in AN AGING WORLD DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY 37 (John M. Eekelaar & David Pearl eds., 1989). In the United States, the emergence of lobbying groups helps elder citizens compete for limited economic resources. Id. at 38. A major focus of groups representing older Americans is securing a significant allocation of state and federal dollars to perpetuate assistance programs such as health and welfare. Id.
5.1% in 1950 to over 6% in 1990. Marked differences in the demographics of aging are apparent between developed and developing countries. Non-industrialized nations characteristically have a very small percentage of elderly people and fertility rates far in excess of those of industrialized nations. The proportion of the population older than age sixty-five in non-industrialized nations has increased less than a full percentage point, from 3.8% in 1950 to 4.5% in 1990. In contrast, developed countries experienced a rise of almost 5% in the same time period.

The aging population of industrialized nations is a recent, sudden event. That greater numbers of people live beyond sixty-five reflects the improved well-being of the entire population. In earlier centuries, infant mortality was significantly higher and life expectancy shorter than now. Declines in fertility and mortality foretell additional increases in percentages of elderly in relation to total population. The tendency towards rapid growth of the elderly cohorts within the total population will manifest worldwide. However, even into the next century, the proportion


4. Peter Laslett, *The Demographic Scene — An Overview*, in *AN AGING WORLD DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY* 3, 5 (John M. Eekelaar & David Pearl eds., 1989) (reporting that the percentage of people over 65 residing in developing countries is approximately one third the number of elderly residing in developed nations). The developed countries include Japan, the United States, the United Kingdom, Sweden, France, and the former Soviet Union. *Id.* The developing countries include Brazil, India, China, African nations, and Poland. *Id.*

5. *Id.* at 4. Both the actual numbers and the percentage of elderly will rise within the non-industrialized nations as a function of falling birth rates. Laslett projects that by the millennium, the proportion of elderly in non-industrialized nations, though increasing, will remain less than half of the share of elderly people residing in developed nations. *Id.*


7. Laslett, *supra* note 4, at 7. Laslett cautions that the figures do not take into account the distinctive social and cultural features of the nations surveyed. *Id.* Thus, even though aging itself can be quantified across all cultures, the socio-cultural aspects of each country form unique contextual milieus. *Id.* The demographic figures take on different meanings in the various social settings. *Id.* at 5.

8. Ulen, *supra* note 3, at 107 (attributing increases in the number of elderly in the world population to rising real incomes, better health-care, and a decline in the birth rate).


10. *Id.* at 4.

11. *Id.*
of elderly in the developing nations will remain less than half of the number of elderly residing in developed countries.\textsuperscript{12}

Three main trends are directly associated with population aging: increased life expectancy, altered patterns of fertility, and the feminization of aging.\textsuperscript{13} These trends can be viewed as interrelated.\textsuperscript{14}

\textbf{A. Increased Life Expectancy}

Societal viewpoints regarding aging, death, and dying have changed in light of increases in life expectancy. In the recent past, death was often an unanticipated visitor. Death at any age was accepted by our ancestors as one of the unpredictable vagaries of the life cycle.\textsuperscript{15} Now, many people do not encounter the death of a loved one until early adulthood.\textsuperscript{16} As a result of improved living conditions, individuals in

\begin{itemize}
\item \textsuperscript{12} Id. at 5. Projections for third-world populations are expected to rise from 4.0\% in the 1980s to 7.8\% by 2020. Id. In contrast, the aged populace of developed countries is expected to rise from 1.3\% in the 1980s to 16.7\% by 2020. Id. In terms of actual numbers, the world will have 760 million inhabitants over age 65 by 2020. Id. This figure represents over 9\% of the population. Laslett, \textit{supra} note 4, at 5.

\item \textsuperscript{13} Gunhild O. Hagestad, \textit{The Aging Society as a Context for Family Life}, in \textit{AGING AND ETHICS} 123, 123-31 (Nancy S. Jecker ed., 1991). The author ties these trends to changes in key aspects of family life, such as decreased size of the nuclear family, diminished age differences between siblings, altered patterns of kinship relations, and more predictable death experiences. Id.

\item \textsuperscript{14} Paul Paillat, \textit{Recent and Predictable Population Trends in Developed Countries}, in \textit{AN AGING WORLD: DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY} 25 (John M. Eekelaar & David Pearl eds., 1989). Paillat analogizes the contemporary family to a \textit{frail ship} able to withstand the influence of a stormy contemporary environment. Id. Societal notions of marriage relationships interact with fertility, longevity and migration patterns to impact resource allocation within particular communities. Id. Paillat regards the dynamic tension between the factors as contributory to the shift in demographics. For example, the author interprets the rapid growth of post World War II population as a function of declining morbidity rather than a manifestation of "genetic frenzy." Id. As successive generations controlled reproduction, population has become increasingly sensitive to economic and social phenomenon. Id. at 26-28. In Paillat's view, economic fluctuations alternatively increase or decrease migration. Migration, in turn, impacts the economic well-being of a particular region. Migratory trends may place additional demands on the medical, social and cultural infrastructure of a community. Id. at 30, 31.

\item \textsuperscript{15} Hagestad, \textit{supra} note 13, at 124 (characterizing morbidity as "a normal experience in all phases of family life"). The recent trend is to characterize death which occurs at any point other than old age as atypical. Id. Death's increasing \textit{predictability} and its association with aging removes mortality from everyday experiences. Id. at 125. Death of younger people becomes traumatic by virtue of its untimeliness. Id. Likewise, for the aged and their families, death is more likely to mark a lonely transition devoid of the comfortable knowledge that others have shared this common experience. Id. at 124.

\item \textsuperscript{16} Id. at 125. Parents in the early 1900s had a greater than 60\% chance of experiencing the death of a child. Hagestad, \textit{supra} note 13, at 124. Likewise, children born at the turn of the last century often experienced the death of either a sibling or a parent. Id. The unexpected loss of parent or sibling is unusual in current generations. Id. Where in previous times the family's
industrialized countries are generally able to predict with certainty that they will attain old age.\footnote{Babiak, supra note 1, at 225.}

Increases in the number of elderly pose puzzling questions about the roles of families and institutions. While the bulk of this paper focuses on broad policy decisions regarding care of the elderly, it is important for the reader to develop an understanding of the dilemmas individual families confront regarding elderly access to health-care. Demographic data indicate that as people live longer, the family unit possesses fewer same generation members than intergenerational members, who progressively increase in number.\footnote{Laslett, supra note 4, at 8 (reporting there is a universally rising expectation of life at later ages). Laslett informs his readers that the demographic projections derived from survival curves are representative of global trends. Id. at 11. A survival curve is composed by examining the longevity of a particular cohort of babies born in the same year. Id. The curve is plotted on an X axis that reflects the (declining) number of individuals in the cohort and a Y axis that reflects the age in years of the subjects. Historically, the survival curve dropped markedly for the first year of life and then descended in a flat, diagonal descent to about the 80 year point. Id. In the mid-1900s, the initial drop flattened out and the survival curve both lengthened and crested upward, reflecting a decrease in mortality in the earlier years and increases in survival rate at the very end of the life span. Id. at 13. This redefinition of the survival curve is known as rectangularization. Id.}

Where three generations of family coexisting contemporaneously was once the norm, it is now not uncommon to have four or even five generations existing together.\footnote{Paillat, supra note 14, at 28 (citing data acquired from a longitudinal survey conducted in France which supports this contention). The study revealed that approximately 20% of 59 year old men in a sample of over 1000 people lived in a four generation family consisting of one parent (usually maternal), an adult child and a grandchild. Id. at 32-33. Paillat also asserts that in countries where probable life expectancy is greater than 70 years, two generations of retirees will belong to the family unit. Id. Specifically, the newly retired 60-year-olds will coexist in family units with their 80-year-old parents. Id. at 33.} These demographic changes diminish the ability of the family unit to care for elderly relatives, and it is unclear whether government resources are capable of providing appropriate support.

\section*{B. Fertility Patterns}

Changes in fertility patterns influence the size and age structure of generational demarcations. In contrast to the historical trend for women to...
bear many children throughout their adult years, women of industrialized countries have concentrated their childbearing activities into a more circumscribed time frame. As a result, the proportion of children born to women over age thirty-five is declining rapidly in industrialized countries.

Declines in the number of offspring change the age structure of kinship networks by decreasing the number of intergenerational relationships. As women choose to bear fewer children, horizontal relationships within each generation diminish. A decrease in the number of siblings and cousins in a family creates an additional consequence, a shifting of the numerical balance between the older and younger members of each generation. The diminishing number of young adults carries tremendous implications for both familial and governmental support systems. Many governments are restructuring health-care services at the same time the number of care-givers within each family shrinks. Whether the family safety net will fold in the face of government cutbacks in health-care services has yet to be determined.

The redefinition of intergenerational age structure portends a restructuring of family members' roles. In a reversal of historical trends, grandmothers are not bearing children concurrently with the onset of their own children's parenthood. Instead, grandparenthood signals the beginning of a life stage which now lacks clearly defined cultural expectations.

20. Hagestad, supra note 13, at 123 (reporting that the typical family at the beginning of the 1900s had four children whereas today's family has two).

21. Paillat, supra note 14, at 25 (contrasting this phenomenon with the frequency of births in communities where contraception is not practiced). There, fertility is determined by the frequency of births among females of reproductive age and by the death rate of female children between birth and reproductive age. Id. at 26. In industrialized nations, where birth control may be practiced, fertility can be controlled. Id. Several indicators may be used to express fertility levels. Id. The total fertility rate indicates fertility at one given date but does not predict future trends related to fertility. Id. at 27. Two additional measures have predictive value. A parity-progression ratio allows investigators to predict how many additional children a woman will have, given her present number of offspring. The interval between two successive births measures reproductive behavior. Longer than average intervals demonstrates contraception is being utilized. Id.

22. There are fewer sisters, brothers, and cousins within each generation. Hagestad, supra note 13, at 129 (citing the extreme case of family units in China, where the majority of families have only vertical relationships). Under China's one-child policy, women were prohibited from having more than one offspring. Id. There are, therefore, virtually no siblings and no cousins in the present generation of young Chinese. Id.

23. Id. at 129. This is the first time in history that the number of elder members of the family outnumber the number of children and grandchildren. Id.

24. Id.

25. Hagestad, supra note 13, at 129. Rights and obligations are ill-defined. Today, it is not uncommon to have grandparents whose ages range anywhere from mid-20s to over 90 years. Id. at 131. The wide divergence in age fosters role uncertainty. Id.
numbers, impact the function of the family unit. With decades of life following parenthood, men and women do not simply raise their children and then succumb to the frailties of old age. Longevity escalates demands on the family support system.

Both civic and familial support systems impact the needs of older adults. Interpersonal relationships link elderly with care-givers and support systems. Support systems vary along a gender-based dimension. Many elderly women are divorcees or widows living alone, but the majority of men over seventy-five years of age live with a spouse. The gender distinctions are not without important social consequences. Historically, the family has been an important source of care giving. The traditional care giving role of the intact nuclear family may change in the presence of divorce and with the demands of multiple generations of elderly. The costs, both financial and emotional, of caring for two generations of elders, and potentially for two sets of parents and their

26. Id. at 130 (reporting that 66% of men over 75 years of age reside with a spouse). Although nearly half of today's marriages will end in divorce, men's patterns of remarriage increase the likelihood that a second wife will provide support during old age. Id at 137. Of the population older than 65 years, men remarry with greater frequency than do women. Id. at 138. As a result of the gender-related variances in patterns of remarriage, the roles of older men and women differ within the family unit and also in society at large. Hagestad, supra note 13, at 129. The older man more likely than not experiences stepchildren, a second family, and a marital partnership during the last decades of life. His spouse provides an emotional and physical support system, and his role as wage earner places him in a situation of relative economic independence. Id. at 140. In contrast, elderly women face dramatically different circumstances than their male contemporaries. Females experience more pronounced longevity than males. Id. at 123. The older woman frequently lives alone; less than 20% of elderly women are living with a spouse. Id. at 138. Many elderly single women rely upon their children for support. Id. at 134. Since there is less remarriage among elderly women than among their male contemporaries, altered fertility patterns impact women's family networks to a greater extent than they do men's. Id. The choice to circumscribe childbearing reduces the number of offspring in the nuclear family and sharpens the demarcations between generations. Hagestad, supra note 13, at 129. Elderly women are often cared for by their daughters. Id. at 134.

27. Id. at 134 (reporting that 80% of elders' constant care is provided by female relatives, particularly wives and daughters). Men who remarry often lose touch with their children. Id. at 138. Professor Hagestad cites research that reveals that many children lose contact with their father subsequent to a divorce. Id. at 139. Although there is scant literature on the dissolution of step-relationships, many remarriages also are terminated. Id. at 140.

28. It is unclear the extent to which family resources, both economic and emotional, will be exhausted when the-younger generation has to care for two groups of elders. In the 1990s, wage earning adult children may care for an over 65 year old retired parent as well as a grandparent of 80 plus years who may be frail as well as elderly. While the older adults may contribute personal resources towards their care, the young family nevertheless is often responsible for a large share of the care giving. In light of fertility patterns decreasing the numbers of siblings and cousins, a trend discussed above, the number of young people available to assume traditional care-giving functions continues to diminish.
spouses through remarriage, may tax even an able child with considerable resources.

In addition to gender distinctions, divorce and subsequent remarriage redefine familial roles. When men remarry, their contact with children from the first marriage often declines or disappears. For the divorced, non-custodial parent, relaxation of family ties, sometimes to the point of unraveling, alienates the children who form the support system for an aging parent. Different problems confront divorced women. Women frequently experience reduced standards of living following divorce, although, unlike males, they tend to preserve kinship relations.

C. Feminization of Aging

Simply the fact that women outlive men creates a generation of elderly women, who look to others for care. Since women tend to outlive

29. Hagestad, supra note 13, at 137. Males age 65 or older remarry at a rate approximately eight times higher than that of their female contemporaries. Id. at 138. Professor Hagestad cites a 1980 study conducted by G.B. Spanier and P.C. Glick, which indicates that women with higher levels of education and greater income are less likely to enter a second marriage than men with equivalent financial and educational resources. Id. The data suggest a gender-dependent split in the educational and financial resources available within the population of single elderly women as compared to the population of single elderly men. Id.

30. Id. at 138 (noting that "divorce and remarriage create more disruption in men's family networks than in women's. In a study on mid-life divorce, many of the men expressed concern about the viability of family bonds. About a third felt that relationships with their children had suffered as a result of the break-up.").

31. Hilde Lindemann Nelson & James Lindemann Nelson, Frail Parents, Robust Duties, 31 UTAH L. REV. 746 (1992). The authors describe the taxing mental and physical fatigue that results from managing medications, hygiene, nutrition, supervising safety, and emotionally supporting an aging parent. Id. at 748. For the caregiver, these duties are inescapable. Id. at 749. The care giving routines impact upon other members of the family unit and upon the relationships the caregivers maintain with their spouse and children. Id. at 748. Employment and social networks are recast in terms of the filial obligation to care for an aging parent. Id. at 749.

32. Hagestad, supra note 13, at 137. Additionally, the needs of the children do not diminish in the face of uncertain financial resources. Ulen, supra note 3, at 108, notes that elderly populations have increased subsequent to a number of factors, one of which is rising real income. In 1991, 12.4% of the elderly were poor whereas 14.2% of the general population was characterized as impoverished. Id. Compare these figures to the United States Bureau of the Census 1992 figures, which classify 12.9% of adults 65 years old or older as poor. Additionally, a comparison to the figures from the Panel on Poverty and Family Assistance, which was convened by the National Research Council of the National Academy of Sciences, places the poverty rate for individuals 65 years old and older at 10.8% in 1992.

33. Hagestad, supra note 13, at 139. "[D]ivorce may lead to an intensification of bonds to grandparents on the custodial side, but to a weakening of ties to the "noncustodial" grandparents. ... [T]he mother often serves as a kin-keeper for her husband's kin." Id.

34. Nelson, supra note 31, at 747 (citing statistical information indicating that women outlive men by more than seven years, on the average).
men by almost a decade, the explosive growth in the number of individuals over sixty-five increasingly recasts health-care in female terms.\textsuperscript{36} The fact that caregivers frequently are daughters or daughters-in-law of the patient adds yet another female dimension to the complex interplay of factors which influence health-care and the elderly. Although the mother-daughter relationship has traditionally been a key factor in maintaining elders within a family network,\textsuperscript{37} the changing dynamic of the modern family erodes the traditional role of the daughter as the caregiver.\textsuperscript{38}

In the United States, traditional family-centered care of the elderly is disintegrating. Societal supports are inadequate to meet the needs of the burgeoning population of older Americans. Other industrialized nations have responded to similar demographic trends and social phenomena by modifying their health-care policies in an attempt to accommodate the needs of an aging citizenry. As discussed below, the policy supports do not provide adequately for the escalating numbers of seniors seeking access to health-care services.

\section{III. Health-Care Systems and Elderly Consumers}

\subsection{A. Japan}

The Japanese model of health-care provides all consumers with universal access to comprehensive low-cost medical care.\textsuperscript{39} The right to

\begin{itemize}
  \item \textsuperscript{35} This is not to say that the elderly are absolved of decision making.
  \item \textsuperscript{36} Nelson, \textit{supra} note 31, at 747. The number of individuals over 65 has increased eightfold since 1900. \textit{Id.} Health-care policy assumes the tinge of a women's issue because of the disproportionately large number of females surviving beyond their sixth decade. \textit{Id.} Creating a feminine view of the aging question carries with it broader issues regarding the status of elderly women and the policy decisions made by a power structure not necessarily predisposed to the needs of the older, female constituency.
  \item \textsuperscript{37} Hagestad, \textit{supra} note 13, at 134. Eight out of ten aging mothers reside in the homes of their children. \textit{Id.} Over 60\% of those children are daughters. \textit{Id.} When constant care is provided by a family member, over three-quarters of the caregivers are wives and daughters. \textit{Id.}
  \item \textsuperscript{38} Nelson, \textit{supra} note 31, at 748. The authors discuss the sandwich-generation women who are squeezed between the demands of their offspring and the needs of their elders. \textit{Id.} at 749. Cultural expectations that women physically assist elders place working mothers in incredibly stressful circumstances. \textit{Id.} The toll of care giving may monopolize the energies of the care-giver to the point that she "experiences extreme mental and physical fatigue . . . cannot sleep, loses marital privacy, and often gives up salaried work or switches to part-time work, despite the repercussions this has on future earnings and pensions." \textit{Id.}
  \item \textsuperscript{39} David Wilsford, \textit{States Facing Interests: Struggles over Health-care Policy in Advanced, Industrial Democracies}, 20 \textit{J. Health Pol., Pol'y & L.} 571, 585 (1995). The Japanese spend less than seven percent of their Gross Domestic Product on health-care as compared to almost 14\% in the United States. \textit{Id.} But the author cautions that the Gross Domestic Product may not be the most relevant yardstick by which to measure health-care expenditures. \textit{Id.} at 588. Japanese expansion and restructuring of the post World War II
health-care is rooted in Japan's post World War II constitution. Although access has been a non-issue, Japanese incur additional expenses for any services not offered through the system. The system has been characterized as a complex collection of "loosely connected insurance schemes." However, government financial oversight provides an overarching unity.

The Universal Health Insurance program, Kokuminkai Hoken, began in 1961 as Japan became a prosperous industrialized country. Kokuminkai Hoken is composed of three large group plans: Employees' Health Insurance (Kenko Hoken), National Health Insurance (Kokumin Hoken), and a special pool, which funds services for the elderly. A number of small homogeneous units are integrated into each of the three large group plans. All employed persons and their dependents belong to a economy has resulted in phenomenal economic growth. Id. Rapid economic growth may mask fluctuations in certain components of the economy. Id. at 589. See also Aki Yoshikawa et al., How Does Japan Do It? Doctors and Hospitals in a Universal Health-Care System, 3 STAN. L. & POL'Y REV. 111, 113 (1991). Japanese health-care costs are growing by approximately one trillion yen per year. Id. The escalating costs are considered manageable when compared to expenditures of other industrialized nations. Id.

40. KENPO, art. 25. See also Wilsford, supra note 39, at 586 (citing W. Steslicke, The Japanese State of Health, A Political-Economic Perspective, in HEALTH, ILLNESS, AND MEDICAL CARE IN JAPAN 34, 35 (E. Norbeck & M. Lock eds., 1987). "The right to maintain the minimum standards of wholesome and cultured living. . . [A]nd in all spheres of life, the state shall use its endeavors for the promotion and extension of social welfare and security, and of public health." Id.

41. Yoshikawa et al., supra note 39, at 134. Only 0.2% of the Japanese who seek medical care cite access as a problem. Id.

42. Id. at 131. Highly advanced medical treatment examples are use of the artificial pancreas and Extracorporeal Shock Wave Lithotripsy. Id. Because the rapid diffusion rates of high technology devices and interventions have escalated costs, the government has limited their use. Id. at 134. The highly advanced medical treatment system provides reimbursement to patients for specified high tech equipment only if treatment is obtained in a designated hospital after authorized institutional approval is obtained. Id. See Dana Derham-Aoyama, U.S. Health-care Reform: Some Lessons From Japanese Health care Law and Practice, 9 TEMP. INT'L & COMP. L.J. 365, 375 (1995). Japanese health-care does not generally cover prenatal care, childbirth, or preventive-care programs.

43. Yoshikawa et al., supra note 39, at 117.

44. Wilsford, supra note 39, at 586. (describing the broad scope of government intervention). Legislative action affects the levels and extent of coverage, extends scope of coverage to uninsured individuals, sets government, employer and employee contribution levels to finance plans, and establishes nationally uniform drug pricing and service provider rates. Id.

45. Yoshikawa et al., supra note 39, at 112. See also Derham-Aoyama, supra note 42, at 373. Japan, the world's second largest industrialized democracy, was the first Asian nation to implement universal health insurance.

46. Wilsford, supra note 39, at 587 (presenting an organization of health insurance funds in Japan). The Employees' Insurance Fund insures general employees at workplaces of small or medium enterprises who are not enrolled in any other health insurance society. Id. Society-managed insurance provides benefits to employees' at large enterprises with a health insurance
Each subscriber pays a premium based upon income and limited by a maximum contribution cap. Providers are reimbursed at a prescribed fee-for-service schedule for any medical services approved by the Central Social Insurance Medical Council.

The Health and Medical Services System for the Elderly covers bedridden persons over age sixty-five and seniors over age seventy. Elderly individuals receive public subsidies and are responsible for only limited cost-sharing (co-payments). The elderly currently comprise slightly more than ten percent of Japan’s population. This group is

society. Id. Day laborers, seamen, teachers, and school employees, railway, and telephone employees’ plans are organized under the Employees’ Insurance Fund. Id. The Regional insurance plan insures individuals not covered by employees’ insurance such as self-employed, farmers, physicians and other professionals, artists, and independent small businessmen. Id. Retirees formerly covered by employees’ insurance and their dependents are covered through a regional insurance provider. Id. For a more detailed explanation of the intricacies of the Japanese Health Insurance Funds, see also Derham-Aoyama, supra note 42, at 375-77.

47. Yoshikawa et al., supra note 39, at 114. Employee health-care groups evolved prior to the introduction of Universal Health Insurance. Id. In the 1920s, large corporations were guided by government to create health-care associations, which financed care for limited numbers of employees. Id. The Japanese government incrementally expanded coverage, first to blue collar workers, and then to white collar workers, farmers, fishermen, and other workers. Id. Efforts were accelerated and extended to virtually all segments of the populace prior to the Pacific War. Id.

48. Derham-Aoyama, supra note 42, at 376-77 (limiting expenditures to approximately $3000 per household under the national health insurance plan and setting caps at a fixed percentage rate of an employee’s monthly standard salary in the employees health insurance plan). See Yoshikawa et al., supra note 39, at 114. The insured must also pay a 10% percent co-payment for inpatient and outpatient services. The family members of the insured pay a higher co-payment for the services. Id.

49. Derham-Aoyama, supra note 42, at 377. The Central Social Insurance Medical Council is a government agency. Id. The Council’s decision making impacts national policy because of its rate setting function. Id. In addition to determining rates, the Council authorizes services and decides whether to preclude or remove procedures on the current list of reimbursable services. Id. Chuikyo’s determinations have a major impact on both service providers and consumers. See Yoshikawa et al., supra note 39, at 118, for a discussion of specific examples where the behavior of the consumer changed when high technology procedures were listed on the fee schedule.

50. Yoshikawa et al., supra note 39, at 117. The 1982 Health and Medical Services Law for the Elderly requires the more amply funded Employees Health Insurance societies to subsidize the elderly. Id. This cross-subsidization lowers the amount of government contribution and attempts to minimize disparities across insurance plans. Id.

51. Id. at 134. Under the plan, outpatients pay six dollars monthly for services provided by the plan and an additional three dollars monthly for hospitalization.

52. Laslett, supra note 4, at 5. See also Takatomi Ninomiya, Welfare and Support for the Elderly in the Community: from a survey in Sumida-ku, Tokyo, Japan, in AN AGING WORLD, DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY 189 (John Eekelaar & David Pearl eds., 1989). The Japanese government is reformulating policies that were traditionally directed at assisting poor elderly citizens. Id. Concepts of autonomy, self-support, and maintaining the
anticipated to increase over twenty-three percent by the year 2020.\textsuperscript{53} The accelerated growth in the numbers of elderly consumers will stress existing health-care supports.

Like all industrialized nations, Japan's leaders must confront the future in light of significant demographic changes.\textsuperscript{54} The graying of the population and shrinking of the numbers of young entry level workers diminish the tax base which funds the nation's health-care programs. Despite the massive projected growth in the elderly population, only a small number of hospital beds currently are allocated for their care.\textsuperscript{55} Since the elderly are a service-intensive sector of the population, the rise in the elderly census heralds a proportionate increase in medical care costs through longer stays and deployment of more intensive medical intervention. Prolonged hospitalizations have been identified as a major source of inefficiency in the Japanese health-care system.\textsuperscript{56}

Concurrent with the surging population of elderly, notions of the family as the source of care are eroding. Recent increases in hospital and nursing facility placements and a rapid decline in the number of elderly residing with adult children have been noted.\textsuperscript{57} The decline of family-based care is attributed to a number of social factors. Over the past forty years, Japan has evolved from an agrarian, communal society to an industrialized nation.\textsuperscript{58} Abandonment of a traditional intergenerational communal lifestyle marks the transition to an industrialized society where resources

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family unit underlie government policy. \textit{Id.} The author rejects the basis of the policy as "wishful thinking, because the traditional family structure is rapidly declining." \textit{Id.}
\end{flushright}

\textsuperscript{53} Yoshikawa et al., \textit{supra} note 39, at 128. The rapidity of this change surpasses anticipated changes in the distribution of elderly individuals as a percentage of the overall population for all other industrialized nations. \textit{Id.}

\textsuperscript{54} \textit{Id.} Since elderly consumers require more costly medical treatment, the authors predict that Japan will experience "an unavoidable surge" in health-care costs. \textit{Id.}

\textsuperscript{55} \textit{Id.}

\textsuperscript{56} Derham-Aoyama, \textit{supra} note 42, at 379. Patients over seventy stay an average of three months. \textit{Id.} The extremely long admissions are attributed to paucity secondary care facilities coupled with an absence of home care options. \textit{Id.}

\textsuperscript{57} Daisaku Maeda, \textit{Decline of Family Care and The Development of Public Services - A Sociological Analysis of the Japanese Experience, in AN AGING WORLD DILEMMAS AND CHALLENGES FOR LAW AND SOCIAL POLICY} 297, 304 (John Eekelaar & David Pearl eds., 1989). Although these trends indicate social changes, more than half of elderly parents reside with their adult children. \textit{Id.} at 301. The figure increases to seventy percent in rural areas. \textit{Id.} Even if annual decreases in co-living elderly continue at the present rate, statistical extrapolations of available data indicate that the proportion of elderly residing with adult children will not reach a national low of 50\% for almost another quarter century. \textit{Id.} at 300-02.

\textsuperscript{58} \textit{Id.} at 306 (citing Statistics Bureau, General Executive Office data from 1955 and 1958). Forty-one percent of the population was engaged in agriculture in the mid-1950s. By 1985 the number of people engaged in agriculture had declined to approximately nine percent. \textit{Id.}
and occupations are not shared. Small urban family units have supplanted the natural and expeditious multigenerational living and working arrangements of farm communities.

Higher geographic mobility also contributes to disintegration of large extended families. Many women, traditionally the caregivers for elderly parents, are unable to both care for aged parents and work outside the home. Children may be unable to give care because of their own poor health or finances.

Finally, as the number of children decreases, so do available family caregivers. Though cultural traditions of caring for aging parents are still pervasive, children have no absolute legal responsibility to care for family elders. Because of the profound demographic changes and their socioeconomic ripple effects, the Japanese universal health-care system is “experiencing a crisis.”

The Japanese are contemplating changes to address the needs of their elderly citizens. Any changes must address tensions existing between the Central Social Insurance Medical Council and the Japanese medical

59. Ninomiya, supra note 52, at 189. Traditional family life involved two or three generations residing together.

60. Maeda, supra note 57, at 306 (discussing changes brought about by industrialization). Job changes, driven by economic factors, force workers to move to areas remote from their agrarian family homesteads. Id. Residential communities in industrialized areas are designed to accommodate many small family units. Id. In addition, increasing affluence brought about by industrialization has contributed to a new perception of independence in the younger generation. Id. at 307. While the younger generation finds wealth and independence in the urban industrialized areas, aging parents may choose to remain at the original family residence. Id. at 306.

61. Ninomiya, supra note 52, at 188. Only one-quarter of the elderly look to their children for housing. Id. The author surveyed seniors ages 60 to 74 living independently in the Sumida-ku district of Tokyo. Id. at 185, 186. Data indicated that of the 75% of the respondents with children, less than one-fifth of the children visited daily. Id. at 188. Less than half of the children who maintained frequent contact (either by telephone or in person) lived within 30 minutes of their parents. Id.

62. Maeda, supra note 57, at 300. The author attributes the preservation of traditional family care to the fact that Japan’s industrialization occurred later than industrialization in Western European or North American nations. Id. at 301.

63. Id. at 299 (reporting that “both financial responsibility and responsibility to care for aging parents is now defined very narrowly in the actual administration of the Law for the Welfare of Elderly Persons”). The child is under no obligation to abandon outside employment to become a caregiver, despite the fact that many middle aged women feel compelled by social pressures to do so. Id. Without regard to financial status, a family may request the government provide necessary care, including institutional placement, for elderly parents under the Law for Health and Medical Services for Elderly Persons. Id. at 300.

64. Derham-Aoyama, supra note 42, at 385.

65. See Yoshikawa et al., supra note 39.
establishment, a traditionally autonomous and politically influential group.\textsuperscript{66} The bureaucrats are driven by economic pressures, including those exerted by foreign interests to increase domestic consumption,\textsuperscript{67} while the Japan Medical Association seeks fewer economic restraints and reductions in paperwork.\textsuperscript{66}

Government efforts are being directed at reducing costs through decreases in the length of hospital stays. Changes have occurred in how health-care for the elderly is funded. The Health and Medical Services Law for the Aged of 1983 created a pooling fund financing services for persons over seventy.\textsuperscript{69} At the same time, the government implemented a limited amount of cost shifting by requiring consumers to make small co-payments on services.\textsuperscript{70} The government has also inversely linked the amount of reimbursement to the length of a hospital stay.\textsuperscript{71} A new voluntary prospective reimbursement system transforms payment from fee for type of service to daily capitation payments. All nursing care, medications, and examination costs are covered; however, other costs, comprising approximately fifty percent of the medical care, are not covered.\textsuperscript{72}

Programmatic supports for the burgeoning elderly population have been introduced via a policy known as the "Golden Plan."\textsuperscript{73} This Policy focuses on moving the elderly out of hospitals and into other potentially

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\textsuperscript{66} Wilsford, \textit{supra} note 39, at 590 (discussing the possibility that the Japan Medical Association [hereinafter JMA] is losing cohesiveness as younger physicians face a different economic reality than the senior doctors). Senior level physicians frequently possess an ownership interest in a clinic or private hospital. \textit{Id.} Facilities often employ young doctors as salaried staff. \textit{Id.} As groups proliferate, competition for the same patient base heats up. In the face of diminishing resources, the successful facility owner will realize a huge financial gain, while salaried providers reap little financial benefit and face constant pressure to increase the volume of patients seen while running an economically efficient service. \textit{Id.}

\textsuperscript{67} \textit{Id.} at 585. The sociopolitical context is one of collaborative problem solving and negotiation, therefore organized medicine and the state work together to implement reforms. \textit{Id.} In contrast, American physicians are often cast as adversaries and intra-interest group conflict is more often than not the norm in United States health-care policy-making. \textit{But see} Yoshikawa et al., \textit{supra} note 39, at 118 (explaining that the Chuikyo negotiations with the Japanese Medical Association are agency action and as such sidestep the legislative process). Yoshikawa also notes that "politics within the council is unavoidable, and many may manipulate the reimbursement system to serve their own ends." \textit{Id.}

\textsuperscript{68} Derham-Aoyama, \textit{supra} note 42, at 378.

\textsuperscript{69} Yoshikawa et al., \textit{supra} note 39, at 128.

\textsuperscript{70} Willsford, \textit{supra} note 39, at 591. \textit{See} Yoshikawa et al., \textit{supra} note 39, at 134. Elderly outpatients pay approximately six dollars per month and inpatients pay three dollars per month for medical care.

\textsuperscript{71} Yoshikawa et al., \textit{supra} note 39, at 134.

\textsuperscript{72} \textit{Id.} at 130.

\textsuperscript{73} \textit{Id.} at 128.
less restrictive forms of elderly care. To this effect, the government
developed institutional long-term care facilities (Tokurei Kyoka Rojin
Byoin), intermediate level facilities (Rojin Hoken Shisetsu) akin to
hospices, and a variety of home help and daycare services. Consumers
may also elect to participate in HMO-type privately funded geriatric long-
term care beds instead of customary hospital based care. Generally,
health management significantly improves life-functioning capabilities for
the elderly; however, the bedridden hospital bound patient requires
additional resources so care can be tailored to the needs of the patient
without producing heavy societal costs.

Japan has reevaluated traditional policies, which relegate the care
of the elderly primarily to family members. Concepts of self support and
independence are central contributions of family and community networks;
however, as socioeconomic realities change the lifestyles of the younger
generation, elderly consumers increasingly rely on outside help to address
health-care needs. Some consumers look to the private sector, others to
the restructuring resulting from the Golden Plan. But the substitution of
less costly and lower intensity services for elderly consumers is an
insufficient response in the face of rapid and radical graying of the
Japanese population.

74. Maeda, supra note 57, at 312. The government-approved beds are subsidized. Id. A
bedridden elderly patient may be admitted for a short-term stay in nursing homes for any reason,
including respite care. Id. This service has existed for over a decade, and there are over forty
thousand such beds in Japan. Id.

75. Id. (describing the increase in home-helpers and the establishment of “rehabilitative
and reactivation services,” which will enable elderly to become increasingly functional and
independent in daily living skills).

76. Yoshikawa et al., supra note 39, at 130.

77. Id. at 134.

78. Noriyuki Nakanishi, et al., The Association of Health Management with the Health of
Elderly People, 24 AGE & AGING 334 (1995). A survey study of over 1300 seniors living in
Settsu City, Osaka revealed that participation in social activities, which foster a reason for living,
may bolster and preserve the health of the elderly. “[H]ealthy psycho-social conditions may
motivate the adoption of preventive health practices and the use of health checks.” Id. at 339.

79. Ninomiya, supra note 52, at 189. The traditional family structure is deteriorating and
thus can no longer provide the type of care elders need. Id. Additionally, individuals who can
not pay for services rely on a central government that increasingly looks to the public sector to
serve the elderly. Id. Information about public sector services is not freely disseminated to those
seniors most in need of assistance. Id. “It is impossible to expect adequate help for the elderly
given the present situation.” Id.
B. Canada

The Canadian health-care system provides citizens with government sponsored universal socialized insurance. The concept of socialized insurance was introduced in the province of Saskatchewan in 1944 and expanded to encompass comprehensive medical care insurance in 1962. Socialized insurance, as adopted by the federal government in 1966, makes health-care a right. Access to generous program benefits is premised on a philosophy that the system will serve all citizens, not just provide for the neediest members of the nation.

The interaction between provider and payor in the social insurance system compels accommodation between the desires of the physician and those of the federal and provincial governments. General government revenues raised through both provincial and federal taxation are disbursed at the provincial level to cover expenditures that are medically necessary.

80. Murray G. Brown, Rationing Health-care in Canada, 2 ANNALS HEALTH L. 101, (1993). Federally funded publicly administered health-care programs are collectively referred to as "Medicare." Id. at 103. Medicare members access to medically necessary services is comprehensive, universal, and portable. Id. at 101-04. For an excellent discussion of the Medicare program see Evans infra note 87.


82. Tuohy, supra note 81, at 209.

83. The Medical Care Insurance Act, ch. 64, S.C. 1966-67 (Can.); the Canada Health Act of 1984, ch.6 R.S.C. 1985 (Can.); and section seven of the Canadian Charter of Rights and Freedoms, Constitution Act, 1982 Pt. I, § 7 (Can.) (stating "everyone has the right to life, liberty, and security of the person . . . ."), provide statutory guarantees to health-care access.

84. Brown, supra note 80, at 101.

85. Tuohy, supra note 81, at 205. Continuity and development of the health-care system is dependent on the physician-provider relationship. Id. Physicians' roles vary from one province to another, however, two main controversies emerge: the extent to which physicians exercise entrepreneurial versus clinical discretion and the issue of physician autonomy. Id. When the Canadian government removed financial barriers to treatment by providing tax-based funding for medical care, the physician's financial autonomy necessarily was curtailed. Id. at 210-14. Physicians must work within the economic boundaries set by the provincial legislatures; however, within those bounds, doctors have the power and autonomy to determine the array of services that will be provided to health-care consumers. Id. at 222-25.

86. Wilsford, supra note 39, at 593 (describing financing as primarily a provincial function). Up to one-third of provincial tax revenues are devoted to health-care. Id. Federal government contributions currently comprise approximately 40% of provincial expenditures. Id.

87. Robert G. Evans, Canada: The Real Issues, 17 J. HEALTH POL. POL'Y & L. 739, 744 (1992). Medically necessary treatments are subject to frequent redefinition. Id. At present, almost any service that a physician is willing to provide to a patient is considered medically necessary treatment. Id. "The increasing interest in the effectiveness, or lack of it, of much contemporary medical care is likely to infuse more content into the principle of medical
Administrative costs are quite low, as the government is the single non-profit payor. The unified funding source allows consumers the freedom to select providers of choice.

While the government determines the amount of funding available, the physician defines the treatments that are to be included in the plan. Under Medicare, consumers do not pay the provider directly for covered services. Government severance of medical decision making from funding allocations preserves the physician's clinical autonomy at the expense of the medical provider's economic self-determination.

How to equitably balance access with cost containment is a subject of intense debate. Each province arrives at a satisfactory equilibrium by necessity." Id. Providers are reimbursed according to a fee schedule, which has been negotiated with Provincial authorities. Id. at 742. Provincial agencies reimburse hospitals on the basis of global budgetary projections of operating costs as opposed to fee for service reimbursement. Id.

Evans, supra note 87, at 748. Some Canadians opine that the lean and mean philosophy of single payor system has created administrative anorexia. Id. at 749. Provincial governments are loath to spend on management while nevertheless continuing to steer the health-care ship. One might ask, without a crew to look after the engine room, who will tell the captain that the ship is taking on water?

Brown, supra note 80, at 103. Federal cost sharing supports Medicare through specific federal fiscal allocations and through general federal-provincial agreements that enable poorer provinces to provide their residents with equitable resources for public services. Id. The federal-provincial agreements are no string allocations that allow poorer provincial governments to provide a broader scope of services than would be possible given the provincial budgetary constraints. Id. at 103, 104.

Wilsford, supra note 39, at 596. Discussing tradeoffs under the social insurance system, the author notes that although Canada provides accessible quality care at reasonable cost, physicians must negotiate with provincial governments for adequate funding. Id. at 593, 594. The government imposed financial control creates tension between the provinces and the physicians. Id. The provincial objective of cost containment is characterized by organized medicine as underfunding. Id. at 594. Medical professionals argue that restrictive funding hampers professional freedom, limits patient protections, and lessens quality of care. Id.

Brown, supra note 80, at 103. Medically necessary services include a broad but not unlimited array of treatment options including hospitalizations, diagnostic services and medical care.

For example, included in the delivery system are not-for-profit hospitals; Red Cross blood service; other non-governmental organizations . . . ; [and] other health professionals . . . Provincial governments directly deliver certain health-care services such as mental health and long term chronic care . . . [and] a broad range of public health and population health programs that do not deliver direct patient care.

Tuohy, supra note 81, at 224. The accommodation between the provincial governments and the medical profession is in a state of flux, but will continue to be a focal point of the development of Canadian health-care. Id. at 222-25. The government underwrites a service delivery system that has remained essentially unchanged since the advent of national health-care in the 1960's. Id. at 209.

Numerous articles have appeared in the Canadian press. See, e.g., Robert Brown, Inevitable Surprises: The Graying Population Will Impact the Economy in Good and Bad Ways,
weighing the efficacy of hospital utilization, high technology treatments, and clinical services against the economics of service use. There is a tension inherent in these tradeoffs, as health-care must be rationed to allow both economic viability and broad access. How are the elderly affected by the provinces’ balancing acts?

How and when rationing occurs depends upon the interplay of numerous factors. Although methodological difficulties exist, managerial decision making within Medicare is, in theory, outcome driven. Practically, an implicit ranking process weighs consumer health needs against the fiscal well-being of each provincial health-care system.

But Not Necessarily in the Way You Think It Will, 8 CAN. INV. REV. 34 (1995) (illustrating some concerns of contemporary Canadians). The author urges governments to consider economic responses to the rapid upward shift in the proportion of elderly in the general population. Id. Extending the normal retirement age to 69 and increasing the ratio of working elderly to retirees is a proposed response to the looming price inflation that accompanies declines in national productivity. Id. at 36. Other articles voice concerns that elderly Canadians are denied health-care services for financial reasons. See The Age Factor In Heart Surgery, GLOBE & MAIL METRO EDITION, June 2, 1995, at A13.

94. Brown, supra note 80, at 102. “Underlying these explicit equity goals regarding access to health-care and public funding is the imperative to manage scarce public sector resources efficiently.” Id. Since access is equivalent to free medical care, the provinces must manage fiscal resources in a manner that enables citizens to have reasonable access to the health-care system. Id. at 103.

95. Wilsford, supra note 39, at 593 (noting the increasing cost of care strains the system).

96. Brown, supra note 80, at 107 (identifying limits to the validity and reliability of data, if data is available at all). Further difficulties arise when multidimensional comparisons of effectiveness are attempted; for example cost-effectiveness, clinical-effectiveness, and programmatic success. Id. The chronic or acute nature of a person’s health status presents another variable, which impacts effectiveness measurements. Id. at 117-18. Limited statistical data may not account for individual differences, creating uncertainty in resource-allocation decision making. Id. at 118.

97. Individual patient characteristics that are independent of outcome measures, such as ethnicity, economic status, or social background, are theoretically external to an outcome-driven resource allocation process. However, economic status, ethnicity, education and a multitude of other non outcome-based factors may contribute to personal wellness. Additionally, non outcome related factors may influence an individual’s determinations regarding whether or when to seek medical care. The number of patients availing themselves of the system and the acuteness of their ailments necessarily impacts the outcome data.

98. Evans, supra note 87, at 746. Since patient access is based upon physician determination of need providers become gatekeepers to the health-care system. Id at 758. However, the physician working in Canada’s fee-for-service environment, must treat patients in sufficient volume to maintain an economically viable medical practice. Id. at 746. The physician will find it advantageous to determine if patient need exists. Id. The physician also must respond to government pressure to limit services as utilization escalates and costs increase. Id. “The political struggle is then over the processes by which need is to be defined. To the medical profession, need is whatever a physician says it is . . . . Governments, on the other hand, are increasingly arguing that the test of necessity is effectiveness . . . .” Id.

99. Brown, supra note 80, at 115. At the federal level, cost-sharing incentives attempt to limit growth to acceptable rates. Id. at 109. Current federal policy links funding to the rate of
Barriers to access are imposed when the fiscal considerations of provincial governments are afforded more weight than patient treatment needs. Explicit barriers the province may construct include redefining the boundaries of the entitlement, controlling hospital capacity and the array of offered services, and restricting the number of licensed physicians.

The stresses imposed by cost shifting impact all segments of the population; however, they may appear most formidable to the elderly consumer. The elderly population simply consumes more and requires more intensive interventions. The definition of medical need becomes more flexible when the patient is of more advanced years. Rationing provincial population growth and gross national product. Federal expenditures in the health-care sector have progressively declined as the Canadian economy slumps. In order to preserve the shrinking pool of resources, provincial management of Medicare shifts costs between the private and the public sectors in a variety of ways. Future projections of more robust economic growth will allow the health-care sector some continued expansion; however, that expansion will not develop at such severe cost to the GNP or public sector expenditures.

Brown, supra note 80, at 105. Brown believes the realities of resource scarcity make rationing necessary, however the manner in which rationing is imposed reflects societal value systems. Canada rations services at the policy level through managerial decision making of government organizations and transaction specific provider determinations regarding resource allocations to individual consumers.

Tuohy, supra note 81 at 215 (identifying decreased availability of certain high-technology services). For example, 800% more magnetic resonance imaging scans and radiation therapy units and 300% more cardiac catheterizations are performed in the United States than in Canada; six times the number of lithotripsy centers exist per capita in the United States than in Canada and more coronary artery bypass surgery occurs in Canada than in the United States. See Brown, supra note 80, at 112. The boundaries between necessary and unnecessary medical care are in a constant state of flux. Recently, provincial governments have deinsured services deemed to "have low marginal contribution to improved health outcomes." So far, the federal government has not found provincial deinsurance tactics objectionable.

Provincial governments manage capacity by controlling both the structure and the functions of the hospital. The number of beds allocated to various acute, sub-acute, and chronic care services, the breadth of services: local, regional or tertiary care, the nature of the care: inpatient/outpatient, the nature of diagnostic services and budget allocations for staffing and capital equipment expenditures are all decisions of government managers. The location of the hospital and the role of the fee for service provider working within the facility also are within the purview of the province.

Restrictions placed on the immigration of foreign-trained doctors almost two decades ago were tightened in 1993 through implementation of additional reductions in numbers of physician immigrants and licensure restrictions for foreign educated physicians. Available spaces in education and training programs within Canada were reduced by 10% in 1993.

Evans, supra note 87, at 753 (questioning the efficacy of the utilization patterns). Treatments are "often of unproven effectiveness").

Id. at 757 (commenting that for elderly consumers, "need is indefinitely expansible within the relevant range"). In addition, as the availability of staff and facilities increase, utilization also increases. Id. at 758. The relationship of utilization patterns to need is unclear.
access to technology may disproportionately disadvantage elderly consumers; however, further information about efficacy of treatment is needed before definitive comment can be made.\textsuperscript{106} It appears that Canadian social insurance meets consumers' medical needs by providing broad access at the expense of service intensity.

Whether an elderly consumer's medical need is addressed by the health-care system may, in part, be a function of the elderly person's social support systems. Elders' reliance on social supports creates complex and variable interactions with medical service providers.\textsuperscript{107} Social networks may be central to threshold determinations of whether people get to the hospital in the first place.\textsuperscript{108} However, social support only weakly relates to hospital utilization.\textsuperscript{109} Yet, home health utilization, which provides high levels of support, is associated with decreased hospital use.\textsuperscript{110} Moreover, individuals who relied upon informal social networks received less intensive home care services.\textsuperscript{111} Was the amount of home health service provided a reflection of the elder's reliance on outside help or were potential elderly consumers denied access to services because informal networks already existed?\textsuperscript{112}

The elderly may be forced to rely upon additional resources outside Medicare. Provinces have custom-tailed supplementary programs for particular segments of the population.\textsuperscript{113} Supplementary programs are created by legislative action and financed through provincial

\textsuperscript{106} Tuohy, \textit{supra} note 81, at 219.

\textsuperscript{107} Margaret J. Penning, \textit{Health, Social Support, and the Utilization of Health Services Among Older Adults}, 508 J. GERONTOLOGY, SOC. SCI. 330, S337 (1995). The author examined whether social support systems impacted elders' usage of health services. \textit{Id.} Interviews were obtained from a random sample of over 1200 non-institutionalized adults age 60 and over. \textit{Id.} at S332. Results reveal significant interactions between the elderly person's social support systems and health status. \textit{Id.} at S337. Quantitative and qualitative differences across the spectrum of care suggest that the importance of social support varies across levels of care. \textit{Id.} at S337, S338.

\textsuperscript{108} \textit{Id.} at S337 (indicating that the presence of support is positively correlated to incidence of hospitalization).

\textsuperscript{109} \textit{Id.}

\textsuperscript{110} \textit{Home Healthcare — The New Direction in Canada's Healthcare System}, NEWswire, July 24, 1996, available in CANNEWS. Community based home health services include nursing, physical therapy, speech pathology, and home support workers. Home health-care agencies report that clients experience greater personal autonomy and preserve free choice when they choose home health services over more institutionalized care settings. \textit{Id.}

\textsuperscript{111} Penning, \textit{supra} note 107, at S337.

\textsuperscript{112} \textit{Id.} at S338. Some provinces, as a matter of policy, consider an individual's informal support networks when making a determination of whether to provide services. \textit{Id.}

\textsuperscript{113} Brown, \textit{supra} note 80, at 116. An example is the Nova Scotia Senior's Pharmacare Plan. \textit{Id.}
revenues.\textsuperscript{114} Changed circumstances impacting provincial finances may cause changes in the supplementary health program entitlements. Benefits may be reduced, co-payments for services may rise,\textsuperscript{115} and the targeted population may be redefined to limit access.\textsuperscript{116}

The elderly in Canada participate in an “overwhelmingly popular” system. Yet, several concerns about the impact of Medicare management on elderly consumers remain unanswered. Canada’s response to recent fiscal stresses was to curtail expansion of services. Rationing was accomplished at the macro-level by redefining the nature of the entitlement and the roles of hospital, physicians, and other health service providers.

Macro-level management strategies eventually exact personal costs from consumers and providers. The elderly pay a price when they must supplement Medicare in order to meet medical needs. The sometimes uneasy accommodation between the provincial government and the health-care providers creates tensions in the system. As the numbers of elderly consumers increase, how will funding and rationing decisions interface with consumer and provider concerns? Will equitable delivery of quality care be possible?

C. Great Britain

The National Health Service (NHS) was created to remedy Great Britain’s health-care problems. During the 1930s and 1940s, citizens of Great Britain were subject to inequitable care, inefficient administration, and costly services. Health-care was only accessible to individuals who were able to afford it and could travel to the areas where services were offered.\textsuperscript{118} Those individuals fortunate enough to obtain care entered a

\textsuperscript{114} Brown, supra note 80, at 114-16. Publicly funded and administered supplementary health-care programs restrict eligibility to provincial residents. \textit{Id.} at 116. Private sector entities contract to provide service delivery. \textit{Id.} at 114.

\textsuperscript{115} \textit{Id.} at 116 (reporting increased co payment fees for both an ambulance transportation program and the Senior’s Pharmacare Plan in Nova Scotia.)

\textsuperscript{116} See Penning, supra note 107, at S338.

\textsuperscript{117} Tuohy, supra note 81, at 220. Medicare is a “defining element of the Canadian identity.” \textit{Id.} Medicare is highly regarded by both the consumer and the physician. \textit{Id.} at 220, 221. Physician satisfaction surveys reveal over three-quarters of the respondents are satisfied with practice conditions. \textit{Id.} at 221.

\textsuperscript{118} Margaret Whitehead, \textit{Who Cares About Equity in the NHS? United Kingdom’s National Health Service}, 308 BRIT. MED. J. 1284, 1285 (1994). The prewar insurance system covered only 43\% of the population. \textit{Id.} at 1284. Workers’ spouses and children were often excluded from coverage. \textit{Id.} Access was difficult for individuals living in rural and less affluent areas. \textit{Id.} Practitioners located in desirable areas and served selected patients. \textit{Id.} at 1284.
disjointed system where hospitals, clinics, and physicians fought over patient dollars, not patient care. In the post World War II era, administrators in the ministries of Health and Finance built a system of socialized medicine that was free to consumers, centrally administered, and universally inclusive. The system is nationally funded through general tax revenues. The unified funding source initially contributed to a more equitable staffing distribution in historically under-served areas by compensating staff according to a national pay scale and funding ambitious multi-regional hospital construction efforts.

However, access did not guarantee excellence. One commentator summed up outreach within the system: "[t]he consumer's...

119. Id. at 1284. The state of services was “highly fragmented and unplanned”, “haphazard,” and “inefficient.” Whitehead, supra note 118, at 1284. Waste and duplication of services were common as entities battled for scarce economic resources. Id. The focus of competing entities was retention of patient dollars, not optimizing patient care through referrals to other, perhaps more appropriate, treatment settings. Id.

120. Id. (noting that working class people received distinctly different treatment than wealthier patients).

121. Wilsford, supra note 39, at 597. The British health-care system is “the most socialized of the seven largest O[rganization for] E[conomic] C[ooperation] D[evelopment] [hereinafter OECD] countries.” Id.

122. Rudolf Klein, Big Bang Health Reform — Does It Work? The Case of Britain's 1991 National Health Service Reforms, 73 MILBANK Q. 299, 303 (1995). Free health service severed payment considerations from considerations regarding eligibility for treatment. Id. But see Whitehead, supra note 118, at 1285 (asserting that free treatment at the point of use has been eroded by current cost shifting back to the consumer in dental, ophthalmologic, and long-term care settings).

123. Wilsford, supra note 39, at 597 (describing the administrative system as a large and highly developed one in which strategically placed public officials focus policy).

124. Klein, supra note 122, at 303 (commenting that the goal of providing all consumers in the system with equitable service has met with only qualified success). Even at the beginning of this decade, geographic equity in resource distribution and access was lacking. Id. at 304. Although inequities in funding allocations between regions had diminished, the distribution of funding allocations within regions varied greatly. Id.

125. Whitehead, supra note 118, at 1285 (characterizing the funding system as “one of the most progressive,” among the OECD nations). Id.

126. Klein, supra note 122, at 312 (identifying strict central control over creation of new positions). See Whitehead, supra note 118, at 1284. Introduction of a National Resource Allocation Formula reduced inequities in care. Id. At the outset the NHS used a carrot and stick approach to redistribution of practitioners: new practices were prohibited in over served areas and practitioners received financial incentives for establishing offices in underserved locales. Id.

127. Whitehead, supra note 118, at 1284. Construction of hospitals began in 1962, with many facilities completed prior to evaporation of funding sources in the 1970s. Id.

128. Klein, supra note 122, at 304. Each District Health Authority allocated funds in widely different ways. Id. Services provided in each district also varied widely. Id. "[T]he
only right is to have access to the health-care system: once that has been achieved, it is for the professional providers to determine what treatment is appropriate." Even though the distribution of general practitioners has improved to the point that less than five percent of the population resides in "undoctored areas," access does not guarantee the highest standard of medical care, but merely universalizes the adequate.

New reforms introduced in 1991 attempted to improve efficiency throughout the system. The reforms split purchaser functions from provider functions within the NHS. District Health Authorities now receive per capita funding and pay providers for services on a prospective basis. Per capita payments free administrators to spend allocated funds on the most cost-effective services, regardless of whether

129. Klein, supra note 122, at 311. See Alan Maynard, Distributing Health Care: Rationing and the Role of the Physician in the United Kingdom National Health Service, 4 HEALTH MATRIX 259, 263 (1994) (contending that even after the reforms of 1991, "cost data are poor, there are large variations in clinical practice, the little effectiveness data that exist tend to be ignored, often for many years, and the majority of health care services in use have no proven scientific basis.")

130. Whitehead, supra note 118, at 1287.

131. Klein, supra note 122, at 304. See Howard Davies & Hugh Powell, How to Ration Health Care -- and be Reelected: The U.K. Experience, 3 STAN. L. & P. REV. 138, 140-41 (allowing physician discretion in treatment decisions leads to inadequate management information systems). The result is cost analyses based upon inadequate data collection. Id. at 141. Allocation decisions, heavily weighting high profile specialties while slighting screening programs and preventive medicine, become arbitrary. Id.


133. Id. See Davies, supra note 131, at 141. The Secretary of State for Health chairs a political board, which heads the NHS. The management executive reports to the Board. There are fourteen Regional Health Authorities, which oversee funding, in two separate bodies: the Fund Holding for General Practitioner Practices (approximately 90 entities) and the National Health Service Trusts (55 entities). Id. The Regional Health Authorities also oversee the 189 District Health Authorities. Id. Following the 1991 NHS reforms, the District Health Authorities maintain contractual relationships with approximately 250 direct service providers, the NHS Trusts, and the Fund Holding for General Practitioner Practices. Id. Direct care providers also maintain a contractual relationship with the Fund Holding for General Practitioner Practices. Id.

134. Whitehead, supra note 118, at 1286. In 1976 a national resource allocation formula (RAWP) severed funding from financial allocations based upon historical patterns of utilization. Funding determinations were to be based on medical need. Id. RAWP reflected need by weighting a standardized mortality ratio. Id. Under RAWP, regions with relatively high mortality rates received more funds than populations in areas where mortality rates were low. Id. Under RAWP, poor regions experienced improvements in resources while in affluent areas services were reduced. Id.

135. See Davies, supra note 131, at 142.
the provider is within or without the NHS. There are concerns that the new capitation formula moves away from equitable geographic distribution of services and shortchanges patients requiring more intensive resources. However, the new reforms are also viewed with cautious optimism.

When the NHS’ funding function was severed from care delivery functions, care provision within Britain fragmented into separate competing units. The new reforms introduced cost competitiveness into the system. As a result, physician-governed medical decision making is overshadowed by managerial determinations in a market driven system. Now, hospitals and primary care groups develop purchasing plans that target specified health outcomes. The private payor system which has

136. Id. See Davies, supra note 131, at 142-43. The per capita funding is adjusted for certain pathologies and for age.

137. Whitehead, supra note 118, at 1284 (asserting serious differentials in quality exist between deprived and affluent areas of the country). The weighting assigned to standardized mortality in the 1991 capitation formula has drawn resources away from poor areas and inner city districts with high morbidity and mortality figures to the wealthier and healthier districts. Id. A revised national formula is being developed from 1991 census data, however, it is unclear whether the revised weighting will provide a more equitable distribution of services. Id.

138. Klein, supra note 122, at 313. Because funds follow the patient, providers have incentives to tailor their services to healthier segments of the population. Id.

139. Id. ("There is no reason to think that the dynamics of the new-model NHS will necessarily reduce equity . . . ."); see Wilsford, supra note 39, at 603 ("High state autonomy in the [health] sector gives even the best organized interests few opportunities to exploit."); see also, Whitehead, supra note 118, at 1284 ("Many working within the NHS are determined to maintain an equitable service, and the public at large wants this principle retained.")

140. Whitehead, supra note 118, at 1287 (asserting those who can afford to may purchase fee-for-service elective surgery private health insurance, and private physicians). The private sector expands continuously. Id. The author expresses concern that the continued growth of selection on the basis of financial grounds erodes need-based selection. Id. at 1287. "The situation is not without hope . . . ." Id.

141. Davies, supra note 131, at 142 ("[T]he core principle of the new funding system is that "money should follow the patient"). Hospitals are contracting for funds prospectively and pricing services according to acuity levels associated with particular procedures.

142. Stephen L. Heasell, Nursing, Employment, and Resource Allocation in a Reorganized National Health Service, 4 ANNALS HEALTH L. 173, 176 (1995). The manager becomes the decision-maker at the organizational level. Id. Where the market drives health-care service delivery, the manager may regard services as inputs and outputs, and strive for their efficient use. Id. at 177-78.

143. Klein, supra note 122, at 312. The author identifies several negative aspects associated with such targeting. Id. The interventions are most easily directed at segments of the population that can be most easily reached or those persons who will most likely respond to treatment. Id. "Whereas, in the past, difficult-to-reach patients may have been seen merely as a burden, now they may suddenly be perceived as a possible source of extra revenue." Id. at 313. Conversely, plans that identify inequities may seek to bridge any gaps between particular populations' at risk health status and deficient service provision. Id.
always existed in Britain recently expanded significantly.144 Reforms in the NHS have essentially created a health-care market driven by bottom line financial considerations.145 At the same time, technology and innovation have increased the number and types of potential treatments.146 In light of the NHS reforms and the burgeoning number of therapeutic options, physicians and administrators are placed in the catch-twenty-two situation of attempting to maximize both cost containment and care. Can this approach bring anyone satisfaction even though it involves the simultaneous pursuance of two seemingly diametrically opposed goals?

Increasing numbers of elderly consumers, and their increasing need for medical treatment, impose additional demands on the British health-care system. While the NHS has always implicitly rationed resources through funding allocations,147 reform has made rationing of resources more explicit.148 Cost shifting is especially noticeable in non-acute and community health services, where there is increasing evidence of hardship.149 In addition, local authorities now conduct tests to determine an

144. Id. at 307. By 1991, over 6.5 million individuals carried some form of private insurance. Id. at 313. Klein opines that the increase of over 1.5 million private care subscribers during the first half of the 1990s indicates a failure on the part of the NHS to respond to consumer demand. Id.

145. Wilsford, supra note 39, at 603 ("The essence of the purchaser-provider split within an internal market was to emphasize market imperatives in decision making rather than purely medical imperatives."); see Gary J. Maxwell, Changes in Britain's Health Care An American Attempts to Revisit 'From the London Post', 10 J. AM. MED. ASS'N. 789, 792 (1996) ("There is concern that marketization of health care risks the undermining of the principles of uniform, universal care.")

146. Maynard, supra note 122, at 262. In a market where doctors act as advocates for the patient, who demands health-care, consumer capacity to access services is cost sensitive. Id. at 271. Insurers determine the reimbursement rules by examining and restricting use, while society anticipates adverse risk ratings if insurers' costs rise as a result of services being used frequently. Id. at 261.

147. Wilsford, supra note 39, at 601. The overall budget is fixed by the Treasury Department and approved by Parliament. Id. The Regional Health Authority allocates funds received from Treasury to the District Health Authority budgets and to the fund holding budgets for General Practitioners. Id. See Whitehead, supra note 118, at 1284. The British system has also imposed financial rationing by allowing limited charges to be imposed on prescription medication, dental care and ophthalmic services. The percentage of total cost imposed upon the consumer has steadily risen.

148. Richard Smith, Rationing: The Debate We Have to Have, 310 BRITISH MED. J. 686 (1995). Health-care rationing has been debated in the medical press for over a decade. Id. In opening remarks for a 1993 national conference on rationing, the Secretary of State for Health stated that the government had a role in determining strategic shifts of resources but that priority setting was to be conducted on a local level. Id. Author Smith interprets the Secretary's comments as a refusal to engage in "the broad, deep, informed and prolonged debate on rationing that is needed." Id.

149. Whitehead, supra note 118, at 1284-85 (noting a disturbing erosion of entitlement to free care at the sub-acute level). Changes to the Social Security regulations now make it possible
individual’s eligibility for service. The new funding schemes tip the equitable balance away from the poor and the elderly.

The physician has historically acted as a gatekeeper within the NHS; however, the recent reforms cast the workings of the system in a new light. Doctors have been trained to attend to the needs of individual patients, not necessarily to look at the opportunity costs that treating one individual imposes on the entire system. Working within the new reforms forces care providers to construe need as the capacity of the patient to benefit at the margin rather than the capacity of the treatment to benefit the individual patient. The prioritization of resources has moved from the almost invisible bedside rationing to the very public forum of political policy-making.

for private contractors to provide nursing home care. Id. The change in regulations transforms a formerly free service into a means-tested one. Id. “[H]ard pressed NHS managers have been only too willing to transfer patients into private homes to relieve the NHS budget.” Id. at 1286. See Becky J. Berke, Booknote, (reviewing Jane M. Orient, M. D., Your Doctor is Not In: Healthy Skepticism About National Health Care (1994)), 24 Sw. U. L. REV. 501, 507 (1995). Rationing is not working well. Id. The method of allocating resources is creating shortages. Id. Almost one million patients experience waits of almost four years for treatment related to renal dialysis, chemotherapy for cancer, coronary artery bypass surgery, and hip replacement surgery. Id.

150. Whitehead, supra note 118, at 1285. The NHS has permitted the screenings since 1993. Id. Type and extent of screening varies regionally. Id.

151. Id. “The evidence of resulting hardship caused to some patients and their relatives is mounting.” Id. But see Klein, supra note 122, at 312. (“On balance, however, the dynamics of the new NHS do not suggest that the poorer or more vulnerable groups in society will necessarily suffer.”)

152. Klein, supra note 122, at 311. The physician determines what treatment is needed and clinical decision making is the basis of patient management. Id. “In a sense, therefore, in 1994 — as in 1948 — the scope of the NHS’s services, the degree of its comprehensiveness, remains a matter of professional convention and local decision making.” Id.

153. Davies, supra note 131, at 142-43. Now, prospective funding will be based on diagnostic determinations for the population to be served (similar to DRG’s in the United States). Id. The contracts will predetermine allocations according to projections of patients’ acuity levels. Id. at 142.

154. Id. at 143. The utilitarian focus of looking to the overall needs of the greatest number of people shifts the focus of health-care priorities. Id. at 142. Problems arise when managers prioritize which procedures will accomplish the greatest good for the most people. Id. at 143.

155. The NHS reforms force providers to balance cost and efficiency considerations against the individual needs of each particular patient who seeks care and treatment in the system. See Heasell, supra note 142, at 174. (“There are those who seem to doubt that a market and its material incentives — in shorthand, money — will induce the appropriate choices to supply care and to employ inputs that have the capability to contribute to the provision of health-care.”).

156. Heasell, supra note 142, at 173. Some sectors of the population view the reforms as imposing further constraints on the publicly financed resources provided by the NHS. Id. But see Smith, supra note 148, at 686 (contending that “most people have not had an opportunity to understand the scale of the problem and to give their opinion on issues such as trading off quality against quantity of life . . . “). Britain has not made an in depth investigation into rationing
D. United States

America lacks a comprehensive health-care system. The system is actually a complicated patchwork of assorted payors that has been described as expensive and inadequate. The system is market driven; consumers who possess sufficient financial resources may purchase services while individuals who find costs unmanageable have limited, if any, access to care. High costs and large numbers of uninsured are indicators that the system is in serious need of reform. Although

practices. Id. Instead, debates are sparked whenever stories about denial of treatment surface. Id.


160. Furrow, supra note 157, at 31. Despite the fact that society values access to health-care, many needy people are unable to obtain treatment. Id. The payment structures of most American health-care systems foreclose the possibility of service to people who have insufficient means to pay for treatment. Id.

161. Rothstein, supra note 159, at 614. Local, state, and federal taxes fund some programs; employer and employee contributions, private insurance premiums, and other payors fund other types of health care coverage. Id.


163. Rothstein, supra note 159, at 619. "[N]inety percent of the public believes that the American health-care system needs reform and more than fifty percent believes that serious problems exist." Id.
academic, professional, and political forums continuously examine possibilities for universalizing health-care, such drastic change is not imminent. Unlike many industrialized nations where health-care is considered a right, the United States government offers citizens no universal guarantee to health-care.

Some government programs do exist to assist the elderly population to obtain medical care; however, the government safety net represents only a frayed lifeline extended to a small segment of the population. Government benefits packages provide very narrowly defined services with many gaps in coverage. Although millions of

164. Gostin, supra note 157, at 43. Health care reform has been attempted since the post World War II era. Id. at 42. President Truman recommended a comprehensive health program in 1945, advocating the removal of financial barriers to care. Id.

165. Too much is at stake. Insurance companies fear tighter government regulation, institutional providers fear the economic costs of comprehensive care. See David Blumenthal, Health-care Reform - Past and Future, 332 NEW ENG. J. MED. 465 (1995). The inability of private interests and of state governments to adequately address comprehensive health-care reform invites continuing federal government involvement. Id. The author believes that the success of federal legislative initiatives is contingent upon building novel alliances between front line providers and managed care organizations and creating increased public awareness of health-care issues. Id. at 468.

166. See, supra Part II.

167. No Congressional legislation has recognized health care as a right in spite of efforts of several past administrations to craft such guarantees. See Gostin, supra note 157, at 8. The Supreme Court of the United States has not found a fundamental right to health care. Harris v. McRae, 448 U.S. 297 (1980). Nor has the constitutionality of our present health-care system been overturned on equal protection grounds. See Back, supra note 158, at 255 (discussing constitutional issues of rationing under Medicare and Medicaid). But see Barry R. Furrow et al., HEALTH LAW § 12, at 1, n.3 (1995) (discussing selected state constitutions that may provide an affirmative health-care right).

168. Title XVIII of the Social Security Act, 42 U.S.C.A. § 1395-1395ccc sets forth the governance provisions for Medicare. See Furrow, supra note 167, § 13-2 for a discussion of eligibility. Medicare became a reality in 1966. Id. § 13-1. The program covers persons experiencing long term disabilities, seniors over 65, and persons requiring renal dialysis. Id. § 13-4. Though Medicare remains a program, which is limited in eligibility and scope, it pays for a significant share of health care in the United States because it covers the part of the population most in need of medical care and the most expensive types of care required by this population. See infra note 169.


170. Medicare is composed of Part A (hospital) and Part B (supplementary medical) federal insurance programs. See William G. Dauster, Protecting Social Security and Medicare, 33 HARV. J. ON LEGIS. 461, 481 (1996). 42 U.S.C.A. § 1395d(a) (1988) identifies covered services as semiprivate rooms, ordinary nursing care, social services, medications, supplies durable medical equipment, and diagnostic or therapeutic goods or services normally provided by the hospital to inpatients. Under 42 U.S.C.A. § 1395x(b)(6) (1988), skilled nursing facility visits and services may also be covered, but not for purposes of custodial care. Id. See Daniel Callahan, Limiting Health Care for the Old, in AGING AND ETHICS 219, 222 (Nancy S. Jecker,
seniors receive Social Security and Medicare funds, a majority of these recipients verge on poverty. Medicare and Social Security operate as government administered social insurance programs, and they are in deep financial trouble. Resources within the system are finite; however demand for services appears infinite.

ed. 1991) (stating Medicare does not cover long term care costs and requires recipients to pay several hundred dollars towards the costs of hospitalization). Id. Length of stay is limited to 60 days. Id. Under 42 U.S.C.A. §1395x(m) (1994), home health services for visiting nursing services and rehabilitative therapy professionals or assistants and durable medical goods are covered. However, service delivery agencies may impose time restrictions on the number of hours providers will visit each patient. See MEDICARE HOME HEALTH AGENCY MANUAL 205.1. For a listing of Part B covered services see Furrow, supra note 1, § 13-15. Medicare excludes from coverage any services "not reasonably necessary for the diagnosis or treatment of illness or injury or to improve the functioning of a malformed body part." 42 U.S.C.A. § 1395y(a)(1) (1994).

171. Rothstein, supra note 159, at 617. Elderly people covered under Medicare often purchase Medi-gap insurance. Id. Long-term care insurance policies are also a popular purchase with older Americans. Id.


174. Dauster, supra note 170, at 466. Statistical records indicate, "a vast segment of America's seniors need Social Security and Medicare to remain above the poverty level." Id. Social Security is the primary income for over half of the senior beneficiaries. Id. Of the small percentage of Social Security beneficiaries receiving income from other sources, over 65% realize less than $10,000 annually in non-governmental income. Id. Three-fourths of Medicare recipients make less than $25,000 annually. Id.

175. Id. at 463, 464. The programs operate by matching workers' contributions to the system with employers' contributions. Dauster, supra note 170, at 464. While Social Security pays out retirement, death, and disability benefits, Medicare provides funds for health needs of the elderly and persons experiencing long term disability. Id.

176. See Dauster, supra note 170, at 464, for a detailed discussion of the perils of funding these federal programs. "[I]n the end, however, the choices are simple ones: cutting benefits or raising taxes." Id. at 506. See also, Concurrent Resolution on the Budget for Fiscal Year 1996, Medicare Solvency: Hearings Before the Senate Comm. on the Budget, 104th Cong., 1st Sess. 309, 309 (1995).

177. A View of How Health Issues Might Play, 22 HEALTH LEGIS. & REG. WKLY., Nov. 7, 1996, available in ALLNEWSPLUS, File No. WL 11279477. Douglas Badger, aide to Senate Majority Whip Don Nickles, said that the focus of health policy, once cost control, has shifted to discussions about maintaining quality of care and consumer choice. Id. The abundance of innovative, high technology treatment increases costs while the numbers of elderly place heightened demands on limited resources. Id. See Steve Teske, Medicare Reductions Threaten Access in Philadelphia Hospital Says Washington, BNA HEALTHCARE DAILY, Oct. 26, 1995 available in BNA-HCD, HCD d6 (reporting that the president of Albert Einstein Medical Center fears devastating result should Medicare be cut in accordance with proposed legislation. Reductions in Medicare will force smaller hospitals into financial ruin). Id. Larger institutions will have to absorb patients from defunct small hospitals as well as deal with loss of federal
IV. RATIONING RESOURCES

While the first shots of the opening rounds in the battle over resource allocation have been fired, the rationing revolution is not fully underway. Unprecedented increases in longevity, a proliferation of high technology medical care, and unrelenting demand for more and better health-care in industrialized nations challenge existing social policies. Financial considerations are of deep concern to government leaders. Health-care costs creep upward in some countries and soar in others.

Id. This double whammy increases the financial burden on and demand for services within the surviving institution. 

Id. But see, Charles Marwick, Longevity Requires Policy Revolution, 273 J. AM. MED. ASS’N 1319 (1995). In an interview with Robert H. Binstock, Ph.D., Henry Luce Professor of Aging, Health, and Society at Case Western University School of Medicine, Professor Binstock contended that withdrawing availability of technologically advanced and costly procedures for patients 80 and older would have negligible impact on overall health-care expenses. “Health-care as a percentage of gross domestic product is not associated with population aging.” Id. at 1318.

178. Jan Blustein & Theodore R. Marmor, Cutting Waste By Making Rules: Promises, Pitfalls, and Realistic Prospects, 140 U. PA. L. REV. 1543, 1569. While the term rationing evokes fearsome images of forced choices “waste cutting . . . suggests saving people from medical interventions that would not have done them any good.” Id. at 1544. The author’s user-friendly term waste cutting encompasses both administrative and procedural aspects of medical services. Id. Does putting a more benign face on the process of allocating scarce resources make rationing decisions less problematic?

179. See Part II, supra notes 1-10 (discussing the demographic shift and the impacts of the elderly on health-care service provision).

180. Dov Chernichovsky, Health System Reforms in Industrial Democracies: An Emerging Paradigm 73 MILBANK Q. 339, 342 (1995). All industrialized democracies are implementing health-care reforms, tailoring changes to cultural, social, historical, and political circumstances unique to each nation. Id. at 339. The central themes of reform are directed at cost containment, quality concerns, improving efficiency, and equitable distribution of services. Id. at 339-40.

181. Goold, supra note 159, at 69. Resources are limited because society must also purchase a wide range of other services, such as education, housing, national defense, food, etc. Id. at 70. In order to allocate a finite monetary sum among a variety of competing services, expenditures in one sector are necessarily limited. Id. The ability of society to purchase health-care in sufficient quantity has strained finances; yet demand continues to escalate. Id. The author articulates the question over which countries struggle: “Who shall decide how to ration health-care, and how shall this be done to respect autonomy, pluralism, liberalism, and fairness?” Id. at 69.

182. Blustein, supra note 178, at 1543. In 1970, Americans allocated only 7.4% of Gross Domestic Product to health-care. Id. In 1990, the figure had almost doubled. Id. See Rothstein, supra, note 159 at 615, for a listing of percentages of Gross Domestic Product spent on Health-care. Canada spends almost 10%; the United States spends 14%. Id. “Most of the countries report that health-care inflation is greater than the general inflation rate.” Id. See also, Dauster, supra note 170, at 474. The Social Security fund will stop running surpluses in less than twenty years and will be exhausted in 2031. Id. at 480. Medicare is projected to run at a deficit imminently. Id. at 486. “The Medicare HI Trust Fund is in worse condition than the Social Security Trust Fund . . . in the short run, Social Security expenditures are currently growing at roughly the same rate as the economy, Medicare costs are growing much more quickly, reflecting the rapid growth of medical expenses . . . .” Id.
The potential of medicine to develop and offer innovative treatments increases, yet payors' finances become increasingly constrained. In the face of scarce resources, the question is not whether to ration health-care, but how rationing is to be accomplished.

One focus of debate centers on the philosophical rationales employed to ration scarce resources. Rationing determinations ideally encompass principles of autonomy, fairness, and justice. The application of moral principles to health-care resource decision making poses a number of problems. First, there is a lack of consensus on how to apply often conflicting moral principles. Second, structural supports are inadequate; the process of allocating resources is ill-defined. Finally, substantive criteria used for rationing are often based on sketchy data. Despite

183. Goold, supra note 159, at 71. The author defines autonomy as the right to make independent decisions. Id. Justice requires allocating social resources fairly. Id. The concept of fairness encompasses respecting all people equally, and regarding every person as deserving and worthy. Id. The author supports private health system reform. Id. at 81. She contends that policies that use moral criteria for rationing could be developed and enforced by institutional authorities (Health Maintenance Organization's, other managed care entities, insurers, and hospital boards). Id at 95. Further, the actions of these institutional authorities, if supported by morally relevant criteria, should be upheld by the courts. Goold, supra note 159, at 95.

184. Goold, supra note 159, at 72. Which principle will prevail when conflicts occur? Society lacks consensus on notions of moral reasoning and distributive justice. Id. Different premises for rationing are advanced by various philosophical camps. Id at 76. Rawlsians advance a theory of distributive justice to ensure equal opportunity among all consumers; utilitarians argue for maximizing available quantities of health-care through the use of some cost-effective standard; and libertarians assert the beneficence principle compels moral societies to provide health-care for individuals who lack the means to obtain services. Id. at 72. See also Shah Ebrahim, Public Health Implications of Ageing, 29 J. ROYAL C. PHYSICIANS LONDON 207, 209 (1995) (contending that the clinical ethical value of beneficence conflicts with utilitarian principles). "One of the major tensions for professionals in management is to juggle these two ethical principles of beneficence and utilitarianism, both of which have validity." Id. Ebrahim cautions that favoring individual interests over the greater good would create "an insatiable consumer of health-care." Id.

185. Goold, supra note 159, at 74. As opposed to defining and invoking substantive matters to guide rationing allocations, "[a] practical advantage of a focus on the process of decision making is its flexibility, its ability to change decisions as both facts and social values change." Id.

186. Ebrahim, supra note 184, at 210. In Britain, where health-care policy is based upon utilitarian principles, resources are distributed to ensure the greatest good for the largest number of people. Id. The author contends that policy considerations should incorporate selective provision of resources "where they will do the most good" rather than continuing distribution according to historical patterns of use. Id. at 209. The paucity of outcome-based information prevents redefining objectives according to health outcome. Id. See Edward Dickinson & Paula Rochon, Commentary, Cochrane Collaboration in Health-care of Elderly People, 24 AGE & AGING 265 (1995). The Cochrane Collaboration is a collaborative web of individuals who, since 1993, have worked to achieve three objectives, all having to do with disseminating health-care data. Id. The group conducts literature searches to identify published randomized controlled trials on the 25 topic areas currently under investigation. Id. The group produces Cochrane reviews in keeping with explicit guidelines. Id. The Cochrane Collaboration also created and
uncertainty in defining the objectives, principles of supply and demand compel substantial change in the distribution of resources.

Several schemes for allocating health-care have emerged in the past decade. The market-based approach has been completely rejected for its failure to address market imbalances, an inability to disseminate information to consumers, a lack of accountability, and an overall absence of fairness. Cost-benefit analysis presents both methodological and interpretive problems. Nor is entrusting health-care policy making to government institutions without risk. Factionalism, pork-barrel politics and the inability of under represented segments of society to access legislative and administrative forums are factors which jeopardize equitable outcomes in a democratic decision making process. Although regulatory

maintains a registry for the reviews together with an information distribution system for individuals requesting information. Ebrahim, supra note 184, at 209. The Collaboration established the Cochrane Collaboration in the health-care of elderly People in response to the growing importance of investigations focused on geriatric populations. Id. One focus of the group is to compile a specialized database relevant to health issues affecting the elderly. Dickinson, supra note 186, at 265.

187. Goold, supra note 159, at 75 (describing this process as allocating resources on the basis of a consumer's ability to pay for service).

188. Id. at 74. The effects of insurance and the presence of market monopolies as well as the status of health-care as a public good create market imperfections. Id. at 75. Providers' poor attempts at educational outreach and the efforts of some within the system to preserve personal power by controlling the flow of information are communication barriers to the consumer. Id. Furthermore, many argue ability to pay is neither a fair nor a just criterion for rationing decisions. Id. Dr. Goold asserts that "the 'invisible hand' of the health-care market is not accountable to the general population." Id. at 76.

189. Ebrahim, supra note 184, at 209, questions the definition of the term benefit in the cost-benefit analysis. Utilitarians regard benefit to be that measure, which gives a population value for the treatment that an individual receives. Id. The yardstick by which benefit is measured is defined as the quality adjusted life year (QALY), years of life gained by virtue of receiving treatment. Id. at 209. The utilitarian definition differs from the definition of benefit according to a clinical perspective. Id. To a practitioner, a benefit enhances the life of the individual patient. Id. A clinician’s yardstick measures the personal benefit derived from each intervention or course of treatment. Id. As each individual's response to disease and treatment is unique, the outcomes measures are flexible and individually focused. Ebrahim, supra note 184, at 209. Which definition of benefit, population-centered or individualistic, should be employed in a cost-benefit analysis? See also Goold, supra note 159, at 78. Outcome data may exclude consumers' perceptions about aspects of service unrelated to medical improvement; however, perceptions may greatly influence an individual’s sense of well-being. Cost benefit analysis fails for a number of reasons, which Dr. Goold discusses in detail. Id. at 77. Among the reasons he discusses are the following: the outcome measurements derived from the entire population are applied to individuals who may respond unconventionally, intangibles that impact health are not included in the calculus of benefits as measured by outcomes, and there are problems implicit in the method used to value benefits. Id. at 77.

190. Goold, supra note 159, at 82 (taking issue with allowing health-care decisions to be made in the political arena for a number of reasons). The wealth and life experiences of many politicians influence their exercise of power. Id. at 81. The voice of privilege is not necessarily the voice of experience, best able to identify where resources should be allocated. Id. at 82. Dr.
bodies develop frameworks which delineate reimbursable services, technological growth and patterns of industry expansion, these types of determinations are far removed from the exigencies of disease, the expectations of patients, and the dilemmas of daily care.191

Proponents of bedside rationing express confidence that physicians are in the best position to allocate resources.192 A system that preserves physician control over resource-allocation decisions precludes governmental entities from promulgating complex and detailed sets of rationing rules for every conceivable factual contingency.193 Despite the insanity of rule-based rationing,194 ceding rationing decisions over to physicians has been opposed on moral and ethical grounds.195 Consequently, United States legislation severs cost considerations from

Goold points out that the ability of socially or economically powerful groups to sway decision making does not contribute to reasoned decision making. Id. at 84.

191. David Mechanic, Professional Judgment and Rationing, 140 U. PA. L. REV. 1713, 1721 (1992) (supporting the concept of a central authority that sets broad constraints on the market but asserts that “the realistic contingencies of disease, the complexities of comorbidity and the diversity personal and family situations,” need to be addressed by the care giver). Id.

192. Id. at 1728. The doctor is in the best position to respond to unanticipated circumstances. Id. Using clinical discretion builds in sensitivity to individual variances, which is factored into the allocation process. Id. Ongoing communication between doctor and patient promotes effective service provision. Id. Malpractice suits and internal organizational structures such as peer review committees and grievance proceedings provide checks against abuse. Id.

193. Peter A. Ubel & Robert M. Arnold, The Unbearable Rightness of Bedside Rationing, 155 ARCHIVES OF INTERNAL MED. 1837 (1995). Bedside rationing is a necessity if cost containment is to be accomplished. Id. It is one of several cost containment mechanisms available to governments and other payors. Id. at 1839. The extensive scope of guidelines required to capture the particulars of every case risks quality at the expense of possible clarity. Id. at 1841.

194. Mark A. Hall, Rationing Health Care at the Bedside, 69 N.Y.U. L. REV. 693, 702 (1994). “A complete and scientifically valid set of rationing rules would entail the impossible task of developing rigorous empirical information for each of the almost 10,000 diagnostic entries in the World Health Organization’s International Classification of Diseases and the almost 10,000 medical interventions listed in the American Medical Association’s Current Procedural Terminology.” Id. Add to that daunting task of updating the rules each time a medical advance occurs, and the fact that the rules do not account for consumer preferences. One can grasp the extraordinarily challenging burden of developing such a system.

195. Id. at 703. Traditional medical ethicists find bedside rationing morally and ethically indefensible. Id. Rationing poses a conflict of interest with the physician’s obligation to heal the sick. Id. The role of healer compels the doctor to provide every benefit, no matter how small to an ailing patient. Id. at 705. Traditionalists argue that cost-consciousness falls within the domain of policy-making, and should not taint medical decision making. Hall, supra note 194, at 706. Minority viewpoints also exist. Id. Some accept bedside rationing, but only when providers are not financially compensated on the basis of rationing decisions. Id. at 707. A small proportion of ethicists regards rationing as an inescapable necessity. Id. But see Ubel supra note 193, at 1842. The moral problems have been overstated.
bedside rationing for recipients of government funding, and Britain's National Health Service educates physicians to internalize cost considerations through the practice of conservative clinical decision making.

Who should decide how to ration medical care? No easy, generic solution exists. Physician-practitioners who must adapt to new practice constraints imposed by rationing wrestle with the problem daily.

Dealing with human beings and their problems, we are person and event oriented; our creed has always been and is the best that can be done for an individual, at a point in time. Increasingly, we must modify this traditional approach by viewing episodic care of the individual as a part of two continua, of the individual in relation to their life span, and of the individual in relation to the community and health-care system to which all belong. We are not skilled or practiced in defining our overall aims.

The general consensus is that bedside rationing, with all its faults, is a clinical reality which practitioners must learn to tolerate.

To the increasing numbers of elderly health-care consumers, the import of rationing will depend upon the objectives that the rationing is designed to achieve. Should industrialized nations provide invasive medical assistance for whatever stretch of years legislators determine to be a "natural life span," and thereafter finance only palliative care? The underlying rationale supporting a policy of age-based rationing is the equitable and cost-effective distribution of health-care services among all


197. Since British doctors within the National Health System [hereinafter NHS] are salaried employees, there are no explicit cash inducements to ration care; however, the 1991 reforms have introduced market competition into the System. The reinvention of British health-care makes explicit rationing an emerging concern. Now, different units within the NHS compete for the dollars that follow each patient, economic viability of particular NHS programs may not turn on cost determinations. See discussion of the National Health Service, supra Part III.


199. Daniel C. Callahan, Limiting Health-care for the Old, in AGING & ETHICS 219, 224 (Nancy Jecker, ed. 1991). "The future goal of medical science should be to improve the quality of old people's lives, not to lengthen them." Id. at 223. The author defines 'natural lifespan' as seventy to eighty years but realizes that others may set different endpoints. Id. at 224.
age groups of consumers. Age-based rationing ends intergenerational warfare over scant resources but creates its own set of problems. Current policy (or lack thereof) allows elders to consume services at the expense of other age cohorts.

But restricting elders' access to costly technology and aggressive medical interventions in their final years, though intuitively appearing to be a cost-saving strategy, is actually of only marginal economic significance. The real costs are associated with chronic conditions, which afflict the elderly and impair functional status. Allocating funds for research into conditions such as Alzheimer's disease, Parkinsonism, and osteoarthritis, promises to ultimately reduce the financial burden upon the health-care system.

The needs of the increasing numbers of elderly who are not seriously ill but require expensive supportive care are of great concern.

200. Id. at 224. Government-supported medical care should relieve suffering and avert premature death rather than deliberately attempt to extend life beyond the natural life span. Id. Three principles underlie this type of rationing. Id. at 225. First, the government should not seek to extend life beyond the natural life span. Callahan, supra note 199, at 225-26. Second, the government's entitlement programs should finance medical technology necessary to allow individuals a natural life span. Id. at 225-26. Third, the government should provide only palliative care, not life-extending technologies, to individuals who exceed the limits of a natural life span. Id. at 226.

201. First, how will one define a natural lifespan? Callahan, supra note 199, at 224 (suggesting the late 70s or early 80s). Insurance companies currently use actuarial tables to accomplish the same objective. Demographic data, though, continue to push the edge of the envelope to ever-higher numbers. See Laslett supra note 4. Second, we devalue the contributions of the elderly if society merely juggles numbers in order to maximize returns on our dollar investments. Disregard for individual contributions to the social network of family and community transforms elderly people into little more than unprofitable investments.


203. Smith & Rother, supra note 169, at 1850. Studies examining Medicare expenditures during the final year of life, indicate that the proportion of money spent has been nearly constant each year since the Medicare program began; "only 3% of Medicare decedents incur 'high costs' . . . but saving this sum would have produced little of economic significance in the context of health-care expenditures that reached nearly one-half of a trillion dollars." Id.

204. Id. at 1851 (pointing out that monies spent on government funded research in to geriatric pathologies accounts for only a small fraction of expenditures associated with these diseases). Prevention could radically decrease costs. Id.

205. Id.

206. Alison Barnes, The Policy and Politics of Community-Based Long-Term Care, 19 NOVA L. REV. 487, 491 (1995). "One of the most problematic aspects of health-care reform is the absence of well-developed and funded plans for providing long-term home and community-based care to aged and disabled persons." Id.
Current supports in industrialized nations are woefully inadequate. In the United States, patterns of fraud and regulatory violations have been reported frequently within the nursing home industry. Changes in Britain's National Health Service have shifted skilled nursing funding from the public to the private domain. Private markets exist for home help, housekeeping, and home companions for the elderly; however, non-traditional supportive living arrangements afford few legal protections.

The Japanese still regard the family as the primary source of care for the elderly; however, that support erodes as the number of elderly in the population increase. Even Canada has imposed explicit limits on certain services and now requires co-payments for consumers of long term care. In sum, industrialized nations need improved programs that serve older individuals across a spectrum of care.

V. CONCLUSION

Around the globe, industrialized nations have failed to adequately define the scope of care and to develop service mechanisms for elderly consumers. Developing a comprehensive health-care system in which

207. Daniels, supra note 202, at 232 (characterizing the long-term care system as "the clearest example of the failure to meet important needs"). Id. The author argues against institutionalizing many of the elderly, preferring to strengthen home health outreach. Id. at 238. "They will have more opportunity to complete projects and pursue relationships of great importance to them, or even to modify the remaining stages of their plans of life." Id.

208. John Braithwaite, The Nursing Home Industry, 18 CRIME & JUST. 11, 12-14 (1993) (discussing the nature of violations in the nursing home industry, and noting that Medicaid and welfare fraud are increasingly common). Quality of care regulation is also subject to fraud. Id. at 13.

209. See Whitehead, supra note 118, at 13.

210. Andrew Bainham, Shared Living Among the Elderly: A Legal Problem in Search of a Home, in AN AGING WORLD, DILEMMAS & CHALLENGES FOR LAW & SOCIAL POLICY 426, 429 (John Eekelar & David Pearl eds., 1989) (noting that different types of for-profit services are provided to elderly). However, "greater consideration needs to be given to the professional organization of such services." Id. at 430. In addition, shared living arrangements that are outside of the for-profit domain may place elderly individuals at legal risk. Id. at 431. English law has not provided protections for the unconventional relationships formed when unrelated elderly people reside in the same home. Id. at 432-36. Contractual arrangements may offer some rights to individuals who wish to enter into an agreement regarding a supportive living arrangement; however the current law does not favor such arrangements. Id. at 438. The author concludes that more attention needs to be devoted to the legal implications of shared living arrangements among the elderly. Id.

211. Maeda, supra note 57, at 313 (asserting that the family is paramount in providing support for the elderly; however services "will undoubtedly need to be expanded" due to anticipated increases in frail elderly and changes in family networks resulting from increasing industrialization and urbanization of Japanese society). See also supra Part III, discussing health-care in Japan.

212. See supra Part III discussing health-care in Canada.
elderly consumers can obtain affordable care remains a daunting challenge both in universal care systems and in the patchwork system of the United States. However, targeting the health-care needs of the elderly must become a priority.

The burden on health-care systems produced by the increasing demands of growing numbers of elderly is a problem that will not soon vanish. Governments grapple with the problem, but provide too little, too late. Nor can care of the elderly continue to be delegated to families. Families are no longer able to afford, both emotionally and financially, the costs of caring for multiple generations of elders.

What will the health-care of tomorrow be, an *E Ticket* ride through a maze of gatekeepers, a brave new world of institutional rationing, or something more caring and less self-serving than a social system that refuses to address the needs of those who are disadvantaged by age or disability? The magnitude of the demographic shift occurring across industrialized nations most assuredly is transforming health-care systems. It is unclear whether the pressures of change will create diamonds from disorder or leave the elderly in a situation where they have *fallen and can’t get up*. 
CIRCUMNAVIGATING INTERNATIONAL SPACE LAW

Ty S. Twibell

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**I. INTRODUCTION**

Man's exploration of space is often analogized to his exploration of the ancient oceans. Ancient sea-explorers faced obstacles of uncharted oceans and land. They also faced difficulties in finding the means and financing to make their discoveries. Space industrial development suffers difficulties as well, however, many of the difficulties are legal obstacles. This author and numerous legal authorities have asserted that international space law presently hinders the commercial development of outer space, and thus, requires legal change. Vigorous space commercial development is crucial, however, not for intellectual development alone. It offers massive economic, medical, industrial, and humanitarian rewards.

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4. “[T]he current space industry today is a multi-billion dollar industry with revenues of $40 billion annually.” *Id.* at 31. “Although these figures sound impressive, they are a result of small-scale, isolated space ventures which merely scratch the surface of what can be achieved given changes in the current legal regime.” *Id.* at 32.

5. Advancements in the medical field have resulted from efforts in space endeavors such as artificial skin, “accelerated development of hospital monitoring devices and similar paramedic tools, heart pacemakers, and artificial skin. . . . In space biotechnology, purer biological preparations have been obtained for manufacturing non-allergenic medicines, more active and
Better vaccines and antibiotics can be produced in space in far greater quantities than on earth. Mining the moons, asteroids, and comets provides answers to future energy depletion and would provide enormously less expensive construction of spacecraft and colonies than launching from Earth. Space industry also paves the way in addressing future crises both manmade and natural.

stable strains of antibiotics, vitamins for use in agriculture, and ultrapure serums and vaccines." *Id.* at 39.

6. The electronics industry would benefit from space industry and some of these benefits are already being realized on a small scale much for the same reasons as developments in vaccines and antibiotics, *see supra* note 5, because of the vacuum and weightlessness of space unmatched by any attempt to replicate a similar vacuum on earth. Ceramic oxide crystals grown in space have lead to developments in "computer memories, optical communications, optoelectronics, and ultrasonics . . . ." *Id.* at 42.

Another compound, gallium arsenide, used for switching on computers, is estimated to have a worldwide market of $860 million by the year 2000. One company has contracted with NASA to produce gallium arsenide aboard the space shuttle and estimates $400 million could be realized with only ten percent of the market.

*Id.*

7. Humanitarian rewards would result from the societal benefit from the improvements and products space industry has to offer. Space industry would also provide a strong foothold in space able to solve near-future crises. *See infra* note 13.

8. "The [space] environment enables, as demonstrated by experiments on the space shuttle, improved production over earth bound laboratories at seven hundred times the quantity and four times the purity." *Twibell, supra* note 1, at 38 (citing NATHAN C. GOLDMAN, AMERICAN SPACE LAW: INTERNATIONAL AND DOMESTIC 25 (1996)).

9. The Moon has numerous resources available such as iron, aluminum, copper, and Helium3. *Id.* at 44. Helium3, once nuclear fusion becomes controlled, exists on the Moon in massive quantities and barely exists on Earth because of the solar wind and Earth's atmosphere. Helium3 would enable fusion to have virtually no dangerous radiation unlike the current use of fission.

10. A "one-kilometer-sized metallic asteroid will provide a billion tons of iron, 200 million tons of nickel, 10 million tons of cobalt, and 20,000 tons of platinum metals: net market value, about $1 trillion." JOHN S. LEWIS & RUTH A. LEWIS, SPACE RESOURCES: BREAKING THE BONDS OF EARTH 105, 394 (1989).

11. Hydrocarbons, similar to petrochemicals and fossil fuels, exist in massive quantities throughout the solar system. For example, "Halley's Comet hydrocarbon stores are comparable to Earth's entire reserves." *Twibell, supra* note 1, at 47 (citing A. Zuppero, *Discovery of Abundant, Accessible Hydrocarbons Nearly Everywhere in the Solar System*, in STEWART W. JOHNSON, 2 ENGINEERING, CONSTRUCTION, AND OPERATIONS IN: SPACE V 791 (1996). Moreover, comets come closer to Earth than other celestial bodies and can be reached using current rocket technology. *See id.* at n.330.

12. Launching payloads into space is very burdensome and cumbers construction of large spacecraft. Mining celestial bodies is the key.

Mining extra-terrestrial bodies, such as asteroids and the moon, is crucial for a substantive space industrialization, not for the immediate purpose of exportation back to Earth to supplement our resources — that is a need not to come for many decades or centuries — but for colonization and the construction of large projects in space. Such mining is the only feasible way
This paper seeks methods to overcome legal hurdles that inhibit mankind’s motivation to develop a vigorous space industry. It also seeks to address concerns for endeavors that will ultimately challenge the current weaknesses in space law including colonization, space stations, and new to construct any space station, space ship, or other similar facility of any significant size. It is to inefficient and expensive to launch large amounts of raw materials into space. For example, it takes 100 tons of rocket propellant to get one ton of payload into geostationary orbit. Whereas, a mass driver — a sort of magnetic catapult already technologically feasible — on the moon or an asteroid could hurl mined materials into orbit for construction, lifting 100 times its own weight into orbit every year. This would lower the cost of building space facilities near earth by an amazing 20,000 times.

Id. at 45.

13. Established colonies in space would obviously create an escape route for world-wide man-made catastrophes such as nuclear holocaust. Space development would also pave the way for the development of new technologies that could address needs here on earth. Overpopulation is one inevitable problem. Nobel Laureate, Richard Smalley notes the population explosion as one reason to invest in nanotechnology research. The human population explosion is unique from any time in history. Smalley states that the human population has never decreased since year 1 A.D. It has remained constant on a global level and has exponentially increased over the past two centuries. Major wars and plagues that have been often cited as important in keeping the human population at a controllable level and that a major third world war or viral epidemic as inevitable in controlling the human population and that neither has existed for sometime. However, that assertion is a myth. Neither wars nor the Black Death (which killed a third of Europe) affected total world population levels. The total world population was approximately one billion until the 1800s. It slightly rose until the beginning of the twentieth century to almost two billion. The industrial revolution and advances in education were one of the main causes. After World War II the population was almost 3.5 billion. Today it is over six billion. The U.N. projects total world population levels by the middle of the next century to be approximately twelve to sixteen billion before leveling off. Smalley goes on to state that “keep in mind, four billion of today’s six billion live a lifestyle that many of us in this room would find abhorrent.” That fact, relatively speaking, probably will not change. The concerns of feeding fifteen billion are not such a problem, but energy consumption and carbon dioxide pollution resulting. See Richard Smalley lecture, University of Missouri-Kansas City, March 26, 1997. Space industrial development will be a necessary venture to help man’s population problem.

14. Natural occurrences, although perhaps far away and perceptively academic still merit attention.

[T]he survival of mankind could ultimately depend on a well-developed foothold in space and commercial development. One day the Earth will die. It could be tomorrow or in a few billion years. Assuming the later occurs, the middle-aged sun will swell up into a red giant and swallow the Earth before it contracts into a white-dwarf or black hole. [But] there will also be environmental catastrophes beyond our control. For example, there are about 2,000 asteroids or other similar objects that will cross Earth’s orbit, measuring at least one kilometer in size that threaten use with collision and mass global destruction and at least a documented 400 of these will certainly collide with Earth.

Twibell, supra note 1, at 31.
technologies such as nanotechnology and replicating technology. This hurdle is treaty-made, therefore, international legal analysis is required to jump over the hurdle. Dias, Gama, Columbus, Magellan, and Drake sought the safest or the shortest passages to a desired destination. Similarly, this paper will first focus on the safest or the shortest passage in jumping the legal hurdle of international corpus juris spatialis before proceeding to the longest and most difficult passage — circumnavigating the entire globe. In this instance, circumnavigating the entire globe is equivalent to the act of amending the treaty.

First, before exploring the best route of legal analysis, some groundwork will need to be laid. This paper provides a brief overview of the present body of international space law and will identify the problematic portion of that body of law. Then, the basic principles of international space laws primary source will be recognized while outlining the full extent of the problem. Finally, this article will present and analyze a series of vaccines (accepted methods for change in international treaty law) to determine which vaccine is best for ridding international space law of its virus.

II. THE INTERNATIONAL CORPUS JURIS SPATIALIS

The international corpus juris spatialis is a relatively new emerging area of law beginning roughly in 1957.18 Soon thereafter, an

15. In 1982 NASA proposed an automated self-replicating lunar facility. NATIONAL AERONAUTICS AND SPACE ADMINISTRATION & AMERICAN SOCIETY FOR ENGINEERING EDUCATION, ADVANCED AUTOMATION FOR SPACE MISSIONS 189, NASA Conference Publication 2255 (1982). If implemented, a self-replicating system would have profound effects on law and society including displacing the entire global economy with cheap and accessible goods and creating liability and property issues from an artificially intelligent machine that converts res communis property into itself possible indefinitely. See infra text accompanying notes 79-81 (discussing the res communis nature of outer space). Nanotechnology is a fairly new field that deals with creating and manipulating substances and creating "machines on an atomic or molecular scale." There is "wet" and "dry" nanotechnology. Living things are of the "wet type." Living cells are "sacks filled with nanomachines." The dry kind, the kind most referred to when using the term nanotechnology, seeks to create a similar biological process utilizing molecular manipulation and artificial intelligence. Ralph Merkle, currently working for Xerox in formulating molecular modeling for nanotechnology, has stated that molecular manufacturing (basically nanotechnology) will replace the existing industrial infrastructure. For an article solely addressing the legal implications of nanotechnology, see Glenn H. Reynolds, Legal Problems of Nanotechnology: An Overview, 3 S. CAL. INTERDISC. L.J. 593 (1994).


17. Derived from the Latin meaning body of space law.

18. Most commentators mark 1957 — the year the U.S.S.R. launched the first satellite, Sputnik — as the year space law began to develop. See, e.g., GOLDMAN, supra note 8.

"Until then, the legal status of activities in space was a speculative matter rather than an immediate practical problem." Twibell, supra note 1, at 9 citing C. WILFRED JENKS, SPACE LAW 3 (1965)).
immediate series of United Nations resolutions and international treaties swiftly emerged leading to the development of the 1967 Space Treaty. Even today, almost thirty years later, this is the primary space treaty which is often referred to as "the cornerstone of international space law."

Three other treaties emerged soon after the 1967 Space Treaty’s passage, the last coming into being in 1975, which formed the main corpus juris spatialis that exists today. These three new treaties addressed more
that non-state entities may be allowed to appropriate space property to themselves. Intellectual property rights are also possible under existing law. However, the Moon Treaty prevents ownership even [by non-state entities]. Intellectual property rights would also be threatened and such innovations would be the property of all mankind, and not of any particular person or nation. [I]f stripped of any exclusivity or their outer space discoveries, companies are unlikely to invest resources in making such discoveries.

Twibell, supra note 1. For a fuller understanding of property rights discussion as part of the premise for seeking the change this paper advocates, see infra, text accompanying notes 29-44.


25. See, e.g., 1972 Convention on International Liability, supra note 23, art. V. ("Whenever two or more States jointly launch a space object, they shall be jointly and severally liable or any damage caused.").

26. See, e.g., 1968 Rescue and Return of Astronauts Agreement, supra note 23, art. IV ("If, owing to accident, distress, emergency, or unintended landing, the personnel of a spacecraft land in territory under the jurisdiction of any State, they shall be safely and promptly returned to representatives of the launching authority.").

27. See Convention on the International Maritime Satellite Organization [hereinafter INMARSAT], July 16, 1979, 31 U.S.T. 1. This treaty seeks to benefit all "ships of all nations through the most advanced suitable space technology available, for the most efficient and economic facilities possible consistent with the most efficient and equitable use of the radio frequency spectrum and of satellite orbits." Id. preamble. It also seeks to "make provision for the space segment necessary for improving maritime communications, thereby assisting in improving distress and safety. . . ." Id. art. 3(1). See also Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Jan. 17, 1980, 31 U.S.T. 333 art. I, II (regulating "environmental modification techniques" — the deliberate manipulation of . . . natural process[es] — in outer space).


29. Although the 1979 Moon Treaty is not a main component of international space law because it has been signed by so few countries, it serves as a good example of foreseen new demands on the legal system caused by future space exploration. See 1979 Moon Treaty, supra note 23. For example, the Treaty foresaw the eventual exploitation of the resources of the Moon and other celestial bodies. See id. preamble.
telecommunications and the commercial launch industry are two examples. As a result, an immense body of international law has developed in a span barely over thirty years. Its fast growth represents the pace of modern society and the growth of communications and new technology. This growth is unparalleled in authoritative doctrines and institutional practices. This explosive growth is not limited to the international realm; United States domestic law has also experienced an equally explosive growth in its own corpus juris spatialis, and similarly, the domestic law of other nations has experienced much growth.

30. The current space industry is estimated to have revenues totaling upwards to $40 billion dollars annually. Twibell, supra note 1, at 30; see also, supra text accompanying notes 4-8.


34. Agency development, statutory law, and case law has flourished in the United States. Major government agencies regulate outer space: The National Aeronautics and Space Administration (most famous regulator of space activity and forerunner of the United States space industry), the Department of Defense (this department's space budget almost exceeds NASA's entire budget), the Department of Transportation (regulates and licenses launching vehicles), and the Department of Commerce (promotes the commercialization of space via its Office of Air and Space Commercialization). See generally Twibell, supra note 1, at 2, 17. There has been an appreciable amount of growth in the statutory realm as well. See, e.g., 35 U.S.C.A § 105 (West 1997) (regulating the patentability of inventions in outer space); 15 U.S.C.A. § 4201 (West 1997) (regulating land remote-sensing commercialization); 17 U.S.C.A. § 901 (West 1997) (regulating the protection of semiconductor chips --such chips are produced efficiently in the vacuum of outer space); The Commercial Space Launch Act of 1984, Pub. L. No. 98-575, (1984) (codified as amended in 49 U.S.C. § 70101 et. seq. (1984)); and the National Aeronautics and Space Act of 1958, Pub. L. No. 85-568, 72 Stat. 426 (1958) (codified as amended in 42 U.S.C. § 2451 (1994) (forming NASA and instituting its directives and policies). See also National Space Port Act Bill, 141 CONG. REC. H4915 (May 12, 1995) (statement of Rep. Seastrand) ("a bill to encourage the development of the commercial space industry by promoting State-run spaceports"); and The Space Business Incentives Act of 1995 (H.R. 1953) introduced on June 28, 1995 (encouraging United States commercial space industry) as cited in Congressional Notes, 23 J. SPACE L. 204 (1995). The ever slow developing United States space case law is developing at a modest pace. Professor Stephen Gorove notes that United States space case law began in 1946. See Gorove, supra note 33, at 3 (citing States v. Causby, 328 U.S. 256 (1946) (hinting that the ancient doctrine cujus est solum, ejus est usque ad coelum (he who owns the land, owns it to the skies) may apply to outer space)). Since 1946, United States space case law has developed in the areas of torts and contracts, environment (e.g., Fla. Coalition for Peace and Justice v. George Herbert Walker Bush, Civil Action No. 89-2682-OG) (D.D.C. 1989) (involving the Galileo spacecraft and environmentalists claiming it used dangerously large amounts of plutonium), taxation (e.g. COMSAT v. Franchise Tax Board, 156 Cal. App. 3d 726 (Cal. App. 1st Dist. 1984) (holding that "satellites were 'tangible personal property owned and used' in the state by the taxpayer")), intellectual property (e.g. Hughes
Unfortunately, as stated in the forefront of this paper, despite the immense growth and adaptation of space law to space activities, space law lacks certainty and proper incentives, and, as a result, fails to effectively promote aggressive space enterprise. Further, international law's failure in these two respects will render it thoroughly incapable of regulating new technologies that could take the world by storm.35

This brings the discussion of "International Corpus Juris Spatialis" to its main issue — which part (or parts) of this immense body of space law is the culprit? Fortunately, the culprit is one simple basic section — the 1967 Space Treaty's no-sovereignty clause.7 This provision, analogous to a computer virus, has spread throughout international law and permeated every other subsequent agreement including United States domestic law. How, and to what degree, this virus has spread is where this paper now turns.

III. THE OVERARCHING EFFECT OF THE 1967 SPACE TREATY'S NO-SOVEREIGNTY PROVISION: IDENTIFYING THE DEGREE OF INFECTION

A computer virus spreads by replicating itself in other computer programs until the programs are smothered by the overwhelming memory storage requirements of the replicating virus. The no-sovereignty virus, however, has only to replicate itself once to do its damage. And instead of attacking computer programs, it attacks international legal documents. Before discussing how to get rid of this virus, it is necessary to evaluate what programs it has infected. But first, the virus itself will be discussed.

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35. Much of this development in foreign domestic law is attributed to the regulation of growth in various country's space industrial infrastructure. Russia, China, the Ukraine, India, Israel, Japan, Australia, Pakistan, and Brazil have established space industries. See Twibell, supra note 1, at 1.

A multitude of other countries are involved in Space. For example, Canada has its own space agency. Chile also has a space program. Some countries are becoming involved in space for the sake of their own peoples' survival. Meterological satellites are crucial for countries such as Ethiopia which need improved weather forecast and early warning systems to [predict agricultural crises]. Kenya requires remote sensing for many of the same reasons. 

Id. at n.237.

36. See supra note 15.

37. See 1967 Space Treaty, supra note 21, art. II ("Outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means.").
The 1967 Space Treaty sought to instill into international law a common consensus of views on the proper course for humanity to take in space endeavors. The concepts it developed would permeate all international law that followed. The basic concepts it instilled into customary international law were the following:

1) Freedom of exploration and use of outer space and celestial bodies;
2) Non-appropriation of outer space or celestial bodies;
3) Exploration and use of outer space and celestial bodies in accordance with the fundamental principles of international law, including the basic principles of the United Nations Charter;
4) Partial demilitarization of outer space and total militarization of celestial bodies;
5) Retention by states of sovereign rights over space objects launched;
6) International responsibility of states for national activities in space, including liability for damage caused by space objects;
7) Prevention of potentially harmful consequences of experiments in outer space and on celestial bodies;
8) Assistance to personnel of spacecraft in the event of accident, distress, or emergency landing; and
9) International cooperation in the peaceful exploration and use of outer space and celestial bodies.

Most of these concepts will not be dealt with herein. However, it must be noted that states retain jurisdiction and ownership of satellites and spacecraft. Therefore, some level of property rights do exist, but only on

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38. See 1967 Space Treaty, supra note 21, art. XIII which states that it would affect all law and space activities as articulated in the following. The provisions of this treaty shall apply to the activities of States Parties of the Treaty in the exploration and use of outer space, including the moon and other celestial bodies, whether such activities are carried on by a single State Party to the Treaty or jointly with other States, including cases where they are carried on within the framework of international inter-governmental organizations. Any practical questions arising in connection with activities carried on by international inter-governmental organizations in the exploration and use of outer space, including the moon and other celestial bodies, shall be resolved by the States Parties to the Treaty either with the appropriate international organization, which are parties to this Treaty.

Id.

39. GENNADY ZHUKOV & YURI KOLOSOV, INTERNATIONAL SPACE LAW 39-40 (1984) (Professors Zhukov and Kolosov are former soviet scholars who played a role in the development of international space law and have analyzed this treaty extensively).

40. See 1967 Space Treaty, supra note 21, art. VII. See also, text accompanying note 39. It is this type of jurisdiction that is analogous to maritime law where states retain jurisdiction over their ocean-going vessels in international waters. For a more extensive analysis of the analogies between maritime law and space law, see GLENN H. REYNOLDS & ROBERT P. MERGES, OUTER SPACE: PROBLEMS OF LAW AND POLICY 27-47 (1989). There are also analogies to the law regarding Antarctica. See Beattie v. United States, 756 F.2d 91, 99 (1985)
the spacecraft itself. Thus, a lunar colony or facility would likely have its sender nation, or nations, retain jurisdiction over it. However, if it becomes a mining operation, would the parameters immediately adjoining the facility and the mined material, once it is removed, become the property of the sender nation(s)? That is the issue where space entrepreneurs become concerned. Hence, the main concept is the non-appropriation of outer space or celestial bodies as Professors Zhukov and Kolosov have termed the no-sovereignty provision.

The no-sovereignty provision is Article II of the Space Treaty. It explicitly states that "[o]uter space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means." This provision, along with the other less- or non restraining concepts (regarding space industrial development), has replicated itself throughout international law. Most international multilateral and bilateral agreements contain references to the 1967 Space Treaty, and, invariably, the no-sovereignty provision contained within the Treaty has spread, infecting all international law and domestic law following it. Even if a treaty or law does not contain reference to the 1967 Space Treaty or no-sovereignty provision, it is still guided by it because the 1967 Space Treaty has become part of the


42. Most international legal multilateral treaty documents cited herein refer to the 1967 Space Treaty: 1968 Rescue and Return of Astronauts Agreement, supra note 23, preamble (noting the importance of the 1967 Space Treaty and "desiring to develop and give further concrete expression of [those] duties. . ." within the 1967 Space Treaty); 1972 Convention on International Liability, supra note 23, preamble ("recalling" the 1967 Space Treaty); 1975 Registration Convention, supra note 23, preamble ("recalling" the 1967 Space Treaty and noting how the 1967 Space Treaty reaffirms the idea that states bear responsibility for their spacecraft (presumably referring to Article VII of the 1967 Space Treaty)); and the Convention on the International Satellite Organization (INMARSAT), supra note 27, preamble ("considering the relevant provisions" of the 1967 Space Treaty); 1979 Moon Treaty, supra note 23, preamble ("recalling" the 1967 Space Treaty and other space treaties—although it seeks to strengthen the no-sovereignty provision). Although some treaties, such as The Operating Agreement Relating to the International Telecommunications Satellite Organization (INTELSAT), supra note 31, do not explicitly refer to the 1967 Space Treaty, the Treaty is part of customary international law, and therefore, if any of the aspect of such agreement still operates within the confines of the Space Treaty. See infra text accompanying note 44.

43. See European, Japanese, and Canadian Space Station Agreement, supra note 28, preamble (including the four major multi-lateral space treaties and specifically, the 1967 Space Treaty); U.S./Italy Space Station Agreement, supra note 28, Preamble (recognizing the 1967 Space Treaty and specifically its Article III).
customary international law.44 In conclusion, the virus is the no-sovereignty provision in the 1967 Space Treaty and it has spread throughout the global legal framework.45 Before addressing what vaccine can be used to disinfect international law of this virus, some specific issues and changes will be presented because if changes in the corpus juris spatialis are to be employed, it is necessary to be specific about what changes are needed instead of the simply calling for the elimination of the no-sovereignty provision. Otherwise, where now there is some

44. It has been said that the formation of treaties itself is the result of customary practice. See MARK E. VILLAGER, CUSTOMARY INTERNATIONAL LAW AND TREATIES 29 (1985). Although developments and practices in regards to outer space can hardly be regarded as customary, certainly the analogies and origins derived from the law of Antarctica and the sea have customary origins. This paper advocates that indeed the 1967 Space Treaty and its no-sovereignty provision are part of not only statutory international law, but customary international law because, first, it is the cornerstone of four treaties that unanimously adhere to it in their preambles. See supra note 42. Secondly, these four documents are considered to be the primary corpus juris spatialis. See supra note 23. Although there was no gradual hardening of practice into law," id., there was a formation of treaty law that now is common practice. The analysis here may seem to be more proper in discussing the effect of a treaty (here, the 1967 Space Treaty) over subsequent law, and indeed that is the next issue, however, space law development is unique to over areas of law. It never had a chance to develop customary law before that custom became ingrained in treaties. Unlike the oceans and polar regions, space was not being explored and settled for centuries before the advent of law. Rather, space law practically arose simultaneously with exploration. Technological and financial restraints made space travel a rare occurrence allowing the legal system, in one of very few instances, to catch up or develop at the at the same pace of an entirely new endeavor (although this paper advocates that it now, or will very soon fall behind in space development). Therefore, space law has given rise to the simultaneous formation of both treaty law and customary law. This conclusion is important because it removes the additional analysis of determining whether the customary rule or the treaty prevails. See cf. id. at 34.

Professor Verdross mentions one main process for a rule to go through in order to be considered customary international law and it has three stages: (1) States engage in a given practice or whatever reason; (2) states react to other state action in adhering or not adhering to the practice “in the expectation that other states still again accord reciprocity;” and (3) the law becomes customary law by states not only adhering to the rule but stating that it is a rule. Id. at 29-30. Have these rules occurred in respect to no-sovereignty? Well, that is difficult to determine at least for the second two stages. It was stated as a rule first via treaty law and no states have violated the Treaty, so it is difficult to determine how states will react. However, no-sovereignty began the space age in the form of treaty law which has been adhered to for 30 years. It at the very least approaches customary international law. Finally, the 1967 Space Treaty tends to state existing law from the analogous areas of law such as maritime law and the law of Antarctica.

uncertainty, without the clause and nothing to replace it, uncertainty would be resoundingly present.46

The need for the industrialization of outer space has been briefly established,47 and if any argument remains, a thorough analysis of that issue should be left for a separate discussion.48 At this point, the need for a change in the legal framework supporting space industrialization is going to be assumed. Accordingly, the legal discussion now turns to what exact changes are desired to promote outer space development.

IV. DESIRED CHANGES IN INTERNATIONAL SPACE LAW: IDENTIFYING THE VIRUS

The changes in international space law required for vigorous space development can also be the subject of in-depth discussion. However, since this paper focuses on how to implement changes, those changes are going to be very brief and are hoped to be commonsensical, at least as it relates to the premise of this paper. The following are the specific changes generally recommended to be instituted in international space law:

1) Appropriation of celestial property to national or private entities at some agreed upon level. The agreed upon level should, at a minimum, include the ownership of mining operations, mining claims, mined material once removed, and reasonable parameters of mining operations;49

2) Determination of liability in automated and replicating systems;50 and

46. The counter argument of this proposition is that states or entities could own celestial property after the removal of this provision. However, as discussed in supra note 44, restrictions of ownership could be part of customary international law. Although if such a provision's removal indeed perceived enough support to make its removal possible, certainly that fact would support the creation of customary law. However, if it was not replaced even with an affirmative approval of celestial property rights, the only clear indication would be uncertainty on the status of property rights and thus, uncertainty would continue although property rights advocate would have one more argument in their favor.

47. For an indepth discussion of the need for property rights in space and how they would increase incentive for investment, see Twibell, supra note 1, and Keefe, supra note 2. See also supra text accompanying notes 3-14.

48. See Twibell, supra note 1; Keefe, supra note 2. See generally Reynolds, supra note 2.

49. See supra note 2; Wayne N. White, Jr., Mining Law for Outer Space in SPACE MANUFACTURING & ENERGY & MATERIALS FROM SPACE 83 (Barbara Faughnan & Gregg Marniak eds., 1991).

3) Formation of an international regime to oversee space activities, address technical issues, and enforce international space regulation.\textsuperscript{51}

V. \textbf{ANALYSIS OF THE ALTERNATIVES IN INSTITUTING CHANGE IN INTERNATIONAL SPACE LAW: DEVELOPING A VACCINE}

There are a number of vaccines available to rid international space law of legal viruses. In international legal thinking, many vaccines are available to combat, for whatever reason, treaty-made law. These vaccines are variations of the terms \textit{modification} or \textit{termination}.\textsuperscript{52} Termination\textsuperscript{53} could be used quite properly as a vaccine. However, it makes no sense to simply terminate a provision when the true objective is to improve the law, making it adaptable to new issues entirely unseen in human history. There must be something to replace the no-sovereignty provision's absence. That rationale is exactly the purpose behind the preceding section above— including changes that not only remove the sovereignty provision, but the additional framework creating legal certainty for space industrialists and perhaps, society as well. Therefore, legal attempts to remove the no-sovereignty provision for its own sake are inadequate. However, since United States unilateral action is one possible route for the 1967 Space Treaty’s modification, the United States could certainly terminate its own obligations and provide answers to the additional issue through its municipal law. Hence, a termination analysis will be provided as a subcategory of unilateral action analysis below.\textsuperscript{55}

Fortunately, legal thought in this area is well-developed. This obviousness is based on the fact that probably the most difficult issue in international law’s young history\textsuperscript{56} is enforcing state compliance\textsuperscript{57} to what repercussions of replicating systems and nanotechnology); Thomas L. McKendree, \textit{Planning Scenarios for Space Development in SPACE MANUFACTURING} 10 (Barbara Faughnan & Gregg Marniak, eds., 1996) (providing hypothetical situations involving “squatters” claiming celestial property with great ease despite the property right constraints of international space law because of technological advances in replicating nanotechnology). \textit{See generally} Fredrick A. Fiedler & Glenn H. Reynolds, \textit{Legal Problems of Nanotechnology: An Overview}, 3 S. CAL. INTERDISC. L.J. 593 (1994).

\textsuperscript{51} For authors asserting the formation of some sort of legal regime to oversee property right distribution, see Keefe, \textit{supra} note 2; Baca, \textit{supra} note 2 (concluding that the “efficient and equitable property system on Earth . . . should be extended into space for the exploitation of celestial resources”); Paxson, \textit{supra} note 45.

\textsuperscript{52} \textit{See generally} \textit{LOUIS HENKIN ET AL., INTERNATIONAL LAW: CASES AND MATERIALS} 484 (3d ed. 1993).

\textsuperscript{53} \textit{See id.}

\textsuperscript{54} \textit{See supra} text accompanying notes 49-51.

\textsuperscript{55} \textit{See infra} text accompanying notes 128-135.

\textsuperscript{56} \textit{See HENKIN ET AL., supra} note 52.
little international law that exists. A survey of a variety of international literature leads now to the following two commonsensical methods of changing international space law:

1) United States unilateral action — including the subcategories *rebus sic stantibus* (reinterpretation), and unilateral denunciation (termination of treaty); and

2) multilateral action — developing a new treaty to supersede the 1967 Space Treaty; and Amendment to the 1967 Space Treaty. Strategies for vaccination should first begin with the simplest and less revolutionary of doctrines which require the least amount of state concerted effort — United States unilateral action.

**A. United States Unilateral Action**

1. **Vaccine I: Implementing the *Rebus sic Stantibus* Doctrine**

*Rebus sic Stanibus* is a doctrine that reminiscent of contract law in that it states that circumstances of the contracting parties may change to

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57. This proposition does not pertain to the seriousness of this problem, because for the most part, nations do comply with international law. See Professor Oliver J. Lissitzyn, *Preface in BHEK PATI SINHA, UNILATERAL DENUNCIATION OF TREATY BECAUSE OF PRIOR VIOLATIONS OF OBLIGATIONS BY OTHER PARTY* XIX (1966); Mary Ellen O'Connell, *Enforcement and the Success of International Environmental Law*, 3 IND. J. GLOBAL LEGAL STUD. 47-48 (1995) (noting the general view that "international law is a monument to successful laws, without requiring much enforcement"). The widespread compliance with international law is probably due to the fact that international law is simply an embodiment of what nations do and have done over a long period of time. See HENKIN, *INTERNATIONAL LAW POLITICS, VALUES AND FUNCTIONS, in HENKIN ET AL.*, supra note 52, at 1-2 (stating "International Law ... is a construct of norms, standards, principles, institutions, and procedures."). So, rather, the proposition embodies the "difficulty" of the issue of enforcement. See generally O'Connell, *supra* note 67 (discussing the difficulties of enforcing international environmental law).

58. This is comparatively speaking to state domestic law. Because of the increasing development of international law and increasing global acceptance and participation in the United Nations over the past twenty years, this proposition may soon be negated.

59. Multilateral action certainly could have the same subcategories as United States unilateral action. However, the analysis of those subcategories demonstrate they would fail for the United States. Correspondingly, multilateral actions would fail for the same reasons. See infra text accompanying notes 62-136. Therefore, it would be impractical to repeat the analysis for multi-lateral action.

60. The use of this concept in changing international law was taken from DANIEL PATRICK O'CONNELL, 1 *INTERNATIONAL LAW* 296 (1965) (presenting the doctrine as a legal possibility for "revision of treaties."). See also *International Law Commission Report in HENKIN, supra* note 52, at 516, 517 ("[T]he acceptance of this doctrine [*rebus sic stantibus*] in international law is so considerable that it seems to indicate a recognition of a need for this safety-valve in the law of treaties."); Anglo-Iranian Oil Co. v. Iran, 1952 I.C.J. 93, 126 (stating that *rebus sic stantibus* is a well-known concept in international law).
such an extent that their obligation to each other ends. This doctrine might provide the basis for interpreting the 1967 Space Treaty to allow some degree of property rights in space. Professor Daniel Patrick O’Connell claims Phillimore describes *rebus sic stantibus* best in the following excerpt: “When that state of things which was essential to, and the moving cause, the promise or engagement, has undergone a material change, or has ceased, the foundation of the promise or engagement is gone and their obligation has ceased.”

Although this is a valid doctrine, many commentators frown on its use because treaty formation is largely based on political notions and “changes in political circumstances are notoriously difficult to assess.” Further, problems result from partially performed contracts and equitable adjustment. Most importantly, perhaps, is the risk to security of treaties. However, domestic courts have occasionally found in favor of *rebus sic stantibus* under the use of executive abrogation. In more recent cases, although its recognition is accepted, it seldom is the winning factor for private parties. International courts recognize the doctrine, but have never ruled in its favor.

Professor O’Connell is correct in his assertion regarding the inequity and difficulty in determining change in political climates, which should be obstacles against a proper decision favoring *rebus sic stantibus*.

61. See, e.g., O’Connell, supra note 60, at 296.
62. Id.
63. Id.
64. Id.
66. O’Connell, supra note 60, at 299 (citing Hooper v. U.S., 22 Ct. Cl. 408 (1887)).
67. See, e.g., Henkin, supra note 52, at 519.

The U.S. Supreme Court [has] recognized that a party to a treaty might invoke changed circumstances as an excuse for terminating its treaty obligations. However, when the states continue to assert the vitality of the treaty, a private person who finds the continued existence of the treaty inconvenient may not invoke the doctrine of changed circumstances.

Id. (citing Trans World Airlines, Inc. v. Franklin Mint, 466 U.S. 243 (1984)).
68. See id. (International Tribunals, while recognizing the principle of *rebus sic stantibus* have generally avoided giving it affect, usually on the ground that it was not applicable to the facts on hand (citing Restatement (Second) of Foreign Relations Law of the United States, cmt. to art. 153 (1965)); O’Connell, supra note 60, at 299 (citing Russia v. Turkey, Scott, 1 H.C.R. 297, 317 (1916)); Nationality Decrees in Tunis and Morocco, 1925 P.C.I.J., (Ser. B) No. 4, at 29 (Feb. 7); Ser. C., No. 2, 140, 187 (1923); A.J., The Permanence of Treaties (1928). The modern trend upholds O’Connell’s assertion since his 1965 text. See generally Denmark v. Norway, 1993 I.C.J. 38, 217 (June 14); Nicaragua v. United States, 1984 I.C.J. 392, 621 (Nov. 26); Belgium v. Spain, 1970 I.C.J. 3, 310 (Feb. 5).
However, the situation of today's post-Cold War world is perhaps less difficult. In fact, it is so drastically different from other political environments, that it may give the strong, legally valid, although seldom successful, *rebus sic stantibus* a fighting chance to receive credence.

In beginning the analysis of *rebus sic stantibus*, the definition to be used will be the International Court of Justice's 1949 articulation of *res sic stantibus* which, unlike Phillmore, is in much simpler terms. It states that "[a] state may refuse to execute a treaty if the conditions have substantially changed." To analyze the phrase *substantially changed*, the International Court of Justice in *Cambodia v. Thailand* stated that *rebus sic stantibus* "contemplates two different situations: the one existing when the treaty was signed and the new one created by conditions and circumstances posterior to the treaty."

First, the circumstances during the time of the formation of the 1967 Space Treaty should be brought to light. The change from that environment to today's environment is very clear. Only two superpowers existed — the United States and the Soviet Union. Both nations possessed massive military industrial complexes and economies capable of vigorous space programs, and were the only two space powers at the time. They were already in conflict in many areas on earth — the Korean War, the Vietnam War, and the Cuban Missile Crises were the most notable examples of major Soviet Union/United States confrontations. Soviet President Nikoli Krushev was famous for his mighty display at a session of the United Nations General Assembly, where he removed his shoe and struck it on the table, shouting that the Soviet Union would crush the United States. This mood permeated well into the 1980s, when President Ronald Reagan referred to citizenry of the Soviet Union as barbarians. Star Wars was also a major issue during the Reagan Era and it epitomized the extension of the Cold War confrontation into outer space. Never had the world witnessed a political conflict guide world policy to such a fantastic degree. It has been stated that the effect of the Cold War and superpower rivalry was one of the principle reasons behind the development of the no-sovereignty provision.

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71. The proposition that the United States has the largest economy in the world is undisputable. However, in light of today's understanding of the Soviet Union's economic condition throughout its brief history, especially since its weak economy substantially contributed to its downfall, the proposition in regards to the Soviet Union may seem less valid. Nevertheless, this same Soviet Union had one of the most massive economies based on its sheer size and total volume of currency regardless of how its relatively weak economy compared to smaller nations.
The no-sovereignty provision was viewed as the means of preventing the spread of the Cold War into space, as well as resulting territorial claims by the United States and the Soviet Union while non-space faring nations stood idly by. 72 Certainly times have changed. The Union of Soviet Socialist Republics no longer exists. The Cold War is gone and has been for some time. There could not be a clearer demarcation of a change in the political arena. Certainly, Professor O'Connell and others would agree. Further, other substantial global changes have taken place since the advent of the 1967 Space Treaty. Not only has the Cold War ceased, but more and more nations have developed the technological and economic capability to become space faring nations. 73 Professor Reynolds has eloquently articulated the mood of this new era:

Today, space is not the sole preserve of the United States and the Soviet Union (or its successor states). A potent European space program now exists. Japan has a rapidly growing program, and Third-World opinion leaders like China, India, and Brazil have important space programs too. Nor are these states the only ones. Although the programs of the United States and the former Soviet Union retain significant leads, those leads no longer appear unassailable. When significant exploitation of space resources begins, many nations will be participating. 74

It would seem that times have dramatically changed since the signing of the 1967 Space Treaty. Political tides and economic boundaries have shifted dramatically that fact is clear. However, substantial argument exists against supporting the removal of the no-sovereignty provision via rebus sic stantibus.

Although third-world economies have improved to the extent that many have viable space industries, 75 they are nowhere near approaching the level of space infrastructure possessed by the United States, or the former Soviet provinces - namely Russia. The People's Republic of China, at least in potential, has already demonstrated a strong presence in the commercial launch market. 76 Nations such as Kenya 77 or Australia could

72. Reynolds, supra note 2, at 229-30.
73. See Goldman, supra note 8, at 110; Reynolds, supra note 2, at 231; Twibell, supra note 1, at 33-34.
74. Reynolds, supra note 2, at 231.
75. The following countries have viable space industries: Brazil, China, India, Israel, Pakistan, the Ukraine, Australia, Canada, and Japan. See Twibell, supra note 1, at 1, n.5.
theoretically launch a spacecraft and claim part of the moon and perhaps begin a mining operation, but what Kenya could do, the United States would certainly be capable of doing many times over and faster. The United States or other conglomerate of nations, such as the European Space Agency would certainly begin reaping profits long before Kenya ever would. Third-world nations are not in a different situation than thirty years ago. They are certainly close equals to the space powers regarding such space endeavors as telecommunications and spacecraft launching, however, such participation in the space industry is minuscule in comparison to the economic and technological requirements of an Apollo-like mission to the Moon. The Apollo Missions were draining on the massive United States economy and required the concerted effort of the richest nation on Earth. Today, such an endeavor would still be very expensive for the United States. Professor Reynolds is correct that third-world countries have vigorous space industries, but in regards to a situation existing where they would directly benefit from celestial property claims, that notion is unrealistic — third-world nations are likely to be equally as skeptical of space power domination of space as they were twenty or thirty years ago. Moreover, there are four space powers which exist today.\textsuperscript{78}

The assertion that a third-world resistance to property rights in space probably still exists should not be confused with the likelihood of implementing changes in space law or policy or whether third-world opinion should have such a substantial impact on the acts of the major space powers. The assertion only demonstrates the argument that circumstances may not have fundamentally changed in certain respects for triggering the \textit{rebus sic stantibus} doctrine.

There are two arguments remaining against \textit{rebus sic stantibus} which have not been put forth. The first is that the assumption that the no-sovereignty provision being based on Cold War fears and superpower domination of space may not be the only substantial reason for the inclusion of the no-sovereignty provision in the 1967 Space Treaty. One strong reason for its inclusion is the notion of peace in space — the desire not to bring man’s problems into space with him, and most notably, the \textit{res communis} doctrine.

\textsuperscript{77} Kenya has demonstrated a vital need for remote sensing for predicting disastrous weather conditions for agriculture. \textit{See} Twibell, \textit{supra} note 1, at 34, n.237.

\textsuperscript{78} The four major space powers are the United States, Russia, Japan, and Europe (as the European Space Agency). \textit{See} Twibell, \textit{supra} note 1, at 16 (citing GOLDMAN, \textit{supra} note 8, at 15).
Res communis means that certain property should belong to all people of the world. This concept applied to outer space is generally accepted. Further, treaties and bilateral agreements seem to support this notion. Truly, the great deal of expense involved in space activities is likely to prevent one nation from acting in such a manner and violating the res communis character of space. This fact allows the commonly held perception of res communis to remain, perceptively leaving no room for visible deviation from the doctrine. Thus, if the no-sovereignty provision is rooted in the res communis doctrine rather than the then existence of the two super powers and since nations have not appeared to deviate from that doctrine, the fact that times have changed in regard to the Cold War may have no meaning in the rebus sic stantibus analysis.

79. Res Communis in international space law is a combination of res ominum communis (meaning community ownership rather than a general right-of-use law) and res extra commercium (“applied typically to the peacetime use of the high seas without claims of ownership, special exclusive interests, or unilateral control.”). See S. Houston Lay & Howard J. Taubenfield, The Law Relating to Activities of Man in Space, 52-53 (1970).

80. See generally supra note 2.

81. See generally supra note 2.

81. Article 62 of the Vienna Convention on the Law of Treaties Between States and International Organizations provides a basis for analysis for the use of “fundamental change of circumstances” that is much more extensive than the International Court of Justice put forth in Cambodia. It sets forth the following guidelines:

1) A fundamental change of circumstances which has occurred with regard to those existing at the time of the conclusion of a treaty, and which was not foreseen by the parties, may not be invoked as a ground for terminating or withdrawing from the treaty unless:
   a) The existence of those circumstances constituted an essential basis of the consent of the parties to be bound by the treaty; and
   b) The effect of the change is radically to transform the extent of obligations still to be performed under the treaty.

2) A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty between two or more States and one or more international organizations if the treaty establishes a boundary.

3) A fundamental change of circumstances may not be invoked as a ground for terminating or withdrawing from a treaty if the fundamental change is the result of a breach by the party invoking it either or an obligation under the treaty or of any other international obligation owed to any other party to the treaty.

4) If, under the foregoing paragraphs, a party may invoke a fundamental change of circumstances as a ground for terminating or withdrawing from a treaty it may also invoke the change as a ground for suspending the operation of the treaty.


The end of the superpower struggle of demise of either the United States or the U.S.S.R. was probable very unforeseen. It definitely shocked the world until very close to the time the Soviet Union did fall. And certainly, the change was of “fundamental character.” However, the third prong of the Restatement test is where the argument above fails as well, see supra text accompanying notes 71-85, that the change in circumstances must be “an essential basis to be
The second argument against *rebus sic stantibus* is the most severe. Both the International Court of Justice\(^2\) and commentary agree\(^3\) that the presence of withdrawal provisions in treaties negates the need for *rebus sic stantibus* because most modern treaties have a provision where states can seek a legal out. The 1967 Space Treaty has such a provision: "any State Party to the Treaty may give notice of its withdrawal from the Treaty one year after its entry into force by written notification to the Depository Governments. Such withdrawal shall take effect one year from the date of receipt of this notification."

With this clause, the contractual provision is instilled for proper and internationally recognized denunciation. Simply, if the United States

bound by the treaty." The 1967 Space Treaty makes no mention of the superpower presence. The superpower aspects seems, and probably rightfully so, to be a theory built on intuition. The *res communis* character or reasoning behind the no-sovereignty provision seems to be more firmly rooted in the actual text of the treaty, and certainly times have not changed in regard to those principles. Note the following provisions from the Treaty:

- Recognizing the common interest of all mankind in the progress of the exploration and use of outer space for peaceful purposes,
- Believing that the exploration and use of outer space should be carried on for the benefit of all peoples irrespective of the degree of their economic or scientific development,
- Desiring to contribute to broad international co-operation in the scientific as well as the legal aspects of the exploration and use of outer space for peaceful purposes,
- Believing that such co-operation will contribute to the development of mutual understanding and to the strengthening of friendly relations between States and people.

1967 Space Treaty, *supra* note 21, preamble. "The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development, and shall be the province of all mankind." *Id.* art. I. As one can easily see, several references are made that would seem to uphold the *res communis* basis for the no-sovereignty provision or any other provision for that matter in the Treaty such as the words *peaceful purposes*, *co-operation*, *common interest of all mankind*, and *benefit of all people irrespective of the degree of economic or scientific development*. Economic and technological developments are still issues of today that have not left with the absence of the Cold War and no where in the treaty is there any mention of superpower domination.

82. Modern treaty provisions are *inherently terminable*. *See cf.* Nicaragua, 1984 I.C.J., 392, 621 (Nov. 26). "It is only necessary to look at the texts of the large number of ... treaties ... to see how almost invariably they are concluded either for a fixed term or for renewable terms subject to right of denunciation, or are made terminable upon notice...." *Id.*

83. *International Law Commission Report in HENKIN ET AL.*, *supra* note 52, at 517. The majority of modern treaties are expressed to be of short duration, or are entered into for recurrent terms of years with a right to denounce the treaty at the end of each term, or are expressly or implicitly terminable upon notice. In all these cases either the treaty expires automatically or each party, has the power to terminate the treaty and has the power also to apply pressure upon the other party to revise its provisions.

*Id.*

84. 1967 Space Treaty, *supra* note 21, art. XVI.
decided that it should have property rights and wanted to exercise those rights, it could do so a year after withdrawing from the 1967 Treaty. However, the United States certainly might experience international political repercussions if it behaved in such a way. These repercussions will be dealt with in depth in a following discussion — United States denunciation of the 1967 Space Treaty.85

a. Conclusion and General Observations of Vaccine I

The rebus sic stantibus doctrine fails to be an effective vaccine for the sought-after changes in international space law. Times have substantially changed, however, those times may not be the reason behind the no-sovereignty provision. If they were, it is not included in the preamble. It only exists in the realm of scholarly thought. Also, many third-world nations would likely object to the sudden creation of property rights without some sort of structure development outside of simple reinterpretation. Finally, the withdrawal provision negates the need in modern times for the implementation of rebus sic stantibus.

2. Vaccine II: Reinterpretation of the No-sovereignty Provision — 150 Year-Old Treaty Interpretation Analysis Applied to the Space Age

Probably one of the easiest methods of reconciling the difficulties of the 1967 Space Treaty is simply reinterpreting the Treaty, condoning a certain level of celestial property rights. Reinterpretation would have

85. See infra text accompanying notes 128-136.

86. See MONSIEUR DE VATTEL, THE LAW OF NATIONS 260-61 (1852) (discussing methods of treaty interpretation and exceptions to prior conceived interpretation of treaties (rebus sic stantibus)); HENKIN ET AL., supra note 52, at 473, n.2, n.3 (a unilateral interpretation of a treaty has an “advisory” effect (citing Ste. Ruegger et Boutet v. Ste. Weber et Howad, [1933-34] Ann. Dig. 404 (No. 179) (Trib. Civ. de la Seine, France), whereas if most or all of the signatories interpret a treaty in a certain way it is an authentic interpretation having almost the binding effect of an additional clause to the treaty.) Cf. O'CONNELL, supra note 60, at 282-83 (referring to travaux pr'paratoires—looking to the intent of the parties at the time the document was signed—while noting that its danger was that “[s]tates which adhere to a treaty after it has been formulated are bound by an abstraction expressed in words independent of the intent of those who shaped the treaty.”) Thus, even if the intent of the parties at the signing of the 1967 Space Treaty was against any form of national property rights, the words themselves are the deciding factor—if there is room for property rights in the words of the Treaty, there is room for interpreting the Treaty in such a fashion regardless of the intent of the signatories.

The Restatement states that treaty interpretation depends on whether the parties have agreed to accept a particular entity’s interpretation. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 148(1) (1965). Otherwise, it is not binding. Id. § 148(2). However, as the Restatement indicates, it is the interpretation that affects the effect of the agreement or treaty. See id. § 146.
substantially fewer intricacies than amending the Treaty or creating an entirely new one. In addition, it would pose fewer international repercussions and less time, which would be required for formulating and passing a new legal regime with a global consensus. Moreover, treaty reinterpretation is a generally accepted method of treaty modification. However, before a nation, or nations, can lawfully interpret a treaty, a certain state of things is required. What does certain state of things mean?

Certain state of things refers to legal rules of treaty interpretation. De Vattel recognized that certain maxims for treaty interpretation must exist. Due to the lack of precision of the written word and language in general, without these maxims, treaty interpretation would be subject to much abuse by the selfish motives of the signing parties. The four general maxims of treaty interpretation as designed by De Vattel almost 150 years ago are as follows:

I. Interpret only that which needs interpretation.
II. If a party has certain interpretations of a treaty or provision and they had a full opportunity to assert such interpretations at the signing of the treaty and did not, it is to their own detriment.
III. Signatories do not have a right to interpret treaties according to their own "fancy."
IV. What is sufficiently declared is to be taken as true.
V. The interpretation ought to be made according to certain rules.

88. See infra text accompanying notes 138-42 (discussing Vaccine IV — changing or nullifying the 1967 Space Treaty by passing a new and different treaty).
89. As discussed infra, text accompanying notes 112-27, the accepted method of treaty interpretation by its very nature should at the most create minimal negative international reaction.
90. See supra note 86.
91. See DE VATTTEL, supra note 86, at 261.
92. See id. at 244-74.
93. See id. at 243-44.
94. "[F]raud seeks to take advantage even of the imperfection of language, and that men, designedly throw obscurity and ambiguity into their treaties, in order to be provided with a pretense for eluding them upon occasion." Id. at 244.
95. Id. at 244-46. The first three maxims were paraphrased from the originally written following maxims: "1st general maxim: it is not allowable to interpret what has no need of interpretation."; "2d general maxim: if he who could and ought to have explained himself has not done it, it is to his own detriment."; and "3d general maxim: Neither of the contracting parties has a right to interpret the treaty according to his own fancy." Id. at 244-45.

De Vattel's rules for treaty interpretation are used for illustration because it makes for an interesting analysis of judging space age dilemmas with an analysis developed over 150 years ago when automobiles did not even exist. His standards are still valid and virtually the same.
De Vattel outlines some of the certain rules referred to in his fifth maxim. For example, whenever obscurity in language occurs, one must look to the ideas of those who drew up the deed, and interpret it accordingly. Regarding the meaning of terms, common usage guides. Interpretation leading to absurdity should be rejected. Absurdities would likely include contradiction of one portion of a treaty to another portion rendering it inconsistent or invalid. In terms of a rule relating to interpreting the no-

Note the similarity of the Restatement's criteria for treaty interpretation as compared to De Vattel's analysis discussed herein (compare the general maxims and other rules required by the fifth maxim infra text accompanying notes 112-27; see also De Vattel, supra note 86, at 267-74 (establishing 10 more specific rules of treaty interpretation similar of the Restatement Second as articulated below):

Criteria for Interpretation:

1) International law requires that the interpretive process ascertain and give effect to the purpose of the international agreement which, as appears form the terms used by the parties, it was intended to serve. The factors to be taken into account by way of guidance in the interpretive process include:

(a) the ordinary meaning of the words of the agreement in the context in which they are used;
(b) the title given the agreement and statements of purpose and scope included in the text;
(c) the circumstances attending the negotiation of the agreement;
(d) drafts and other documents submitted for consideration, action taken on them, and the official record of the deliberations during the course of the negotiation;
(e) unilateral statements of understanding made by a signatory before the agreement came into effect, to the extent that they were communicated to, or otherwise known to, the other signatory or signatories;
(f) the subsequent practice of the parties in the performance of the agreement, or the subsequent practice of one party, if the other party or parties knew or had reason to know of it;
(g) change of circumstances;
(h) the comparability of alternative interpretations of the agreement with (i) the obligations of the parties to other states under general international law and other international agreements of the parties, and (ii) the principles of law common to the legal systems of the parties or of all states having reasonably developed legal systems;
(i) comparison of the texts in the different languages in which the agreement was concluded, taking into account any provision in the agreement as to the authoritiveness of the different texts.

RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES, § 147 (1965).

96. Id. at 247
97. Id. at 248.
98. Id.

99. See id. This is an old concept forming the legal Latin phrase omnis interpretatio si fieri potest ita fienda est in instrumentis, ut omnes contrarietatis amoveantur, or "[e]very interpretation, if it can be done, is be so made in instruments that all contradictions may be removed." BLACK'S LAW DICTIONARY 1087 (6th ed. 1990).
sovereignty provision of the 1967 Space Treaty, interpretations should be
guided by the "reason of the . . . treaty."100

According to De Vattel, there is one main exception to these rules. This exception is analogous to rebus sic stantibus, termed by De Vattel in this instance as conventio omnis intelligitur rebus sic stantibus.101 Recall rebus sic stantibus: That state of things alone, in consideration of which promise was made, is essential to the promise; and it is only by a change in that state, that the effect of the promise can be lawfully prevented or suspended.102 Therefore, if reinterpretation of the 1967 Space Treaty's no-sovereignty provision cannot pass analysis under the rules of treaty interpretation, the exception to the standard rules on treaty interpretation remains. But first, the determination of whether the no-sovereignty provision can be reinterpreted.

a. First General Maxim: It Is Not Allowable to Interpret What Has No Need of Interpretation103

The no-sovereignty provision probably has plenty of room for interpretation. Note the clause again: "outer space, including the moon and other celestial bodies, is not subject to national appropriation by claim of sovereignty, by means of use or occupation, or by any other means."104 The first part of Article II makes clear that all space objects — moons, asteroids, comets — and even empty space itself, is the target of the action or command. Issues will arise if objects are removed, such as by mining or some other sort of extraction. The words "is not subject to national appropriation" are vague. For example, appropriation could mean to include a variety of celestial body utilizations.105 It could mean merely physical occupation or any other sort of taking.106 However, the words have a qualifier, by claim of sovereignty, by means of use or occupation and by any other means must certainly be descriptive of claim of sovereignty because they define possible modes of claiming sovereignty. Thus, a taking in the guise of a national taking — a national control at some level over outer space or any celestial body is prohibited. These

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100. DE VATTEL, supra note 86, at 255.

101. Id. at 261-62. The Restatement has the same exception. See RESTATEMENT (SECOND) supra note 95, § 153 cmt. ("[Section 153] is often referred to as the doctrine of rebus sic stantibus.").

102. Id.

103. Id. at 244.

104. 1967 Space Treaty, supra note 21, art. II.


106. Id.
types of takings or appropriations are described with very broad, over-inclusive terms. The provision basically in a sense states that states may not exercise any control over empty space or any celestial body.

In a strict sense, this clause has already been violated in the past, and will certainly be violated in a direct way in the future. Further it is impossible not to violate the provision. The Apollo lunar landing for a time took direct control by the United States of a very small portion of the Moon for a very small amount of time. Realistically, even a strict interpretationist of the no-sovereignty provision would probably not object. Although the United States placed its flag there, it made no claim of sovereignty—it was merely symbolic. However, future plans will do the same, but the operation will be larger and will last over a longer period of time. What would a strict no-sovereignty provision interpreter say then?

The coming international space station\(^{107}\) will in effect be taking up a portion of empty space by use, occupation, and any other means—although under the jurisdiction of a conglomerate of states instead of one as the clause seems to semantically direct. If empty space is not clearly demonstrative, imagine the implications of a lunar or Martian colony. Those endeavors would undoubtedly challenge the no-sovereignty provision. For one, it would be somewhat permanent. Even if it only lasted for a few months or years, the effect would be taking a portion of the Moon under United States claim of national sovereignty according to the plain language of the Treaty. At first, retention of United States jurisdiction would be less problematic if the first stage of the lunar colony was launched from Earth. Then the vehicle as it first becomes a colony could arguably retain a ship/vessel type of national jurisdiction consistent with Article VII of the Space Treaty. However, gradually the line will become more obscure as additional modules are built and connected to the original earth-launched vehicle or as the original vehicle becomes entrenched into the lunar surface. When does it stop becoming a lunar vehicle and become a colony? Once it becomes a colony, does Article VII cover those types of situations? Complicating matters further, what would be the impact of replicating nanotechnology—a technology that does not mine the Moon, but rather, converts lunar material into itself?

Thus, a situation develops where maritime-vessel type jurisdiction might exist at the first launched component, but the component replicates and converts non-sovereign material into sovereign material. Macrotechnological replicating facilities likely could be classified as an initial space craft, but the more probable implementation of nanotechnology is more difficult. Nanotechnology functions at a molecular

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107. See supra note 28 (bilateral agreements regarding space station).
level. Would the introduction of nanotechnology on the Moon likely be classified as a *space craft*, a man-made type of pseudo-biological substance, or something else entirely?

Most commentators, space law theorists, and third-world interests have predicted similar ambiguity in the 1967 Space Treaty and its difficulty in applying to new realities of space development such as celestial mining, therefore believing the 1967 Space Treaty requires revision or that a new treaty should be implemented. The 1979 Moon Treaty is an example of some of those concerns. Although maritime law analogy does not effectively address space issues such as colonization,\(^{108}\) Antarctic law could foreseeably answer questions. Antarctica is a sovereignless territory and many countries have installations not unlike *colonies* within which they retain national jurisdiction. However, adjudication would only uncover and implement such analogy because no reference to these procedures or applicable Antarctic law is mentioned in any space treaty, much less the 1967 Space Treaty. Moreover, some other issues remain. For example, when celestial mining becomes feasible, will mining countries have to split the profits? Once a substantial portion of a celestial body has the potential to be mined or begins to create large profits, could third-world nations cite to the preamble and article I asserting that regardless of their economic or technological status that they should be entitled to the benefits of the exploitation?\(^{109}\)

In conclusion, the 1967 Space Treaty's no-sovereignty provision does include much vagueness worthy of interpretation. This vagueness has been demonstrated by both semantics and potential application to old and new scenarios. At the time the 1967 Space Treaty was formed, mining celestial bodies was viewed as a near-future event. However, now celestial property issues will be imminent within the next ten or twenty years and the time for reinterpretation is ripe.


109. One might argue that third-world nations should have access to one or a few exploiting nations’ space industry profits or other rewards. However, since space investment carries much risk and expense in comparison with other terrestrial investments, entities would even be less likely to invest knowing they would have to split their hard-earned rewards with nations who have stood idle. This argument is especially strong when space industry is in its infancy. Otherwise, *no nation* may benefit from the rewards of space industry and humanity in general will suffer a loss. On the other hand, if the United States or other conglomerate of nations maintains a high-rewarding space industry for many years harming other nations economies with some sort of monopoly, certainly adjustments may have to be made. But the key is getting hard-to-start industry started, especially an industry that could be crucial for the survival of mankind.
b. Second General Maxim: If He Who Could and Ought to Have Explained Himself Has Not Done It, It Is to His Own Detriment

There is little analysis under this second maxim. If the United States, or any other nation, had a different interpretation or desire for property rights in space, there was no evidence supporting this notion. Rather, almost all were strictly against such notions. Even if there was any sort of prevailing view on property right concepts, it would be to their own detriment and thus, ineffective as an excuse for reinterpreting the Treaty.

c. Third General Maxim: Neither of the contracting parties has a right to interpret the treaty according to his own fancy

If the United States was the only nation to benefit from a liberal view of the 1967 Space Treaty’s no-sovereignty provision, this third general maxim would negate United States efforts at reinterpretation. However, as stated above, the reinterpretation should favor all nations, not just the United States. But many third-world nations would certainly view the interpretation as only favorable to the space faring nations because of the economic and technological status of third-world nations. While such status prevents them from exploring and exploiting space, it is not a valid argument in determining the why of a nation’s own fancy. Thus, despite potential third-world arguments, a pro property interpretation asserted by, for example, the United States, would not necessarily be to its own fancy.

The interpretation would benefit all nations, especially when third-world nations catch up technologically and economically. Further, the lead taken by the space faring nations would make it easier for third-world nations to enter the same endeavors. Today’s space industry is a firm example. Once, several nations took a lead in certain industries such as telecommunications and the commercial launch industry, third-world nations have entered and are becoming competitive; today, Europe takes a greater market share of commercial launch contracts over the United States. Third-world nations reap the benefits of remote sensing and the Global Positioning System.110 Future space industry would be no different. The creation of Solar Power Satellites111 would fuel the nations most in

110. The Global Positioning System, (hereinafter GPS), is a constellation of satellites formerly used by the military that can be used to pinpoint any object’s location on Earth within only a few meters. See Twibell, supra note 1, at 35. BMW and Mercedes Benz, for example, use the GPS systems for guidance systems in their cars which have detailed road maps with extreme accuracy which keep track, via satellite, exactly where the car and driver are on the maps. Id.

111. Solar Power Satellites are technologically feasible satellites that can gather larger amounts of sunlight in space than on Earth and transmit the energy via microwave back to Earth
need — third-world nations. Third-world space craft manufacturers could contract to less expensive space craft or stations to be made in space by the space faring nations. Hence, space could be more accessible to all nations.

d. Fourth General Maxim: What Is Sufficiently Declared Is to Be Taken for True

This fourth general maxim analysis includes many arguments in the first general maxim — if “it is sufficiently declared to be taken for true” it is probably not overly vague, and therefore, not necessary to interpret. However, if something is vague, it is difficult to take it for true. While Article II states that there shall be no claim of national sovereignty and this should be taken for true, it does not indicate what degree of sovereignty should exist, such as in the case of colonization. Therefore, if Article II cannot apply to a given situation with certainty, how can it be taken for true? This is where any effort at reinterpretation will primarily lie for it is the near-presence of space ventures and property issues for which reinterpretation will be sought. However, if any reinterpretation should happen to include claims for sovereignty where it was claimed a nation could acquire a portion of the Moon and call it its own, Article II is clear on this issue and it would certainly be taken for true that a nation could not make such a claim.

e. Fifth General Maxim: The Interpretation Ought to Be Made According to Certain Rules

It is not disputed that the interpretation of the no-sovereignty provision commanding that no nation shall appropriate celestial property is a valid interpretation (evidenced by lack of dispute in scholarly work over this interpretation), 112 but does an interpretation allowing national appropriation violate certain rules? It probably does not.

For one, interpreting the no-sovereignty provision to include some level of national appropriation would violate the 1967 Space Treaty’s Preamble and create absurdity and contradictions within the Treaty. 113 The preamble states that “space exploration and use of outer space should be carried out for the benefit of all peoples irrespective of their economic or scientific development.” 114 This seems to contradict any notion of the United States or any other major space power taking a portion of a moon or asteroid and reaping the rewards of their resources. Thus, this use of

\footnote{112. \textit{But see} Reynolds, \textit{supra} note 2, at 241.}

\footnote{113. \textit{See} supra text accompanying notes 96-100.}

\footnote{114. \textit{See} 1967 Space Treaty, \textit{supra} note 21, preamble.}
outer space would likely be construed as not benefiting peoples in lower economic and scientific development and therefore violative of the provision.

Secondly, Article I would be contradicted. Article I transforms the portions of the Preamble immediately discussed above into commands. It also states that all areas of “the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind on the basis of equality.” A major mining operation on the Moon retaining jurisdiction and ownership over mined material certainly would easily entertain arguments that other states were being deprived of their use and exploration of that area. The larger the colony and the more lucrative the industry, the more likely the argument would prevail. Thus far, the interpretation creating limited property rights would seem to contradict other provisions in the Space Treaty, violating general rules of treaty interpretation and the notion of omnis interpretatio si fieri potest ita fienda est in instrumentis, ut omnes contrarietaties amoveantur. However, this analysis is purely academic - using general rules of treaty interpretation, semantics, and research. Some space law academics disagree with this conclusion of the incompatibility of property rights and the 1967 Space Treaty.

Professor Glen Reynolds believes that a minimal level of property rights can exist as they do with the res communis character of the oceans. He asserts that a state can recognize national jurisdiction over commercial recovery of mineral resources without violating accepted principles of international law. This jurisdiction does not include any claim of sovereignty over areas or resources in an area, only extracted resources and the freedom to explore. Reynolds proceeds to assert that an analogous scheme applied to outer space “would not constitute the extension of sovereignty to outer space” nor does it “even constitute the creation of full-fledged property rights.” Rather, such right would be termed “an extraction right” — a “mineral right, or right of use.” Therefore, the no-sovereignty provision under Reynolds interpretation

115. See id., art. I.
116. "The exploration and use of outer space, including the moon and other celestial bodies, shall be carried out for the benefit and is in the interests of all countries, irrespective of their degree of economic or scientific development and shall be the province of all mankind." Id.
117. Id.
118. Reynolds, supra note 2, at 234; see supra text accompanying notes 79-81.
119. Id.
120. See id.
121. Id.
122. Id.
simply mandates that states "refrain from acts that involve national appropriation" and that "methods of creating incentives for space development involving [certain levels of property rights] and even involving methods in which enterprises do acquire absolute title to land."123

Despite Professor Reynold's valid assertions, it is very likely other nations would disagree especially since such an interpretation of the no-sovereignty provision creating some level of property rights in space would seem to violate at least three of the general maxims on treaty interpretation. However, there still may be a chance for such interpretation to prevail, and this is the exception — omnis intelligitur rebus sic stantibus.124 The rebus sic stantibus failed in the analysis above regarding the Treaty as a whole, but would it prevail for only a particular portion of the Treaty? Probably not.

The reason behind this conclusion is that if there was a violation or a need to reinterpret the 1967 Space Treaty, the no-sovereignty provision would probably be the only culprit. It would be difficult to imagine many violations of the Treaty's other provisions with their humanitarian and cooperative values that primarily encompass the rest of the treaty. Furthermore, most nations encourage cooperation125 and space exploration for the whole of mankind.126 Much of this reasoning is often based on the need to combine international ingenuity, technology, and financing for expensive space projects never embarked on before. A simple change of the Cold War climate might invoke some nations to argue De Vattel's warning regarding the use of rebus sic stantibus:

[W]e ought to be very cautious and moderate in the application of the present rule; it would be a shameful perversion of it, to take advantage of every change that happens in the state of affairs, in order to disengage ourselves from our promises were such conduct adopted, there could be no dependence place on any promise whatever.127

Therefore, the analysis of the no-sovereignty provision in respect to this special case of rebus sic stantibus has the same ill fate of the rebus sic

123. Reynolds, supra note 2, at 234; see supra text accompanying notes 79-81.
124. See supra text accompanying notes 86-102 (discussing the exception to the general rules of treaty interpretation).
125. See supra notes 42-43 (treaties and bilateral agreements supporting international cooperation and freedom of space exploration in their preambles).
126. See, e.g., supra note 28.
127. DE VATTEL, supra note 86, at 261.
stantibus applied to the Treaty as a whole since the no-sovereignty provision is the only provision likely to be the provision violated.

f. Conclusion and General Observations for Vaccine II

There is certainly much room for interpretation of the 1967 Space Treaty's no-sovereignty provision as allowed by the general maxims of international law. However, the particular interpretation that includes a certain level of property rights is not so compatible with certain rules of treaty interpretations under the fifth general maxim. The one exception to these general rules, rebus sic stantibus, shows little likelihood for success either. It fails for the 1967 Space Treaty in general and for the no-sovereignty provision by itself because it is the only portion of the 1967 Space Treaty that would need reinterpretation or likely to be affected by the substantial change in the state of things. Furthermore, it is unneeded because of the withdrawal provision. Thus, this vaccine does not provide the answer.


This vaccine, because of the 1967 Space Treaty's withdrawal clause,128 is irrelevant in regards to the legality and international perception of whether it was a proper withdrawal from the 1967 Space Treaty. If no such provision existed, the United States could only legally withdraw from the Treaty if other parties had breached the Treaty,129 or only if such breach was substantial.130 Some authorities believe a violation of a treaty by one party never terminates the obligations of the other parties no matter how significant the violations.131 Other authorities believe nations always have an absolute right to terminate a treaty no matter how significant the violation.132 Today, there appears to be no grounds for the United States to terminate its obligations under the Treaty under any sort of analysis of these schools of thought. Absolutely no asserted breaches of the 1967 Space Treaty exist to even fall within the most liberal category of permissible treaty denunciation. However, contractually under Article 128. See 1967 Space Treaty, supra note 21, art. XVI; see also supra text accompanying notes 82-85.

129. See BHEK PATI SINHAI, UNILATERAL DENUNCIATION OF TREATY BECAUSE OF PRIOR VIOLATIONS OF OBLIGATIONS BY OTHER PARTY 1 (1966).

130. Id. at 2.

131. Id.

132. Id.
XVI, any signatory can withdraw from the Treaty. As previously discussed, this is why treaty denunciation is becoming less common.133

Thus, the United States can legally denounce the Treaty. That is not the issue.134 The issue is the potential impact and negative repercussions an Article XVI withdrawal would have on the international community.135 If the United States properly withdrew from the 1967 Space Treaty, it may not be free to act in violation of the Treaty's principles. The political consequences of a proper unilateral withdrawal would not be the withdrawal itself, but fear in the international community over what the United States might do once it felt it had a right to allocate itself celestial property. Nations today, including the mighty United States, operate less in a vacuum than they did years ago. Every state action creates ripples in the international community at an extremely higher rate than years ago. Nations do not act or fail to act based on the military repercussions of their actions. States are intricately tied transnationally via communication, economics, and government. Note the United Nations' participation in global conflicts since the breakup of the Soviet Union and the formation of the European Economic Community. The United States must be very careful when it takes any act that might have negative international repercussions, especially with something such as space activities which are so expensive and require substantial international cooperation.

Additionally, this Treaty and its accompanying principles may have become ingrained in international law to such a degree that they have become universally accepted as a rule of positive international law or even customary international law.136 Finally, since most multilateral agreements have embraced the 1967 Space Treaty in their Preambles, the United States withdrawing from the 1967 Space Treaty might cause concerns that the United States might be withdrawing or disaffirming its other agreements that refer to the treaty.

133. See supra text accompanying notes 82-83.

134. For some of the issues arising from denunciation where there is no withdrawal provision, see SINHAI, supra note 129, at 2-3 (e.g., "Are all types of treaties subject to the rule of unilateral denunciation?"; "Does a party to the treaty have the right or prerogative to act as the sole judge and interpreter of the occurrence, the nature and consequences of a violation of an obligation or part of another treaty?;" and, "Does an innocent party have the right to abrogate the whole of a treaty, or only that part which is affected by violations?").

135. See Reynolds, supra note 2, at 233 ("[T]he possibility of the United States simply repudiating the Outer Space Treaty's no-sovereignty provision . . . would probably lead to ugly international repercussions.") However, Reynolds leaves to speculation exactly what those repercussions are.

136. See supra text accompanying note 44; Weaver, supra note 108, at 230 (suggesting some scholars assert that "the principle of freedom of outer space was 'universally accepted as a rule of positive international has and has never been challenged by any state' [except for geostationary orbit claims of empty space] by equatorial countries").
a. Conclusion and General Observations of Vaccine III

Unilateral denunciation from a legal standpoint is not problematic for the United States provided it uses Article XVI for withdrawal. However, non legal repercussions may ensue from the international community. These repercussions would not be in the United States best interest in not only space commercialization, but in other non related realms as well. Any nation embarking on space ventures likely requires international support and cooperation. Further, withdrawal does not implement a regime to govern property acquisition or questions concerning liability of intelligent machines, replicating technology, or nanotechnology utilization in space. The United States might certainly be negatively affected by another nation's use of such technology. Every state has an interest in certainty and a structured legal environment in space. Treaty withdrawal accomplishes none of those things; it only removes barriers to property right acquisition.

B. Multilateral Action


This vaccine addresses the issue of whether the 1967 Space Treaty can be simply ignored and another treaty passed that addresses the needed changes in international space law. Can this be done? Would it be proper for addressing needed changes in space law? It can be accomplished, however, the key is getting the same parties who have signed the 1967 Space Treaty to sign the new treaty.

If they are the same parties, they are clearly competent and in the position to address the problems of the 1967 Space Treaty.

They must also make clear their intentions regarding the prior treaty. Otherwise, the 1967 Space Treaty might remain in effect. The 1967 Space Treaty has ninety-eight signatories and if enough support was garnered to draw up a new treaty creating property rights, enough support can be garnered to amend the 1967 Space Treaty.

137. Henkin et al., supra note 52, at 505.

138. "Where the parties to the two treaties are identical, there can be no doubt that, in concluding the second treaty, they are competent to abrogate the earlier one. ..." Id.

139. Id.

140. Certain questions must be answered to determine whether the first treaty remains in force. "This question is essentially one of the construction of the two treaties in order to determine the intentions of the parties with respect to the maintenance in force of the earlier one." Id.

141. See Twibell, supra note 1, at 8.
If only some of the parties create the new treaty, it will remain questionable whether the no-sovereignty provision remains in effect.142

a. Conclusion and General Observations of Vaccine IV

Thus far, Vaccine Four appears to be the most valuable in implementing the needed changes in international space law. A document can simply be created and passed that embodies the needed changes. This creates some difficulties such as time constraints and may take some great motivation to suddenly get the document to pass international scrutiny before implementation of a high-level space industry or the advent of nanotechnology. However, it provides the needed results. The main problem with this vaccine is that the 1967 Space Treaty has permeated international law at many levels via international agreement preambles and possible international positive and customary law. Therefore, the 1967 Space Treaty itself will inevitably need to be addressed.

2. Vaccine V: Amendment of the 1967 Space Treaty143

Vaccine Five does not suffer the same fate of the previous vaccines. It is the most rational, although it will perhaps take more time for generating its formulation and international consensus as was the difficulty in the passage of a subsequent treaty (Vaccine Four). It may even be more difficult because the no-sovereignty provision will be addressed directly and the property rights issue will be directly subject to criticism, especially with the large number of signatories to the Treaty. However, in the long-run, it could be less time consuming because it could be implemented much more efficiently than the United States trying to enforce its vision of space economic theory via internationally destabilizing means such as withdrawal or non-compliance. Furthermore, time may not be a crucial factor as perhaps normal treaty amending processes — the formation of the 1967 Space Treaty was rather immediate. It formed through a series of resolutions immediately after the launch of Sputnik. Hence, sudden advances in technology could make the amendment process much faster. Since amendment is likely needed,144 an increased or improved likelihood of the viability of space enterprise could easily generate resolutions or actual binding international agreements addressing property right issues and developing a legal regime. It must be conceded that the principle argument against amendment and the drive toward

142. If the signatories did not intend to terminate or suspend the earlier treaty, the first treaty has the priority of inconsistent obligations. See id. at 506.
143. See HENKIN ET AL., supra note 52, at 456.
144. See supra text and conclusions accompanying notes 60-142.
finding other means for seeking change in international law is that it gives grave disincentive to space industry now. Industry would be forced to wait for legal development, or at least lack of legal incentive would slow space technological development or industrial proliferation. However, amending the 1967 Space Treaty solves dilemmas unanswerable by any other vaccine. It would directly address the viral infection of corpus juris spatialis and lend an opportunity for instilling a legal regime and certainty into law without simply creating a void by ridding international law of the Space Treaty’s Article II. If such great effort is taken to reinterpret, withdraw, repudiate, or create an entirely new treaty, that effort needs to be directed at all the needed changes.

Unprotected property rights in space could cause more havoc for space investors than no property rights at all. The United States might tell investors to “go ahead and claim half of the Moon, but beware we will have to militarily protect you because the rest of the world does not recognize your rights.” There could also be a mad rush toward staking claims in space. Moreover, legal inaction and fast technological development might cause a mad rush of squatters in space regardless of international legal prohibitions.146

Economic development in space will likely require a structured environment such as the structure and regulation of industry terrestrially. Amending the 1967 Space Treaty by removing the no-sovereignty clause, elaborating it or perhaps removing it and creating another treaty, solves many problems in implementing desired changes in space law. These qualities make it the best vaccine available. It has its problems in not creating motivation until amendment is completed and it is slow, but there may be methods to improve the efficacy of this vaccine and ridding it of its drawbacks. That key is United States domestic policy.

3. Improving the Efficacy of Vaccine Six — A Vigorous United States Domestic Policy147

Unlike Congress and state legislatures, the United Nations does not have an analogous lobbying structure to implement legislative change. People are not salaried solely for the purpose of wining and dining United Nations ambassadors to have their views affect United Nations decision making. United Nations lobbyists are the states themselves (although they may be acting on behalf of internal or domestic lobbying interests). The

145. Referring to the four previous vaccines beginning with the simplest to accomplish.
146. See McKendree, supra note 52.
147. See Twibell, supra note 1, at 53, n.376 (stating that strong national policy may be the key for changing space law and that some commentators outside the legal field firmly advocate this course of action).
United States could be a lobbyist for the space and property right cause by promoting its own space industry and preparing to do so. Such maneuvers of the world's largest economic and technological giant would not go unnoticed, rather, it would send a message of an impending need for a new international space regime. Other nations would observe the United States preparing for massive space ventures that could question the 1967 Space Treaty's no-sovereignty provision. They would then be extremely motivated to act upon their concerns and address property right issues before the United States foreseeably quashes their opportunities — perceptively to them anyway. Further, other nations would necessarily and inevitably work in conjunction with the United States in its space endeavors, paving the path further or international legal change.

VI. CONCLUSION — CIRCUMNAVIGATING INTERNATIONAL SPACE LAW

When the early space explorers dreamed of traveling from one side of the globe to the other, they envisioned vast riches and short navigable routes to reach those riches. Christopher Columbus sought a shortcut to India, only to have found the longest route to what was really India. Magellan took a route through the Straits of Magellan and the Pacific Ocean only to find the Pacific Ocean was eighty percent larger than he thought, resulting in Magellan practically circumnavigating the globe. Captain Cook's voyages took him around the world and he took no shortcuts. He was a great navigator and knew the oceans well. His voyages were very profitable. In this paper, shortcuts were sought as well in finding the best direct route to needed legal change in international space law. Similarly to the early explorers, the best route was the direct route often requiring a long path, or rather, circumnavigation of the world. Some of the shortcuts, as the shortcuts sought by the ancient ocean explorers, may really be the longest route to the desired destination. Amendment of the 1967 Space Treaty may take us the long way around the world, but it is the most direct route. Albeit the route is long and hard, it is the best route for instituting needed legal change in the international corpus juris spatialis. Further, it will be strong United States policy that persuades Queen Isabella to fund and make the long voyage a reality — a voyage that will not only bring economic and humanitarian prosperity to Portugal or Europe, but to all the world.

149. See id. at 278-89.
150. See id.
DEPORTATION OF CRIMINAL ALIENS AND THE TERMINATION OF JUDICIAL REVIEW BY THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

Orville McKenzie *

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I. INTRODUCTION

Perhaps the most intellectually challenging legal question which has baffled jurists might have been answered by the Anti-Terrorism and Effective Death Penalty Act of 1996.¹ It is the question of whether Congress has the power to eliminate all the subject matter jurisdiction of article III courts.² Congress took a bold step in 1996 with the Anti-

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² "The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish . . . ." U.S. CONST. art. III, § 1.
Terrorism and Effective Death Penalty Act, which eliminates all judicial review of a final order of deportation when an immigrant is deportable by reason of the commission of a criminal violation. Obviously, immigration law goes beyond the courts of any nation, and in fact affects the international community in the form of migration and forcible repatriation.

This Comment examines this constitutional question from an immigration perspective and breaks the analysis down into four sections to give the reader a better means to understand this complex, yet ever changing area of law. Section two provides rudimentary knowledge about federal court subject matter jurisdiction and thus leads into the second section which enumerates criminal ground for deportation in Australia, France, Canada, England, and the United States. As will be evident from the discussion infra, all five countries have different standards for deportation of criminal aliens. The homogeneous characteristic among Australia, France, Canada, and England is that a detached judiciary has jurisdiction to review orders of deportation. The exception is the United States. Is the American policy wise? Why is it that expeditious deportation of criminal aliens trumps the procedural safeguard of having one's case reviewed by a detached and independent judiciary?

Section four provides an in-depth analysis of the constitutionality of the Anti-Terrorism and Effective Death Penalty Act as it relates to the truncation of federal court subject matter jurisdiction. The impetus for the Anti-Terrorism and Effective Death Penalty Act was the Oklahoma City bombing. Many lives were lost, people felt insecure, thus they concluded

4. Id.
6. Representative Schumer stated,

Mr. Speaker, in America there have always been paranoid extremists, . . . I have sat face to face with the victims of terrorism and the families of the victims of terrorism, from Pan Am 103 through the World Trade Center bombing to the atrocity in Oklahoma City. I have met them all. When I compare that pain and that danger to the exaggerated rhetoric I hear from extremists about this bill, I fear for America and I fear for the lives of ordinary Americans.
without evidence that the Oklahoma City bombing was the work of criminal aliens. This consensus knew no boundaries, espoused by both black and white, bourgeoisie, and proletariat.

It is difficult to take a dispassionate look at the Oklahoma City bombing because criticism of remedial measures might make the critic a Judas among us. Taking that for what it is worth, can one securely say that a law which promises deportation if one engages in terrorist activities has even one iota of deterrence effect to a person who has an ardent passion to disrupt the American diaspora? Can we say that criminal alien X will no longer blow up a building or release poisonous gases because of the severe punishment of deportation? It would be logical to answer no to these questions with the explanation that deportation is irrelevant because most likely the commission of such crimes are accompanied with the penalty of death. Now it becomes clear that deportation is not a threat to the terrorists but a threat to immigrants who, for whatever reason, commit a crime punishable by one year or more.


7. Under the heading Middle-Eastern Suspect/Witness Sought, the author wrote:

   At least three suspects/witnesses have reportedly been tentatively identified by the federal bombing task force and one or more may have been taken into custody. Several sources are reporting that three males of “middle-eastern extraction” are being sought in Texas and Oklahoma, and that some witnesses are being questioned at this hour by federal officers . . . .


Clark Staten, the Executive Editor of ENN noted in his editorial perspective:

How could any number of these “experts” quickly jump to the conclusion that the perpetrators in Oklahoma City were “Moslem Extremists”? Most of the law enforcement officials and counter-terrorist analysts, interviewed by ENN, indicated that it was a matter of historic and analytical perspective not a quest to justify the condemnation of any ethnic group. Some, including ERRI, said that they had considered a domestic connection to the Waco Branch Davidian incident because of the date of the event, but had discounted it as details of the type of bomb and the tactics used were discovered. Most said that the circumstances surrounding the deadly atrocity in Oklahoma were just too similar to those seen in Lebanon, Israel, Egypt, England, and elsewhere to lead them to believe that this was a domestic attack....


9. The United States Sentencing Guidelines provide in part that, “[t]he Commission has concluded that in the absence of capital punishment life imprisonment is the appropriate punishment for premeditated killing. However, this guideline also applies when death results from the commission of certain felonies. Life imprisonment is not necessarily appropriate in all such situations.” (visited July 27, 1997) <http://www.ussc.gov/guide/ch2ta.htm>.
The final section points out the unfair effects the statute will have on immigrants and the possibility and, most likely, certainty of abuse. The past is not necessarily reflective of the future, but the United States has a legacy of treating its own unfairly. Who will protect the immigrants?

II. FEDERAL COURT SUBJECT MATTER JURISDICTION

The Supreme Court of the United States has original jurisdiction in all actions in which ambassadors, public ministers, consuls, or vice consuls of a foreign state are parties." The Supreme Court also has original jurisdiction in all controversies between the United States and a state, and all actions by a state against the citizens of the United States or against aliens. Pursuant to Article III of the United States Constitution, Congress promulgated title 28 section 1251 of the United States Code. Congress

10. *Interrmarriage prohibited; meaning of term "white person"*—It shall hereafter be unlawful for any white person in this State to marry any save a white person, or a person with no other admixture of blood than white and American Indian. For the purpose of this chapter, the term "white person" shall apply only to such person as have no trace whatever of any blood other than Caucasian; but persons who have one-sixteenth or less of the blood of the American Indian and have no other non-Caucasian blood shall be deemed to be white persons. All laws heretofore passed and now in effect regarding the intermarriage of white and colored persons shall apply to marriages prohibited by this chapter.


*Colored persons and Indians defined*—Every person in whom there is ascertainable any Negro blood shall be deemed and taken to be a colored person, and every person not a colored person having one fourth or more of American Indian blood shall be deemed an American Indian; except that members of Indian tribes existing in this Commonwealth having one forth or more Indian blood and less than one sixteenth of Negro blood shall be deemed tribal Indians.

Id. § 1-14.


12. In all cases affecting ambassadors, other public ministers and consuls, and those in which the state shall be a party, the Supreme Court shall have original jurisdiction. In all other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

Id.

13. (a) The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more states. (b) The Supreme Court shall have original but not exclusive jurisdiction of: 1) All actions or proceedings to which ambassadors, other public ministers, consuls, or vice consuls of foreign states are parties; 2) All controversies between the United States and a state; 3) All actions or proceedings by a state against the citizens of another state or against aliens.
has the power under article III of the United States Constitution to expand or contract the subject matter jurisdiction of the federal courts within the limitations of article III. This plenary power was unequivocally exercised when Congress gave the Supreme Court the right to issue writs of certiorari to hear appeals on final judgments involving federal questions.

Federal courts obtain their jurisdiction when the cause of action involves a federal question, or when the cause of action is based upon complete diversity. Federal courts inherently have limited subject matter jurisdiction. In Owen, Justice Stewart writing for the majority said, "It is a fundamental precept that federal courts are courts of limited jurisdiction. The limit upon federal jurisdiction, whether imposed by the Constitution, or by the Congress must be neither disregarded nor evaded." Moreover, even the federal courts themselves have espoused the idea of their limited jurisdiction by imposing self-limitation. In Ankenbrandt, the Court said that even though there may be subject matter jurisdiction by virtue of diversity, the federal courts will not hear cases involving divorce, child support, or alimony. Thus the long stance of limited federal jurisdiction is deeply rooted in the adjudicatory tradition of the federal courts.


15. The Supreme Court may review cases from the court of appeals by the following methods: 1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree; 2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.


19. Id. at 374.


21. Id.

22. "[T]he domestic relations exception, as articulated by this Court since Barber, divests the federal courts of power to issue divorce, alimony, and child custody decrees." Id. at 703, 112 S. Ct. at 2214, 119 L.Ed 2d at 469.
The United States Congress has plenary power over immigration which arguably comes from article I of the Constitution, or which emanates from the infinite number of penumbras to the Constitution itself. This is manifested by the creation of the Immigration and Naturalization Service, an executive agency which determines the number of aliens that can legally enter the United States. It has been said that Congress gives and Congress takes. This holds true for immigrants who have committed crimes of moral turpitude by virtue of deportation. "Any alien who is convicted of a crime involving moral turpitude committed within five years or ten years [in the case of a lawful resident] after date of entry, and is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable."

III. CRIMINAL GROUNDS FOR DEPORTATION

A. Australia

An immigrant who has committed a criminal offense punishable for a period of one year or more is deportable from Australia as mandated by the Migration Act of 1958, section 13(a). While the Australian courts have recognized that, "the Australian community may take the view that it prefers not to accept the criminal into its society," the courts have not rigidly followed this rule. This holds true although the S.J. court noted that "the decision to deport may be made, not because the criminal represents any significant future risk to the Australian community if he remains . . . ." The deportation process for a criminal violation seems to take on a two-step process in Australia. First, the criminal violation must be punishable for a period of one year or more. Second, the court must analyze whether the violation was a violent or nonviolent crime. If the offense was violent, "the damage to the community that would flow from

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23. "The Congress shall have the power . . . [t]o establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States." U.S. CONST. art. I, § 8, cl. 4.


27. Id.

28. Id.

29. Id.

30. Id.
recidivism is great and must weigh heavily in favor of deportation."31 However, if the crime was nonviolent such as false pretense, the order granting deportation will be revoked because there is "comparatively little damage likely to be suffered by any person in particular or by the community in general."32 This bifurcation between violent and nonviolent crimes seems to be rationally based on a wise policy decision because it would be safe to infer that violent criminals pose the most serious threat to the community. However, this form of analysis is absent from American jurisprudence.33 In fact, one could be deported from the United States for a nonviolent offense simply because it is punishable by one year or more.34 Thus a legal immigrant could be deported for voting in a federal election.35 It is simply wrong to conclude that Australia has the more preferable system. Deference and earned respect should be given to the American Legislatures for their policy rationale of excluding, and when appropriate deporting criminal aliens.

B. France

Criminal aliens are deportable from France when the alien’s presence on French territory constitutes a serious threat to public order pursuant to the Order (Ordonnance) of 2 November 1945 on the conditions for alien entry into and residence in France.36

31. Id.
34. "Any alien who at any time after entry has been convicted of a violation of [or a conspiracy or attempt to violate] any law or regulation of a state, the United States, or a foreign country relating to a controlled substance . . . is deportable."
35. Section 216 of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 states in part that:

[i]t shall be unlawful for any alien to vote in any election held solely or in part for the purpose of electing a candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House or Representatives, Delegate from the District of Columbia, or Resident Commissioner . . . . Any person who violates this section shall be fined under this title, imprisoned not more than one year, or both.

However, even though a criminal alien may pose a serious threat to public order or public credit, it does not automatically mean that the alien will be deported. For instance, an alien who is, 1) a minor under eighteen; or 2) an alien who can prove that he or she has been a resident of France for more than fifteen years; or 3) an alien who over the past twenty years has not been definitively sentenced to a term of at least one year’s imprisonment without suspension, or without several terms of imprisonment without suspension totaling at least one year, is not subject to deportation. Moreover, a person cannot be deported if deportation would result in degrading treatment or torture in the person’s home country. This comes with two exceptions. First, an alien “sentenced to an unsuspended term of imprisonment of any duration for an offense covered by section 4 and 8 of Act 73-548 of June 1973 concerning collective housing is deportable.” Second, except aliens under eighteen, an alien is deportable in a case of imperative urgency when it constitutes an absolute necessity for the security of the state or for public safety.

C. Canada

Criminal aliens are deportable from Canada pursuant to the Immigration Act of 1976 where: 1) the immigrant has been sentenced to more than six months imprisonment, and 2) five or more years could have been imposed for the criminal violation.

In early English common law, some foreign born nationals were classified as denizens. These are “aliens born, but who has obtained ex donatio regis letters patent to make him an English subject: a high and incommunicable branch of the royal prerogative.” Canepa v. Canada involved an alien claiming a denizen status. The Canepa court rejected the doctrine noting the absence of stare decisis, and espoused the idea that alien rights must be found under the Canadian Charter. The Canepa

37. Id.
38. Id.
39. Id.
40. Id.
43. Id.
44. Id.
45. Id.
court also noted that "[t]he most fundamental principle of immigration law is that noncitizens do not have an unqualified right to enter or remain in . . . [Canada]." This logically extends to the court's conclusion that deportation is not a punishment, and even if it was, it is not "cruel and unusual" because it is not excessive as to outrage standards of decency.

D. England

A person who is not a British citizen is subject to deportation from the United Kingdom if the Secretary of State finds that his deportation would be "conducive to the public good." The actual definition of what is "conducive to the public good" is unknown. However, House of Common paper 159 states that "each case will be considered in light of the relevant circumstances known to the Secretary of State . . . ." Furthermore, an alien ordered deported from the United Kingdom can only be heard to argue that his deportation violates a treaty in which England is a party if Parliament adopts the treaty. This is because "[t]reaties and declarations do not become [English] law until they are made law by Parliament."

In deciding whether to execute a deportation order, the Secretary of State must use every relevant factor known to him, including: age; length of residence in the United Kingdom; strength of connection with the United Kingdom; personal history, including character, conduct and employment record; domestic circumstances; the nature of the offense of which the person was convicted; previous criminal record; compassionate circumstances; [and] any representations received on the person's behalf . . . .

46. Id.

47. Id.


49. Id.

50. Id.

51. Id.

52. Imm. A.R. 277 (quoting House of Commons paper 156).
E. United States

Aliens who have committed "crimes of moral turpitude" are subject to deportation and exclusion from the United States. This is because crimes involving moral turpitude are regarded as evil, and persons committing such crimes have squalid moral sentiment towards the community. The logic behind deporting aliens who have committed crimes of moral turpitude stems from the notion that the United States was generous and overly benevolent in opening its borders to foreign nationals who have the opportunity to reap the benefits that the United States has to offer.

An alien who is recalcitrant to the laws of the United States shows disrespect to the American diaspora, and the establishment of civility. Such aliens who commit crimes of moral turpitude constructively relinquish all privileges to be domiciled in the United States. The crimes that have been traditionally held as "crimes of moral turpitude" within the meaning of United States immigration law all seem to be specific intent crimes. The only exception is rape, a general intent crime, which is also regarded as a crime of moral turpitude.

Prior to the enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996, aliens, whether convicted of a criminal offense or not, could appeal a final order of deportation to the federal courts. On April 24, 1996, Congress enacted the Anti-Terrorism and Effective Death Penalty Act. This Act truncates the federal court's power to hear


54. Bribery is a crime of moral turpitude, see United States v. Esperdy, 285 F.2d 341 (2d Cir. 1961), cert. denied 366 U.S. 905 (1961); Forger and Embezzlement are crimes of moral turpitude, Baer v. Norene, 79 F.2d 340 (9th Cir. 1935); Perjury is a crime of moral turpitude, United States v. Uhl, 70 F.2d 792 (2d Cir. 1934), cert. denied 293 U.S. 573 (1934); Murder is a crime of moral turpitude, Fong Haw Tan v. Phelan, 162 F.2d 663 (9th Cir. 1947), rev'd on other grounds 333 U.S. 6 (1947). But see Sallano v. Doak, 5 F. Supp; 561 (1933). Sex offenses are crimes of moral turpitude, Marinelli v. Ryan, 285 F.2d 474 (2d Cir. 1961). Even consensual sodomy is a crime of moral turpitude, Velez-Lozana v. INS, 463 F.2d 1305 (D.C. 1972); Tax offenses are crimes of moral turpitude, Costello v. INS, 311 F.2d 343 (2d Cir. 1962), rev'd on other grounds, 376 U.S. 120 (1964); Weapon offenses are also crimes involving moral turpitude, Re S 8 I & N Dec. (BIA 1959).

55. Specific intent designates "a special mental element which is required above and beyond any mental state required with respect to the actus reus of the crime." State v. Bridgeforth, 750 P.2d 3, 5 (Ariz. 1988).


57. Kladis v. INS, 343 F.2d 513 (7th Cir. 1965).

deportation cases on appeal in which the deportee has been convicted of a criminal violation. 59

IV. CONSTITUTIONALITY OF THE ANTI-TERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

The jurisdictional limitation section of the Anti-Terrorism and Effective Death Penalty Act of 1996, which will instigate fervent constitutional debate on the viability of immigration law, states in part that “[a]ny final order of deportation against an alien who is deportable by reason of having committed a criminal offense covered by section 241(a)(2)(A)(i), shall not be subject to review by any court.” 60

Noteworthy, and perhaps what can be termed as a troubling epiphenomenon, was an issue pointed out by Representative Velazquez. Representative Velazquez remonstrated about the fact that the Anti-Terrorism and Effective Death Penalty Act is rooted in a bill that was rushed through Congress without adequate deliberation to meet the anniversary deadline of the Oklahoma City bombing. 61 Surely the Act does not hide its meaning or purpose; 62 however, constitutionality of statutes are judged on the basis of whether rights guaranteed by the Constitution are deprived or unreasonably infringed, or whether Congress’ action is within the purview of the Constitution itself. 63

The intriguing question now becomes whether the Anti-Terrorism and Effective Death Penalty Act of 1996 is a valid exercise of Congress’ power pursuant to article III of the United States Constitution, or whether Congressional action usurps federal court subject matter jurisdiction. In Marbury v. Madison, Justice Marshall said that the Supreme Court of the United States is the final arbiter of the Constitution. 64 Thus, it is upon the established precedents of the Supreme Court that Congress’ actions must be judged.

59. Id.

60. Id.

61. 142 CONG. REC. H3612 (daily ed. Apr. 18, 1996). Representative Velazquez in disgust said, “Mr. Speaker, rushing this bill to the floor to meet a publicity deadline is irresponsible. Once again we are sacrificing our people to play election year politics. Americans and their civil rights are too important to allow this.” Id.

62. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945). Justice Learned Hand writing about deciphering the meaning and purpose of statutes wrote, “[I]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or objective to their meaning.” Id.


64. Id.
In *Ex Parte McCardle*, the Supreme Court explicated the limitations that can be placed on the federal courts' subject matter jurisdiction.\(^65\) *McCardle* involved a petitioner who filed for a writ of habeas corpus alleging unlawful restraint by the military force.\(^66\) The writ was issued and returned to the military commander. McCardle was not in the military but was held in the custody of the military because he had published articles allegedly incendiary and libelous. Upon a hearing, McCardle was remanded to military custody. McCardle appealed to the Supreme Court, and his case was heard before the Justices. Before the decision was rendered, Congress repealed the February 5, 1867 Act which gave the Supreme Court jurisdiction to hear the matter. Chief Justice Chase, writing for the majority noted that "[w]e are not at liberty to inquire into the motives of the legislature. We can only examine into its power under the Constitution, and the power to make exceptions to the appellate jurisdiction of this Court is given by the express words."\(^67\) This opinion removed all obfuscation and doubt of Congress' power to limit the jurisdiction of the federal courts. In fact, the opinion went on further to say that the opinions or motives of Congress are irrelevant.\(^68\) Under the *McCardle* framework, Congress could remove the subject matter jurisdiction of the Federal Courts even if Congress was motivated by some form of animus. However, *Ex Parte McCardle* does not stand for the proposition that Congress' power is absolute in jurisdictional expansion and limitation.

*United States v. Klein* involved a statute passed by Congress which gave the President the power to grant pardons and return property to individuals who were thought to be in opposition of the United States.\(^69\) On August 12, 1863, the President granted Wilson a pardon; on January 1, 1867, the Act giving the President the power to grant pardons was repealed. Three years later in 1870, Congress passed another Act which stated that any pardons granted to any person by the President because such persons were disloyal are invalid. Therefore, the jurisdiction of the Supreme Court in the case shall cease and the court shall forthwith dismiss the suit of such claimant.\(^70\) The Court reasoned that if the Act only denied the right of appeal in a particular class of cases, there would be no doubt

\(^{65}\) *Ex Parte McCardle*, 74 U.S. 506 (1868).

\(^{66}\) *Id*.

\(^{67}\) *Id.* at 513.

\(^{68}\) *Id*.

\(^{69}\) *United States v. Klein*, 80 U.S. 128 (1871).

\(^{70}\) See *id.* at 129.
Congress' action was constitutional. However, the Court went on to say that Congress ventured into another coordinate branch of the government when it would ex post facto override an executive decision of the President. The Court stated, "We must think that Congress has inadvertently passed the limit which separates the legislative from the judicial power." Therefore, although there is no doubt that Congress may limit the subject matter jurisdiction of the federal courts, Congress must be certain that it does not step into the department of another coordinate branch of the government. The Anti-Terrorism and Effective Death Penalty Act of 1996 does not pose the separation of powers problem illuminated in *Klein*. The Act, without usurping any executive power simply states that a deportee will not have a right to review in federal courts because of the deportee's deportable status as a convicted criminal. This in no way infringes on the executive branch of the government, but simply limits the federal courts' jurisdiction.

The principle of stare decisis answered the constitutionality of the Anti-Terrorism and Effective Death Penalty Act of 1996 in 1850 in *Sheldon v. Sill*. In *Sheldon*, the Judicial Act prohibited the federal courts from hearing cases in any suit to recover the contents of any promissory note. The Supreme Court in upholding the constitutionality of the statute said:

[I]f the Constitution had ordained and established the inferior courts, and distributed to them their respective powers, they could not be restricted or divested by Congress . . . . [H]aving a right to prescribe, Congress may withhold from any court of its creation jurisdiction of any of the enumerated controversies. Courts created by statute can have no jurisdiction but such as the statute confers. No one of them can assert a just claim to jurisdiction exclusively conferred on another, or withheld from all.

This same linear form of reasoning was also expounded in *Lauf v. Shinner*. *Lauf* involved a statute enacted by Congress which provided that

71. *Id.* at 145.
72. *Id.* at 147.
73. Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1214.
75. *Id.* at 448.
no court of the United States shall have jurisdiction to issue a temporary or permanent injunction in any case involving or growing out of a labor dispute." The Court in upholding the constitutionality of the statute said, "[T]here can be no question of the power of Congress thus to define and limit the jurisdiction of the inferior courts of the United States." 

Likewise, the Anti-Terrorism and Effective Death Penalty Act of 1996 falls within the same ambit of congressional definition and limitation of the federal courts' subject matter jurisdiction. The Act affirmatively limits the federal courts' jurisdiction to review cases involving deportable aliens who have been convicted of a criminal violation. It is upon this same principle that Ex Parte McCardle and its progeny are based. "[T]he appellate powers of the [Supreme] Court are not given by the judicial act, but are given by the Constitution," they are, nevertheless, "limited and regulated by . . . acts [of Congress] . . . ." The Supreme Court and the lower federal courts have long recognized that the federal judicial system is inherently limited, and that Congress may define and limit the federal court's subject matter jurisdiction within the purview of article III.

An alien who has been convicted of a criminal offense and subsequently ordered deported cannot argue but for the Anti-Terrorism and Effective Death Penalty Act he would have had a fundamental right to appeal. The right to appeal is not a fundamental right. It is a legislative grace which can be given and taken away by Congress. In Ross v. Moffitt, the Supreme Court said that the government is not obliged to provide an appeal after a conviction. Moreover, the Anti-Terrorism and Effective Death Penalty Act only prevents judicial review of a deportation order. The Act does not preclude criminal aliens from appealing their criminal convictions. But even if the Act did, it would still not run afoul of the Constitution because there is no fundamental right to judicial review.

77. Id. at 327.
78. Id. at 330.
80. Id. at 513.
81. U.S. CONST. art. III.
82. See McKane v. Durston, 153 U.S. 684 (1894). The Court held that a state need not provide any appeal at all. Based on this rationale, the same principle applies to the Federal government.
84. Id. at 606.
V. THE CERTAINTY OF FAIRNESS IS FOREVER GONE

Representative Scott in opposing the Anti-Terrorism and Effective Death Penalty Act said, "[O]ur rights [will be dilapidated] if we have secret trials where people can be deported, based on evidence presented in private . . . ." At first glance the Representative's statement might seem like a hyperbole. However, the practical effect of the Anti-Terrorism and Effective Death Act is that it will run into procedural irregularities. There are no safeguards in the Act to decipher whether criminal aliens are given fair deportation hearings. The fact that there is a deportation hearing should not lead one to the conclusion that criminal aliens are afforded their procedural safeguards under the Fifth Amendment of the Constitution. In fact, what the Act has done is similar to what the lawmakers in Yick Wo v. Hopkins did. The Board of Immigration appeals will have plenary power to determine which criminal alien gets deported, without their actions reviewable by the detached judiciary. This leaves ajar the door for possible abuses which will go uncorrected. The logical question one might ask is, "What about procedural due process?" Procedural due process is not guaranteed for a criminal alien facing deportation under this new Act.

This dogmatic condition has not always been the case. In Mendoza, the defendants were arrested in Lincoln, Nebraska on October 23, 1984. They were deported on November 1, 1984. On December 12, 1984, they were once again separately arrested in Lincoln, Nebraska. While being prosecuted for illegal entry into the United States, the defendants asserted a collateral attack on their prior deportation hearing. The defendants claimed that the Immigration Law Judge inadequately informed them of their right to counsel at the hearing. The defendants also contend that they unknowingly waived their right to a suspension of deportation. The Supreme Court held that the prior deportation hearing violated the aliens' procedural due process rights. The Anti-Terrorism and Effective Death Penalty Act permanently precludes this type of collateral attack on a deportation order. Abuses like that in Mendoza are

85. Supra note 6 (statement of Rep. Schumer).
86. Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1214.
87. In Yick Wo v. Hopkins, 118 U.S. 356 (1886), the ordinance gave certain counsel members plenary power to issue licenses to operate laundry service. The counsel members used this power to effectuate their racial animus towards the Chinese immigrants.
88. See Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1214.
89. Anti-Terrorism and Effective Death Penalty Act, 110 Stat. 1214.
91. Id. at 837.
bound to occur in the application of this new Act. The only problem is that the criminal aliens who are stripped of their procedural safeguards will no longer have redress in the courts of law.

For illustration purposes assume X, an immigrant, was born in the middle east. He is now twenty-five years old, and has been residing legally in the United States for the last twenty-three years. In all respects but for his nationality, X is a typical twenty-five-year-old American. Recently, X’s girlfriend broke up with him and as a result X has been calling her continuously. She took umbrage to this and obtained a protective order against X. Assume further that after the protective order was issued, the court found that X was in violation. What result? Under the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, X is deportable.92 At the deportation hearing the trier of facts is Judge Unfair who lives up to her name. She abused her power and discretion and ordered X deported. What result? X is going back to the Middle East.93 “Any final order of deportation against an alien who is deportable by reason of having committed a criminal offense shall not be subject to review by any court.”94

Stupified? Flabbergasted? This outcome is fundamentally wrong. What about the length of X’s residence in the United States? What about the strength of X’s connection to the United States? What about X’s personal history? What about the nature of the offense which X allegedly committed? What about the fact that X has no previous criminal record? These are all questions which should be answered before X, or any other

92. Any alien who at any time after entry is enjoined under protection order issued by a court and whom the court determines has engaged in conduct that violates the portion of a protection order that involves protection against credible threats of violence, repeated harassment, or bodily injury to the person or persons for whom the protection was order was issued is deportable. For purposes of this clause, the term ‘protection order’ means any injunction issued for the purpose of preventing violent or threatening acts of domestic violence, including temporary or final orders issued by civil or criminal courts . . . whether obtained by filing an independent action or as a pendente lite order in another proceeding.


93. The author intentionally omitted the sentences, “X is going back home.” This is because it cannot reasonably be said that the Middle East is X’s home. He has been away for almost all his life; he grew up in a different setting, culture, values, norms and traditions. In all respects, X is an American.

immigrant, is deported. A sound immigration policy is necessary, a fair one is paramount.95

VI. CONCLUSION

Federal court jurisprudence has laid the principle that Congress, pursuant to article III of the United States Constitution, may define and limit the jurisdiction of the federal courts. The Anti-Terrorism and Effective Death Penalty Act of 1996, though dogmatic to some, effectuates this well established principle. In essence, this is the same type of limitation that the federal courts have upheld since time immemorial. What remains is the lost cries of immigrants wrongly deported. The United States Constitution guarantees many things, the notable exception being moral fairness. The Australian, French, Canadian, and English cases all point out a process which is no longer available in the United States: review by the independent judiciary.

One cannot blame the American legislatures for abhorring criminal aliens, and their efforts to get them out of the United States as quickly as possible. One also should not question the Legislatures’ motive; but this paper questions the wisdom of the termination of judicial review by the Anti-Terrorism and Effective Death Penalty Act. We can be tough on criminal aliens without trampling on and rampantly traversing the Due Process Clause.

95. The author offers no conclusion or opinion as to whether the Anti-Terrorism and Effective Death Penalty Act is fair, but made statements so that the reader can ponder and conclude without influence as to fairness.

96. See generally supra note 6.