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THE CASE AGAINST OFFICIAL MONOLINGUALISM: THE IDIOSYNCRASIES OF MINORITY LANGUAGE RIGHTS IN ISRAEL AND THE UNITED STATES

Yuval Merin*

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I. INTRODUCTION

Both Israel and the United States are multi-ethnic societies with a large percentage of linguistic minorities. Hebrew and Arabic are the two official languages of Israel whereas the United States lacks an official language at the

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federal level. There are legal, cultural, sociological, and political differences between the two countries. Yet, when it comes to the individual and collective use of minority languages vis-à-vis the government - i.e., in communications with the government, in public notices (street signs and the like), in official government publications for public distribution, in the legislature, the judiciary, and the administrative agencies - both countries show a distinct preference to the majority language, and for the most part, make exclusive use of that language.

By 1999, half of the states in the United States have enacted official English legislation, and currently "English-Only" initiatives are under congressional review. In the United States, English has great supremacy over other languages and a privileged and dominant position. In Israel, the status of Arabic as an official language does not accord Arabs equal language rights to those of Hebrew-speaking Jews. The status of Arabic as official is a historical anomaly, rather than a vigorously enforced protection. Therefore, Hebrew enjoys a superior status to Arabic. A similar trend to the "English-Only" movement in the United States is the call for the abolition of Arabic as an official language in Israel.

This article questions the desirability of the move toward official monolingualism in both Israel and the United States, criticizes the de facto "official" status of English in the United States and further discusses the superior status of Hebrew in Israel. The article's main argument is that adopting one official language is objectionable. Declaring a language "official" may constitute a mere symbolic statement regarding the role of the language; but it is often used in order to protect the dominant status of that language and to outlaw all public uses of other languages. Thus, official monolingualism could serve to formally exclude the use of other languages; serve as a pretext for discrimination on the grounds of national origin, ethnicity, and race; and deprive linguistic minorities of equal rights. In an officially monolingual state, linguistic minorities are forced to learn the dominant language and are disadvantaged in accessing public employment, benefits, and state services.

Part II of this article concerns the nature of language diversity and language policy in Israel and the United States. It also examines the tension between the concept of Israel as a Jewish, Hebrew-speaking country and the existence of a large Arabic minority within it. Part III examines the history and the current legal status of Hebrew, Arabic and English in Israel and contrasts it with the status of English and that of minority languages in the United States.

In Parts II and III the term "official language(s)" demonstrates a language declared in a constitutional provision or by a statute as the official language of the country or state. Part IV examines the complexity and the various other meanings of an "official language" and attempts to define the term more accurately. This part considers the implications of having and maintaining an
official language. For example, it discusses linguistic requirements and practices in the field of education, an area in which official monolingualism would cause the most harm. Furthermore, it analyzes "Hebrew-Only" trends in Israel in light of the "English-Only" movement in the United States and provides a critique of official monolingualism. It examines the de facto and the de jure status of languages in both countries and disputes the assumption that the status of a language is determined by its "official" designation.

Part V of the article provides a definition of "linguistic minorities" and offers a view of language rights as basic constitutional and human rights. It discusses leading court decisions pertaining to language rights in both countries. It contrasts the United States Constitution with the informal Israeli Constitution and Bill of Rights in terms of the extent to which these instruments provide protections for linguistic minorities.

In conclusion, the article proposes to accord language rights to linguistic minorities as a group by virtue of basic principles of equality, pluralism, and tolerance and by viewing language rights as fundamental, notwithstanding the official or unofficial status of a language.

II. THE NATURE AND HISTORY OF LANGUAGE DIVERSITY IN ISRAEL AND THE UNITED STATES

The United Nations' General Assembly Resolution on the future Government of Palestine of 1947 stated that the British Mandate in Israel would end and that a Plan of Partition should be implemented by dividing Israel into two states: one Jewish and the other Arabic. Following this resolution, the Jews in Israel established a transitional government and a small parliament. On May 14, 1948, the official date on which the British Mandate ended, the Jewish-Israeli Parliament and Government declared the foundation of an Israeli state. This later became known as the "Declaration of Independence." The declaration fully corresponded with the part of the United Nations' Resolution regarding the foundation of an Arabic state, but, like the United States Declaration of Independence, did not contain any statement regarding the borders of the state. The Arab state was never founded. Soon after the declaration, the Arabs in Israel and the surrounding Arabic states declared a war against Israel and denied the Jewish-Zionist entity's right to establish a state. The 1948 war ended in victory for Israel, which occupied a larger territory than that designated by the United Nations resolution. This area included the territory of the former Palestine, which was originally to have been divided according to the United Nations resolution. Many Arabs, who lived in Palestine before the war, fled to the surrounding Arab states and became refugees. The ones who stayed in Israel during and after the war automatically became citizens of Israel.
The first Israeli legislation declared the incorporation of the statutes from the Mandatory period into Israeli law. Thus, from the date of Israel's initiation, and according to the incorporated British legislation, it has been an officially bilingual country. Hebrew and Arabic are its two formal languages.

The United States is a multi-lingual country with a monolingual - English - majority and no official language. In the United States, the founders assumed that the de facto "official" language would be English because that was the tongue of the first settlers and of the settler majority. Newcomers automatically accepted the situation. Therefore, there was no need for a constitutional mandate to give English special recognition. Yet, when we examine the history of language diversity in the United States, from the outset, the United States has been characterized by a multiplicity of language groups. Further, this linguistic diversity originally reflected the vying for supremacy in North America among different colonial powers and that later linguistic diversity persisted largely because of continued immigration to America.

Israel is a young country confronting the challenges of nation-building and the constant threat of war. The United States, by comparison, is a well-established, long-standing, and stable democracy at peace. However, important similarities between the two countries exist. In both countries there is a growing concern regarding the relationship between language policy and national identity. Both Israel and the United States are countries established on the basis of immigration. Notwithstanding this original intent, both countries have many restrictions on accepting immigrants. In the United States most restrictions are applied equally to immigrants from all national and ethnic origins and religions. In Israel there is a clear distinction between Jewish immigrants and non-Jewish immigrants. Moreover, the language rights of minorities in Israel apply to a population that has (or should have) equal legal rights; the Israeli Arabs are citizens of Israel, while in the United States, the debate over language policy is shaped by the fact that a large number of linguistic minorities are illegal immigrants or permanent residents. In Israel, the factors of immigration, legality and non-citizenship are irrelevant to language policy.

Both Israel and the United States have a large percentage of linguistic minorities. The largest linguistic minorities in Israel are Jewish Russians, Jewish Ethiopians, and Arabs. Israel's total population is five and one-half million, nineteen percent of which are Israeli Arab citizens, i.e., the Arab minority amounts to approximately one fifth of Israel's population. This


minority is comprised mainly of Muslims, Christians and Druze.\(^3\) In the United States, nearly fourteen percent of persons aged five years or over speak a language other than English at home. Of these persons, over one half are Latinos.\(^4\) The United States has become the world’s fifth largest Spanish-speaking nation.\(^5\) In thirty-nine states and the District of Columbia, Spanish is the most common language spoken other than English.\(^6\) More than half of all non-English language speakers reside in California, New York and Florida.\(^7\) Thus, a large percentage of the linguistic minorities in the United States live in English-speaking cities. In Israel, however, most Arabs are segregated in their own towns and villages, where they speak solely Arabic and aspects of cultural life are carried on in Arabic. Furthermore, in the United States, a large percentage of linguistic minorities are not proficient in English. In contrast, Israeli Arabs are proficient in Hebrew. Yet most of them use Arabic at home, in schools and in their neighborhoods. In the United States, exclusion often is defined on the basis of inability to speak English, but the Israeli experience reveals that even Arabs who speak Hebrew can be deprived of language rights. This is due to the fact that while the United States treats most racial, national, and ethnic minorities equally, Israel shows a clear preference for Jews over other nationals or ethnic minorities.\(^8\)

There are two interconnected principles unique to Israel, affecting language policy in Israel, and contributing to the inferior status of Arabic. The first is the concept of Israel as a Jewish state;\(^9\) the second is the concept of


\(^5\) Blaustein, supra note 1, at 1.

\(^6\) See The 1990 Census, supra note 4.


\(^8\) In this respect it is important to note that my concern here is with linguistic minorities, as opposed to religious or national origin minorities, although there is usually an obvious overlap between language and nationality.

\(^9\) The tenet that Israel is a Jewish state should not be confused with preservation of Judaism as a religion. There is only a partial overlap between the principle of Israel as a Jewish state and the status of the Jewish religion in Israel. The uniqueness of Judaism is that it has a dual meaning: nationality and religion. The greater part of the Israeli population is secular and non-observant, as were the founders of the state, for the greater part, whereas the religious Jews are a minority. Thus, this principle has to do with the preservation of Israel's national identity. One could claim that this distinction is not completely accurate
Israel as a Hebrew-speaking country.

The essence of Israel, in the eyes of its founders, was its status as a Jewish country and Hebrew, as the language of the state, is essential to the country's identity as a Jewish state. Israel's Declaration of Independence states the foundation of "A Jewish State in the Land of Israel." The importance of Israel being a Jewish state has been asserted in many Israeli Supreme Court decisions. Additionally, the principle of Israel as a Jewish state can be found in numerous Israeli statutes. First and foremost, the statutory concept of Israel as a Jewish country is demonstrated by the "Law of Return" of 1950. This law provides every Jew with the automatic right to immigrate and settle in Israel. The Nationality Law of 1952 further provides automatic citizenship to every Jewish immigrant. Israel views Jews all over the world as potential citizens. Non-Jews do not have similar rights. Thus, in areas other than language rights, there is both overt and covert discrimination against the Arab minority. Furthermore, section 7(a) of the Knesset (the Israeli Parliament) Act of 1985 provides that "Israel is the state of the Jewish people" and that whoever denies that principle is not eligible to participate in parliamentary elections. This Act was used as a basis to deny the right of participation in the parliamentary elections vis-à-vis a few political parties that "endangered the preservation of Israel as a Jewish country." Because, unlike the United States Constitution, Israeli law does not require the separation of religion and state, and some statutes are based on Jewish-Hebrew law. However, the existence of such statutes is due in part to the disproportionate political power of religious parliamentary parties in the Israeli Knesset and their significance should be attributed to the preservation of the Jewish tradition and nationality, rather than the Jewish religion as such.

10. See, e.g., H.C. 1/65, Yardor v. The Election Committee for the Sixth Knesset, 19(3) P.D. 365, 386 (stating that Israel being a Jewish state is a basic constitutional fact "which heaven forbid should any authority of the State - be it an administrative authority, a judicial authority or a quasi-judicial authority - deny it in exercising any of its powers").

11. This terminology was employed by David Kretzmer, who defined "overt discrimination" as statutes that expressly distinguish between the rights of Jews and Arabs, and "covert discrimination" as statutes not using the explicit criteria of Jews or Arabs but in fact imply discrimination between the two. See David Kretzmer, The Legal Status of the Arabs in Israel 84-85 (1990). Examples of overt discrimination are the Nationality Law and the Law of Return, both using the criterion "Jew" as a condition for a right or a privilege (the right to settle in Israel provided to Jews by the Law of Return, and the right of Jews to acquire Israeli citizenship under the Nationality Law). Covert discrimination is exemplified by the policy to exempt Arabs from military service, which, among other things, is a source of various benefits (it should be noted however, that the exemption stems from the unique position of Arabs vis-à-vis the surrounding Arab countries). Id. at 89-107. Israeli Arabs are further discriminated against by unequal allocation of resources, e.g., in the field of education. Id. at 115-127. See also Stendel, The Arabs in Israel, supra note 3, at 191.

There is a close connection between Israel being a Jewish state and the superiority and importance of the Hebrew language. As the Supreme Court stated in the case of *Reem Engineers*: 13

[L]anguage is not just a means for individual speech. It is a means for national speech. It is a cultural asset. It is an asset of the nation ... language exemplifies national unity ... it is a symbol ... this is doubly true regarding the Hebrew language. The revival of the state of Israel was accompanied by the revival of the Hebrew language ... without the Hebrew language Israel would lose its soul. The struggle for national independence was part of the struggle for reviving the Hebrew language ... The preservation, development and growth of Hebrew are a major value of the state of Israel ... Hebrew is one of the most important cultural assets of the Israeli society ... Hebrew is the spoken language of the Israeli people.

Hebrew was essentially a dead language, the language of the Bible and of subsequent religious and secular literature. Hebrew was revived and modernized as a spoken language after centuries of exile, during which it was not the spoken language for the vast majority of the Jewish Diaspora. Only in the last century and only in Israel has Hebrew fully regained its status as a native tongue. 14 The Hebrew language in Israel has a traditional, ideological, and national significance. The concept of the Hebrew language in Israel is based upon national pride. It was a major component of the Jewish identity, culture, religion, history and tradition for thousands of years and became a symbol of the independence of Jews in Israel.

Israel is comprised of generations of immigrant Jews from all over the world, mostly from Europe and the Arab countries. Traditionally, a feature of the immigration process, especially on the part of young immigrants and of those who left their countries of origins under less than favorable circumstances, was a reluctance to preserve their former way of life. These immigrants usually maintained a traditionally Jewish way of life when living in their countries of origin. Thus, when immigrating to Israel, these Jews wish to become rapidly assimilated into the Israeli society. A major part of this


assimilation is learning and speaking Hebrew. In the last decade there were major immigration waves of Jews from Russia and Ethiopia. These linguistic minorities, as others before them, quickly learned Hebrew and their linguistic problem was only a transitional one. They are part of the Jewish culture, nationality and religion. The only reason for their being a “temporary minority” is the fact that they emigrated from other countries. Hence, they should not be viewed as ethnic-linguistic minorities whose language rights need to be addressed.

The status of the Arabic Israeli minority, on the other hand, calls for a different approach than that which applies to Jewish immigrants. There is a political, national and ideological tension between the Israeli Arabs and Jews. Unlike the Palestinians, most Israeli Arabs do not view Israel as an enemy, nor are they viewed by it as such. Although many of them define themselves as “Palestinians” and tend to identify with the Palestinians in the occupied territories and with the surrounding Arab countries, they regard themselves as citizens of Israel. Still, many political and ideological tensions persist. Israeli Arabs are segregated from the Jewish society and rarely become assimilated in the Israeli Jewish society. These Arabs originally lived on what later became Israeli territory, and stayed on despite its foundation, rather than because of it. They are Israeli citizens and they preserve their own tradition and language. Thus, these Arabs did not actively strive to become part of the state of Israel,


16. For a discussion of the problem of the Palestinians in the occupied territories and the tensions between Israel and the Palestinians, see generally JOHN QUIGLEY, PALESTINE AND ISRAEL: A CHALLENGE TO JUSTICE (1990).

17. The virtual segregation between Jews and Arabs in Israel is well demonstrated by C.A. 2991/91, X v. Y, 92 Takdin-Elion (1992) (not published): The case involved a custody dispute between divorced parents of a 13-year-old Arab-Moslem child whose mother was Jewish and converted to Islam after her marriage. Before the proceedings, the father had moved with the child from a Jewish city to an Arabic village and sent the child to an Arabic school. The Supreme Court upheld the lower court’s ruling to accord the father custody over the child and stated that the natural place for the child, as a Moslem, was with the people of “his nationality and religion.” However, and in contradiction to its own rationale, the court held that the child should attend a Jewish-Hebrew school in order to preserve his connection to Jewish society and culture. Moreover, the court ordered the father to move within three months to a Jewish city near the school. The main reason for giving the father custody over the child was to preserve the continuity in the boy’s life, as the boy had been living with him for the six years before the litigation, and not to “harm his relationship with his father and his tradition,” as the court stated. However, by forcing the father to move to a Jewish city and send the boy to a Jewish school, the court’s ruling in fact eliminated the possibility of preserving the Arabic-Moslem religion, tradition, and culture. The fact that the court did not consider a combination of living in an Arabic village and, at the same time, studying in a Jewish-Hebrew school or vise-versa, reflects the court’s view that social-cultural and educational integration between Jews and Arabs is impossible: one must reside and conduct all matters of daily life either in a totally Jewish community or in a totally Arabic one. The Supreme Court’s decision reflects the reality of actual segregation in Israel today.
unlike most of the minorities in the United States. Indeed, those groups in the United States that did not evolve as a result of voluntary immigration, i.e., Native Americans, Mexicans after conquest, and Puerto Ricans after conquest, present knotty problems. At least Native Americans have received special treatment with respect to language policy.

The national identity issues and political-ideological views are factors in the debate regarding the use of English and the rights of linguistic minorities in the United States as well. As Shirley Brice Heath observes:

I ideological or political views about the status of a particular language may arise in response to issues that have no direct or necessary relation to language. Within these motivations, language may be considered a tool or a symbol, and politicians may not concern themselves with changing the language itself, but rather with promoting it for status achievement and extension to speakers of other languages. For example, within the United States, ideological adherence to English has been supported by the ideal of a 'perfect union,' a coming together of diverse peoples in a creative force. Individuals, groups and the national government have promoted the idea at different times throughout our history that speaking the same language would ensure uniformity of other behavioral traits, such as morality, patriotism, and logical thinking.

III. THE LEGAL STATUS OF LANGUAGES IN ISRAEL AND THE UNITED STATES

A. The Status of English and the Absence of an Official Language in the United States

The Constitution of the United States contains no reference to an official or national language. The legacy of the colonial and revolutionary periods


19. See Native American Languages Act, 25 U.S.C.A § 2901 (1990) (P.L. 101-477) (providing federal protection for linguistic rights of Native Americans and establishing the right of Native Americans to preserve, practice, and develop their indigenous languages). See also Scott Ellis Ferrin, Reasserting Language Rights of Native American Students in the Face of Proposition 227 and Other Language-Based Referenda, 28 J. LEGAL. EDUC. 1 (1999) (arguing that "English-Only" referenda are in conflict with the Native American Languages Act and must include exceptions for Native American Students).

includes tolerance of diverse languages and the freedom to choose among languages in different areas.\textsuperscript{21}

Some early national leaders, such as John Adams, proposed to set up a national language academy, and English as the official language. These efforts were debated and rejected by the founding fathers. The idea of government regulating American speech was deemed to be incompatible with the spirit of freedom of speech in the United States. During the nation's first century, there was a laissez-faire attitude governing language issues. For example, the Articles of Confederation were printed in German, and at different times federal documents appeared in French, German, Dutch, and Swedish. Bilingual instruction was common throughout the nineteenth century in both private and public schools.

By the middle of the nineteenth century, a stronger central government reduced the importance of tongues other than English. It was not until the late nineteenth century and the first half of the twentieth century that legal, social and political forces strongly opposed maintenance of languages other than English. Only then was a monolingual English tradition mandated in some states and espoused as both natural and national. There was a fear that language diversity would lead to political separation and a national split within the United States. Massive immigration to the United States at the beginning of this century and, as a result, the development and prominence of large ethnic-linguistic minorities, led to negative stereotyping and aroused antipathy towards newcomers. For the first time in American history, an ideological link was forged between language and “Americanism.” During the 1920s, legal and social forces restricted the use and teaching of foreign languages. Since the 1960s, linguistic minorities have stressed the multilingual, multicultural nature of the national society. These minorities insist on the necessity of bilingualism in education, judicial matters, and the workplace. These efforts to revitalize the bilingual tradition in the United States have brought forth questions regarding the historical and current role of linguistic uniformity in national unity and the place of English in the United States’ language heritage. The possibility of a linguistically-divided nation has been discussed with great fervor and frequency. The solutions currently offered are similar to those made periodically over the past two hundred years.\textsuperscript{22} Many bills and proposals to amend the United States Constitution to declare English as its official language have been consistently introduced over the years and have always been rejected. Various forms of such bills are currently being considered in Congress.\textsuperscript{23} At the

\textsuperscript{21} Id. at 42.


\textsuperscript{23} \textit{See infra} Part IV B for discussion of the various proposals.
state level, before 1984 only five states had "English-Only" legislation on their books. By 1999 that number has risen to twenty-five.

An additional reason for English not becoming an official language at the federal level has to do with the protection of immigrant-minorities' rights under the Constitution. Linguistic minorities are protected indirectly by the Constitution for reasons of discrimination based on race, ethnicity, or national origin. Finally, the vision of the United States as a pluralistic nation, with an emphasis on freedom of speech, has contributed to the lack of an enactment of an official English statute at the federal level.

B. Formal Bilingualism and the Status of Hebrew, Arabic, and English in Israel

During the period of the British Mandate over Palestine, English, Arabic, and Hebrew were the three official languages of Palestine. Two legal provisions dealt with the status of official languages in Palestine. According to Article 22 of the Mandate for Palestine, "English, Arabic and Hebrew shall be the official languages of Palestine. Any statement or inscription in Arabic on stamps or money in Palestine shall be repeated in Hebrew and any statement or inscription in Hebrew shall be repeated in Arabic." 

Although this was the first legal provision dealing with official languages in Palestine, the Supreme Court of Palestine, sitting as the High Court of Justice, concluded in the case of Jamal Huseini v. The Government of Palestine that it did not govern the legal status of the three official languages. The Court determined that the official, domestic status of the three languages did not stem from the mandate, and therefore, this provision was inoperative in the internal law of Palestine. It had implications only in the field of international law. The Court held that for a mandatory provision to have effect in the internal law of Israel, it had to be incorporated into the Palestine Order in Council.

Therefore, the only applicable legal provision that declared the official languages and established their status was Article 82 of the Palestine Order-in-Council, 1922, which states:

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All Ordinances, official notices and official forms of the Government and all official notices of local authorities and municipalities in areas to be prescribed by order of the High Commissioner shall be published in English, Arabic and Hebrew. The three languages may be used in debates and discussions in the Legislative Council, and, subject to any regulations to be made from time to time, in the Government offices and the Law Courts.\(^\text{29}\)

The Article provides that, on the one hand, the Mandatory Government and the Branches of Administration have the \textit{duty} of using the three languages. On the other hand, the population and the administration have the \textit{right} to use any of the three languages. A 1939 amendment established that in case of a discrepancy in the text of an ordinance, official notice or official form in the three languages, the English version should prevail.\(^\text{30}\)

The official \textit{Gazette}, official notices and forms were published in all three official languages. Correspondence could be addressed to any governmental department in any of these languages. All railway and road notices had to appear in the three languages. Areas with considerable Jewish population, i.e., not less than twenty percent, were designated as “tri-lingual areas.” In these areas, every official document of the courts was to be issued in the language of the person to whom it was addressed. Written and oral pleadings could be conducted in any of the three official languages. It was mandatory for the notary public of a court in a tri-lingual area, and permissible in any other area, to accept a declaration and register a document in any of the three languages. In all other districts, Arabic alone or Arabic together with English could be used as convenient, provided that the use of Hebrew was not prevented when needed.\(^\text{31}\)

According to the U.N. Plan of Partition of 1947, the Constituent Assembly of each state, Arab and Jewish, was to draft a democratic constitution guaranteeing all persons “freedom of religion, language, speech and publication, education, assembly and association.”\(^\text{32}\) The United Nations resolution further stipulated that the provisional government of each of the proposed States had to make a declaration to the United Nations that would be recognized as part of the fundamental law of the state and prevail over other laws. In the area of religious and minority rights, the declaration would stipulate that “[n]o discrimination of any kind shall be made between the inhabitants on the


\(^{30}\) \textit{See} Interpretation Ordinance 1945 § 34 [1939] Palestine Gazette (no. 898) (Supp. 2) 465; [1945] Palestine Gazette (no. 1400) (Supp. 1) 48, 58.


grounds of race, religion, language or sex." Each state was to ensure adequate primary and secondary education for its Arab or Jewish minority respectively, in its own language and cultural traditions. Furthermore, the right of each community to maintain its own schools for the education of its own members in its own language, while conforming to educational requirements of a general nature imposed by the state, would not be denied or impaired.

Finally, no restriction would be imposed upon any citizen of the state with respect to the free use of any language in private intercourse, in commerce, in religion, in the press or publications of any kind, or at public meetings. The declaration by the Jewish State was to contain an additional stipulation to the effect that adequate facilities would be given to the Arabic-speaking citizens for the use of their language, either orally or in writing, in the legislature, before the courts and in the administration.

Under the terms of the Partition Resolution, Arabic and Hebrew would be the official languages of the City of Jerusalem. As mentioned above, in the aftermath of the 1948 War, the Plan of Partition was never implemented. Nevertheless, the Plan demonstrates how the United Nations viewed the rights of Arabs in the Israeli State. This view will later be compared with the rights of the Arab minority as reflected in language policy in the independent state of Israel, which was no longer formally subject to the United Nations' resolution.

When the British Mandate over Palestine ended and the independent State of Israel was founded, English, Arabic and Hebrew were no longer the official languages of the State of Israel as they were in the Mandatory period. The first statute enacted by the Israeli Parliament was the "Law and Administration Ordinance" of 1948. The ordinance regulated the transition from the mandatory rule to the new Israeli independent rule. According to section 11 of the Law and Administration Ordinance, the law which existed in Palestine on May 14, 1948, i.e., all British legislation from the Mandatory period, shall remain in force, insofar as there is nothing therein repugnant to this Ordinance or to the other laws which may be enacted by or on behalf of the Provisional Council of the State, and subject to such modifications as may result from the establishment of the State and its authorities.33

Thus, Israeli law integrated Article 82 of the Palestine Order-in-Council of 1922 and it is still in effect. However, the absorption of Article 82 into the Israeli Law, subject to the conclusion of Section 11, influenced the applicability of the Article.34 By virtue of the section's conclusion, the status of the official languages in Israel did in fact change. Only Arabic and Hebrew remained the official languages of Israel, and the scope and nature of protection and use of these two languages have been totally transformed since the Mandatory period.

34. Saltoun, supra note 28, at 389.
1. The Legal Status of Hebrew

There is no doubt that Hebrew continues to be an official language in Israel. Although there is no original Israeli statute regarding the official languages in Israel, Hebrew maintains its official language status by virtue of Article 82, because there is nothing in section eleven of the Law and Administration Ordinance which could lead to a different conclusion. Moreover, the Supreme Court of Israel suggested that even without the provision in Article 82, Hebrew would have been recognized as the official language of Israel as a basic fact that stems from the mere initiation of the state. Due to Israel’s unique national identity, Hebrew has enjoyed superiority over Arabic, although Arabic remains an official language as well. Certain legal provisions explicitly give Hebrew a superior status to all other languages. One of these provisions is Section 32 of the Interpretation Ordinance [New Version], which provides that where a discrepancy exists between the Hebrew text of any enactment or public notice and the official translation thereof into a foreign language, the Hebrew text shall prevail. Other provisions exemplify the preference for and superiority of Hebrew: the Nationality Law of 1952 provides that to acquire Israeli nationality by naturalization, a person must possess some knowledge of the Hebrew language; the state seal is designed only in Hebrew; according to the Chamber of Advocates Law of 1961, the conditions for registration as a law clerk include proof of a “sufficient knowledge of the Hebrew language.”

Moreover, all post-independence legislation is drafted in Hebrew. Hebrew is the language in which the laws and regulations are enacted; it is the language in which speeches are made at the dais of the Knesset, the language of the discussions in the committees of the Knesset and at its meetings. It is the language of the government’s publications for the general public and in which the public addresses the government. Hebrew is the language in which the deliberations of the courts are carried on, the language of instruction in the (Jewish) schools, and the language of the public institutions. British legislation from the Mandatory period, which is still in force, is translated into Hebrew, and after its translation and formal publication, it constitutes the

35. See Rubinstein, supra note 12, at 88; Saltoun, supra note 28, at 389.
36. H.C. 1/65, Yardor v. The Election Committee for the Sixth Knesset, 19(3) P.D. 365, 385.
binding version of the law. No plea that the Hebrew version deviates from the original law will be entertained. All the above establishes the legal superiority of Hebrew as the principal official language.

2. The Legal Status of English

Section 15(b) of the Law and Administration Ordinance repeals any provision in the law requiring the use of English language. The reason English had been an official language in the Mandatory period was the British occupation of and mandate over Palestine. This period, a relatively short one, gave no rise to an ingrained use of the English language. As soon as the British mandate came to an end, a reason to maintain the formal status of English no longer existed. Furthermore, unlike Arabic, the English language is not the actively exercised primary language within any minority in Israel.

The Israeli Ministry of Justice translates Hebrew statutes into English, and some transactions of the Knesset appear in English. The only instance in which English retains its preferred status concerns mandatory legislation that has not yet been replaced by a new Hebrew version. The English version of such legislation takes precedence over the Arabic and Hebrew and is decisive in case of discrepancy.

3. The Legal Status of Arabic

No legislation subsequent to Article 82 has altered the status of Arabic, and therefore it remains Israel's second official language. Moreover, the provision repealing the required use of English does not mention Arabic, further confirming the official status of Arabic. According to Article 82, a legal obligation exists to publish all official orders and forms of the government and

38. Tabory, supra note 31, at 278.

39. This is the only original legal provision enacted by the state of Israel dealing directly with official languages. A few Israeli commentators argue that section 15(b) did not entirely terminate the official status of English by abolishing the requirement that the authorities use English, because it did not alter the right of citizens to employ English in all Government offices and courts. See Tabory, Id. at 279; Saltoun, supra note 28, at 391. However, although citizens have the right to employ English in certain circumstances, it should be stressed that the duty to use English has been abolished and only the right to use it remains. Because section 15 stipulates that it is no longer necessary to publish official notices and legislation in English, it is clear that English no longer enjoys the status of an official language in Israel in any respect.

40. This, however, does not grant English the status of an official language. The court must turn to the original English version only for the purpose of an accurate interpretation. Moreover, Hebrew version statutes have already replaced most of the mandatory legislation and the few British Ordinances that are still in effect are in the process of being replaced.

all official announcements of the local authorities and municipalities in Arabic as well as in Hebrew. The only question left is whether the stipulation at the end of Section 11 of the Law and Administration Ordinance affects the official status of Arabic. In a District Court case, Jerusalem Municipality v. Kaha, the judges expressed the opinion that it was no longer necessary to insist on the publication of a certain municipal notice in Arabic based on Section 11, i.e., implicit in the establishment of the State of Israel was a decision that dual publication was no longer necessary notwithstanding Arabic's status as an official language. The Supreme Court rejected the appeal on grounds of standing, but expressed doubt regarding whether an obligation to publish in Arabic persisted in light of the concluding part of Section 11. In another case, the Israeli Supreme Court decided that a police officer, taking down a statement of an accused or a witness, was not required to write it in the original language. Thus, a statement to the police made in Arabic was admissible although it was written in Hebrew. The court added that if the person signed the statement without expressing opposition, this did not infringe the rights of the citizen or the equality of the official languages. In El Harawi, the Supreme Court concluded that publishing statutes in Hebrew is sufficient, unless the plaintiff has suffered a distortion of justice. Frequent violations of Section 82, i.e., traffic signs, signs in public institutions, and street and road signs written in Hebrew and English but not in Arabic, further exemplify the lack of implementation of Arabic as an official language. Even in areas populated by a majority of Arab citizens, most street and road signs are in Hebrew and English alone. Moreover, most government and public institutions use only Hebrew and English, ignoring the official status of Arabic. Although the statute requiring the usage of English was abolished and the requirement to use Arabic has not been changed; in reality, there is a much greater use of English in Israel, both officially and unofficially, than Arabic. In practice, no real obligation to use Arabic in government offices exists, only permission to do so.

However, one should note that although Hebrew is in fact the main official language of Israel, there are a few aspects in which Arabic maintains its status

46. See Fisherman & Fishman, supra note 37, at 514.
47. See D.K. (March 22, 1995).
48. See, e.g., Arabic is not being used in nearly all public hospitals. See D.K. (July 29, 1998). Similarly, all correspondence and documents issued by Social Security Services are sent to Arab citizens in Hebrew alone. See D.K. (June 24 1998).
49. See Fisherman & Fishman, supra note 37, at 528.
as a second official language; e.g., Hebrew laws and regulations must be translated into Arabic. Nevertheless, it takes time until the translations are available, and failure to fulfill the duty to translate laws and regulations into Arabic does not affect their validity.50

The position no longer requiring the government to use Arabic in all official publications is unacceptable. First, the official status of Arabic obligates the state to employ Arabic in official publications and entitles citizens to use that language in Government offices and courts. Second, Section 15(b) of the Law and Administration Ordinance, repealing the use of English, did not include Arabic, and if the conclusion of Section 11 to the same Ordinance provided a basis not to publish in Arabic, there would have been no need to specifically address English in Section 15(b).51 Third, the Supreme Court of Israel has decided in other matters that Section 11 refers only to technical modifications. A decision regarding the status of language used by a national minority cannot be regarded as a technical change effected by the establishment of Israel.52 It is inconceivable that the Judiciary should infringe upon an area where the legislature would not tread.53 However, because there is no statute regarding the status of Arabic except for Article 82, the other provisions of that Article can be applied. The Article enables the Government to relieve councils of the obligation to publish official notices in Arabic and to limit the use of Arabic in Government offices and in the courts. However, such implementation contradicts the essence of an official language.

The foregoing court decisions dealt with limitations on the use of Arabic and have granted inferior status to Arabic in Israel. However, no statute or court decision to date has doubted the fact that Arabic is an official language. On the contrary, ministers of the Government and members of the Knesset have continuously stated the importance of Arabic as an official language in Israel.54 The Israeli Supreme Court has made similar statements.55

50. See Directives of the Attorney General, Use of Arabic Language, no. 21.556 of May 1, 1971. See also KRETZMER, supra note 11, at 166.


52. See Saltoun, supra note 28, at 393.

53. Rubinstein, supra note 12, at 91.

54. Saltoun, supra note 28, at 395. For example, the Minister of the Treasury, Pinhas Sapir, recognized Arabic as an official language in the name of the government when he replied from the platform of the Knesset on February 16, 1966 to a complaint of an Arabic Knesset member regarding the use of Arabic in public institutions. He stated, inter alia, that “the Arabic language is an official language having equal rights to those of Hebrew.” See D.K. (1966) 4726.

C. Comparative Observations

The development of language diversity, the historical background and the status of languages in the United States are, obviously, very different from those found in Israel. Unlike Israel, the United States witnessed no "development" that led to the institution of an official language. The issue of English as the official language of the United States was raised at the federal level, debated and rejected throughout history. Moreover, unlike Israel, which gained independence after having been a colony, the colonials were the ones who created the United States and have never left it. The founders of the United States and its majority spoke English. Therefore, in the United States there was never a shift from a colonialist regime that spoke one language, to an independent regime, which spoke a different language than their former colonizers.

The process by which English became the predominant language of the United States was a natural one, and for that reason Congress never had to make a legal declaration as to the country's formal language. Only the immigration of linguistic minorities to the United States prompted debate regarding English as an official language. In contrast, the minorities who immigrated to Israel were Jews who aspired to speak Hebrew. In this respect, the Arabic minority's status in Israel more closely resembles that of the Native Americans in the United States; each population resided in its respective country before independence and both were subject to the language introduced by the majority.

In both countries, the language of the majority became the dominant language. If not for the statute of official languages enacted by the British colonizers that became automatically part of the Israeli law, Israel might never have had official languages. All efforts to enact an original Israeli statute regarding language status have failed, just as official English provisions have in the United States at the federal level. Furthermore, the incorporation of Article 82 into Israeli law was due to the Law and Administration Ordinance that stated very generally that all the mandatory legislation shall remain in force in the independent state of Israel under certain conditions. In addition, Israel's Declaration of Independence did not address the legal status of languages. It simply stated, inter alia, that "The State of Israel ... shall guarantee freedom of religion, conscience, [and] language ..."56 When a member of Israel's
transitional parliament suggested that the phrase "freedom of language" be included in the Declaration of Independence, Israel’s first Prime Minister, David Ben-Gurion, said that the reason he did not oppose the inclusion of this phrase was not because of the need to ensure the equality of Arabic and Hebrew. He asserted that it was because “the fact that Hebrew is the state’s language should not deprive other citizens of using their language in Israel.”

Thus, it seems that in 1948, the Israeli legislature and the founders of Israel were not aware of the implications of Article 82. Only soon afterwards did Israel realize that it had two official languages. Therefore, the Israeli legislature never consciously or intentionally decided to establish Arabic as an official language in Israel or to maintain equality between the two languages. The fact that scholars have been debating the origin of the status of the official languages in Israel and the extent to which Article 82 still applies, further substantiates these conclusions. The observation from this point of view reveals that behind the legal complexities, there are more similarities between Israel and the United States than seem to emerge at first. In other words, neither country has in fact committed itself to an official language policy—and that, despite the de jure status of languages in Israel.

However, at the same time, differences exist between the development of the status of languages in both countries. The English language in the United States had supremacy over other languages from the very beginning. In contrast, Israel was subject to a major and extreme change regarding the dominant languages of its population: Arabic was the dominant language in the 1930s because more Arabs than Jews lived at that period in Palestine. During the 1940s, a large number of Jews emigrated from Europe to Israel and changed its demography. The legal status of languages was already established during the British Mandate, and was incorporated into the Israeli law. Unlike the United States, no debate ensued regarding the status of languages in the first few decades following Israel’s foundation. Thus, the differences between the United States and Israel regarding the development of the status of languages have also led to the differences in the current legal status of languages in both countries.


57. Rubinstein, supra note 12, at 88.
IV. “OFFICIAL LANGUAGE:” IMPLICATIONS AND MOVEMENTS

Based on the foregoing overview of the de jure status of languages in Israel and the United States, I shall now attempt to define in a more specific and detailed manner the term “official language” – and a related term - “national language” – in order to examine whether and to what extent such definition corresponds to the de facto status of English in the United States, and of Hebrew and Arabic in Israel. Subsequently, this will assist us in realizing the implications of having or not having official languages.

In general, an official language is one used by the government and promoted through the power of the state; it constitutes the major means of communication between the state and its citizens. The official language is the language of record; it is the language of the constitution, of legislation, the language of parliament and the language of the courts. It is the normative language of internal correspondence to and from the government, that of judicial and administrative affairs, that which represents the government and state to its citizens. Language has become a sign of nationalism; a struggle between languages often accompanies a conflict between national movements.

The official language of a country is not necessarily the same as its national language.

For the most part, the national languages are also “permitted” languages in the schools and in commerce, as well as the languages of the ethnic home. National languages imply nationality membership. Official languages imply governmental citizenship.

The United Nations once defined official language as “[a] language used in the business of government (legislative, executive, administrative and judicial) and in the performance of the various other functions of the state;” and national language as “the language of a social and cultural entity which is in widespread use in a country.”

58. Fisherman & Fishman, supra note 37, at 497. Following national and political changes, the status of a language as official may also change; the official status of a language is not permanently fixed and is exposed to fluctuation according to political circumstances. Id. at 498. See generally, JOSHUA FISHMAN, LANGUAGE AND NATIONALISM (1972).

59. Id. at 498.

60. Thus, as Fisherman & Fishman observe, there are countries in which a number of languages are used as official languages, e.g., Switzerland (which recognized three official languages: German, French, and Italian), India (in which there are fourteen official languages), Belgium (where two official languages are recognized, Dutch and French), and Israel (recognizing Arabic and Hebrew as official). However, it does not follow that the official languages are national ones or vice-versa. Thus, for example, in Switzerland the official languages are German, French, and Italian, while the national languages are German, French, Italian, and Romansch. Id.

61. Blaustein, supra note 1, at 2.

62. Fisherman & Fishman, supra note 37, at 498.

This definition lacks a major component. For a language to be an official language of the state there must be a constitutional provision or a statute declaring it as such. However, a constitutional provision by itself is insufficient, if not accompanied by the government’s obligation to use and implement the language. The following definition would thus be more appropriate: An official language is a language that has a special status binding the authorities and the government by virtue of the state’s laws and which has a priority over another language or languages that have no such status. It is not enough to declare a language “official.” The law must explicitly prescribe the boundaries of the “formality” of a language by defining and fixing the limits of its legal status.\footnote{64}

The United Nations, in one of its reports, depicted the process whereby languages become official or national as follows:

During the historical process of nation building, a particular language, usually that of the segment of the population which gains supremacy and imposes itself socially, politically and militarily on other segments in various regions and whose language dominates the other languages or dialects in the country, becomes, because of these extra-linguistic factors, the language of highest standing and, ultimately, the official language. Official recognition is of great importance to this and the other languages spoken in the country because, whether or not it is provided for in the Constitution or other basic law, such a selection means that this privileged linguistic instrument will be used in the various activities of the State ... At the end of the colonial dependence ... the people of many countries ... faced the problem of having to decide which language would henceforth be the official language of their new State. During this process, what became the official language – either the single official language or one of them – was often the language introduced by the colonizers; in a few cases, a national language was chosen.\footnote{65}

This is a general portrayal supposedly applicable to all countries. As to Hebrew, the foregoing description is accurate, since Israel chose Hebrew, which had been the national language, as one of the official languages. However, the description of the development of an official language does not apply to Arabic, as it is only de jure an official language and in practice it has an inferior status to Hebrew. As for English in the United States, this description is accurate except that English became a national language, rather than an official one.

\footnote{64. See Saltoun, supra note 28, at 387.}
\footnote{65. U.N. Report, supra note 63, at 9.}
There is no equality between Hebrew and Arabic in Israel, although both are official languages. The major reason for that, I would suggest, is the perception of an official language and the scope of its implementation. The policies, court decisions and statutes discussed in the previous section indicate the erosion of the status of Arabic as an official language. To declare Arabic as the official language is one thing; to implement it by giving equal linguistic rights to the Arabic minority is another. Arabic’s status as an official language of Israel is a vestige of British legislation. However, confusion ensues because coexistent with the official language status is a lack of linguistic rights for the Arab minority. As explained above, Israel incorporated Article 82, but the status of languages has never been the subject of original Israeli legislation. Original legislation could clarify the Israeli Legislature’s intent, and if there is intent to accord Hebrew priority over Arabic, as is the practice in Israel, the legislature should state this explicitly in a statute. Such a preference should not be inferred from the existing provisions regarding official languages.

A. The Implications of “Official Language”

It appears that a statutory declaration that two languages are official languages necessitates total equality between them and a duty of the government to provide various services in both. The Israeli example proves that this assumption is far from being accurate. The supremacy accorded to the Hebrew language is apparent in all aspects. If we set aside for a moment the requirement for a statutory or constitutional provision establishing the language’s official status and go back to the United Nations’ definitions, we can throw interesting light on the relative status of English, Hebrew, and Arabic. English in the United States and Hebrew in Israel would both be considered official and national languages. In the United States, the English language is the predominant and commonly the exclusive language in all branches of the government. For example, the United States requires English proficiency as a prerequisite to citizenship similar to the Israeli law requirement of Hebrew

66. The status of languages in Canada is another example for both the lack of equality between the official languages and the lack of government implementation of their status as such. Under Article 16 of the Canadian Constitution, the recognition of two official languages did not in fact guarantee a right to any type of service in either official language. See Société des Acadiens du Nouveau-Brunswick v. Association of Parents for Fairness in Education, (1986) S.C.R. 549. In Canada, official language status was interpreted to be merely a “political” declaration which had to be further developed in other constitutional or legal provisions. Moreover, even when the use of English and French in Canada is guaranteed by a statute, it is still limited to certain categories of public services provided by the federal government and only a few specific federal services are, in theory, available in both languages in the whole of the country. See FERNAND DE VARENNES, LANGUAGE, MINORITIES AND HUMAN RIGHTS 174-75 (1996). Similarly, the recognition of eleven official languages by the new South African Constitution is misleading, because official status does not actually imply guaranteed access to administrative or public services in all of these languages. Id. at 175.
proficiency. The existence of such a requirement is one example of the de facto official status of English in the United States. Thus, despite the absence of a federal law declaring English as the official language of the United States, some federal laws, such as the above-mentioned provision requiring English literacy, produce in effect this result.

In such a light, and if we accept the United Nations' definition of a national language as the majority's language, Arabic in Israel would be considered neither an official language nor a national language. Therefore, the de jure status of the languages in both countries does not reflect their actual status. For this reason, both formal recognition and equal treatment must be implemented in order for a language to qualify as official and the mere statutory provision regarding Arabic is in itself insufficient.

One of the most important implications of having an official language is that the minorities whose language is not official must become bilingual or multilingual. In addition to full access to government and administrative agencies, many other reasons exist to learn the dominant language, such as integration and participation in the social and cultural life of the majority. Nevertheless, the effect of having an official language formally excludes by law the use of minorities' languages in government branches. Thus, the minorities must learn other languages in addition to their own and not as a matter of choice. Minority linguistic groups who are forced to become bilingual or multilingual because of their powerless linguistic status have less power than those whose native tongue is the official language. This also demonstrates the de facto formal status of English in the United States. English-speaking Americans do not need to learn any of the languages spoken in the United States apart from English. However, Native Americans, Latinos and other minorities in the United States need to learn English in addition to their mother tongues. It also illustrates the de facto unofficial status of Arabic in Israel. Arabs are forced to learn Hebrew to function effectively in the state's institutions and in society at large. Furthermore, by excluding the use of most other languages, a linguistic majority can control a government and enjoy the privileges, jobs, and services provided by the state in their own language. Individuals for whom the official language is not the primary vernacular find themselves at a disadvantage in terms of access to jobs and services, education,


70. De Varennes, supra note 66, at 86.
and in private business activities.\textsuperscript{71} Moreover, by adopting a one-language-for-all policy, a state uses linguistic criteria to determine who will have access to services provided by the government, such as public schooling or public employment opportunities. It also creates a distinction, based upon language, on the degree to which individuals will be able to enjoy and benefit from these activities or services. Depending on the types of governmental service involved, language proficiency requirements by the state may disadvantage a non-native speaker depending on his or her level of fluency.\textsuperscript{72}

By definition, official monolingualism means that in the majority of cases linguistic minorities experience violations of their linguistic human rights.\textsuperscript{73} Moreover, bilingual government services should be provided in countries where there is a large enough linguistic minority.\textsuperscript{74} They are necessary to ensure that minorities have full access to all resources and are able to participate in government and administration. This is essential in a democratic and pluralistic society. A state that fails to adequately support the bilingualism of its minorities or at least provides some degree of official recognition to a minority language is denying group identity and full human rights from minorities.\textsuperscript{75} Official monolingualism which excludes the use of other languages, or is interpreted or implemented to prohibit public authorities from using other languages, is exceptionable. In the United States, the declaration of English as the official language of some states led to repressive and discriminatory measures.\textsuperscript{76} Official language status should not entail exclusion of other languages. While the state may freely designate a preferential language, and thus recognize its legal obligation to respond in the official language (or languages), such a designation should not allow public authorities to violate the fundamental human rights of individuals.\textsuperscript{77}

Considering all of the above, we can conclude that of the three languages, English, Arabic, and Hebrew, only Hebrew's status accords with the common definitions of an official language in all of its aspects. Although English in the United States has most of the characteristics of an official language, it cannot be regarded as such because of the lack of a statutory or a constitutional

\textsuperscript{71} \textit{Id. See also} Juan F. Perea, \textit{English-Only Rules and the Right to Speak One's Primary Language in the Workplace}, 23 J. L. REFORM 265, 290-91 (1990).

\textsuperscript{72} De Varennes, \textit{supra} note 66, at 55.

\textsuperscript{73} \textit{See Minority Rights Group Report, supra} note 69, at 6.

\textsuperscript{74} For a discussion of which minorities deserve equal language rights and the question of a numerical threshold, \textit{see infra} Part V.

\textsuperscript{75} \textit{See Minority Rights Group Report, supra} note 69, at 8.

\textsuperscript{76} Denying parole to non English-speaking prisoners in Arizona is one example. \textit{See} De Varennes, \textit{supra} note 66, at 175. The Arizona "English-Only" statute was eventually struck down by the State's Supreme Court, \textit{see infra} Part V.

\textsuperscript{77} \textit{See} De Varennes, \textit{id.}, at 175-76.
provision. Arabic in Israel, which is formally an official language, has the status of a non-official language.

B. "Hebrew-Only" Trends in Israel in Comparison to the "English-Only" Movement in the United States

Both the United States and Israel originally had a national commitment to tolerance of linguistic diversity.\(^78\) In recent years, however, both countries have experienced pressure to adopt a single language as the official one.\(^79\)

Over the years, many individual Knesset members suggested legislation making Hebrew the only official language in Israel. In 1952, a member introduced the "State's Language Law," the first of its kind.\(^80\) This bill assumed that Article 82 of the Order-in-Council applied to Arabic, and therefore necessitated repeal. The Knesset rejected this bill, which would have abolished any legal requirement to use the Arabic language.\(^81\) In March of 1976, the Israeli Minister of Justice stated before the Knesset that the status of the official languages was not regulated under legislation and that the government intended to include a provision in a basic law to be presented to the Knesset making Hebrew the official language of the state.\(^82\) Another bill, proposed in 1981, was "The Hebrew Language Law." The aim of this bill was to encourage the Hebrew language without making it the only official language.\(^83\) This proposal would have imposed on the government the duty to use only Hebrew in state sponsored press and media, in state institutions, in international contracts, in Israel's consulates and embassies abroad, on sign posts, in advertisements and so on.\(^84\) This bill was also rejected.

An important bill was brought before the Knesset on October 8, 1996. This bill also provided that Hebrew should be the sole official language of Israel. The bill further provided that ministers and Knesset members be allowed to use only Hebrew in the Knesset. Proposed by a member of a right-wing party, this bill was a reaction to a declaration by Arabic Knesset members that they intended to use only Arabic when speaking in the Knesset. The Knesset member who proposed this bill stated that its purpose was to strengthen

\(^78\) As to the United States, see supra, Part II and Part IIIA. As to Israel, its Declaration of Independence stipulates that the State of Israel shall guarantee, among other things, freedom of religion, conscience, education, culture, and language. See supra, Part IIIB.

\(^79\) See supra, Part III.

\(^80\) D.K. (1952) 2528; See also KREITZMER, supra note 11, at 165.

\(^81\) Id.

\(^82\) D.K. (1976) 2048.

\(^83\) KREITZMER, supra note 11, at 172.

Israel’s identity as a Jewish country. The timing of the Arabic Knesset members’ declaration and the subsequent bill came as no surprise. Israel was in the midst of extreme political tension between Arabs and Jews, and its government (based on a right-wing coalition) was clearly seen to deploy a consistent policy prejudicing minority rights and the pluralism of Israel.

Nonetheless, the chances of this bill becoming law were slim for two reasons. First, as opposed to the Government, the composition of the Knesset was one that would have probably not allowed such a bill to pass, as the Knesset had rejected similar bills before it. Moreover, the political right may have viewed the statement by the Arab members of the Knesset as a provocation. However, the usage of Arabic in the Knesset is not only a long-standing tradition, beginning with Ben Gurion’s statement that the Arabs were not to be denied the right to use Arabic in the Knesset and continuing to this very day, but is also explicitly provided for by Article 82 of the Order-in-Council. Article 82 provides that Hebrew and Arabic be used in debates and discussions of the Legislature. Furthermore, although the actual language of the proceedings in the Knesset has generally been Hebrew with simultaneous translation available into Arabic, Arabic has also been used in speeches and has been simultaneously rendered into Hebrew. Thus, Arabic has always had a special status in the House. The latest bill of this sort went before the Knesset in May 1998. Like previous bills, it proposed to abolish the official status of Arabic, and the Knesset rejected it.

During the past decade, the United States has been in the midst of linguistic conflict. Various ethnic groups, dominantly, but not exclusively, Spanish-speaking, are demanding linguistic rights. Others are finding it necessary to assert that speaking English is essential to preserve national unity and national strength and is key in shaping individual opportunities. In their concern over government support for bilingual programs and services, some proponents lobbied for a Constitutional Amendment making English the nation’s official language. Although the proposed English language amendment has been stalled repeatedly in Congress, proponents of “English-Only” laws had considerable success at the state and local levels. The current “English-Only” movement has produced state resolutions, statutes and

87. See Tabory, supra note 31, at 284.
89. Blaustein, supra note 1, at 2.
constitutional amendments establishing English as the official language. "English-Only" rules are intended to eliminate governmental services in languages other than English. So far, official English legislation has been enacted in half the states, and most states have considered "Official-English" laws. "English-Only" laws were also enacted by initiative and referendum and approved by the voters themselves and not by state legislatures. At the federal level, official English bills were consistently introduced over the years and Congress is currently considering various forms of such bills. However, the courts did not strike down official English State laws unless they were extremely over-broad and restrictive, and it would seem that the United States Constitution does not prohibit official English. Most official English laws

91. As of June, 1999, the following states enacted "English-Only" legislation: Alabama (1990); Alaska (1998); Arkansas (1987); California (1986); Colorado (1988); Florida (1988); Georgia (1996); Hawaii (1978); Illinois (1969); Indiana (1984); Kentucky (1984); Louisiana (1811); Massachusetts (1975); Mississippi (1987); Missouri (1998); Montana (1995); Nebraska (1995); North Carolina (1987); North Dakota (1987); South Carolina (1987); South Dakota (1995); Tennessee (1984); Virginia (1996); Wyoming (1996). See U.S. English: States with Official English Laws (last modified April 26, 1999) <http://www.us-english.org/states.htm>. Most of these laws state in a general and somewhat symbolic manner that English is regarded as the official language of the state (except for Arizona's broad "English-Only" Amendment, which was subsequently struck down). See infra, Part V. Many states also have incidental provisions regarding the language of the judiciary and other government acts. See Leila Sadat Wexler, Official English, Nationalism, and Linguistic Terror: A French Lesson, 71 WASH. L. REV. 285, 348 (1996). See also Perea, supra note 68, at 323.


93. The process of direct legislation has been criticized especially when it has to do with minority rights. See, e.g., Arington, supra note 90, at 343-51.

94. In 1997, the House of Representatives passed the English Empowerment Act of 1996, which declares English the official language of the United States. The bill did not pass in the Senate, but a similar proposal is currently pending in Congress. See Rachel F. Moran, Milo's Miracle, 29 CONN. L. REV. 1079, 1104 (1997). Current "English-Only" bills that have been introduced before the 106th Congress include H.R. 50, The Declaration of Official Language Act (requires the government to function in English and specifically bans bilingual ballots and bilingual education); H.R. 1005, The National Language Act (requires all government business to be conducted in English. It repeals the federal bilingual ballot mandate, the Bilingual Education Act and terminates the Office of Bilingual Education and Minority Languages Affairs); H.R.J. Res. 21, The English Language Amendment (a Constitutional Amendment to make English the official language of the United States), and the English Empowerment Act, which was re-introduced before the 106th Congress. See English First: List of Official English Bills in the 106th Congress (last modified Feb. 22, 1999) <http://www.englishfirst.org/efbills.htm>.

survive equal protection challenges because they are facially neutral: applying to English and non-English speakers alike. In the absence of a showing of intent to discriminate against non-English speakers, courts do not invalidate rational legislation merely because of its disparate impact.\(^96\)

The motivation for these trends is different in each of the two countries. In the United States, the impetus has always been the fear that language diversity would lead to a national split coupled with the fear of immigration endangering national unity. The current "English-Only" movement is mostly a reaction to the large wave of immigration,\(^97\) the perception that newcomers are no longer learning English, and the concern that the majority of immigrants seem to speak one "rival" language, i.e., Spanish. The perception that a majority of the immigrants speak only Spanish and are unwilling to learn English is contradicted by empirical evidence. A study by McCarthy and Valdez confirms a classic three-generation pattern of language acquisition. The first generation is primarily monolingual, the second generation is bilingual, and the third generation prefers English. Thus, Spanish monolingualism persists because of continued immigration, not because Spanish immigrants fail to learn how to speak English.\(^98\)

A concern for the primacy of the English language thus motivates the proponents of "English-Only" laws.\(^99\) There is no material reason to declare English the official language in the United States; it would probably not change the actual status of English and serve only political goals of depriving various rights of minority groups. In Israel, Hebrew is and has always been a privileged official language in relation to Arabic. Unlike the United States, there is no fear in Israel of a national split and the matters relating to immigration were irrelevant to language rights. Therefore, it seems that the purpose of demanding that Hebrew's status as the only official language in Israel and undermining the status of Arabic are part of an inclination to deprive Arabs of their rights in general, and not solely to accord Hebrew a new status. At the same time, there are certain similarities between the trends in Israel and in the United States. The purpose both of having Hebrew as the only official language in Israel and of having English as an official language in the United States is to further emphasize the superior standing of these languages and to prevent linguistic minorities from claiming equal language rights. The fact that these attempts have thus far failed in Israel and at the federal level in the United States also

\(^{96}\) For discussion of these cases, see infra Part V.

\(^{96}\) See Arington, supra note 90, at 336.

\(^{97}\) Perea, supra note 68, at 344.

\(^{98}\) See Schmid, supra note 22, at 71; Perea, supra note 68, at 347; Arington, supra note 90, at 327.

\(^{99}\) Arington, supra note 90, at 327.
stems from the same rationales: the notion of pluralism, the significance of the freedom of speech, and the protection of minorities' rights.

It seems that these latter principles have always outweighed the reasoning behind the English/Hebrew-Only trends. One may hope that they will continue to prevail, because these trends are dangerous in that they may deprive linguistic minorities of equal language rights that they deserve. Moreover, the main reason traditionally given by the supporters of official monolingualism in both countries, that it would contribute to national unity, is empirically wrong. The fact that the United States has never had English as its official language and that Israel has always had both Hebrew and Arabic as official languages, actually contributed to national unity in both countries. Depriving minorities of their basic rights can lead to a national split. The assumption that multilingualism divides a nation whereas one language unites it is wrong. National unity can be built only upon respect for the languages and cultures of all the people who make up the nation. As mentioned above, providing language rights is not only important to minorities in its practical implementation, it is also a symbol of pluralism and tolerance.

Furthermore, the national unity reasoning is actually a pretext for discrimination. Supporters of official monolingualism do not want to prevent a national split and the erosion of the status of the predominant language. Language rights are a matter of politics and culture, and a demand for monolingualism in a multi-ethnic society constitutes an intent to discriminate on the grounds of national origin, ethnicity, and race. Language is a poor proxy for political unity and community of language and culture does not necessarily give rise to political unity any more than linguistic and cultural dissimilarity prevents political unity. Some have contended that monolingualism in one country is domination of one language at the expense of others and is a reflection of "linguicism," i.e., an ideology akin to racism. "Linguicism" is defined as "[I]deologies, structures and practices which are used to legitimate, effectuate and reproduce an unequal division of power and resources, both

100. See Drucilla Cornell & William W. Bratton, Deadweight Costs and Intrinsic Wrongs of Nativism: Economics, Freedom, and Legal Suppression of Spanish, 84 CORNELL L. REV. 595 (1999) (arguing that "English-Only" regulations violate the basic right of personality of non-English-speaking and bilingual Americans, based on both an economic theory and a general theory of rights which is modeled in Kantian moral and political theory; the authors conclude that language rights are weighed against state-imposed norms of assimilation). See also Andre Sole, Official English: A Socratic Dialogue/Law and Economics Analysis, 45 FLA. L. REV. 803 (1993).

101. MINORITY RIGHTS GROUP REPORT, supra note 69, at 8.

102. The view of language as a symbol is discussed in detail by Perea, see supra note 68, at 350.

material and non-material, between groups which are defined on the basis of language."\textsuperscript{104} This concept replaces biologically based racism by a more sophisticated form in connection to language, using the languages of different groups as a defining criterion and as the basis for hierarchy. Moreover, it is the fear of diversity and the view of the "different" as "opposite" that drives these movements:

A pluralistic view of culture conceives of dissimilar value systems and civilizations not in terms of opposition to one another, but simply as expressions of different historical and linguistic environments. To the monolingual mind, different cultural systems are perceived as being in opposition to one another ... monolingual thinking perceives other cultures as hierarchically inferior, and thus subordinate to the superior system.\textsuperscript{105}

Moreover, an "English-Only" policy in the United States or a "Hebrew-Only" policy in Israel is a preference based upon language, which favors those who speak English or Hebrew respectively as a primary language. This creates a situation where others do not receive the same privileges or advantage of using their primary language. "English-Only" and "Hebrew-Only" policies are based on an unreasonable language preference that constitute differential treatment, favors individuals speaking English or Hebrew as their primary tongue, and disadvantages those who do not.\textsuperscript{106}

The demand for official monolingualism as a pretext for discrimination and the extent to which the official status of a language is implemented are best exemplified by exploring the practices in the field of education. This is also the arena in which official monolingualism would cause the most harm.

C. Linguistic Requirements and Practices in the Field of Education

All languages have equal worth for those speaking them yet they are rarely entitled to equal support or equal resources. One area where this is especially true is education. Children belonging to the majority are educated in their mother tongues and this is accepted as a natural human right. The same is not true for all minorities. Majorities act as if minority mother tongues were somehow inferior (cultural linguicism), and emphasize educational efforts geared toward the learning of the majority language while neglecting or assigning a much lower priority to measures geared toward the learning of

\textsuperscript{104} Minority Rights Group Report, supra note 69, at 8.

\textsuperscript{105} Jose Faur, Monolingualism and Judaism, 14 Cardozo L. Rev., 1713, 1716-17 (1993).

\textsuperscript{106} See De Varennes, supra note 66, at 89.
minority mother tongues (institutional linguicism). These precepts apply to both the United States and Israel.

In Israel, the Compulsory Education Act of 1949, which also applies to elementary schools in the Arab sector, does not specify any language of instruction. Israeli Arab pupils study in their own separate schools in each of their towns and neighborhoods. At the same time, Arab children have the right to study in Jewish schools, and individual Arab students do so. According to the State Education Law of 1953, the Ministry of Education "shall prescribe the curriculum of every official educational institution, [and] the curriculum shall be adapted to the special conditions thereof." Special curricula were drawn up for Arab education institutions, emphasizing Arab culture, literature and history, as well as the Arabic language. All curricula in the Arab schools use Arabic as the language of instruction, with Hebrew and English as compulsory foreign languages. The goal is fluency in the Hebrew language, both in oral and written form.

In contrast, Arabic is taught in many Jewish elementary schools but is only optional in Jewish academic high schools and is studied by relatively few with a generally low level of achievement. There is a low level of interest in this subject, and most students prefer studying English, which, unlike Arabic, is compulsory from second or third grade until the end of high school. It is clear then that Israel views English as more important than Arabic as a second language, despite the fact that Arabic is an official language in Israel and that English no longer has such a status. The rationale for the emphasis on English language studies in Israel, as in many other non-English speaking countries, stems of course from its international status as a lingua franca. However, not only do Arabs constitute a fifth of Israel's population, but Israel is also located in the Middle East where Arabic is the predominant language. Furthermore, the preference for English does not serve any domestic objective that has to do with a specific minority. Incidentally, it also validates the inferior status of Arabic as viewed by the Israeli authorities.

In 1976, the Knesset Education and Culture Committee recommended that the Ministry of Education and Culture make the instruction of Arabic in elementary and secondary schools compulsory. A similar recommendation was brought before the Knesset in 1986, based on a committee report regarding the
status of Arabic studies in the Jewish schools.\textsuperscript{112} To date, these recommendations have not been implemented. Arabic language study among Israeli Jews should be compulsory not only because it is a formal language of the state, but also because the knowledge of Arabic will advance the understanding of and tolerance towards the Arab minority among Israeli Jews. Compulsory education in both languages would reinforce the importance of the two languages and cultures in Israel. In countries like Israel and the United States, in which a number of languages are spoken, it is vital that the various languages be used in the school system if linguistic minorities are to survive. This is especially true at the primary level, since language is inextricably connected with education.\textsuperscript{113}

As opposed to the United States, in Israel there are parallel and segregated educational systems for Jews and Arabs conducted in Hebrew and Arabic, respectively, and bilingual education exists only in a few selective and experimental schools. Such a distinct separation between linguistic minorities and the majority in the educational system does not exist in the United States. This difference is mostly due to the sociological, political, and demographic differences between the two countries. While Arabs comprise one fifth of Israel's population which itself exists as an enclave in a region populated by millions of Arabs, English is not only the predominant language of the United States, but it is also the second most spoken language in the world. This basic difference suggests dissimilar courses of action in each of the two countries. While the study of Arabic should be compulsory in the Israeli Jewish schools, in the United States, the English speaking majority should not be forced to learn Spanish. Spanish is neither sufficiently pervasive nor central to domestic policy in a measure that would merit such a requirement, nor does it enjoy the status of an official language.

Minorities in both countries should, however, receive equal educational opportunities. A few statutes provide some protection for language minorities in education in the United States. The Bilingual Education Act\textsuperscript{114} recognized the fact that minority language children were not receiving an adequate education in schools that operated exclusively in English. One of the main impediments to the implementation of the Act, similar to that of the Arabic educational system in Israel, is that the resources and funding for bilingual education have been inadequate for the growing non-English speaking population. The Bilingual Education Act did not provide a right to bilingual education; rather, it offered financial assistance for local bilingual programs

\textsuperscript{112} See D.K. (Jan. 29, 1986).


designed to meet the needs of children with limited facility in English. The question of whether the failure to provide educational assistance to non-English speaking students violates the Constitution was never resolved. Another protection for linguistic minorities in the field of education is found in The Equal Education Opportunities Act. The Act, among other things, requires school districts to take appropriate action to overcome language barriers that impede equal participation by students in an instructional program. The current debate in the United States over bilingual education stems from some of the same arguments used by official English proponents and opponents. There is strong opposition to bilingual education, exemplified by the recent anti-bilingual education initiative in Arizona, and Proposition 227—“English for the Children”—in California. Such measures would in effect end bilingual education in these states and will likely lead to the adoption of similar initiatives in other states.

In both the United States and Israel, a high standard of education is usually not available in the language of the minority, at least to the same extent as in the majority’s language. The result is an unavoidable conflict between the minority’s wish to have their children speak their language and learn their history and culture for reasons of communal identity and preservation of

115. See Schmid, supra note 22, at 85.
117. Since the Arizona legislature failed to pass a bill to end bilingual education, the matter is now left for the voters, as a ballot initiative modeled on California’s Proposition 227 (see infra note 114) was filed in Arizona at the beginning of 1999, and is aimed at the year 2000 election. See Ruben Navarrette, Jr., Legislature’s Lapse Leaves Bilingual Education to Voters, ARIZ. REPUBLIC, May 5, 1999.
118. CAL. EDUC. CODE § 300 (1998). Proposition 227, which was approved by the voters on June 2, 1998, dismantles the state’s special programs for students with limited English proficiency; these programs are to be replaced with one-year “immersion classes” (i.e., placing English learners in an English-translation class.). After that, children must be placed in classes in the regular program alongside native English speakers; the law bans most existing forms of bilingual education and in effect ends bilingual education in California. Some districts, such as San Francisco, refuse to implement the new law and continue bilingual classes in which immigrant students are taught primarily in their native languages. See Thomas D. Elias, Bilingual Classes Ban Gets A in California; Immigrants’ Enthusiasm Belies Critics, WASH. TIMES, May 16, 1999, at C4. See also Valeria G. v. Wilson, 12 F. Supp.2d 1007 (N.D. Cal. 1998) (upholding the constitutionality of Proposition 227).

tradition, and the imperative need of Hebrew schooling (in Israel) and English schooling (in the United States) in order to have equal opportunity and participation. It is incumbent upon the United States and Israel to each provide the opportunity for its minorities to achieve both goals. It can do so by acknowledging the importance of these needs and by creating constitutional rights of minorities to equal educational opportunities, through bilingual education or other methods which would achieve this goal and be supported by an equal allocation of financial resources.

V. LINGUISTIC MINORITIES AND LANGUAGE RIGHTS AS CONSTITUTIONAL AND HUMAN RIGHTS

We now turn to the question of whether justifications can be found for the privileged status of Hebrew in Israel and of English in the United States and, if not, to what extent and in what ways should minorities be placed on an equal footing with the majority. The main question in this regard is the legal status of language rights, i.e., should they be viewed as fundamental constitutional and human rights. For the purpose of exploring this question, I will attempt to define specifically whose rights come under discussion here.

The definition of linguistic minorities should be a broad one that includes not only those groups whose mother tongues are not official languages in the countries where they live, but all groups whose language has a status inferior to that of another dominant language. This definition applies both to countries that do not have an official language, such as the United States, and to countries which may have a language that is official de jure, but should be viewed as a language of a linguistic minority because of its inferior status de facto, such as Arabic in Israel.

In 1984, the United Nations' Sub-Commission on the Protection of Minorities and Prevention of Discrimination of the Commission on Human Rights proposed to define "minorities" as follows:

A group of citizens of a state, endowed with ethnic, religious or linguistic characteristics which differ from those of the majority of the population, having a sense of solidarity with one another, motivated, if only implicitly, by a collective will to survive and whose aim is to achieve equality with the majority in fact and in law.\(^{119}\)

The Commission on Human Rights never accepted this definition or any other proposed definitions that preceded it and the United Nations has yet to accept any single definition of a minority. The inability to reach an acceptable definition of "minority" and the lack of a formal definition demonstrate the

\(^{119}\) See Zoglin, supra note 113, at 28.
complexities that surround the rights of linguistic minorities. The United Nations’ proposal is too narrow since it is based solely on numbers without taking power into account, and since it requires that the minority be citizens of the state. The definition should also include non-citizens and the power of the group and not numbers alone.

For the purpose of this analysis, I find useful the following definitions of “majority” and “minority:”

The “majority” is “a social group that experiences social life from a position of privilege, ‘normal’ status, or dominance relative to other groups ... A ‘majority’ does not necessarily contain more than half of the members of the society. According to this model, there is no single ‘majority,’ since the meaning of this term will vary depending on the social context.”

“Minority” is “a social group that, having been constructed by society as different, experiences a relatively subordinate social identity and social status, which often results in fewer opportunities for economic and social advancement. It is usually true, but not essential, that a ‘minority’ group is comprised of fewer than half of the members of the population.”

I use these definitions in conjunction with the foregoing definition of “linguistic minority.”

In general, Israel’s policy neither recognizes the Arabs as a “minority” nor confers rights on Arabs as a minority. Even though the Arabs in Israel have a common culture, language, traditions, heritage, and economic and social interests that differ from those of the majority, there are no specific statutes that address their rights as a group. Israel’s failure to recognize the Arabs as a “minority” group in either the law or the government’s policies is due to Israel’s emphasis on building its identity as a Jewish state.

One of the crucial questions in regard to language rights in Israel is whether the Arab population has the opportunity to collectively exercise the right to use its own language as prescribed in international human rights instruments. Freedom of language is part of freedom of speech. While freedom of speech is upheld as a basic human and constitutional right, the right to use
one's own language in exercising that right has often been overlooked. The freedom of language, as part of the freedom of speech, should be regarded as a broad and a fundamental constitutional right as well as a basic human right. There are multitudinous meanings to language rights and ways in which language use may be of sociopolitical relevance to linguistic minorities. The freedom of language should include, among other things, the right to state-sponsored education in one's mother tongue; the right to participate in cultural activities in a language easily understood; the right to publish and broadcast in one's own language; the right to correspond with and be informed by the government of any administrative procedures; and, within the judicial system, holding trial proceedings in a language that the parties can understand.

Language rights are human rights and constitute a fundamental element of the international idea of equality. However, there is no declaration of the right to language in the international sphere. The principle of non-discrimination based on language is set forth in Article 2 of the Universal Declaration of Human Rights, according to which "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." No mention is made in this general provision of linguistic or other minorities as a group being entitled to collective rights. The first and most significant provision in a universal instrument, which refers to the existence of linguistic groups per se, is Article 27 of the

123. Manfred W. Wenner provides a useful and comprehensive list of language rights and categorizes them as follows: I. Individual Use: (a) the right to use the language at home; (b) the right to use the language "in the street"; the right to use the language for personal names (both first and family names); II. Individual and Collective Use: (a) the right to use the language in personal communications (letters, telephone conversations and the like); (b) the right to use the language in activities designed to perpetuate its use: (i.) schools, (ii.) newspapers, journals, magazines, books, etc., (iii.) radio and television broadcasting, (iv.) movies; (c) the right to use the language in private economic activities: (i.) business and manufacturing enterprise between workers, (ii.) advertising (storefront, media, etc.), (iii.) record-keeping (orders, invoices, inventories, and the like), (iv.) other communications (letterheads, etc.); (d) the right to use the language in private associations in: (i.) clubs of all types (social, sport, cultural), (ii.) churches and religious organizations; (e) the right to use the language in public meetings; III. Individual and Collective uses vis-à-vis the government: (a) in courts of law (with or without an interpreter supplied at government expense); (b) in communications with the government, such as license forms, filing required affidavits, tax forms, and applications for governmental services; (c) in public notices (street signs, public information signs, and the like); (d) in campaigning and running for public office; (e) in government reports, documents, hearings, transcripts, and other official publications for public distribution; (f) in the national legislature (in debates), the national judiciary, and the national administrative agencies, bureaus, and departments. See Manfred W. Wenner, The Politics of Equality Among European Linguistic Minorities, in COMPARATIVE HUMAN RIGHTS 184, 193 (Richard P. Claude ed., 1976).


125. Mala Tabory, Language Rights as Human Rights, 10 ISRAEL YEARBOOK ON HUMAN RIGHTS, 167, 175 (1980); KRETZMER, supra note 11, at 163-65.
International Covenant on Civil and Political Rights. The Article is the most positive provision on the subject of language rights of minorities and it provides that:

[I]n 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.\textsuperscript{126}

Some regional arrangements also address language rights. The 1948 American Declaration of the Rights and Duties of Man parallels the Universal Declaration of Human Rights. It includes the following non-discrimination clause: "All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor." Hortatory and non-binding, this Declaration enjoys lesser international legal status than the Universal Declaration because it is a "customary, internal recommendation."\textsuperscript{127}

Thus, international instruments provide very limited protection to linguistic minorities as a group. Notwithstanding the limitations of international law, it seems that the implementation of some language provisions is more suitable at the national level, where they can be adapted to the particular linguistic circumstances of each country. Neither the United States Constitution nor the unwritten Israeli Constitution give any language special recognition. However, minorities’ language rights are partially protected by these Constitutions and by constitutional court decisions.

The original intention of the founders of Israel was to enact as soon as possible a written constitution containing a Bill of Rights. The first Knesset was indeed elected as a Constituent Assembly. Several draft constitutions were laid before it, but the first Knesset decided, after lengthy and tedious deliberations, not to enact a constitution at that stage but to enact a series of "Basic Laws." These laws were eventually to be consolidated into a single constitution, but they never were. Such basic laws have meanwhile been enacted on almost all aspects of constitutional life.\textsuperscript{128} In Israel, as in the United

\textsuperscript{126} Id. at 182. See also De Varennes, supra note 66, at 134-57.

\textsuperscript{127} Id. at 205.

\textsuperscript{128} The reasons for the delay and hesitation in enacting some of these basic laws and gathering them into a written constitution are mainly the political opposition of the Jewish religious parties in the Knesset. They fear that a formal Bill of Rights would enable the courts to strike down some religion-based statutes. For example, marriage, divorce, and other important aspects of family law are based on religious Jewish law and consequently they discriminate against women and deprive them of equal protection. Under current law, the courts cannot strike down these statutes.
Kingdom, which also lacks a written constitution and Bill of Rights, opinions vary as to the desirability of introducing a Bill of Rights into the legal system.\textsuperscript{129} Generally, a Bill of Rights must be a written document that cannot be amended by the regular legislative process, and has supreme legislative status. The latest Israeli basic law that was enacted in 1992 and titled "Basic Law: Human Dignity and Freedom," seems to correspond to these requirements. This statute can be regarded as a basic law on civil rights. It contains provisions for almost all the human and civil rights traditionally guaranteed in constitutional instruments. However, it does not explicitly include freedom of speech and the principles of equality and non-discrimination.\textsuperscript{130} Even before the enactment of this statute and other basic laws, the legal situation in the field of human and civil rights in Israel proved to be quite satisfactory due to protection of these rights by the courts.

Throughout Israel's history, the Supreme Court had a prominent role in establishing and developing basic principles and freedoms and has been intensively involved in human rights issues. Most of these fundamental freedoms were recognized, implemented and enforced by the Supreme Court, sitting as High Court of Justice, notwithstanding the lack of any statutory authority. Fundamental freedoms and liberties are recognized and implemented by the judiciary, whenever redress is required.\textsuperscript{131} Condemnation of discrimination, freedom of expression, and the principle of equality are protected by case law of the Supreme Court. According to this case law, unless given clear statutory authority to do so, governmental bodies may not discriminate between citizens on grounds such as national, racial, or ethnic origins.\textsuperscript{132} Despite the

\textsuperscript{129} One of the major arguments against a Bill of Rights is that entrenched clauses limit the legislative supremacy of Parliament. See Shitreet, supra note 56, at 338-39. Moreover, as has been proven in Israel, the system of law could reach similar results irrespective of the existence of a written constitution. On the other hand, it can be argued that a Bill of Rights ensures judicial review of legislation and may be used to limit the powers of the majority, particularly where rights of the minority are concerned. In Israel it could be used to protect the civil rights of the minority Arabic population and could be more effective in dealing with discrimination. \textit{Id.}

\textsuperscript{130} This basic law invests the courts with the power to strike down any law enacted by the Knesset that is not in accordance with it. Therefore, it has an explicit constitutional status. The term "human dignity" is not defined in the basic law and may be employed in the future through court interpretation to include many fundamental rights not expressly mentioned, such as language rights. "Basic Law: Human Dignity and Freedom" is not entrenched and may be amended by simple majority; further, it grants immunity against judicial review to all existing legislation. Only legislation that was enacted after the basic law itself was enacted will be subject to judicial review on the grounds that such legislation violates a protected right. \textit{See Introduction to the Law of Israel} 52 (Amos Shapira & Keren C. De Witt-Arar, eds., (1995)).

\textsuperscript{131} Cohn, supra note 56, at 267-69.

fact that the protections provided by Israeli law are more easily reversed than similar protections under the United States Constitution, the informality of the Israeli Constitution does not undermine the scope of protection that can be provided by the Israeli courts regarding the rights of minorities in general. This is specifically true for the rights of linguistic minorities.

In the case of Reem Engineers, the Supreme Court of Israel dealt for the first time with the issue of language rights from a constitutional perspective. This decision provides new status for language rights of minorities with important constitutional implications. The suit was brought by a contractor who asked the municipality of Nazareth for a permit to publish a notice to Arab citizens in Arabic about the construction of buildings in an Arabic neighborhood. The municipality refused to issue the permit because, according to one of its bylaws, advertisements on billboards should be written in Hebrew or Hebrew and another language, as long as the Hebrew is at the top of the advertisement and does not occupy less than two thirds of the notice’s space. The District Court held that the bylaw does not prohibit the use of Arabic and that its requirement to add Hebrew does not infringe on any fundamental right. On appeal, the Supreme Court reversed the District Court’s judgment and struck down the provision. The court held that the bylaw’s provision is unreasonable and illustrates an unjustifiable constriction on the freedom of speech, part of which is the freedom of language.

The court stated that freedom of speech has always been a basic principle in Israeli law. The court held as follows:

Speech is linked to language ... language is more than a means of communication, it is equivalent to speech ... [t]he basic constitutional concept is that the freedom of speech encompasses the freedom of language. There is no freedom of speech unless there is freedom of language. This freedom may be at odds with other interests or values, and a balance may be needed which would render partial protection to this value ... as a relative, and not an absolute right.

The court discussed the two conflicting interests in this case: freedom of speech and language and the public interest in the Hebrew language. Regarding the public interest in the Hebrew language, the court asserted the importance of Hebrew as a national language, as the language of the majority of the citizens in Israel, and as a means for national unity. Hebrew readers have an interest in reading in their own language. In general, there is a public interest that every

133. C.A. 105/92, Reem Engineers v. The Municipality of Nazareth, 40(5) P.D. 189.
134. Id. at 201.
135. Id. at 201-03.
notice be understood by all.\textsuperscript{136} Regarding the freedom of speech, this principle received considerable prominence as a basic human right. The Court also found it applicable to the freedom of language mentioned in the Declaration of Independence.\textsuperscript{137} The court balanced the relative weight of these two conflicting interests. In doing so, the Court distinguished between state actions, e.g., sign-posts regarding names of streets and regarding traffic, which must be "in the official language;" and actions in which the state has a minimal role, such as in the case of state billboards, on which every individual can communicate. In the latter instance, freedom of language prevails, so the contractor could write exclusively in Arabic.\textsuperscript{138}

The court also justified its decision by noting that there is an Arabic minority living in Israel whose language is Arabic and that Arabic is the language of its speech, religion, and culture.\textsuperscript{139} The Arabic language is an official language and the language of many of the country's citizens. It further noted that pluralism and tolerance are inherent to the Israeli concept of democracy. Finally, the court added that the strong status of Hebrew in Israel today is not threatened and could not be jeopardized by awarding minorities the freedom to express themselves in their own language.\textsuperscript{140}

The court's decision was based upon freedom of speech and language and \textit{not} on Arabic being a formal language in Israel. Therefore, there was no need to scrutinize the special status of Arabic as an official language, which was not disputed. The court continued by saying that the status of Arabic as an official language has always been recognized in Israel based on Article 82 and based on the social reality that a large minority of Israel's citizens are Arabic speakers.\textsuperscript{141}

Because the decision was not based on Arabic being an official language, the court's decision applies to any language. Other than in the obiter dictum of the decision, the court does not address the issue of Arabic as an official language with special status in Israel. The court accorded an important status to language rights in general, but its decision did not accord Arabic any special status. Presumably, the court would have reached the same decision had the notice been written in any other language. The only apparent reason for the court's mentioning the status of Arabic and Arabs in Israel, was because Arabic was the "foreign language" in dispute. In fact, since the court dealt with the

\begin{itemize}
\item \textsuperscript{136} \textit{Id.} at 203, 208.
\item \textsuperscript{137} \textit{Id.} at 201-202, 207.
\item \textsuperscript{138} \textit{Reem Engineers,} 40(5) P.D. at 209.
\item \textsuperscript{139} The Israeli Supreme Court has recently reaffirmed this principle in C.A. 12/99, Jamel Mar'i v. Farid Sabek (February 23, 1999, Justice M. Cheshin).
\item \textsuperscript{140} \textit{Reem Engineers,} 40(5) P.D. at 210-212.
\item \textsuperscript{141} \textit{Id.} at 214.
\end{itemize}
language rights of Arabs, it could have struck down the bylaw by stating that a requirement to publicize only in Hebrew, or primarily in Hebrew with less space for another language, is unconstitutional due to the status of Arabic as an equal official language. I would surmise that one of the reasons the court avoided striking down the bylaw on the basis of Arabic’s official status was to emphasize the supremacy of Hebrew over Arabic and to avoid the need to define the scope of protection given to Arabic as an official language.

The court implicitly viewed Hebrew as if it were the only official language in Israel and its approach was that Arabic should be given the protection given to any other language. A view of Arabic as an equal official language could have led the court to explicitly declare, when it discussed state actions, that they should be performed in both Arabic and Hebrew. Instead, the court used the singular rather than the plural: “the official language,” meaning clearly Hebrew alone. Furthermore, the concurring Justice was of the opinion that all official publications should be in Hebrew “as the language of the state.”

Although the court did state the importance of Arabic and its status, it stressed that it did not base its opinion on these factors. It would appear then that it is one thing to claim that Arabic is an official language and quite another to implement it.

Furthermore, viewing freedom of language as part of freedom of speech, is not the exclusive or essential approach for the granting of freedom of language and language rights. An alternative approach is viewing language as an independent right. Some consider language as a collective right, and not as part of freedom of speech. Others view linguistic rights as linked to the right to education and the principle of equality.

Nevertheless, this is the first court decision to grant freedom of language a special and new constitutional status, never before accorded to language rights in Israel. Yet the right accorded was individual, and there is no Israeli court decision granting collective rights to linguistic minorities.

American law offers an impressive range of protections for the individual but, like the Israeli law, it has its limitations with respect to the rights of linguistic minorities. The constitutionality of language rights in the United States has been addressed in connection with the First Amendment and the Equal Protection Clause. The First Amendment prohibits the government from abridging freedom of speech, expression, and association. The First Amendment is implicated when the government restrains the private use of

142. Id. at 216.
144. See Wenner, supra note 123, at 184.
145. Perea, supra note 68.
foreign languages. The two cases that implicated the First Amendment are directly related to the "English-Only" movement. In the matter of Asian American Business Group v. City of Pomona, the facts and the decision were similar to those in the Israeli case discussed above. However, Asian American is one decision of a District Court that has yet to be followed in other circuits. In this case, the city restricted the size and language of business signs. The 1988 Ordinance provided that "on-premises signs of commercial or manufacturing establishments which have advertising copy in foreign alphabetical characters shall devote at least one-half of the sign area to advertising copy in English alphabetical letters." In effect, this restricted the use of foreign script, and specifically Chinese characters. The District Court held the ordinance unconstitutional because it burdened the freedom of expression, which is a fundamental interest: "Choice of language is a form of expression as real as the textual message conveyed. It is an expression of culture." The decision in Yniguez v. Mofford was the first appellate decision to strike down a state official English measure. The Ninth Circuit relied on the First rather than the Fourteenth Amendment. In 1988, Arizona voters passed Proposition 106, which became Article XXVI of the Arizona Constitution entitled "English as the Official Language." This measure amended the state constitution, requiring the state, its political subdivisions, and all government officials and employees during the performance of government business, to speak in English only. Yniguez, a Latina employed by the state Department of Administration to handle medical malpractice claims was accustomed to speaking Spanish with claimants who had difficulty communicating in English. She sought an injunction against the Article. Writing for an en banc court, Judge Reinhardt struck down Proposition 106 as violating the First Amendment. The court found the provision unconstitutionally over-broad because it burdened the right of public employees to speak on matters of public concerns. The court held that Yniguez's speech was of public concern because the public had a strong interest in receiving it. Judge Reinhardt concluded that, because the Article restricted the speech rights of all government employees and banned the dissemination of critical information to non-English speaking Arizonians, the speech interests impaired by the Article outweighed the government's interests in the Article's operation. The United

146. Schmid, supra note 22, at 75.
148. Id. at 1329.
149. Id. at 1330; A similar approach can be found in Canadian court decisions, see, e.g., Ford v. Quebec (Attorney General) (1988) D.L.R. 577, 604-05.
151. Id. at 314.
States Supreme Court refrained from reviewing the case on procedural grounds and vacated it as moot, since Yniguez had resigned from state employment. However, another challenge to the law brought by ten bilingual individuals (elected officials, state employees, and a public school teacher) who, like Yniguez, spoke Spanish during the performance of their job, has met with success. In April of 1998, after a decade-long battle over Arizona’s Official English Amendment, a unanimous Arizona State Supreme Court struck down the “English-Only” Amendment as a violation of the First Amendment and the Equal Protection Clause. The Court found this Amendment among the strictest and the most sweeping of all states’ “English-Only” laws. Consequently, Arizona public employees and officials may now speak languages other than English. Nevertheless, a less restrictive “English-Only” ballot measure is anticipated in the year 2000 election and is likely to pass.

The most obvious source of constitutional protection against government
sponsored language-based discrimination is the Equal Protection Clause of the Fourteenth Amendment. The Supreme Court has not resolved the question of whether language-based classifications constitute a "suspect" category. Language-based discrimination should be afforded strict scrutiny or at least intermediate level scrutiny. In general, the courts have rejected an equal protection challenge by language minorities unless the law in question involved a very close relationship between language and race, ethnicity, or national origin. These forms of discrimination are suspect classes. Strict scrutiny will also be employed if law infringed on rights considered fundamental. In Gutierrez v. Municipal Court, the Ninth Circuit did not reach the validity of California's "English-Only" law under the Equal Protection Clause. First, the court said that the California Constitution simply asserts that English is the state's official language. It does not require that English be the only language spoken. In addition, the Ninth Circuit held that even though an individual is bilingual, his primary language remains an important link to his ethnic culture and identity. Thus, the decision sheds no light on equal protection issues arising out of "English-Only" legislation. In both private employment and public employment, courts have refused to treat "English-Only" rules as creating a suspect classification and have held that the rules do not result in discrimination. The discriminatory intent requirement compounds the difficulty of confronting discrimination against linguistic minorities under the Equal Protection Clause. In Frontera, the court added that English is the national language of the United States and that there is a national interest in having English as a common language. The same approach is found in other cases dealing with linguistic rights.

155. Schmid, supra note 22, at 72.
156. See id. at 74. See also Cornell & Bratton, supra note 100, at 691 (setting forward a theory of rights that compels the law to accord suspect status to discrimination based on language). Cornell & Bratton further suggest that official English be condemned based on a right to cultural and linguistic freedom under the Thirteenth Amendment. Their argument builds on David A. J. Richards's interpretation of the Thirteenth Amendment as including and forbidding all forms of moral slavery, and on his concept of suspect classification (see David A. J. Richards, WOMEN, GAYS, AND THE CONSTITUTION 5, 355 (1998)). Id.
158. Alva Gutierrez v. Municipal Court of the Southeast Judicial District, County of Los Angeles, 838 F.2d 1031, 1039, 1043-44 (9th Cir. 1988); Zoglin, supra note 113, at 17.
159. See, e.g., Garcia v. Gloor, 618 F.2d 264 (5th Cir. 1980).
160. See, e.g., Frontera v. Sinell, 522 F.2d 1215 (6th Cir. 1975).
161. Id. at 1220.
162. See, e.g., Soberal-Perez v. Heckler, 717 F.2d 36 (2d Cir. 1983).
163. See Olagues v. Russoniello, 797 F.2d 1511 (9th Cir. 1986).
Thus, language rights are protected under the Fourteenth Amendment only when the victims prove that the discrimination is based upon race, ethnicity, or national origin. Language minorities must establish a nexus between race, national origin, or ethnicity and language in order to advance a successful claim under the Equal Protection Clause. Because language bears an extremely close relationship to race, ethnicity, and national origin, state actors may use language as a subterfuge for invidious discrimination. Therefore, it is necessary to distinguish between classifications that use language as a means of promoting efficiency, and those that impermissibly use language to differentiate people along ethnic or racial lines. To date, neither access to education nor cultural preservation for linguistic minorities received more than rational basis scrutiny under United States constitutional doctrine. The United States courts do not consider language as a fundamental right. If the United States Supreme Court viewed language rights as part of freedom of speech, language rights would hence be fundamental. Thus, one could claim that the Israeli Supreme Court has provided a higher constitutional recognition and protection of language rights than is afforded by United States law. In Israel language rights are considered part of freedom of speech which has always been regarded as a fundamental constitutional right. On the other hand, although language rights are not recognized by the United States Supreme

164. Language is not recognized as a prohibited ground of discrimination; despite efforts to include language implicitly under another prohibited ground of discrimination such as race, national origin, or ethnicity, there is obviously an imperfect match and some individuals will occasionally “escape” protection. See De Varennes, supra note 66, at 113. It is interesting to note, in this context, that the Equal Employment Opportunity Commission has interpreted the concept of national origin to encompass an individual's language rights. 29 C.F.R. § 1606.7 (a) (1996) ("The primary language of an individual is often an essential national origin characteristic."). See Lisa L. Behm, Comment, Protecting Linguistic Minorities under Title VII: The End for Judicial Deference to the EEOC Guidelines on Discrimination Because of National Origin, 81 MARQ. L. REV. 569, 570 (1998). However, this definition is not binding upon the courts. See also Bill Piatt, Toward Domestic Recognition of a Human Right to Language, 23 HOUS. L. REV. 885, 901 (1986) (arguing against the view of language as part of national origin not only because the two are not the same, but also since such a link may perpetuate the fear of some monolingual individuals that the use of a language other than English is “foreign”).


166. See id. at 483.

167. See, e.g., Olagues v. Russioniello, 797 F.2d 1511 (9th Cir. 1986) (implementing an objective test to determine whether a language classification uses language as a pretext for race, ethnicity or national origin. According to the objective test, certain language classifications mandate strict judicial scrutiny because their very terms single out particular language groups for special treatment; thus, classifications imposing the same requirements on all people, regardless of their language and regardless of the intent of the state decision maker, do not establish a sufficient nexus with race, ethnicity, or national origin to justify strict scrutiny).

Court as fundamental constitutional rights at the practical level, it seems that linguistic minorities in the United States were afforded the same rights as those in Israel, if not more.

The argument that language rights should be regarded as fundamental human, civil, and constitutional rights brings us back to the definition of linguistic minorities, and to the question: whose rights come under consideration? The proposed definition was to view all groups whose language has a status inferior to that of another dominant language as linguistic minorities. However, one should not infer that all linguistic minorities deserve equal rights. The view of language as a basic human and constitutional right is the only means by which a state could provide adequate protection for linguistic minorities. This view should be fully implemented as far as the private usage of a language is considered, i.e., the right to freely use one’s own language. However, it does not follow that the status of the languages of all linguistic minorities should be the same as that of the majority language vis-à-vis the state. Unlike other fundamental rights, such as religion and race, the prohibition of discrimination on the ground of language is not an absolute. There is no obligation for a state to conduct all of its activities in any language spoken by the inhabitants in its territory. Non-discrimination does not prohibit every distinction involving a language, only those that are “unreasonable” when one considers all relevant factors: those that relate to the state’s interests and goals, and those that relate to the individual’s interests, rights and how the individual is affected. 169 Thus, some minority languages do not warrant equal status or similar status to that of the majority language and should not be accorded “official” status or have characteristics of an official language. 170

A “sliding scale” approach is an appropriate means in order to arrive at a linguistic policy which does not discriminate based on language. 171 The “sliding scale” formula takes into account factors such as: the number of speakers of a language, their territorial concentration, the level of public services being sought, the disadvantages, burdens or benefits a state’s linguistic practice imposes on individuals, and even a state’s human and material resources. 172 Such a model can provide a balanced and reasonable response to

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169. See Varennes, supra note 66, at 126.

170. For example, no one would think that a single minority language child would warrant construction of a school, and most would feel that the more children there are the more pressing is the concern. See Green, supra note 143, at 666. Thus, although I argued that the definition of “minority” and “linguistic minority” should not include a numerical threshold, when it comes to determining which language minority should be accorded equality to the majority language in acts of government, the size of the group should matter and be taken into account. There should be a sufficient number of speakers of a language in order to impose any duties on a state. See De Varennes, supra note 66, at 129.

171. See De Varennes, supra note 66, at 177.

172. Id. at 247.
the presence of various numbers of speakers of minority or non-official languages. When public authorities face a sufficiently high number of individuals whose primary language is not that of the majority or the official state language, it would be discriminatory not to provide a level of service appropriate to the relative number of individuals involved. The major factor, according to this model, is the percentage and geographical concentration of individuals using a language distinct from that of the majority or the official one. There are thus minimum requirements that the public authorities must respect. The sliding scale implies (beginning at the lower end of the scale and moving to a progressively higher end), e.g., (i) making available official documents and forms in the non-official language or in bilingual versions; (ii) the acceptance by authorities of oral or written applications in the non-official language, and response thereto in that language; (iii) being able to use the non-official language as an internal and daily language of work within public authorities.

To provide a more precise guideline as to when a state must mandate measures to avoid imposing an unreasonable burden or disadvantage upon too many people, adding some kind of a numerical threshold may be of assistance. However, because the variables in each country are so different, it is difficult to establish clear numerical criteria, and different countries have adopted dissimilar thresholds. Such numerical thresholds would seem appropriate and justifiable only in countries that have no official language statute, like the United States at the federal level, and in the states that have adopted official English legislation. Numerical thresholds should not be

173. Id. at 177.
174. Id. at 178.
175. Id. at 179. See also Steven W. Bender, Consumer Protection for Latinos: Overcoming Language Fraud and English-Only in the Marketplace, 45 AM. U.L. REV. 1027, 1058 n.176, 1069-70 (1996).
176. In India, for example, whenever a language is spoken by thirty percent or more of the population, the state should be recognized as bilingual and the relevant minority language should be placed on the same footing as the formal/majority language by public authorities; whenever the linguistic minority constitutes fifteen to twenty percent of the population in a certain area, government notices, rules, laws and the like should be reproduced in the language of the minority in that particular area. In Canada, where both English and French are official languages, most bilingual federal government services are only available where the population includes at least five percent of speakers of the official language minority. See De Varennes, supra note 66, at 179.
177. As previously asserted, official monolingualism is objectionable. See supra Part IV. The solution for the problems of linguistic minorities should be either official bilingualism or multilingualism (which include the language of the majority and that of the largest minorities in a given country), or not declaring any language as official. However, when faced with official monolingualism, adopting a sliding scale with a numerical threshold is one of the ways to protect the rights of linguistic minorities in these states, rights that are not available according to the current legal scheme.
adopted when a country recognizes more than one language as official. The declaration of two languages or more as official should be viewed as encompassing in itself the assumption that there is a sufficient number of speakers of all official languages to warrant equality between them in terms of government services. The fact that Arabs constitute one fifth of Israel’s population justifies the maintenance of the status of Arabic as an official language. Once Arabic has been accorded equal status to Hebrew, all government services should be bilingual notwithstanding any numerical threshold.178

In the United States, on the other hand, where there is no official monolingualism at the federal level, numerical thresholds should be used to decide where and to what degree the government should provide rights to linguistic minorities. Thus, federal requirements in the United States to provide public services in languages other than English should be encouraged and expanded where a sufficiently large number of individuals who speak a minority language exist. An example of such a requirement is that of state agencies that administer “food stamp” programs to have bilingual staff and to translate written materials in areas where there are a substantial number of low income, non-English speaking families.179 Similar policies, if applied in the state level, would allow for such services to exist at a widespread level.

VI. CONCLUSION

The superiority of Hebrew over Arabic and the disparity between the two languages exist due to the basic concept of Israel as a Hebrew-speaking, Jewish country. The essence of Israel has to do with its Jewish identity and the reason for its establishment as a nation was to provide the Jews with a safe haven. These factors seem to contradict formal bilingualism. On the other hand, one cannot ignore the existence of the large minority of Arabic-speaking citizens within Israel’s population who deserve equal rights. Providing equality would not only implement the law that provides that both Arabic and Hebrew are the official languages of Israel, but also would promote national unity and integration and diminish some of the animosity Arabs hold toward Jews in Israel. The status of Hebrew in Israel will not be threatened by providing equality to Arabic, just as there is no danger to the status of English in the United States.

Official monolingualism in both the United States and Israel is objectionable. By adopting an official-monolingualism-statute, which in fact

178. Thus, for example, if Canada wishes to accord some governmental services in only one language, as it in fact does, it should not have adopted a statute declaring two languages to be the official languages of the state.

179. See De Varennes, supra note 66, at 180.
will serve to exclude the use of most other languages in all government branches, linguistic minorities in both countries will not be able to enjoy many privileges. For example, they would not have access to jobs and services provided by the state. These minorities would be disadvantaged and will assume a heavier burden by not being able to use their primary language. Those who are not fluent in the official language will not be permitted to receive the same benefits and services that the state confers to the majority and would be forced to learn the official-dominant language. Moreover, such a demand for monolingualism could constitute an intent to discriminate on the grounds of national origin, ethnicity, and race. Thus, the legal status in both countries should not be changed.

English in the United States has, de facto, all the characteristics of an official language apart from a constitutional provision. Making English official at the federal level would only promote the political objectives of the opponents of immigration and would elevate discrimination against linguistic minorities.

Arabic in Israel does not have the characteristics of an official language because it does not enjoy equal status and respect in governmental proceedings. Arabs in Israel are a distinct minority that constitutes one fifth of its population. Coupled with the fact that Arabic and Hebrew are both official languages by law, this fact certainly warrants equality between Arabic and Hebrew. It further warrants full protection against discrimination with respect to language rights of Arabs in Israel, state intervention, and promotion of their language. Abolishing the status of Arabic as an official language in Israel is unacceptable. If Israel wishes to change the status of Arabic and grant Hebrew priority, it should do so by enacting an explicit statute that would change the languages' status in Israel. Inequality between the two formal languages should not be inferred from the existing provision regarding official languages.

Alternatively, Israel could drop official languages altogether, as has been the practice in the United States. However, preserving Israel's commitment to both official languages and strengthening the equality between them is preferable. This is because dropping official languages in Israel would lead to less protection for the Arabic-speaking minority than it has under the current legal status. There is no linguistic minority in the United States with characteristics similar to those of the Arabs in Israel. The political animosity between Jews and Arabs in Israel; the treatment of Arabs as second class citizens by the Jews in other areas of legal and social life; and the fact that Arabs constitute a large minority within Israel's population, necessitate full implementation of Arabic as an official language. The official status of Arabic should bind the authorities and the government. The government should accord full equality to the Arab linguistic minority regarding the use of Arabic in all institutions of the state: legislative, executive, administrative, and judicial, and in the performance of various other functions of the state. That would include,
for example, changes in the educational system, i.e., making the study of Arabic in Hebrew schools compulsory and equally allocating resources to both educational systems.

The United States has proven that without having an official minority language, or for that matter, any official language, it can provide equality in some areas to linguistic minorities. Israel does not have a long-lasting tradition of providing rights for minorities and its pluralism is limited due to, among other things, the ongoing tensions between Arabs and Jews. Paradoxically, due to the different paradigms of protection for linguistic minorities that have developed in each country, the dangers that an “English-Only” statute at the federal level in the United States would permit discrimination against linguistic minorities, is similar to the danger of discrimination that would arise in Israel if Arabic lost its official status. Not having official languages in Israel would lead to similar consequences as enacting an “English-Only” statute in the United States: Hebrew, de facto, would be the only language used and spoken in all aspects of life in Israel, the segregation between Arabs and Jews would increase, and Arabic would be used only individually and only in the Arabic enclaves.

In both the United States and Israel, linguistic minorities should be accorded language rights as a group by virtue of basic constitutional principles of equality and by viewing language rights as fundamental. Yet, the right not to be discriminated against on the ground of language is not absolute. Thus, the degree to which a state should be bound to use a language other than that of the majority for the conduct of its affairs depends on various factors, such as the number of speakers of a minority language, their territorial concentration, and the level of public services being sought. Countries where no official language statute exists, like the United States, should adopt a sliding scale approach with an appropriate numerical threshold. However, this model is inappropriate when a state already has more than one official language, such as Israel. Thus, where there is more than one official language, the official languages should be equal in the conduct of all state affairs.
ETHNICITY AND CONSTITUTIONAL REFORM: 
THE CASE OF ETHIOPIA

Charles E. Ehrlich

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I. INTRODUCTION

Ethiopia has recently undertaken one of the most sweeping constitutional reforms in contemporary Africa. The foremost issue on the constitutional agenda, how to treat a patch-work of ethnic groups yet still maintain a viable central government, concerns most other African states that may one day soon

have to rewrite their own constitutions in the post-Cold War reality. Unlike most of sub-Saharan Africa, Ethiopia has an ancient history which gives constitutional reform special meaning. Like most of Africa, the outcome has resulted more from the direct past than from ancient historical traditions. The Ethiopian Government has at least paid lip-service to federalism and federal structures. It has transplanted Western theories about federal structure in an attempt to solve its nationalities question—how to govern multi-ethnic societies. But these theories have yet to produce a completely satisfactory answer in the West. Even if they did produce a satisfactory answer, whether that answer would apply to Africa and to Ethiopia in particular remains still unclear.

The current regime in Ethiopia has introduced Western theories in order to define a modern state identity. In doing so, it has replaced the old indigenous Ethiopian identity with a new identity. The new identity does conform to Western ideas of the state; however, it is wholly artificial in Ethiopia. This article will explore some of the Western theories which have influenced constitutional debate in Ethiopia and will explore what lessons Ethiopia should take away from these theories.

II. ETHIOPIAN IDENTITY

A. The End of Imperial Ethiopia

Ethiopia has one of the most ancient civilizations in the world. Yet, like many ancient civilizations, Ethiopians never grew together in any homogeneous fashion, but rather fostered diversity over the millennia. The “Ethiopian” identity, for what it was, applied to a civilization, not to a tribe. In Ethiopia today, the various peoples speak nearly ninety languages, but they share millennia of interaction, common traditions, and a sense of civilization. Despite their differences, they are all recognizably Ethiopian, not in the sense of sharing an ethnicity but in sharing a culture. In the modern world, where ancient Ethiopia has had to interact with modern states, this hodge-podge has needed to come together into a coherent country: Ethiopia has had to forge an identity co-terminus with the state. This struggle has taken a good part of the last century.


The ancient empire confronted colonial powers, brought in westernizing codes and theories, and finally met its death at the hands of a brutal communist dictatorship. Although there had been previous conflicts between the different tribes within Ethiopia, those conflicts never defined the groups as somehow parts of separate civilizations. Indeed, intermarriage and inter-settlement underscored the interdependence of the tribes and assured a fundamental Ethiopian identity. Contact with the West unleashed the nationalities question, and governments this century have tried to find different ways to suppress that question.

B. A New Artificial Ethiopia

The rebels who overthrew the communist regime came primarily from an ethnic group near the periphery; the Tigrayans. One of their primary concerns in taking over the state was granting the various ethnic regions autonomy. However, they, in effect, did not wish to relinquish the power they had newly won in the central state. The federal state they proposed did not match the one they put into practice. The issues which faced the new regime were much the same as those which faced previous regimes, with the difference being that the new regime professes to want to confront the issues in a more democratic manner, thereby enabling Ethiopia to develop into a functional and modern state in the global political system. The new regime must take into account ethnic differences, if only because these have surfaced as important to Ethiopians, but do so in a way that will preserve and strengthen the unity of Ethiopia, allowing for decentralization and ethnic tolerance while developing a distinct civil society for the entire state based in the central regime.4

The new regime, despite its announced intentions, has taken another fragmentative path, creating artificial regions and strengthening ethnic divisions while weakening the institution of the central government except to preserve the current government’s own physical power. Ethnic groups do not necessarily confine themselves to the regions proposed as the units into which the state has been sub-divided. Yet granting power to specific allied ethnic groups within each region furthers discrimination and leads to the ultimate breakdown of the human rights that the new Ethiopian regime proudly professes.

III. THE MEANINGLESSNESS OF BOUNDARIES

State boundaries rarely correspond with ethnic boundaries. This fact is especially true in Africa, where the boundaries reflect lines drawn almost arbitrarily by European colonial powers. The Europeans never envisioned that

these units would turn into viable independent states.\(^5\) For these states to become viable it is necessary for them to come to terms with their borders in one way or another. One solution, that the Africans redraw their boundaries, has been summarily discounted by virtually all outside academia. No matter how illogical the existing borders are, there is no theoretical reason that the states cannot find some way to work, given the right balance of constitutional structures. Finding the right balance is key: multi-ethnic states are commonplace in Europe as well, yet the nationalities’ question persists there with no clear solution. Accounting for ethnicity and potential ethnic conflict remains the central issue in contemporary African constitution-writing.\(^6\)

A. Cross-claims with Somalis

The main struggle between distinct groups within Ethiopia over the centuries has been religious rather than ethnic in nature. The bulk of Ethiopia’s population is Christian, but there is also an important Moslem minority. For example, these religious issues defined the historic Amharic/Somali struggles more than the ethnic issues.\(^7\) The Somalis living in the Ogaden region present an additional problem to the Ethiopian state because they have more in common with Somalia than with Ethiopia proper, and are more inclined to seek justice in Somali tribal courts on both sides of the international boundary and trade with Somalia more than with the rest of Ethiopia. Their existence has largely remained peripheral to an Ethiopia content to let them get on with their own traditional existence, and they do not represent a challenge to the historic state, at least not until they get empowered to do so under an overly-decentralizing and destabilizing constitution.\(^8\)

On achieving independence in 1960, Somalia staked a claim on the Somali-populated areas of Ethiopia. A claim that received some backing throughout Africa. In the context of decolonization and independence movements, the Organization of African Unity (OAU) responded with a resolution, still in place, calling for the inviolability of colonial boundaries. Despite the illogic of many of these boundaries, the OAU felt that such a resolution was needed in order to affirm the rule of international law and to reduce conflict between states. Ethiopia, however, had fixed its boundaries in conjunction with the colonial powers in the last century, and had an inherent interest in maintaining its own conquests, including those in the eastern Somali-

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8. *Id.* at 109.
populated areas. Therefore, it exerted great influence over the proceedings of the OAU resolution. Nevertheless, Somalia continued to support a Somali separatist movement, one of the many ethnic or pseudo-ethnic separatist groups within Ethiopia which have grown in the last few decades.

B. The Fiction of Eritrea

One part of Ethiopia did secede after the overthrow of the Communist regime was Eritrea, the former Italian colony along the Red Sea Coast. Islam has figured as an important element in the Eritrean issue as well. Historically, Eritrea has been as ethnically and culturally diverse as any other territory in Africa. Not only did diversity exist within Eritrea, but the tribal boundaries crossed the international ones. Two religions, Islam and Christianity, existed alongside each other as they did in neighboring areas. However, in the second half of the twentieth century the situation of Eritrea got recast as an ethnic one, with the Eritreans forming a supposed people. The impetus for this came from Moslem rebels who merely wanted independence from the Amharic — and Christian-dominated mother state. Eritrea, however, exists as a historical fiction, created by the Italians in the late nineteenth century. The prior struggle between inhabitants of the region and the Ethiopian Imperial regime had never existed on ethnic grounds but rather on religious ones, and even then only in a portion of the population of Eritrea. With the creation of a fictitious Eritrea, however, some sort of regional identity could finally be used to counterpose against the Amharas. The struggle of the Eritrean people, then, is one of extremely recent creation.

A well thought-out constitution would still accord the individual inhabitants of Eritrea their share of human rights, including the right to identify with their region as an integral part of the greater state. Indeed, if handled well, the creation of Eritrean identity could have been regional and non-ethnic in nature and a positive building-block for Ethiopian identity. In reality, an Eritrean people, historical fiction though it may be, was created this century and finally accorded recognition as a distinct people under the new constitution, because the Eritrean separatists had been the chief ally and supply conduit for the Tigrayan nationalists in overthrowing the Marxists. In return for their

9. Id. at 111.
12. Id. at 112.
13. Haile, supra note 2, at 7.
support of the victorious Tigrayan rebels, the Eritrean nationalists got what they wanted: secession from Ethiopia.

IV. SELF-DETERMINATION AND THE THREAT TO DEMOCRACY

A. Ethiopia in Practice

Although many Africans have cheerfully pointed to Eritrea’s independence as a bloodless and amicable split (at least at the time of Eritrean independence — a bloody border war ultimately erupted in 1998), they have overlooked the meaning of the artificial ethnic struggle which underlies it, and indeed the threat that such a split poses to the future integrity of Ethiopia as a state. Furthermore, they ignore one other issue which undermines the democratic front put up by the governments of Ethiopia and Eritrea: that the separation was the product of an agreement between two unelected provisional governments, those of Ethiopia, dominated by the Tigrayan rebels, and of Eritrea, dominated by the Eritrean rebels, their close allies.14

The split with Eritrea actually underscores the undemocratic tendencies of the victors in Ethiopia’s civil wars. The new Eritrean Government makes no secret that now that it has achieved independence through the sacred right of self-determination and democracy, it does not want to organize itself along the same lines. The regime in place in Eritrea has opted for a centralized and intolerant system of rule.15 Meanwhile, the new regime in Ethiopia has begun to impose itself upon the greater state, forcing its way while it still can. It has put up its own fronts within various ethnic groups when it does not feel it can sufficiently control the main ethno-political movements which dominate Ethiopian politics.16 And, of course, the primary way it has manifested its intentions is through the constitutional system it put in place.

The Tigrayans form a distinct, but small, ethnic group from the northern highlands. Tigray forms an integral part of Ethiopia, but the Tigrayans themselves have historically resisted domination by the Amhara majority. Through alliances with other ethnic groups and especially with the Eritreans, the Tigrayans finally had the opportunity to put their own vision of the state in place when they overthrew the dictatorship.17

Although constitutions exist in part to delineate and limit the powers of government, the new constitutional framework in Ethiopia fails to accomplish this. Despite its seeming constitutionalism, the new regime maintains power, which in turn means power remains in the hands of those ethnic groups, primarily Tigrayans, who occupy power because of their position in overthrowing the former Marxist regime. The presumed democracy now extant in the country merely represents a new form of dictatorship based on institutionalized tribalism rather than a civic society which can effectively promote democratic structures, human rights, ethnic harmony, and state unity.  

B. Western Theory Transposed

Due to settlement patterns over centuries of history when modern states formed without regard to ethnicity, state boundaries did not come to reflect ethnic demarcations in contemporary Europe either. However, as ethnic movements of various sorts became important in the age of nationalism, modern states had to consider how they would deal with the problem. Many countries had the opportunity to consider constitutional reform, either because their states were more recent creations or because of war and occupation. Many of these issues which political theorists grappled with remain present. Therefore, to properly consider current situations in any country—European, African, or other—it helps to assess the broader theory behind attempts to deal with similar problems.

Europe has had several multi-ethnic states and numerous constitutional regimes which have tried to deal with these issues. The Austrian Empire was perhaps the most notable due to its diversity and its ultimate spectacular failure. Spain has been more successful at keeping itself together, but nevertheless has found its question of nationalities to be the critical issue to dominate its constitutional debate for over a century. Its current constitutional arrangement—the Estado de las Autonomías—is much studied today as a successful mix of regionalism and federalism with state supremacy. However, although the Spanish Constitution has come to serve as a model for developing states, it has not fully addressed the concerns of its minorities to the extent that the issue continues to dominate Spanish constitutional debate. If the system is not right for Spain, for which it was designed, then it is less likely to be successful in culturally dissimilar African countries like Ethiopia or South Africa, which take it as a model. The Africans can, however, study the debate in other countries to learn lessons which might be applicable to them.

Spain is actually an apt example for Africa because it remained one of the last large states in the West to develop economically, and its constitutional
debates corresponded with its industrial development. Industrialization brought Marxist thought into the mix, something which has also influenced Africa and which mixes uneasily with the treatment of ethnicity thanks to Marxism's traditional dismissal of ethnic issues.

The modern "nation" emerged as an important concept in Post-Enlightenment Europe, yet the multiple and contradictory definitions that historians, politicians, and the general population gave the word rendered it practically meaningless. To some, the "nation" corresponded exactly to the sovereign state; to others, the "nation" represented something more tribal in nature. These latter tribalist groups also often felt that the "nation" should correspond to the sovereign state, and that the existing states should be dismantled to allow for this. Although African countries did not form in the same way as European ones, post-colonial realities usually left one ethnic group in a dominant position, facing opposition from movements dominated themselves by specific ethnic groups.

To clarify, any study of this debate requires laying out definitions. The most common, and therefore the most confusing, word was "nation." Some, particularly groups which formed the majority and viewed the identity of the central state as essentially that of their own group, considered "nation" as synonymous with "state." Other large nationalities, such as the Germans, considered themselves a nation even though they possessed no single state until very late. Still other groups considered themselves nations even though they had no independent state, while other members of their own community denied their nationhood simply because they had no state. Still further, Marxism, which came of age at the same time as nationalism, denied the importance of ethnic demarcation as a primary element of identity, stressing the horizontal cleavage of class over the vertical cleavage of ethnic group in human society.

Karl Marx's strict economic interpretation caused him to overlook the cultural and historical psyche of peoples. Therefore, he, too, confused the terms "nation" and "state," viewing this element as a purely economic unit. Certainly, Marx would have completely discounted the tribes of Africa as worthy of preservation, and would have argued heavily in favor of some greater state to modernize and civilize their society. Recognizing ethnic differences within a constitution would have undermined this commonality.

But ethnic consciousness did exist, and it needed some definition. When they wrought the "nation-states" of modern Europe, the relevant forces merely

19. On the difficulty in defining this messy term and why it is best left unused, see LOUIS SNYDER, ENCYCLOPEDIA OF NATIONALISM 230-34, (1990).


21. Id. at 8.
acted out human nature: the desires of men to associate with those who most closely resemble themselves, especially in the face of real or perceived threat. Ethnic identities, as demonstrated through language, culture, and custom, have proven most fundamental in shaping the general world-view of individuals. Despite modernization and democratization, nationalism persists and any effective constitution in the modern world must therefore deal with the concept — either through openly recognizing it or through organizing the state along some sort of regionalist or federalist model which allows the forces of nationalism to have an outlet other than against the stability of the state.

In Africa, as in Europe, ethnic groups channeled their efforts into four distinct possibilities. Separatism and minority dominance of the state form the two possibilities on either end of the spectrum, and the bulk of minority ethnic movements have tried to take one of these two routes. In between those possibilities exist seeking protection within a multi-ethnic framework for the greater state and mere access to a non-ethnic state apparatus. These last two are more difficult to accomplish, even in the European countries where these theories developed. Furthermore, a regime like the current one in Ethiopia can pay lip-service to one of these last possibilities, even within a written constitution, while effectively operating under one of the first two paradigms.

V. REGIONALISM

A. Regionalist Theory from Spain

The term "regionalism," currently in vogue in several constitutional structures, emerged from nineteenth-century Spain. The concept became the cornerstone of a Catalan political party which acted on the general Spanish political scene and sought to govern all of Spain from Madrid at the same time as it wished to govern an autonomous Catalonia from Barcelona. The theorist behind the party was Lluis Duran i Ventosa, who supplied the term "regionalism" in order to distinguish clearly between types of "nationalist" objectives: the mere promotion of culture and regional autonomy on one hand and the micro-nationalist demand for ethnic self-determination on the other. The only drawback, Duran admitted, was that its root implied geography, not ethnicity, which he correctly feared would allow micro-nationalists a means to question regionalism as a movement of ethnic identity. Indeed, in its contemporary guise in the late twentieth-century, regionalism has taken on the overtones of a mere administrative reform rather than a recognition of the

22. Adam, supra note 3.
23. Id. at 110.
24. LLUIS DURAN I VENTOSA, Regionalisme i Federalisme, 10F (1905).
inherent rights of whatever ethnic group forms the majority of the population within a given autonomous or semi-autonomous region.

Respecting historical accidents that established modern states, historic regionalists stressed cooperation between all groups for the benefit of all groups. When ethnic affiliation alone becomes the determining factor of a state or region, then citizens of different groups are necessarily, by definition, excluded. When dividing states into their respective historical regions, the cultures of the groups which formed the majorities within the regions better be promoted, but not at the expense of that region’s minorities. In Duran’s terms, the importance of the greater state served as a “guarantee and union based on mutual respect of the rights of every [group].” These regions must, according to this concept, remain federated within the state. Duran’s federalism was the “regime of convenience of political organisms bound in permanent union without the loss of their respective personalities.” Once the groups within a federation learn to trust each other and to cease thinking of others by ethnic classification, then a firm federation could acquire unity and loyalty to a greater state without abandoning particularism, such as in the United States, which had the advantage of not being settled in the traditional tribal manner, but rather found itself mixed from its outset as a haven for many peoples.

Another crucial distinction, realized early by the United States, is that between “federation” and “confederation.” As Duran explained, federalism is the “union of nations [nationalities] for a common end,” while confederation consists of “separate states, that work together for common interests.” The federation remains one state, and thus represents a more effective way to accomplish common government and establish true equality of nationalities within one entity. Since confederate states are nominally independent, the entire unit can function less effectively, and the former regional character becomes synonymous with the state’s. Regionalists, therefore, have rejected this confederal solution as well. They have argued, as with completely independent states, when the identity of a tribe or people equals that of a state, then the citizens lose loyalty to any greater concept of state, and thus to any concept of multi-ethnic government.

25. Id. at 102.
26. Id. at 13.
27. The thirteen original American states initially banded themselves together with the “Articles of Confederation” in which each state maintained a large degree of independence. This became unworkable if these states wished to operate effectively as a single unit, and thus the United States Constitution established a federal structure. Duran, like many conservative thinkers, greatly admired the United States Constitution.
28. 28 Duran, supra note 24, at 96.
B. Regionalism Applied in Ethiopia

The contrast with how the term "regionalism" is now being employed in Ethiopia bears this out to some degree. The regions which the current Ethiopian regime has created are somewhat artificial, but are meant to represent dominance by particular ethnic groups. In Ethiopia, this has fostered confusion because the structure of Ethiopian society was one in which regional divisions did not have accompanying ethnic demarcations of any great importance, but which, through their existence, are fostering tension where it did not exist before. This is not Duran's regionalism: the regional boundaries do not have any historic basis and are being used to create ethnic conflict by a governing regime that sees the division of Ethiopia as one means of dividing the country's society to make it more governable by those who currently control the reins of government.

The new Constitution in Ethiopia divided the country into fourteen regions based on presumed ethnic demarcations, not on historic boundaries. Every citizen, therefore, must assume some sort of ethnic identification — either the majority one of the region or a minority within a region dominated by another group. Regions themselves have ethnically-divided sub-divisions to account for this. The regions and sub-regions have broad cultural and linguistic powers, and ultimately the right to secede. Rather than producing a more loyal Ethiopian citizenry, this results in greater fragmentation. The so-called "federal" government is nothing more than a collection of near-sovereign, tribally-defined units which effectively undermine the unity of the Ethiopian state.

Such a situation renders Ethiopia's federal government virtually extinct. No real power remains in the center, but rather has passed fully to the ethnic regions, and can pass still further to any other ethnic claimant which seeks to fulfill the right to ethnic self-determination in the constitution. Constitutional sovereignty rests not in the Ethiopian people, but in the nationalities. For the concept of self-determination to work as a centripetal rather than centrifugal force within a multi-ethnic state intent on preserving itself, the emphasis must remain in individual rather than group rights.

So many powers have been devolved in the constitutional framework that virtually nothing remains in the hands of the federal government. The powers that do remain with the federal government can be scrutinized by the Federal Council, a body composed of

29. Wagaw, supra note 1, at 397.
30. Haile, supra note 2, at 4-5.
31. Id. at 20-22.
representatives of the ethnic regions which has final interpretive constitutional scrutiny.\textsuperscript{33} One of the tenets of American federalism — checks on power by the various elements of government — does not exist in Ethiopia since the federal government has no means to restrain the regions.\textsuperscript{34} The regions themselves, acting through the Federal Council, determine their own powers, up to and including secession.\textsuperscript{35} That the country has not already ruptured (beyond the splitting off of Eritrea) represents not restraint on the part of tribal groups still loyal to the concept of Ethiopian citizenship, but rather the immense power the Tigrayan-dominated government maintains over all areas of Ethiopian society for the benefit of the government and its cronies in particular, and not for the benefit of Ethiopians in general.

The right to secede produces an open-ended chain of events, which can lead to the dismantling from within the state as ethnic groups feel no need to preserve a state they are not bound to, thus further fueling ethnic conflict.\textsuperscript{36} A constitution which cedes powers and even territory without outside pressure merely to satisfy a component group’s claims to self-determination is fundamentally suicidal.\textsuperscript{37} The state-structure enshrined in the Ethiopian Constitution falls into this category in the long term since it has left no real power in the center other than that held by the brute force of the current government.

Furthermore, the federal government of Ethiopia has become associated with a single tribe in particular. When a specific tribe lends its identity to a federal regime, expressions of opposition naturally take the form of ethnic conflict against the regime. Ethnic opposition, now with its own territorial base in a federal system, manifests itself by expressing the interests of its own constituents, regardless of what is in the best interests of the state as a whole.\textsuperscript{38} Each region sees itself for what it is: a distinct political entity. Ethnic federalism foments rival nationalisms which are by definition incompatible.\textsuperscript{39} This fragmented political system, rather than promoting harmony and compromise between distinct groups, causes increasing conflict.

\begin{itemize}
\item \textsuperscript{33} Haile, supra note 2, at 24-27.
\item \textsuperscript{34} Id. at 52.
\item \textsuperscript{35} Id. at 28-30.
\item \textsuperscript{36} INSTITUTE OF THE BILL OF RIGHTS, supra note 17, at 39-40.
\item \textsuperscript{37} Brietzke, supra note 32, at 77.
\item \textsuperscript{38} Haile, supra note 2, at 12.
\item \textsuperscript{39} INSTITUTE OF THE BILL OF RIGHTS, supra note 17, at 49.
\end{itemize}
C. The Language Issue

No where is this fragmentation more apparent than in the issue of language. The new constitutional framework in Ethiopia downplays Amharic, the most widely-spoken language in Ethiopia and the one in which the country has traditionally been governed. Because the main force within the current regime originated as a Tigrayan rebel group, the desire to undermine Amharic is, perhaps, not surprising. But preserving Amharic as the main language of the country would not necessarily mean sanctioning domination by Amharas, rather, it would provide stability to the entire state and make it governable. Amharic could become the common language of government without infringing on the rights of non-Amharic speakers. But, since non-Amharas will now receive an increasingly diminished amount of formal education in Amharic, they will effectively lose access to the state apparatus. This will in turn further disconnect them from a sense of Ethiopian identity. The increasing use of English in the schools, justified as an international language, also will not help the situation.

Nationalist groups in the West at least admit to these tactics. In Catalonia, the Catalan nationalist government has gone against the Spanish constitution to decrease the amount of Spanish used in schools, and has even promoted English in its place so that Catalan students can learn to function in the global community. Between the world and Catalonia, Spain becomes irrelevant, with language the most tangible symbol of this trend. Just as the Catalan Government has tightened Catalan-language requirements in public services in Catalonia, so groups in Ethiopia have enough latitude to exclude other groups from active roles in what is, in reality, an extremely inter-mixed population. The difference is in the constitutions of the two countries: Spain’s does not allow these actions but the Catalans succeed through political power plays; Ethiopia’s specifically provides for this sort of fragmentation.

VI. REGIONAL STRUCTURES AND CIVIL SOCIETY

A. The Tigrayan Regime versus Civil Society

Some have questioned the motives behind writing the constitution in this manner. One belief suggests that the Tigrayans who dominate the current Ethiopian regime wrote the constitution in this way in order to give themselves some sort of an escape should they not succeed in dominating Ethiopia over the more numerous Amharas in the future. Their current political dominance

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40. Wagaw, supra note 1, at 397-98.
41. Haile, supra note 2, at 36.
42. Wagaw, supra note 1, at 398.
serves as a means to undermine the Amharas even if the Amharas return to power. In the very least, others suggest, the Tigrayans could only hope to continue to dominate Ethiopia if they adopted a “divide-and-rule” tactic. More sympathetic opinions have simply argued that any new government in 1991 had to undo the damage of the previous Marxist regime and that only an ethnic-liberative platform could inspire enough diverse people under the same banner. Once successful at overthrowing the regime, however, it would have become too difficult to turn back on promises of ethnic self-determination, lest the new regime fall in turn before it could establish a democratic framework for society.

The true test of the new regime will come when its ability to promote a democratic society can receive a full evaluation: how it uses the decentralizing process to put democratic principles into place and to bind Ethiopians to civil society in such a way that they can continue to regard themselves as members of an ethnic group and as adherents to a religion and as citizens of Ethiopia. However, the structure of civil society under the current regime does anything but this. Instead, all civic activity takes place within the context of ethnic organizations. Although these organizations are themselves further organized within an Ethiopia-wide umbrella, they nonetheless effectively promote ethnic division instead of state cohesion.

B. Regional Structures which Support Civil Society

The South African example, under consideration simultaneously with the Ethiopian Constitution, provides the opposite use in that it shows how regional boundaries can be set up to mollify certain ethnic groups. It also shows that when the state itself is fundamentally unitarist in concept, conflicts will arise that will stir up unnecessary tension between tribes with distinct historical identities. Specific tribes may have territorial dominance over specific regions, but the regions themselves should have economic and historic viability for individuals’ loyalty to pass to both the region and the state. Failing this, the regions become the source, not the solution, for ethnic conflict.

43. Id. at 399-400.
45. Id. at 202-03.
47. See David Welsh, The Provincial Boundary Demarcation Process, in BIRTH OF A CONSTITUTION 223-30 (Bertus de Villiers ed. 1994) and Lawrence Schlemmer, Regionalism in South Africa: Opportunities Missed, in BIRTH OF A CONSTITUTION 242-255 (Bertus de Villiers ed. 1994).
Regionalist parties in Europe have generally been conservative, and as such willing, in the name of order, to compromise on many issues in order to allow for the greater functioning of the state. This has included compromise on language issues, which have often produced the most divisive debates in multi-ethnic states. As conservatives, they sought stability and honored the language of the central government as a means of preserving the state: the introduction of other (minority) languages by the political center would only have resulted in mass confusion. They also rejected the notion of redrawing regional boundaries in order to reflect language boundaries because of the mix of different ethnic groups within the regions. Historically-determined regions could allow for government in the predominant language of the region, but must also recognize the Staatssprache (the “language of state”). Thus, the Czech regionalists within the old Austrian Empire accepted German as this Staatssprache, but in doing so in no way implied a “German character” but, rather, an Austrian one, with German as the language of convenience.\footnote{František Palack, \textit{Österreichs Staatsidee} 31F (1866).} 

The Austrian Empire spent its last half-century of existence trying to quench this situation. Germans formed the dominant group for historical reasons despite making up less than a quarter of the population. Slavs were the single largest racial group, but they were subdivided into several ethnic divisions so that Germans and Magyars formed the largest two ethnic groups within the Empire. Among the Empire’s defenders were many important Slav figures who argued for the preservation of Austria with a more federal structure. This would allow different groups to express their identities while maintaining a greater state structure, which would ensure prosperity and equal rights.\footnote{František Palack, \textit{Gedenkblätter} 152 (1874).} Conservatives and regionalists saw ethnic origin as only a part of an individual’s identity. More important was the unity of the state, which itself should have no specific ethnicity, only freedom of identity for all groups and individuals. Regionalists then saw themselves as regionalists of the state (e.g. “Austro-slavs”), not separate “nations” entitled to self-government either inside or outside their state.

Meanwhile, the rise of Czech industry produced anxiety in the Germans — especially within Bohemia, where the German population had traditionally controlled the only industries — but, the conservative government tried to harmonize the interests of the two groups for Austria’s maximum benefit. With the failure in the economic sphere, all solutions had to take into account the aspirations of nationalists in order to calm their intransigence, and here Austria was bound to come to grief. The continued failure to reconcile the desires of nationalists from German-speaking and other ethnic camps led to the break-up
of the Empire a quarter of a century later. This happened especially as the common link for all of Austria’s regions — the institution of the monarchy — was itself delegitimized by the growth of left-wing politics.50

C. Variations on Marxism

An environment such as Austria produced some of the most cogent attempts to rectify nationalist theory with the Marxism which was also salient in Central Europe. The experiences of the Austro-Marxists made them believe that ethnic identity was more important than Marx had believed. The Austrian Socialist Otto Bauer described the natural conflict of interests between multi-ethnic states (Natiohnalitätenstaaten) and nation-states (Nationalstaaten) as the central struggle of Europe’s entire question of nationalities.51 While Austria retained its central monarchy and Imperial institutions, the Nationalitätenstaat could survive, as radical groups pressed for their ethnic identities and the overthrow of the Habsburg Monarchy, they sought to give the resultant creation in Central Europe the character of one (for the Germans) or more (for the other nationalists) Nationalstaaten.52

This clashed with standard Marxist theory, which, when confronted with nationalism, tends to group it into two classes: progressive (liberative) and counter-revolutionary (bourgeois capitalist means of defining state). Therefore, Marxists have often felt that some nationalisms deserved to be aided as a means to accomplish socialism, while others deserved to be fought.53 Yet Marx himself showed scorn for the “geschichtlose” (“history-less”) peoples which he saw as backwards and in need of being attached to more progressive “nations.”54 Marx’s associate Friedrich Engels argued further that the mix of populations over geographic areas (and over history) made it impossible to (re)create ethnically homogenous states. Gradually, ethnic identity would cease to matter.55 In practice, the Soviet Union worked — despite its apparent federal constitution — because the communist ideology, in reality, admitted no divergence from the party line. Ethnic groups found themselves channeled into manifesting support for the Soviet system, which remained federal in name and propaganda only.56

50. The best overview of the period, focusing on a Conservative/Slavic coalition government, is WILLLIAM A. JENKS, AUSTRIA UNDER THE IRON RING, 1879-93 (1965).
53. Conner, supra note 20, at 7.
54. Id. at 9.
55. Id. at 12.
The Soviet Constitution admitted secession in theory, but the regime imposed centralized order in practice. Ethiopia’s current regime wavers. If it wanted to leave secession in as a possible last resort to make ethnic groups feel more secure within Ethiopia, it could have accomplished this through other mechanisms. Instead, it copied Soviet constitutionalism without the intent to force the preservation of the central state at all costs. In any respect, though, the Soviet system worked only for a time — nationalism outlasted even so repressive a regime as the Soviet one. Before they became ostensibly democratic, however, the Tigrayan rebels, who now dominate the Ethiopian regime, were avowed Marxists and extolled the virtues of such a system. Some of that optimism remains as a residual component of their thought. However, should the Soviet-style federal system not work in Ethiopia as it has failed everywhere else, then the Tigrayans, themselves a distinct minority, do indeed have their own escape clause.

Classical Marxism tried to explain all history through economics, partially because Marx himself failed to grasp the complexity of human nature. Nationalism has proven more durable than he gave it credit for. Lenin accused many socialists of taking it too seriously, arguing that it was the mere by-product of — and discontent with — the human condition, and that therefore, it really existed as a socio-revolutionary force. The ethnic group, Lenin reasoned, was a false identity crafted by history and useful only if it furthered the international revolution. The Austrian Bauer, while continuing socialist rhetoric, has nevertheless admitted a connection between micro-nationalism and oppression. Micro-nationalism grew out of the same concern socialism had: oppression by a certain conservative group. Even so, the existence of macro-nationalism gave him empathy for the minorities struggling to combat it.

Marxism has, of course, poisoned the debate in Africa as well. Classic European Marxists would have had less time for what they would have considered the primitive tribes of Africa than they did for Europe’s geschichtlose peoples. However, this did not prevent the rise of African socialism. The military regime in Ethiopia which replaced the Empire, based its power on a Marxist-Leninist single-party state, which proved incapable of satisfying its utopian promises or even of maintaining order in society. It adopted a Marxist approach to the nationalities question, asserting on one hand the “right to self-determination” and on the other a non-nationalist state. The dictatorship released a quasi-constitution, the “Program of National Democratic

57. Id. at 32-35.
58. Id. at 43-44.
60. Bauer, supra note 51, at 165.
61. Kawabata, supra note 10, at 126.
Revolution of Ethiopia," in 1976, which declared that "no nationality will dominate another one since the history, culture, language, and religion of each nationality will have equal recognition in accordance with the spirit of socialism. The unity of Ethiopia's nationalities will be based on the common struggle against feudalism, imperialism, bureaucratic capitalism, and all reactionary forces." The document also guaranteed regional autonomy.62

This typically Marxist approach failed to see the staying power of nationalism once that force was released. Indeed, none other than ethnic-based movements overthrew the regime. Chief among these were the liberation fronts from Tigray and Eritrea who both professed support for greater recognition of minority rights.63 Both groups themselves had liberative Marxist backgrounds, which they conveniently downplayed to gain Western support against the Soviet-backed dictatorship.

D. The Inapplicability of the American Model

An American approach, though, would also not apply. To transplants, like the entire population of the United States, a just state easily assumes precedence in loyalty. Regions become mere administrative units designed to increase liberty by removing centralized control. Most importantly, ethnic settlement becomes secondary. In such a framework, dual-loyalty becomes practical and possible, but only for those who accept the framework. Such a system as American federalism could not work in Europe, nor will it work in Africa without taking local needs into account. Successful federations such as the United States and Canada did not form based on ethnicity. Therefore, states which have natural ethnic divisions cannot expect to adopt North American federalism wholesale. While ethnicity cannot be the guiding determinant of a federal structure, it cannot be ignored either.64

Not least among the differences between the United States and African states are the founding principles. American colonists looked to establish a system to protect individual rights and to functionally federate states. These states despite their differences, were essentially similar and homogenous in population. Recent attempts at constitutions in Africa have sought instead to stress group rights, even to the point of assigning groups' predominance within regional administrative structures. Rather than seeking to federate a bunch of colonies, African states are already extant within their boundaries—federation in Africa and following the American model would require breaking the state apart into components which would re-federate. Quite understandably, African

62. Wagaw, supra note 1, at 395.
63. Kawabata, supra note 10, at 126. See also Wagaw, supra note 1, at 396.
64. Haile, supra note 2, at 10.
leaders are generally loathe to do this. As a result, African attempts at federalism are bound to appear more unitarist.

E. The Application of the Spanish Model

It is here that the model of Spain becomes apt. Spain attempted administrative reform at the beginning of the twentieth century. This reform was thwarted by the liberal oligarchy that wished to preserve its hegemony. The Republic in the 1930s formed along a left-wing and in some ways socialist model which left little room for devolution in theory, but which in practice needed the support of the peripheral ethnic groups — especially the Catalans — and so had to grant autonomy within an otherwise unitarist state. The authoritarian regime of General Francisco Franco re-centralized power, and a newly-democratic Spain had to rethink the issue in the 1978 Constitution. The result was the "Estado de las Autonomías," in which seventeen traditional regions were formed and were permitted to seek varying degrees of autonomy from the central government. Most of the regions concerned have no history of self-government, which has angered the so-called "historic" regions of Spain — Catalans have derided the system as "coffee for everyone," and have declared that they did not want to see Catalonia become "another North Dakota."65 Without taxation powers, though, Catalonia in many ways has less sovereignty than North Dakota.

Within the context of the Spanish state-structure today, self-government does not necessarily mean independence. The Constitution of 1978 divided Spain into seventeen autonomous communities, based roughly on historic regions mostly to mollify the Catalan nationalists.66 The Constitution technically "recognized" the regions rather than "constitute" them, thus, acknowledging their right to autonomy. However, the Constitution also spoke of the unity of the Spanish State, in the process denying any right to self-determination in the traditional sense of sovereignty.67 The arrangement was meant to allow each region or "nationality" autonomy and local self-government within the Spanish state. As a trade-off, the principle of "self-determination" was applied to the Spanish state in its entirety, — as a democratic country, Spain was providing self-determination to all of its peoples, especially in as far as it allowed regional self-government. Within the

Spanish Constitution of 1978, the State was paramount and controlled the distribution of power to the regions. According to the legal terms of the Constitution, as explained by its framers, the "nationalities" of Spain form components of the unitary Spanish "nation" and act as expressions of its "variety." 68

F. Other Models

In many ways the system in South Africa resembles Spain more than the United States. In Spain, as in South Africa, the central state constituted the regions and gave the regions wide latitude to act — but only within the structures of the central constitution. 69 Although the constitution establishes regions and gives them powers to act locally, much of the real power remains in the center, where the constitution is enforced and interpreted, not to mention the power of taxation. 70 The Spanish Constitution of 1978 inspired the South Africans in another way as well, because it marked a transition from dictatorship to democracy, which had predicated the nationalities question as its primary concern. Even with this insistence that it would take its regional groups into account, Spain's constitution avoided slipping into federation, something that enamored it to the forces dominant in the South African transition. 71

The concerns of the Zulus — arguably South Africa's most historic ethnic group — parallel Catalan concerns about their historic identity. The regions in the new South Africa are somewhat historic (not exactly, but the regions in Spain do not exactly correspond with history either) and delineate ethnic groups. But South African regions also have a far greater ethnic base by definition — in some ways, the unitarist tendencies of the main constitutional framers sought to include these regions in order to control and contain ethnic identity. As in Spain, however, there is a fundamental power-play between one important ethnic group which sees itself as more historically self-governing, and the central state. Reaction to Catalan demands in Spain has produced anti-catalanism on the part of many. This has also led to other regions, that might not think of gaining broad autonomic powers and might not otherwise have


70. Ronald L. Watts, Is the New Constitution Federal or Unitary?, in BIRTH OF A CONSTITUTION 75-78 (Bertus de Villiers ed. 1945).

71. Daniel J. Elazar, Form of State: Federal, Unitary, or ..., in BIRTH OF A CONSTITUTION 30-35 (Bertus de Villiers ed. 1945).
supported such a provision, demanding broader powers to counter-act what is seen as a special treatment for Catalonia. The Zulus risk producing similar back-lash in South Africa. Yet, like the Catalans, the Zulus — or at least their leaders — do not want to risk losing their privileged position at the bargaining table with a central state with unitarist tendencies.\textsuperscript{72}

Some have suggested that the Indian Constitution could serve as an example for Ethiopia instead. Yet India has a more homogeneous identity manifested in the Hindu religion to which over eighty per cent of the population subscribes and which is uniquely Indian. India itself faces perceived external threats which outweigh the internal threats to its statehood — from China and Pakistan in particular, which represent another more formidable threat than Somalia or Sudan do to Ethiopia. And the Indian Constitution safeguards the central government in ways that the Ethiopian one — intent as it is on the issue of self-determination — fails to do. Fundamentally, therefore, the Indian Constitution, like the South African one, is not as federal as it professes to be.\textsuperscript{73}

VII. CONCLUSION

Ethiopia makes a stark contrast to all traditional state theories. The regions in the new constitution have no historic justification and purport to an even greater extent to correspond to ethnic subdivisions within society. However, those ethnic lines are often not clearly defined and so the new constitution there is virtually attempting to create ethnic groups. This a recipe for disaster. Ethiopia may not really require pseudo-ethnic regions to protect the rights of its citizens, on the other hand, Ethiopia may not be properly set up to allow a federal system along United States lines. The destruction of its ages-old monarchy meant the loss of the one main unifying force. Nevertheless, Ethiopia can continue to exist as a viable state if it finds the right degree of administrative decentralization and stable central institutions. Ethiopia has much to learn from Western — European and American — thought; Ethiopia need not copy Western models.

\textsuperscript{72} For a case study on the Zulus see Wilson, supra note 5, at 442-45.

\textsuperscript{73} Haile, supra note 2, at 17-19.
CADAVERIC ORGAN DONATION AND CONSENT: A COMPARATIVE ANALYSIS OF THE UNITED STATES, JAPAN, SINGAPORE, AND CHINA

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I. INTRODUCTION

Due to the remarkable advances in medical science, the overall success in organ transplantation has led to one major problem—a shortage of human organs for transplantation. As a result, many patients have died while awaiting organ transplantation surgery. Since 1968, the United States responded to this problem by attempting to establish a uniform system with respect to cadaveric organ donation. One aspect of cadaveric organ procurement in the United States is requiring voluntary consent before organ procurement is authorized. Other countries, however, have adopted or followed different methods of procuring cadaveric organs for transplantation. This paper will not address the allocation of procured organs, nor will it address organ procurement from living donors. Instead, it will focus on the different methods of cadaveric organ procurement in the United States and in some Asian countries. In addition, this paper will evaluate the application and the relative success of each country’s method of organ procurement. Ethical implications of each method will also be discussed.

Part II will chronicle the evolution of cadaveric organ procurement law in the United States. In addition, this part will focus on the method of voluntary consent and the ways in which consent is requested. Part III will review Japan’s new organ procurement law, which requires a more stringent form of consent than the United States. Part IV will examine Singapore’s presumed consent law and will compare it to presumed consent laws of other countries. In addition, Part IV will address the viability of adopting a similar law in the United States. Part V will describe China’s method of organ procurement, which includes harvesting organs from many of its non-consenting executed criminals. In addition, Part V will briefly discuss some of the views in the United States regarding procurement of organs from its executed criminals. Finally, Part VI will provide the reader with a brief summary of the various methods of organ procurement. In conclusion, Part VI will suggest a path to follow which will increase cadaveric organ supply in the United States.
II. ORGAN PROCUREMENT IN THE UNITED STATES

Since 1968, advances in organ transplantation along with the need for more human organs to save lives led the United States to pass laws and regulations dealing specifically with cadaveric organ procurement. This part will chronicle the evolution of those current laws. Part II(A) will provide the foundation of uniformity among the states regarding cadaveric organ procurement—the 1968 Uniform Anatomical Gift Act. Part II(B) will discuss the segment of the National Organ Transplant Act that banned the sale of human organs. It will also describe the Uniform Determination of Death Act and how that act enabled physicians to pronounce a person brain dead. Part II(C) will address some of the problems associated with the 1968 Uniform Anatomical Gift Act. Next, this part will describe how the National Conference of Commissioners on Uniform State Laws (the Commissioners) sought to solve those problems when they approved the 1987 Uniform Anatomical Gift Act (1987 UAGA). Although a number of states adopted the 1987 UAGA, many problems continue to hinder cadaveric organ supply. Part II(D) will disclose those current problems. Finally, Part II(E) will discuss the most recent attempt to increase cadaveric organ supply—the 1998 DHHS Referral and Request Regulation.

A The 1968 Uniform Anatomical Gift Act

In 1968, the Commissioners approved the Uniform Anatomical Gift Act (1968 UAGA). During this period, transplant surgery became an increasingly viable option to save lives. By utilizing the advances in transplant surgery techniques, the Commissioners clearly intended to increase the supply of organs to help save lives. To facilitate this increase, the Commissioners were required to harmonize various competing interests. Thus, the Commissioners were

6. Supra note 1, at § 1-7.
7. See id. Prefatory Note. "It is said that 6,000 to 10,000 lives could be saved each year by renal transplants if a sufficient supply of kidneys were available."
8. See id. Those interests were: (1) the wishes of the deceased during his lifetime concerning the disposition of his body; (2) the desires of the surviving spouse or next of kin; (3) the interest of the state in determining by autopsy, the cause of death in cases involving crime or violence; (4) the need of autopsy to determine the cause of death when private legal rights are dependent upon such cause; and (5) the need of society for bodies, tissues and organs for medical education, research, therapy and transplantation.
required to answer several legal questions to balance those competing interests. Many states already tried to answer those questions. When they passed their own legislation, the Commissioners sought to eliminate the uncertainties that existed when applying the law from state to state. At one time, all fifty states enacted their own versions of the 1968 UAGA. Presently, only thirty states and the District of Columbia have retained versions of the 1968 UAGA.

1. Who may make a gift?

The 1968 UAGA answered one of the questions about who is authorized to make an anatomical gift. The 1968 UAGA answered that question by authorizing any individual of sound mind over the age of eighteen to make an anatomical gift. Absent the decedent’s intent, the 1968 UAGA also authorized the decedent’s next-of-kin to substitute their consent to make an anatomical gift, provided there was no contrary indication by the decedent. This theory is in accord with cases which hold that the testamentary wishes of

9. See id. These questions included the following: (1) who may during his lifetime make a legally effective gift of his body or a part thereof; (2) what is the right of the next of kin, either to set aside the decedent’s expressed wishes, or themselves to make the anatomical gifts from the dead body; (3) who may legally become donees of anatomical gifts; (4) for what purposes may such gifts be made; (5) how may gifts be made, can it be done by will, by writing, by a card carried on the person, or by telegraphic or recorded telephonic communication; (6) how may a gift be revoked by the donor during his lifetime; (7) what are the rights of survivors in the body after removal of donated parts; (8) what protection from legal liability should be afforded to surgeons and others involved in carrying out anatomical gifts; (9) should such protection be afforded regardless of the state in which the document of gift is executed; (10) what should the effect of an anatomical gift be in case of conflict with laws concerning autopsies; (11) should the time of death be defined by law in any way; and (12) should interest in preserving life by the physician in charge of a decedent preclude him form participating in the transplant procedure by which donated tissues or organs are transferred to a new host.

10. See id. For example, a valid anatomical gift in one state may not be valid in another.


12. See UNIF. ANATOMICAL GIFT ACT (1968) Table of Jurisdiction Wherein Act has Been Adopted.

13. See UNIF. ANATOMICAL GIFT ACT (1968) Prefatory Note.

14. Id. § 2(a).

15. Id. § 2(b). For cases holding that a decedent’s next-of-kin possesses some kind of property right for burial purposes, see Whaley v. Tuscola, 58 F.3d 1111, 1115 (6th Cir. 1995) (holding that next-of-kin have the right to possess the body for burial and prevent its mutilation); and Perry v. Saint Francis Hosp. & Medical Center, Inc., 886 F. Supp. 1551, 1563-64 (D. Kan. 1995) (holding that next-of-kin is the owner of a quasi-property right over the decedent’s body for the limited purposes of preserving and burying it). For an in-depth analysis about how different jurisdictions have handled the property right issue, see Annotation, Validity and Effect of Testamentary Direction as to Disposition of Testator’s Body, 7 A.L.R. 3D 747 (1996 & Supp. 1998).
a decedent to be buried or cremated after death will be binding over contrary wishes by the decedent’s next-of-kin.16 The 1968 UAGA also established a priority of persons who could substitute their consent in the place of their decedent loved one.17 An individual at the same or higher priority level of one who actually gives consent, may nullify an otherwise valid anatomical gift.18

2. Manner in which to make a gift.

One who wishes to make an anatomical gift must do so by executing either a will or a document other than a will.19 If the gift was made by a document other than a will, the donor and the witnesses must sign the document.20 If the decedent’s intentions were unknown, the decedent’s next-of-kin may substitute their consent by “telegraph, recorded telephonic, or other recorded message.”21


17. See UNIF. ANATOMICAL GIFT ACT (1968) § 2(b). The order of priority is as follows: (1) the spouse, (2) an adult son or daughter, (3) either parent, (4) an adult brother or sister, (5) a guardian of the person of the decedent at the time of his death, [and] (6) any other person authorized or under obligation to dispose of the body.”

18. Id.; see also Mansaw v. Midwest Organ Bank, No. 97-0271-CV-W-6, 1998 WL 386327, at *8 (W.D. Mo. 1998) (where one of the parents who objects to an anatomical gift is silent and the other parent voices her consent to such gift, the parent giving consent was presumed to have spoken for the other silent parent).

19. See UNIF. ANATOMICAL GIFT ACT (1968) § 4; see also Dumouchelle, 317 S.E.2d at 104 (held that if a will is later declared invalid, the anatomical gift remains valid to the extent that it has been acted upon in good faith).

20. See UNIF. ANATOMICAL GIFT ACT (1968) § 4(b).

21. Id. § 4(e). This provision enables next-of-kin—who may be far away—to give their consent to donate the decedent’s organs in a quick manner. See id. § 4(e) at Comment.
Once a proper gift has been made, the 1968 UAGA sets out the manner of delivery to the donee.\textsuperscript{22}

3. \textit{Revocation or amendment.}

In order to carry out the ultimate desires of the donor, the 1968 UAGA prescribed how a donor could amend or revoke an anatomical gift.\textsuperscript{23} If an individual executed a signed statement, made an oral statement witnessed by two persons, or made a statement during a terminal illness addressed to an attending physician, the amendment or revocation of a gift would be enforced.\textsuperscript{24} Those statements must also be conveyed to the donee.\textsuperscript{25} In addition, revocation or amendment is permitted if someone found a signed card or document identifying the decedent’s objection or amendment.\textsuperscript{26} If a gift was not delivered to a donee, all copies of the document of gift must be destroyed before revocation or amendment.\textsuperscript{27}

4. \textit{Check-and-balance system.}

The 1968 UAGA has also established a type of check-and-balance system, meaning that the physician who pronounced death could not participate in the organ procurement process.\textsuperscript{28} Naturally, as with any proper check-and-balance system, the physician who became a donee was unable “to participate in the procedures for removing or transplanting a part.”\textsuperscript{29}

5. \textit{Requirement of good faith.}

Perhaps the strength of the 1968 UAGA lies in the provision that created civil and criminal immunity for those who acted in good faith.\textsuperscript{30} Absent malice, or the intent either “to defraud or to seek an unconscionable advantage,” so long as medical personnel honestly believed they were acting in accordance with the 1968 UAGA, the good-faith defense was available.\textsuperscript{31} Whether one acts in good

\begin{itemize}
  \item \textsuperscript{22} See \textit{id}. § 5. Delivery, however, is not required to validate a gift.
  \item \textsuperscript{23} \textit{id}. § 6(a).
  \item \textsuperscript{24} \textit{id}.
  \item \textsuperscript{25} \textit{UNIF. ANATOMICAL GIFT ACT (1968)} § 6(a).
  \item \textsuperscript{26} \textit{id}. § 6(a)(4).
  \item \textsuperscript{27} \textit{id}. § 6(b).
  \item \textsuperscript{28} \textit{id}. § 7(b). For determination of death discussion, see infra, Part II(C).
  \item \textsuperscript{29} \textit{id}. § 4(c).
  \item \textsuperscript{30} \textit{UNIF. ANATOMICAL GIFT ACT (1968)} § 7(c).
  \item \textsuperscript{31} See Rahman v. Mayo Clinic, 578 N.W.2d 802, 805-06 (Minn. 1998); \textit{citing BLACK'S LAW DICTIONARY} 623 (5th ed. 1979), \textit{construed in Perry}, 886 F. Supp. at 1558, Lyon v. United States, 843 F.
Physicians, hospitals, their employees, and other organ procurement organizations frequently rely on good-faith immunity to defend tort and contract claims brought by either the estate of a decedent or the decedent’s next-of-kin. A good-faith defense, however, is limited to only the procurement process and cannot be extended to treatment of the donor prior to death. Although the 1968 UAGA provided many answers to cadaveric organ transplantation, some questions were left unresolved.


The 1968 UAGA failed to answer two questions: (1) would the sale of human organs be permitted; and (2) how would the death of a potential donor be determined? In 1984 the United States answered the first question in the negative by passing the National Organ Transplant Act (NOTA). Section
274e of NOTA provided that: "[i]t shall be unlawful for any person to knowingly acquire, receive, or otherwise transfer any human organ for valuable consideration for use in human transplantation if the transfer affects interstate commerce." The term "valuable consideration" does not include reasonable payments associated with the organ procurement process. "Reasonable payments" do not include risks of living donors, difficulties of procurement, or increased costs of insurance resulting from organ donation. Nonetheless, whether an individual donor can sell his or her organs is heavily debated.

Another question left unresolved in the 1968 UAGA was "when could a physician legally declare death so that cadaveric organ procurement could begin?" In 1980, the Commissioners approved the Uniform Determination of Death Act to codify the preexisting common law requiring total failure of the cardiopulmonary system. In addition, at the recommendation of the American Medical Association, the Commissioners added whole brain death. The Commissioners defined death as when "[a]n individual who has sustained either (1) irreversible cessation of circulatory and respiratory functions, or (2) irreversible cessation of all functions of the entire brain, including the brain stem." Presently, forty-four states and the District of Columbia recognize whole brain death.
Legal brain death does not include "neocortical death" nor "persistent vegetative state." Similar to the 1968 UAGA, the Uniform Determination of Death Act granted civil and criminal immunity to persons acting in good faith who were either authorized to determine death or who relied on another's authorized determination of death.


Despite the efforts to increase cadaveric organ donation, nineteen years after the Commissioners approved the 1968 UAGA, "the issue of organ procurement was brought back into the center stage of public policy concern." The advent of cyclosporine along with the improvements in surgical techniques for transplanting organs helped to increase the demand for cadaveric organs. Also, a 1985 Hastings Center Report pointed out several key problems with the 1968 UAGA. The Commissioners tried to remedy those problems by approving the 1987 UAGA.

1. The differences between the 1968 and the 1987 UAGAs.

The 1987 UAGA differs significantly from the 1968 UAGA in several

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See also Carey Goldberg, A Not Entirely Happy Anniversary, N.Y. TIMES, Nov. 11, 1998, at A14.

46. See id. Prefatory Note; see also People v. Selwa, 543 N.W.2d 321, 328 (Mich. Ct. App. 1995) (error for doctor to rely on higher brain death to determine that baby was born dead where evidence existed supporting the inference of brain stem activity).

47. See UNIF. DETERMINATION OF DEATH ACT, Prefatory Note.


49. See id. For the benefits of cyclosporine, see Borel & Z. L. Kis, The Discovery and Development of Cyclosporine (Sandimmune), 23 TRANSPLANTATION PROC. 1867 (1991).

50. See UNIF. ANATOMICAL GIFT ACT (1987) Prefatory Note. Those key problems were as follows: (1) failure of persons to sign written directives; (2) failure of police and emergency personnel to locate written directives at accident sites; (3) uncertainty on the part of the public about circumstances and timing of organ recovery; (4) failure on the part of medical personnel to recover organs on the basis of written directives; (5) failure to systematically approach family members concerning donation; (6) inefficiency on the part of some organ procurement agencies in obtaining referrals of donors; (7) high wastage rates on the part of some organ procurement agencies in failing to place donated organs; (8) failure to communicate the pronouncement of death to next of kin; and (9) failure to obtain adequate informed consent from family members. Id. Another problem was that only one third of Americans surveyed in a 1985 Gallop Poll indicated that "they would be very likely to donate their own organs." See Cate, supra note 11, at 71-72. The Gallop Poll survey disclosed that 93% of the Americans surveyed knew about organ transplantation. Although 75% approved of the concept of organ donation, only 27% indicated they would be very likely to donate their own organs. Seventeen percent stated that they had actually completed donor cards, and of those people, about half did not tell their family members their intentions to donate. Id.

51. Id.
ways. First, the 1987 UAGA simplified the manner in which one is required to make a gift. Witnesses are not required on the document of a gift. This change also permits states to distribute driver's licenses or identification cards that can double as legally valid anatomical gifts. The 1987 UAGA also imposes a duty on police, rescue workers, and hospital personnel to search for the document.

The 1987 UAGA requires hospitals to designate personnel to inquire about their patients' wishes to donate — "routine inquiry" — and who are also required to request for an anatomical gift from next-of-kin — "required request." Moreover, failure to make an anatomical gift of one part is not a presumption against making a gift of another part. Also, revocation or amendment of an anatomical gift does not have to be communicated to a donee. If a valid gift has not been revoked, consent is not required. In addition, the 1987 UAGA recognizes a limited presumption that an individual consents to donate organs after death. Absent any knowledge that a decedent or a decedent's next-of-kin has objected to organ donation, and if an authorized request for a needed anatomical gift has been made, a medical examiner or coroner may authorize procurement of the needed anatomical gift from the decedent. Finally, the 1987 UAGA codified the National Organ Transplant

52. See id. § 2(b), Prefatory Note.
53. Id. § 2(b); compare with UNIF. ANATOMICAL GIFT ACT (1968) § 4.
54. See id. § 2(c). Anatomical gifts remain valid despite the expiration of an individual's driver's license.
55. See UNIF. ANATOMICAL GIFT ACT (1987) § 5(c), Prefatory Note. For example, emergency response personnel believing that an injured person is dead or near death, are required to search for documentation indicating whether the injured person intended either to donate or to not donate his or her organs. Id. § 5(c)(1). A similar duty exists for hospitals when they admit an injured patient. Id. § 5(c)(2).
56. Id. §§ 5(a)-(b).
57. Id. § 2(j).
58. Id. § 2(f); compare with UNIF. ANATOMICAL GIFT ACT (1968) § 6(a).
59. See UNIF. ANATOMICAL GIFT ACT (1987) § 2(h). Although consent was not required under the 1968 UAGA, this provision is set out more clearly in the 1987 UAGA; see generally, UNIF. ANATOMICAL GIFT ACT (1968) § 6.
60. See UNIF. ANATOMICAL GIFT ACT (1987) §§ 4(a)-(b), Prefatory Note. Most states that have adopted this section have required a reasonable search for the decedent's next-of-kin. See Cate, supra note 11, at 84. For case law addressing the validity and constitutionality of these types of presumptions, see Brotherton v. Cleveland, M.D., 923 F.2d 477, 482 (6th Cir. 1990) (requiring predeprivation process before coroner was authorized to take deceased's corneas); State v. Powell, 497 So.2d 1188, 1191 (Fla. 1986) (recognizing reasonable relationship to state's objective to provide sight for the blind); and Tillman v. Detroit Receiving Hosp., 360 N.W.2d 275 (Mich. App. 1984) (dismissing plaintiff's claim because a medical examiner may retain body portions for investigation and plaintiff/next-of-kin did not have a property right in decedent's body).
Act when it prohibited the sale of organs. The 1987 UAGA did, however, retain the good faith immunity defense.

2. Most of the adopted versions of the 1987 UAGA are not exact replicas.

Presently, twenty-one states have adopted a version of the 1987 UAGA. Some of those adopting states have not, however, adopted the 1987 UAGA word for word. Many states, for instance, omitted the routine inquiry section. Other states either failed to adopt or have changed the hospital’s duty of required consent. A few states have omitted the limited presumption provision. Other states changed the definition of “good faith” to include gross negligence. Some states have even reduced the age requirement to make a

61. See id. § 10; see also supra Part II(B). Other differences between the 1987 UAGA and the 1968 UAGA will not be addressed. For potential donees id. § 6. For the requirements of hospitals to coordinate and set up agreements with their local organ procurement organizations. Id. § 9.

62. See id. § 11(c). “A hospital, physician, surgeon, [coroner], [medical examiner], [local public health officer], enucleator, technician, or other person, who acts in accordance with this [Act] or with the applicable anatomical gift law of another state [or foreign country] or attempts in good faith to do so is not liable for that act in a civil action or a criminal proceeding.” Id. See also id. § 11(d). Neither an individual nor the individual’s estate are liable for any injury or damage that may result from making an anatomical gift. See id. § 11(d).

63. See id. Table of Jurisdictions Wherein Act has Been Adopted.

64. Those states and their respective statutes are as follows: Arizona, see ARIZ. REV. STAT. ANN. § 36-845(A); Arkansas, see ARK. CODE ANN. § 20-17-605(a); Idaho, see IDAHO CODE § 39-3406; IOWA, see generally, IOWA CODE ANN. §§ 142C.1 to 142C.16; Minnesota, see MINN. STAT. ANN. § 525.9214; Montana, see MONT. CODE ANN. § 72-17-213(1); Nevada, see NEV. REV. STAT. § 451.577; New Mexico, see N.M. STAT. ANN. § 24-6a-2; North Dakota, see N.D. CENT. CODE § 23-06.2-05; Oregon, see OR. REV. STAT. § 97.958; Rhode Island, see R.I. GEN. LAWS § 23-18.6-5; Vermont, see VT. STAT. ANN. § 5241; Virginia, see VA. CODE ANN. § 32.1-292.1; and Wisconsin, see WIS. STAT. ANN. § 157.06-5.

65. Those states and their respective statutes are as follows: Iowa, see generally, IOWA CODE ANN. §§ 142C.1 - 142C.16; and Virginia, see VA. CODE ANN. §32.1-292.1. California’s statute requires that either the hospital or their local organ procurement organization make the routine inquiry and the required request. See CAL. HEALTH & SAFETY CODE § 7184.

66. Those states that have omitted this provision are as follows: New Mexico, see generally, N.M. STAT. ANN. §§ 24-6A-1 - 15; and Vermont, see generally, VT. STAT. ANN. tit. 18 §§ 5238 - 5247. Other states either omitted this provision, or modified it by limiting procurement to eyes, corneas, or pituitary tissue. Connecticut’s statute permits qualified personnel to procure only pituitary tissue and corneas. See CONN. GEN. STAT. ANN. § 19(a)-281. Nevada’s statute permits procurement of only eyes. See NEV. REV. STAT. § 451.583. And Washington’s statute permits the procurement of only corneal tissue. See WASH. REV. CODE ANN. § 68.50.630.

67. Virginia’s and Washington’s statutes substitute “gross negligence or willful and wanton conduct” as an exception to good faith. See VA. CODE ANN. §32.1-295(E); and WASH. REV. CODE ANN. § 68.50.510.
valid anatomical gift.\textsuperscript{68} Two states have omitted the duty to search for a donor card.\textsuperscript{69} Although many states have changed the 1987 UAGA to reflect their local concerns, those states are trying to make positive steps toward increasing the supply of cadaveric organs for transplantation.

D. Current Problems

For nearly thirty years, all fifty states have had some version of the Uniform Anatomical Gift Act on their books. Yet thousands of patients continue to die each year while they wait for life saving organs.\textsuperscript{70} This subpart will address many of the problems that are presently hindering cadaveric organ procurement in the United States. First, medical personnel frequently refuse to procure the decedent’s organs without first obtaining consent from next-of-kin, even when the decedent properly executed a valid anatomical gift.\textsuperscript{71} A second problem is that hospital personnel sometimes fail to request consent from next-of-kin, even when their state’s required-request provision requires them to do so.\textsuperscript{72} Third, although the 1987 UAGA imposes a duty on emergency and hospital personnel to search for legal documents of gifts, many valid documents of gift are not retrieved.\textsuperscript{73}

Other problems are related to the would-be donor or the next-of-kin or both. A fourth contributing problem is that despite the overwhelming public support for organ donation, individuals have not executed anatomical gifts.\textsuperscript{74} A fifth unfortunate problem is that many next-of-kin refuse to consent to the

\begin{itemize}
  \item \textsuperscript{68} Washington’s statute lowers the age of those who are able to make a gift to 16. See id. at 68.50.540. Other states lowering the age requirement are Iowa and New Mexico. See Iowa Code Ann. § 142C.3-2; and N.M. Stat. Ann. § 24-6A-2.
  \item \textsuperscript{69} Those states are Iowa and New Mexico. See generally, Iowa code Ann. §§ 142C.1 to 142C.16; and see generally, § N.M. Stat. Ann. §§ 24-6A-1 -15.
  \item \textsuperscript{70} See Organ and Eye Donation, Number of Transplants Performed Remained Flat in 1996 in U.S., Europe, Transplant News, Apr. 29, 1997, at 1. Available in LEXIS, News Library. Of the 70,000 patients waiting for organ donations in 1996, 3,926 died.
  \item \textsuperscript{71} One author notes that “donor cards are legally binding in 48 states and health professionals who act on them are immune from liability in every state.” Cate, supra note 11, at 82. Reasons for this extra consent requirement include the following: (1) fear of professional criticism and legal action; (2) psychological unwillingness; and (3) resentment held by physicians about being told what they must do by legislators and bureaucrats. See Cate, supra note 11, at 82; and Naylor, supra note 16, at 181-82.
  \item \textsuperscript{72} See Cate, supra note 11, at 82.
  \item \textsuperscript{73} See Andrew C. MacDonald, Feature, Organ Donation: The Time Has Come to Refocus the Ethical Spotlight, 8 Stan. L. & Pol’y Rev. 177, 180 (1997).
  \item \textsuperscript{74} Although 85% of Americans support organ donation, many “are reluctant to contemplate and plan for their own death.” Id. That is, many either procrastinate until it is too late or they exhibit an unwillingness to think about their own mortality.
\end{itemize}
procurement of their deceased loved ones’ organs. Some of the reasons a decedent’s next of kin have refused to consent in the past are as follows:

1. fear that death might be hastened by an eagerness to procure organs;
2. objections that stem from being dismembered, such as aesthetic or religious concerns;
3. lack of education; and
4. lack of satisfaction the decedent’s next-of-kin may have over the hospital’s treatment and care of their loved one.

E. The 1998 DHHS Referral and Request Regulation.

In light of the current problems regarding the lack of supply of suitable cadaveric organs, on December 15, 1997, Vice President Al Gore along with the Department of Health and Human Services (DHHS) launched a national initiative to increase organ donation by twenty percent. One element of the national initiative was to propose a rule ensuring that next-of-kin are asked to consent to the procurement of their loved ones’ organs. As a result, the DHHS passed a Referral and Request regulation in August of 1998.

The new regulation provides that hospitals wishing to receive Medicare payments must refer their patients who died along with their patients whose deaths are imminent to a local Organ Procurement Organization (OPO). Consequently, the OPO would provide personnel trained and experienced in obtaining consent to consult with the patient’s next-of-kin and request consent to procure their loved one’s organs. This regulation, in essence, removes the

75. See MacDonald, supra note 73, at 180; and see Cohen, supra note 35, at 15, n.54.
76. See One in Five Families Regret Decisions to Donate, or Not Donate, According to a New Study, TRANSPLANT NEWS, Mar. 31, 1998, at 1. Available in LEXIS, News Library; and Families Satisfied With Hospital Care Donate Organs of Loved One More Often, TRANSPLANT NEWS, Feb. 13, 1998, at 1. Available in LEXIS, News Library. For some of the more frequently cited problems, see MacDonald, supra note 73, at 180; see also Watanabe, supra note 45, at 705.
77. For all the elements of this initiative, see HHS Launching National Organ/Tissue Donor Initiative; Goal is Increasing Donation Twenty Percent After HCFA Regulation Final, TRANSPLANT NEWS, Dec. 17, 1997, at 1. Available in 1997 WL 8941217.
78. Id.
80. Id.
81. See id. This new regulation was modeled after a Pennsylvania law that increased donation rates forty percent in three years. See Elizabeth Neus, Order: Report all Deaths to Organs Procurers, U.S.A. TODAY, June, 18 1998, § News, at 1A, available in LEXIS, News Library. This same type of regulation is practiced in Spain—a country with the highest success rate of any cadaveric organ donation system. See Richard H. Nicholson, The Good is Received the Giver is Forgot; Moral and Ethical Aspects of Organ Donation is Deliberated in Several Court Cases in Europe, HASTINGS CENTER REP., July 1994, at 5.
duty of required request from hospitals and places it in the hands of those more motivated to obtain consent.  

In addition to the national initiative to increase the supply of cadaveric organs, some experts have suggested other methods to increase the supply of cadaveric organs for transplantation. In their search for answers, many have looked abroad. The remainder of this paper will examine and describe how some Asian countries have attempted to increase the supply of cadaveric organs in their own countries.

III. THE JAPANESE ORGAN DONATION LAW.

Before 1997, Japan was the only developed country where procurement of cadaveric organs from brain-dead donors was not officially recognized. As a result, a large percentage of Japanese patients waiting for suitable organs have died. Those who have received suitable organs have received them from either live donors or another country’s donors. Consequently, some people

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83. For example, one expert has placed the duty on attorneys to help “investigate alternatives to current transplant practices and, where necessary, participate in altering the existing legal structure to make it possible for new procedures to be implemented.” Cate, supra note 11, at 87-9. Cate also suggests that the attorney-client relationship be used to provide clients accurate information, to counsel and act on behalf of the client to “assure that a decision to donate is followed when medically appropriate; and to act to maintain the integrity of the transplantation system.” Id.

84. See generally, infra Part IV.


86. For example, 30% of Japanese patients who were waiting for a liver transplant died in 1993. See David Forster, Comment, When Body is Soul: The Proposed Japanese Bill on Organ Transplantations from Brain-Dead Donors, 3 PAC. RIM L. & POL’Y J. 103, 109-11 (1994).

87. Of the patients remaining from supra note 86, about 13% received organs from living donors, 11% received their organs from overseas, and 40% remained on the waiting list. Id. Also, of all the kidneys

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have correctly argued that legal and public support of brain death was necessary to increase Japan's supply of cadaveric organs.\textsuperscript{88}

This part will review how Japan has tried to increase the supply of cadaveric organs to meet increasing demands. Part III(A) will examine the many social and religious beliefs that have traditionally rejected brain death and the procurement of organs from those whose brains have indeed expired. Part III(B) will introduce Japan's new law as the world's most stringent cadaveric organ procurement law. In addition, this part will compare Japan's new law to similar laws in the United States. Part III(C) will explain the success and problems with Japan's new organ procurement law.

A. Japan's social and religious obstacles to brain death and cadaveric organ procurement.

Until very recently, Japan's strongly held social and religious beliefs against brain death and organ procurement were impenetrable barriers to the formal recognition of organ procurement from those who were brain dead. For example, although most Americans view the body and soul as separable, the Japanese "view individuals as 'completely integrated mind-body units.'"\textsuperscript{89} In addition, the United States recognizes inherent individual rights in life and in death. Japan, on the other hand, views the individual as "a social being who is regarded as part of a collective reality,"\textsuperscript{90} a collective to which the family also belongs.\textsuperscript{91} Also, Japanese people view the belly as the master organ of the body, not the brain.\textsuperscript{92} Yet another social problem stems from the Japanese demand for perfection—false positives, no matter how remote their possibility,

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\textsuperscript{88} See Forster, supra note 86, at 109; and Takao, supra note 85, at 1164. For one Japanese doctor's view that recognition of brain death is a bad idea in Japan, see Watanabe, supra note 45. Many of Watanabe's problems are with the side effects of cyclosporine and the medical problems associated with heart surgery. Id. at 703-4. Watanabe stated that "[s]ustaining the life of a transplant patient is said to be a tightrope walk between infection and rejection." Id. Another problem this author has is that although Japan averages about 7,000 people per year who have succumbed to brain death, the majority of those are over the age of 60. See id. at 704. Consequently, there are not as many suitable organs as the proponents brain death believe. Id. at 705.

\textsuperscript{89} See Forster, supra note 86, at 115-16.

\textsuperscript{90} Id. at 116-17. This communal identity is demonstrated by, for instance, "traditional birth and funeral rituals."

\textsuperscript{91} Id. The decedent's body and organs equally belong to the family, who must give their approval before organ procurement may begin.

\textsuperscript{92} See Haruko Akatsu, The Heart, the Gut, and Brain Death in Japan, HASTINGS CENTER REP., Mar./Apr. 1990, at 2. "For example, a Japanese Samurai warrior, when committing suicide plunged the sword into his belly, not into his heart or his brain." Id.
are unacceptable. Many Japanese believe that it is unnatural to declare one brain dead while that person's chest is still moving.

Many of the social barriers can be further explained by the various Japanese religions. Buddhists believe, for instance, that to be declared brain dead while one's heart continues to beat is wrong and that "until the body is wholly dead, there is no oneness at death." Also, in order to reach attainment, a deceased must remain "in this world for forty-nine days..." Thus, many fear that removing one's organs during this attainment period will disrespect the spirit "who is still present." Another religion practiced in Japan, Shintoism, proscribes that one's spirit will be content so long as the individual did not die a violent death. Taking one's organs while the heart is still beating constitutes a violent death. Ancestor worship, which is a combined form of Shinto, Confucian, and Buddhist beliefs, is yet another example of strong religious beliefs against brain death and cadaveric organ procurement. Those who practice Ancestor worship believe that after they die they enter a community of spirits and then, thirty-two years after death, they become ancestors through a series of rituals. During the thirty-two year ritual period, the decedent’s family commits to making their loved one’s spirit happy and comfortable. Family members believe that procuring organs from their decedent loved one is contrary to their obligation, as the spirit may become unhappy. Although Ancestor worship appears to be declining in practice, the other religious beliefs will preclude many Japanese from accepting brain death and cadaveric organ transplant.

93. Id. Compounding these concerns are the public's mistrust of medical personnel due to poor quality control and lack of accountability. See Leflar, infra note 131, at 69-70; see also infra Part III(C).
94. See Akatsu, supra note 92.
95. Forster, supra note 86, at 116, 118. The Buddhists feel that declaring one dead while one's body contains living cells is contradictory to death. Id. at 118.
96. Id.
97. Id. Some commentators feel, however, that organ donation "supports True Offering, a gift of compassion which has no feelings of regret or self-praise attached."
98. Id. Also, "injuring a corpse is taboo."
99. Id. at 118-19. Although one may consent to organ donation, family members would rather ignore one's living will than injure the corpse.
100. Id.
102. Id.
103. Id.
B. Japan's stringent method of cadaveric organ procurement.

Despite the obstacles, on June 17, 1997, Japan passed its first law that formally recognized brain death. Under the new law, however, brain death is only recognized by those "who have previously expressed a willingness to donate their organs." The law was passed for the sole purpose of facilitating organ procurement, rather than as a rigid declaration that brain death indicates the end of human life.

At first glance, the new organ transplant law appears similar to the United States' laws with the overall theme of voluntary consent. Also, Japan's new law appears to clear the obstacles that, at one time, hindered its cadaveric organ supply. A thorough examination of the new organ transplant law, however, reveals some substantial hurdles. First, the voluntary requirement of Japan's new law is more stringent than the consent requirement in the United States. Would-be donors, for instance, not only consent to organ procurement, but they also must consent to the pronouncement of brain death—all of which must be in writing. This provision helps to explain that brain death will only be recognized by consenting would-be donors. In addition to the individual donor's consent, and in contrast to the 1968 and 1987 UAGAs, next-of-kin must give their consent to organ procurement and the pronouncement of brain death. A significant difference that helps make this new law one of the "most stringent in the world," is that a would-be donor must be at least fifteen years old.


105. Id.

106. Id.


108. Id.


110. Id. Experts fear that one objection from any of a would-be donor's next-of-kin would be sufficient to preclude organ procurement.


Also, at least two doctors not involved in the procurement process are to confirm brain death.\textsuperscript{113}

C. Japan’s new law’s success and problems.

Japan’s stringent organ transplant law is defined by some as the “Organ Transplant Prohibition Law.”\textsuperscript{114} Presently, the new law has enjoyed little success and has endured much criticism. One of the problems that hinders the new transplant law’s success is the relatively few Japanese who have died carrying donor cards.\textsuperscript{115} Of the individuals who had donor cards, some did not consent to the pronouncement of brain death, and one other filled out his card improperly.\textsuperscript{116} In one instance, stringent donor card interpretations led authorities to deny procurement of the heart and liver of Japan’s first donor card carrying cadaver — a fifty-year-old male.\textsuperscript{117} Because the man failed to check one of the options on his donor card, doctors were precluded from procuring the man’s organs until after his heart stopped beating.\textsuperscript{118}

Another problem hindering cadaveric organ procurement is the fear in the Japanese medical community of criminal prosecution against those who procure organs from brain-dead cadavers.\textsuperscript{119} This fear stems from a murder complaint against a doctor, who in 1968, performed Japan’s first and only heart

\begin{footnotes}
\footnotetext{113}{See \textit{Mainichi Daily News}, Sept. 28, 1997, \textit{supra} note 109.}
\footnotetext{114}{For example, because of the age minimum, some children will be deprived of their chances to undergo organ transplant operations. See \textit{id}; and see 1997: An Annus Mirabilis for Science, \textit{Daily Yomiuri}, Jan. 7, 1998, at 7, \textit{available in Lexis}, News Library, A-WLD File.}
\footnotetext{115}{Although four million donor cards were distributed, only nine people died with organ donor cards during the first six months of the new law’s tenure. See \textit{Steep Hurdles Continue to Block Easy Organ Transplants}, \textit{Japan Econ. Newswire}, Apr. 13, 1998, at 1. \textit{Available in Lexis}, News Library, A-WLD File. “Of the nine, two opted for donation after heart stoppage, one gave no clear position, while the other six chose to donate all their organs after brain-death. However, in all but one case, the donors died of causes that did not result in brain death only.” \textit{id}.}
\footnotetext{116}{\textit{id}.}
\footnotetext{118}{\textit{id}. Although he marked that he consented to donate his heart, liver, lung, pancreas and kidney, he failed to mark the section asking whether to donate his organs before or after brain death. Once his heart stopped beating, however, doctors were able to procure the man’s kidney, cornea and portions of his skin. \textit{id}. Another reason for the failure to procure his organs at brain death, was the man “became brain dead at a hospital that was not designated as eligible to take and provide organs from brain-dead donors.” \textit{id}. Another article implies that a would-be donor’s family members must also sign the donor card. See \textit{Transplant Refused After Donor Card Judged Invalid}, \textit{Daily Yomiuri}, Jan. 7, 1998, at 2, \textit{available in Lexis}, News Library, A-WLD File.}
\footnotetext{119}{See \textit{Japan Econ. Newswire}, Apr. 13, 1998, \textit{supra} note 115.}
\end{footnotes}
Fitzgibbons

transplant. Since this incident, "eight transplant operations in which organs from brain-dead donors were used have come under the scrutiny of law enforcement officials, with criminal complaints filed in each of the eight cases."

The lack of social acceptance of the new law presents a significant problem. Prior to the approval of the new Japanese organ transplant law, one newspaper reported that a majority of the public wished to have their organs donated after they were pronounced brain dead and that "they would approve organ donations from brain-dead family members who previously gave their consent ... " After the new law went into effect, however, other newspapers reported that social acceptance has declined.

Other social problems concerning this new law stem from the way Japanese family members assist their loved ones while their loved ones are treated in a hospital. Because the Japanese family normally takes the predominant role of the nurse when their loved ones are in a hospital, Japanese doctors are reluctant to ask family members for their consent to remove organs, "especially when the brain-dead person is still breathing and warm." Also, because there is no policy of informed consent in Japan, "patients and family are kept outside of the medical decision-making process." In addition, strong

120. Id. Although a complaint was filed, the doctor was not prosecuted.

121. Id. In 1968, family members filed a murder complaint against a hospital in which doctors procured the kidneys from a patient whose heart stopped beating. Other problems the article cites to are that brain death accounts for only one percent of Japan's deaths, and only a small number of Japanese hospitals are authorized to perform transplantation proceedings from brain-dead donors. Id.


123. The poll consisted of 1,256 computer randomly selected adults. See Poll: Public Support for Organ Transplants Growing, MAINICHI DAILY NEWS, July 5, 1997, § Domestic, at 18, available in LEXIS, News Library, A-WLD File. "Fifty-six percent expressed a willingness to donate their organs, 32% did not; 67% were willing to approve donations of organs of family members, while twenty-two said no." Of the people who were willing to donate their own organs, 83% stated "they would approve transplants of organs of family members who had previously given consent." In a similar poll conducted in 1991, "53% were willing to donate their organs, while 43% were not." Id.


125. See Forster, supra note 86, at 119-21.

126. Id.

127. See Forster, supra note 86, at 120; see also DAILY YOMIURI, supra note 104.
fears among the Japanese that a doctor might declare a patient brain dead when that patient is still alive is another problem hindering the new law's success.\textsuperscript{128} Despite Japan's attempt to increase its supply of cadaveric organs, many legal questions must be answered and public scrutiny must be minimized before its new law will achieve much success.\textsuperscript{129} One of the questions that must be addressed if Japan expects its citizens to consent to organ procurement of their loved ones is informed consent.\textsuperscript{130} Informed consent is not practiced the same way in Japan as in the United States.\textsuperscript{131} Rather, Japanese doctors practice more of a paternalistic approach towards their patients.\textsuperscript{132} Important medical information that is necessary to make an informed decision is usually withheld for the good of the patient.\textsuperscript{133}

In light of all the problems, patients continue to go abroad for life-saving organs.\textsuperscript{134} Clearly, it will take some time to break through Japan's social and

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\item[128] See Forster, supra note 86, at 120-22; see also Akatsu, supra note 92.
\item[129] "It is unclear, for instance, who should be brought in to confirm that a patient is brain dead, who would actually donate a body from which organs would be removed, and the timing of transplants." Daily Yomiuri, Jan. 7, 1998, supra note 114. Other uncertainties include, "who will explain to the patient's family about the need to confirm brain death and under what authority. The law also fails to address the dignity of and respect for those who are at the point of death." \textit{Id}.
\item[130] The public should know about the care that their terminally ill loved ones may receive. \textit{Id}.
\item[132] Informed consent in the United States grew out of a strong deference towards individual autonomy. \textit{See Furrow, supra note 131, § 6-9 at 265-66. This deference stemmed from the "prevalent belief that an individual has a right to be free from non-consensual interference with his or her person, and a basic moral principle that it is wrong to force another to act against his or her will." Id. Japan, however, adheres to more of a group orientated view, and many times medical information is withheld from the patient. \textit{See Leflar, supra note 131, at 18. Rather than deferring towards individual autonomy, in Japan, there is a stronger deference towards medical custom. Id. at 48-61.}
\item[133] The diagnosis of cancer, for instance, is withheld from the patient; but as a substitute, the patient's physician discusses treatment and a limited prognosis with the patient's family. \textit{See Leflar, supra note 131, at 20-27. Presently, there is an ongoing debate over informed consent, and there have been hints of a gradually developing trend towards a more western style of informed consent; however, this style is far away. Id. at 110-112.}
\item[134] Since the law's approval, two children traveled to the United States for organ transplants, "and two adults died while preparing to leave for treatment abroad." \textit{See JAPAN ECON. NEWSWIRE, Apr. 13, 1998, supra note 122. One of the parents, when referring to the current age minimum of 15 under the new law said: "I hope the age limit will be abolished, because going overseas for a transplant is too much for parents to bear..." Id. One Japanese women who was suffering from cardimyopathy said, "I really wish I could have it in Japan, but I have no choice [but to do it elsewhere]." Id. One Japanese man died from complications of his illness one month before he was scheduled to travel to the United States to receive an organ. If he
religious barriers before Japan will achieve success in its cadaveric organ program.

IV. SINGAPORE’S LAW: A COMBINATION OF PRESUMED AND VOLUNTARY CONSENT.

While Japan’s method of procuring cadaveric organs is very strict, Singapore has adopted quite a different approach — presumed/voluntary consent. Singapore, a small city-state with 2.7 million people, performed its first kidney transplant in 1970. Originally, Singapore used a voluntary system of organ donation. During its tenure, Singapore enjoyed a good track record with its renal transplants. Nonetheless, this voluntary system was producing little, if any, cadaveric kidneys. In June 1987, in an effort to remedy its cadaveric kidney shortage, Singapore passed the Human Organ Transplant Act (HOTA).

This section will examine HOTA along with some of the other countries that have adopted similar laws. Part IV(A) will discuss each of HOTA’s presumed consent provisions. Next, Part IV(B) will describe the other part of Singapore’s organ procurement law—the voluntary requirement of those whom HOTA does not presume to consent. Part IV(C) will compare Singapore’s presumed consent provision to some of the other countries’ versions of presumed consent. Finally, Part IV(D) will consider the viability of adopting presumed consent in the United States.

A. Presumed consent

Singapore’s HOTA, commonly referred to as a system of presumed/voluntary consent, presumes one group of its citizens consent to donate their organs, but presumes another group does not. Under HOTA, the law “presumes that all mentally competent citizens or permanent residents between the ages of twenty-one and sixty who are victims of fatal accidents are kidney
donors unless they have registered prior dissent. Next-of-kin do not have to consent." What puts teeth into the law and makes HOTA a law of presumed consent is the language, "... unless registered prior dissent." HOTA's presumed consent provision, however, relates only to kidneys and not to any other organs. In addition, HOTA limits the age to consent, and it also limits the manner in which a would-be donor has died-by fatal accident. Finally, consent from next-of-kin is unnecessary.

When first adopted, HOTA enjoyed an early success. Recently, however, this trend has regrettably reversed. Singapore was the first Asian country to adopt presumed consent with respect to cadaveric organ procurement. When Singapore adopted HOTA, it did not impose presumed consent status immediately, but rather implemented the presumed consent provision smoothly over time. After Singapore adopted HOTA, the average number of kidneys procured per year jumped from 4.7 before HOTA to 31.3. More recently, however, one article reported that the number is closer to twenty per year—eight kidneys per million people. The early success of HOTA, therefore, has not stabilized, but rather it has reversed. One doctor believes the reversing trend is due to the reliance on HOTA's presumed consent provision. If this

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141. Teo, supra note 136, at 10.
142. Id.
143. Id.
144. Id.
145. Id.
146. See Gorsline & Johnson, supra note 16, at 25.
147. See Teo, supra note 136, at 10. For example, dissenters were given six months in which to register their dissent by completing an Objection-to-Kidney-Removal card, which was made readily available. Also, widespread media attention was directed at informing Singaporean citizens about the new law. Id. Presently, Singapore notifies its citizens, and just prior to turning 21, the government mails them a letter "informing them of their duty to opt-out if they so desire." Melissa N. Kurnit, Note, Organ Donation in the United States: Can We Learn from Success Abroad? 17 B.C. INT'L & COMP. L. REV. 405, 425 (1994).
148. See Gorsline & Johnson, supra note 16, at 25. "Of those organs procured, 58.5% were attributed to HOTA and 41.5% to voluntary donation." Id. at 25, n.203.
149. See Indrani Nadarajah, No Donors, So List for Kidney Transplants Grows, STRAITS TIMES, May 12, 1997, § News Focus, at 3, available in LEXIS, News Library, A-WLD File. During the two-year period from 1994 to 1996, the number of kidneys procured dropped from 84 in 1994 to 44 in 1996—nearly a 50% drop. Id. In 1995, 53 kidneys were procured. Id. Singapore's average of eight million cadaveric donors per year was actually less than half of the average of the United States' figures in 1995. See United Network for Organ Sharing (visited Sep. 19, 1998) <http://traders.co.uk/insulintrst/unos.htm> [hereinafter UNOS Report]. The average cadaveric donor per million persons in the United States was 20.9 per million. Id.
reliance were true, Singapore would ignore a large population of its potential donors — those exempt under the presumed consent provision.151

B. Voluntary Consent

Along with HOTA’s strong presumed consent provision, its success also depends on individuals who have not consented under the law.152 Indeed, one doctor pointed out that “[t]he bulk of organs available for transplant, however, come from donors who have opted to donate their organs upon death ...”153 But in the past, only a fraction of those available to opt-in actually carried donor cards.154 Under HOTA, Muslim Singaporeans — a large part of Singapore’s population — “are automatically considered objectors to HOTA on religious grounds.”155 Consequently, Singapore’s sole reliance on HOTA’s presumed consent provision excluded nearly half of its potential supply of cadaveric organs.156

To realize its potential supply, Singapore was required to address the factors that hindered voluntary consent. A significant factor, precluding most Muslims from donating their organs, was the belief that Islamic law forbade organ donation.157 Such a belief led to a Singaporean education drive directed at Muslims, in which Islamic leaders acknowledged that organ donation was not illegal so long as the parts saved lives.158

151. See, eg., Teo, supra note 136, at 10.
152. Id.
154. Id. In 1995, “only 29,000 out of 1.5 million Singaporeans above the age of 18 [held] the donor card.” Id.
155. Id.
156. See Teo, supra note 136, at 10.
157. See Christina Williams, Note, Combatting the Problems of Human Abuses and Inadequate Organ Supply through Presumed Consent, 26 CASE W. RES. J. INT’L L. 315, 339 (1994). Also, fears concerning medical and legal safeguards, similar to those realized in the United States, were among other influential factors that hindered voluntary consent. See Organ Donors Less Wary “If They Knew Safeguards,” STRAITS TIMES, June, 21, 1992, § Home at 16, available in LEXIS, News Library, A-WLD File; STRAITS TIMES, Nov. 20, 1995, supra note 150, at 33. And for similar fears in the United States, see infra Part II(D). Most of these fears, however, could be lessened with a program designed to educate the public. See also STRAITS TIMES, June, 21, 1992, supra.
158. Id. at 339-40, nn.155-56. “The object of transplanting a kidney from the body of a deceased Muslim to that of a donee is primarily and exclusively to save lives. On no account can a kidney be allowed to be removed from the body of a Muslim for other purposes...” Id. at n.155 citing HUMAN ORGAN TRANSPLANT ACT, 1987, pt. IV, S14 (Sing.), reprinted in REPORT OF THE SELECT COMMITTEE ON THE HUMAN ORGAN TRANSPLANT BILL (Bill No. 26/86)). For an article discussing a new Bioethics course in which Singaporean law students learn about the intricacies of organ donation, see Serena Toh, Law Students
Another helpful practice, although not required by HOTA, is that many hospitals notify transplant coordinators about those patients "who are dying from causes other than fatal trauma and who have not made voluntary pledges."^{159} This practice is similar to the Referral and Request regulation in the United States.^{160} Another similarity to the United States' recent regulation is that once a transplant coordinator is notified, "[t]he next of kin are then tactfully approached for consent to post mortem removal of their loved one's organs."^{161}

C. How does HOTA stack up to other presumed consent laws?

All presumed consent laws have one thing in common — without an expressed statement to the contrary, one is presumed to consent to donate his or her organs. But some of these laws are more stringent than others.^{162} Austria, for instance, strictly adheres to its presumed consent law.^{163} In Austria, so long as a decedent previously did not object to organ procurement, the procurement of the decedent's organs will be permitted without considering the decedent's next-of-kin's wishes.^{164} This is called "pure presumed consent."^{165}

^{159} See Teo, supra note 136, at 10.
^{161} Teo, supra note 136, at 10. Since this practice is not unanimous, HOTA should be amended to mandate either routine inquiry by the hospitals or notification to a transplant coordinator and required request. Id. For another problem where the author suggests HOTA's priority principle and incentive provisions undermine its humanitarian purpose, see PUBLIC HEALTH, 42 C.F.R. § 482.45.

^{162} For example, two economists defined both ends of the presumed consent spectrum as follows: the most stringent form of presumed consent includes conscription or organ draft, which when applied, organs are procured without obtaining consent from anyone; at the other end of the spectrum are those presumed consent laws that give a right to object to organ procurement by the would-be donor and the surviving next-of-kin. See A.H. Barnett & David L. Kaserman, The Shortage of Organs for Transplantation: Exploring the Alternatives, 9 ISSUES L. & MED. 117, 123 (1993). The less stringent method includes personnel informing the would-be donor or the surviving next-of-kin of their right to object. Actually, the less stringent end of the spectrum appears to more accurately reflect the classic opt-in system. Id.

^{163} See Kurnit, supra note 147, at 423.
^{164} See Gorsline & Johnson, supra note 16, at 22. The objection must be in writing and it must accompany the body. See id.; and see Kurnit, supra note 147, at 423.

^{165} For a more in-depth discussion about Austria's pure presumed consent law, see Gorsline & Johnson, supra note 16, at 22; Kurnit, supra note 147, at 423; and Williams, supra note 157, at 340-44. Austria does not discriminate when it comes to procuring one's organs—it includes foreigners as well. See Dr. James Le Fanu, Review: Gifts of Life Cannot be Left to Chance Dr. James Le Fanu Considers the Options for Doctors Facing a Shortage of Donors, SUNDAY TELEGRAPH, July 19, 1992, at 108, available in LEXIS, News Library, A-WLD File. The article suggested the following warning to those who plan a
Despite Austria’s somewhat barbaric approach to cadaveric organ procurement, its method enjoys more success than its European counterparts, as well as the United States.\textsuperscript{166}

Austria is not the only European country with a presumed consent law. In fact, thirteen European counties have such a law in effect, though not as strict as Austria’s.\textsuperscript{167} France, for instance, practices a less stringent method of presumed consent.\textsuperscript{168} It allows an objection to organ donation made in any manner, which is then registered in a hospital.\textsuperscript{169} In practice, the strength one would expect to find under the auspices of presumed consent is missing. For example, next-of-kin cannot prevent the organ procurement of their deceased loved one if their loved one failed to object to organ donation; however, it is not practiced by France’s physicians.\textsuperscript{170} Instead, “physicians rarely remove organs if the family objects.”\textsuperscript{171} Also, the presumed consent law bears even less bite when one considers the requirement that — prior to organ procurement — any physician participating in the procurement process must make reasonable efforts to locate a decedent’s possible objection.\textsuperscript{172} This requirement is similar to the 1987 UAGA, which requires that a coroner or a medical examiner must conduct a reasonable search for a decedent’s next-of-kin to request their consent to procure the decedent’s organs.\textsuperscript{173}
D. *Is presumed consent a viable option in the United States?*

Although the numbers mildly suggest that adoption of a presumed consent law will increase the supply of cadaveric organs, most states in this country will not rely merely on numbers. Rather, they are forced to deal with the prevalent views that support the current voluntary system. Both the 1968 and the 1987 UAGAs respect personal autonomy over one's body. Indeed, it is personal autonomy's attractiveness that may drive the stake through the heart of presumed consent in the United States. Personal autonomy stems from the encouragement of voluntary altruism and benevolence. Encouraging altruism and benevolence will likely foster generosity among others, promoting a "better human community in which giving and receiving is the rule." A system such as presumed consent clearly will not foster an individual's generosity. Thus, the ideal spirit of a civilized community may indeed dwindle to callousness.

The altruism and benevolence of America's public with respect to giving their organs after death seemed clear after a recent survey in which the majority said they would consent to donate their organs. In reality, however, quite the contrary exists. So many people support organ donation, yet because so few actually consent when it really counts, some commentators have argued that adopting a presumed consent law in the United States will simply coerce where

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174. Actually many of the countries, which have adopted presumed consent laws, are experiencing a success rate at or even less than the success rate in the United States. See UNOS Report, *infra* note 149.

175. For commentaries on the possibility of adopting presumed consent in the United States, see Gorsilin & Johnson, *infra* note 16; Kurnit, *infra* note 147; Naylor, *infra* note 16; Silver, *infra* note 16; and Williams, *infra* note 157.


177. See Kurnit, *infra* note 147, at 426.


179. Id. at 696-97.

180. See 1993 Gallup Poll: Majority of Americans Support Organ Donation, <http://www.transweb.org/partnership> [hereinafter 1993 Gallup Poll]. In this recent Gallup poll, 85% of the Americans surveyed answered that they supported organ donation. See id. Thirty-seven percent were very likely to consent to donate their own organs after death; 32% were somewhat likely to do the same, and 25% were not likely to donate their organs after death. See id. Ninety-three percent indicated that they would indeed support a family member's request to donate, but less than half—47%—indicated it would not matter if donation was not discussed beforehand. Id.

181. Referring to a 1985 Gallup Poll survey, one author noted, "[t]hat 75% say 'yea' to organ donation from an armchair, while 83% say 'nay' from the deathbed, suggests that most people believe they should donate their organs post-mortem but cannot bring themselves to do so." Silver, *infra* note 16, at 697.
voluntary incentive is lacking. A careful analysis of current law suggests that the coercion has indeed begun.

The limited presumed consent provision — section four of the 1987 UAGA — has already taken the first step towards presumed consent. Of the states adopting the 1987 UAGA, most adopted this limited presumption and others either omitted it or further limited it to the procurement of corneas or pituitary tissue or both. All of these states require qualified medical personnel to make a reasonable search for the decedent’s next-of-kin prior to organ procurement. Some have exempted certain religious groups.

Many of these limited presumptions have been challenged on property and personal rights grounds. Although many courts have not recognized a complete property right over a loved one’s body, courts recognized that a decedent’s next-of-kin possesses a quasi-property right for the purpose of burial. Consequently, presumed consent appears to pass any legal or constitutional barriers in the United States. Indeed, a jurisdictional determination that next-of-kin possess only quasi-property rights may be another step towards presumed consent.

The barrier of autonomy, however, remains. It is a barrier that many physicians have not crossed even in countries that have adopted presumed consent laws. Many physicians, for instance, continue to request consent from the decedent’s next-of-kin, even though they are not required to do so. Under

182. Id.
184. For states that have either omitted section four or modified it, see supra note 66.
185. For the language creating this duty, see UNIF. ANATOMICAL GIFT ACT (1987) §4(b). If the only parts that are going to be procured are corneas, California’s statute does not impose a duty search. See CAL. HEALTH & SAFETY CODE § 7151.5.
186. Those states that have adopted religious exceptions are Connecticut and Iowa. See CONN. GEN. STAT. ANN. § 19(a)-281; and IOWA CODE ANN. § 142C.6.
187. See supra Part II(C).
188. See generally, supra notes 33, 60.
189. So long as a decedent’s next-of-kin can perform a proper and decent burial for their loved one, case law suggests that this quasi-property right has been satisfied. See supra note 60.
190. For example, Singaporean doctors request family consent when ever possible, even though the law does not require it. See Teo, supra note 136, at 10. Other countries where doctors request consent from next-of-kin are France and Belgium. See Gorsline & Johnson, supra note 16, at 23-24; Kurnit, supra note 147, at 421-23; and Williams, supra note 157, at 340-41. These softer versions of presumed consent appear to be more in line with the 1968 and 1987 UAGAs concerning personal autonomy; that is, when a decedent’s intention about whether he or she consented to organ donation is unknown, the present law requires physicians and hospital staff to honor the decedent’s autonomy through the decedent’s next-of-kin. See UNIF.
a pure system of presumed consent, the decedent's autonomy, if unexpressed, is replaced by the government's and public's interests in saving lives. In the United States, the majority of Americans said they would consent to organ donation. Cloaking the opt-out provision into the form of autonomy assumes, however, that all who object will take the initiative and register their dissents. But if the various states' legislatures were to consider the viability of presumed consent in the United States, they must undoubtedly be willing to find that state and public interests outweigh the interests of personal autonomy. For a presumed consent system to enjoy appreciable success, all those involved in the procurement process must presume one consents without consulting with next-of-kin. Although presumed consent is acceptable in other countries, it will most likely not be so acceptable in the United States.

V. CHINA'S METHOD OF ORGAN PROCUREMENT: AN INHUMANE HARVEST?

The lack of personal autonomy, even in the purest form of presumed consent, is merely a brick in the Great Wall compared to the shocking manner in which China procures/harvests its citizens' organs. This part will expose China's disturbing practice. Part V(A) will unveil perhaps the most inhumane method of organ procurement in the world, which is killing for organs. Part V(B) will disclose what China does with the cadaveric organs once harvested. And finally, Part V(C) will attempt to shed some light on some of the views in the United States about the procurement of its own executed criminals' organs.

A. Organ procurement from a freshly executed corpse.

Imagine a loved one is yanked out of bed in the middle of the night by the


191. This may actually prove emotionally beneficial, because of the added emotional stress that emerges when deciding whether to consent to the procurement of a loved one's organs. See I. Kennedy et al., The Case for "Presumed Consent" in Organ Donation, 351 LANCET 1650, 1651 (1998), available in 1998 WL 14104066.


193. This seems unlikely in a country where procrastination is so prevalent. Some critics assert: "that presumed consent will 'lead to a situation where the poor, the uneducated, and the legally disenfranchised might bear a disadvantageous burden, and only the more advantaged groups would be able to exercise autonomy,' since only the more advantaged groups would be aware of their right to opt-out." Williams, supra note 157, at 343.

194. Unless strict penalties were imposed on medical personnel involved in the procurement process, in the United States—where so many doctors continue to request consent from a would-be donor's next-of-kin—it seems unlikely that a presumed-consent law would be very successful at all. See supra Part II(D) and supra note 74.
FBI and taken to their headquarters for interrogation. Your loved one is arrested and charged with tax evasion and then immediately locked up in a dark cell. A few days later, your loved one is found guilty of tax evasion and sentenced to death. After the sentence is read, he or she spends the night handcuffed to a chair. The next day your loved one is shot in the head, pronounced dead, then instantly carried off in a van to have his or her organs harvested and sold to the highest bidder. According to many sources, this is exactly what happens in China.\textsuperscript{195}

In China each year, about 100,000 Chinese are estimated to need organ transplantation surgery.\textsuperscript{196} How can China attempt to supply this excessive demand? Through a program of voluntary consent? Absolutely not. Credible sources have unveiled that China’s program of cadaveric organ procurement involves the most inhumane practice of all, which is harvesting organs from its executed prisoners.\textsuperscript{197} Presently, China’s criminal laws recognize sixty-eight crimes that are punishable by death, including car theft and tax evasion.\textsuperscript{198} Although a high court perfunctorily reviews capital crimes cases, “the time between arrest and conviction is often days, and reviews have consistently...


\textsuperscript{198} Some of the offenses include: “... reselling value added-tax receipts, theft, burglary, hooliganism, seriously disrupting public order, pimping, trafficking of women, taking of bribes, corruption, forgery and tax evasion.” Testimony by T. Kumar, supra note 195. After arrested and charged with a crime, it takes only days to convict. \textit{Id.} “Condemned prisoners tend to be paraded at mass rallies or through the streets before being privately executed.” \textit{Id.} Once sentenced to death, the condemned prisoner is usually handcuffed to a chair overnight, and watched by others in case the condemned prisoner attempts suicide. The next day, the condemned is shot either in the back of the head or in the heart. \textit{Id.}
resulted in confirmation of sentence."[199] In 1997, China carried out 4,367 executions of its citizens who allegedly committed one of the sixty-eight capital crimes.[200]

About ninety percent of those executed were used as non-consenting cadaveric organ donees.[201] China officials vehemently deny this practice,[202] and declare that a China regulation expressly prohibits organ procurement from its executed prisoners unless one of the following three criteria have been satisfied: (1) "nobody claims the body or the family refuses to bury it;"[203] (2) "the prisoner voluntarily donates the body for use by medical facilities;"[204] or (3) "the inmate's family consents to its use after death."[205] In regards to the individual consent requirement, it is difficult to imagine that even if a condemned prisoner consented to the harvest, such consent was informed and given freely and voluntarily.[206] Nevertheless, China's system of cadaveric

199. See Statement by Hon. John Shattuck, supra note 195. China does not consider its prisoners' extenuating circumstances of the crime when it imposes the death penalty.

200. See Statement by Hon. John Shattuck, supra note 195. Because of the secrecy in China, the actual number of those who were executed may be up to 10 times the amount reported. See Teresa Poole, China's Executioners Work Overtime; International Outcry over Organ Transplant Grows as Car Thieves Join Rising Toll of Those Shot after Summary Trials, INDEPENDENT, Oct. 30, 1994, § World Page, at 16, available in LEXIS, News Library, A-WLD File.

201. See Testimony by T. Kumar, supra note 195.

202. Officials argue that most of the information or evidence proving this practice is circumstantial and that the allegations are being made for the sole purpose of interrupting international relations between China and the United States. See Official Reiterates Denial of Prisoners' Organs in Transplant Allegations, BBC SUMMARY OF WORLD BROADCASTS, July 6, 1998, § Part 3 Asia-Pacific; China; Internal Affairs; FE/D3271/G, available in LEXIS, News Library, A-WLD File. Although there appears to be some truth to this, the circumstantial evidence and hearsay relied upon, some argue, was indeed from credible sources. See Statement by Hon. John Shattuck, supra note 195. "Credible sources include public statements by patients who have had transplants in China and testimony by doctors and former Chinese officials who claim to have witnessed or taken part in such practices or to have seen incriminating evidence." Id. Also, an arrest in the United States in which two Chinese nationals allegedly offered to sell organs that were removed from Chinese executed criminals helps bolster the evidence that this practice indeed exists. Id. Another credible source supporting the alleged practice came from the statement of a Chinese delegate, Sin Yongjin, when he admitted that China harvested its executed prisoners' organs. See Awaya, supra note 195.

203. Statement by Hon. John Shattuck, supra note 195. Lack of notice to a family about the imminent execution of their loved one sometimes precludes this category from stopping the harvest process. Another obstacle is the long distances a family must travel to get the body. Id. Also, generally the executed are cremated. See Testimony by T. Kumar, supra note 195. But when a family requests that their loved one's body be returned intact, their requests are met with a bill for the expenses incurred for the upkeep while their loved one was in prison. Id. Thus, many families cannot afford these bills and must accept the cremated remains of their loved one. Id.

204. See Statement by Hon. John Shattuck, supra note 195.

205. Id.

206. Id. According to the Amnesty International report, however, consent is rarely requested. Id.
organ procurement truly lies at the most inhumane end of the spectrum—killing for organs.

B. Chinese organs for sale.

Once the organs have been harvested, foreigners pay a lot of money and travel to China in order to undergo organ transplantation surgery. According to a Japanese law professor, at least twenty-six Japanese travel to China for the purpose of transplantation surgery.\footnote{Some patients have paid as much as $70,000 to Chinese hospitals.} Sales of China’s executed prisoners’ organs have not been limited to Asia. In 1998, two Chinese citizens were arrested in New York on charges of conspiring to sell human organs.\footnote{They allegedly offered to arrange for kidney transplants inside of China and to export corneas and other body parts to the United States.} In regards to that incident, a Chinese spokesman stated that if the allegations were true, “the relevant departments will punish [them] according to the law.”\footnote{For a more in-depth analysis about the inability of the Chinese condemned prisoner to consent, see Statement by Hon. John Shattuck, supra note 195.}

Condemned Chinese prisoners do have the right to voice their objections to organ donation in the form of a written will. However, the chances of the will surviving the censoring process, the handling by prison guards and officials, and finally arriving to the condemned family’s residence before the condemned is executed, are very low.\footnote{Extensive and invasive medical examinations are given to those condemned prisoners whom doctors subsequently prepare for harvest, even prior to execution.} The condemned prisoners are not told the true reasons for these examinations.\footnote{For more information, see Testimony by T. Awaya, supra note 195.} For China’s official response to these allegations,\footnote{Japanese brokers stated that the money paid to Chinese hospitals is distributed to “the related police, military, court, etc.” Id. In 1991, one Hong Kong citizen paid $20,000 for a kidney from an executed Chinese prisoner. See O’Donnel, supra note 195. A former Chinese police officer was quoted as saying, “[i]f you have the right connections you can arrange to obtain organs for transplant from executed prisoners.” Id. And the money paid to Chinese hospitals is just part of the money paid for these operations. Patients must pay travel expenses, broker fees, and if they want their own physician to perform the surgery, they must pay his or her expenses and fees. Id.} For an in-depth comment on China’s practice, see generally, Kelly M. Brown, Comment, Execution for Profit? A Constitutional Analysis of China’s Practice of Harvesting Executed Prisoners’ Organs, 6 SETON HALL CONST. L. J. 1029, 1061-78 (1996). For China’s official response to these allegations,\footnote{In 1991, one Hong Kong citizen paid $20,000 for a kidney from an executed Chinese prisoner. See O’Donnel, supra note 195. A former Chinese police officer was quoted as saying, “[i]f you have the right connections you can arrange to obtain organs for transplant from executed prisoners.” Id. And the money paid to Chinese hospitals is just part of the money paid for these operations. Patients must pay travel expenses, broker fees, and if they want their own physician to perform the surgery, they must pay his or her expenses and fees. Id.} Japanese brokers stated that the money paid to Chinese hospitals is distributed to “the related police, military, court, etc.” Id. In 1991, one Hong Kong citizen paid $20,000 for a kidney from an executed Chinese prisoner. See O’Donnel, supra note 195. A former Chinese police officer was quoted as saying, “[i]f you have the right connections you can arrange to obtain organs for transplant from executed prisoners.” Id. And the money paid to Chinese hospitals is just part of the money paid for these operations. Patients must pay travel expenses, broker fees, and if they want their own physician to perform the surgery, they must pay his or her expenses and fees. Id.

Hypothetically, if the United States concedes to a probable extradition request, because of the number of relatively minor crimes that are punishable by death, it is at least conceivable that the two prisoners may soon be executed and have their organs harvested and sold to the highest bidder.

\footnote{Evidently, in 1997, the Chinese government passed a law that banned the sale of organs. Id. Hypothetically, if the United States concedes to a probable extradition request, because of the number of relatively minor crimes that are punishable by death, it is at least conceivable that the two prisoners may soon be executed and have their organs harvested and sold to the highest bidder.}
C. The viability of China's method in the United States.

Presently, an executed prisoner can only donate an organ while alive and the donee must be a family member. Organ procurement at death is prohibited by the Federal Bureau of Prisons. Some commentators, however, have suggested that condemned prisoners ought to be given the chance to consent to donate their organs before they are executed. Just recently, one Missouri state representative proposed a bill that would effectively commute a condemned prisoner's death sentence to life without parole, provided the prisoner consents to donate either a kidney or bone marrow; the proposed bill is called "Life for Life." Before the various states are able to adopt such a law, they will most likely have to create valid safeguards to ensure that a condemned prisoner's consent is informed and freely given. But even if these safeguards were in place, the National Organ Transplant Law — which prohibits the sale of organs — may prove fatal to any such acts, especially if states offer their condemned life sentences in consideration for organs.

212. See Statement by Hon. John Shattuck, supra note 195. This prohibition appears to be practiced in other countries as well.

213. See Laura-Hill M. Patton, Note, A Call For Common Sense: Organ Donation and the Executed Prisoner, 3 VA. J. SOC. POL'Y & L. 387 (1996). The author suggests that donation would not ensue unless the ill-fated prisoner fully consents. In support of her recommendation, the author chronicles the history of how unidentified bodies and executed prisoners were used as basic anatomical models to the most advanced forms of transplantation. Id. Because the current methods of carrying out death penalties across the United States do not foster healthy organs for transplant, the author suggests an alternative method of carrying out these sentences. Id. Her proposed method is called the "anesthesia-induced brain death." Id.; see also Phyllis Coleman, "Brother, Can You Spare A Liver?" Five Ways to Increase Organ Donation, 31 VAL. U. L. REV. 1, 26-38 (1996). Dr. Jack Kervorkian added his own sort of spin-off from this idea. See Kervorkian Riles Transplant Community by Offering Kidney of Assisted Suicide Client for Transplantation, TRANSPLANT NEWS, June 15, 1998 available in LEXIS, News Library. As the title suggests, Dr. Kervorkian offered a kidney of a 45-year old male who was a quadriplegic. Id. Despite his offer, no physician wanted to use the kidney. Id.

214. See Missouri Legislature Considers Organ Donation from Death Row Inmates, CORRECTIONS PROF., Apr. 17, 1998, at 1. Available in LEXIS, News Library. Any person sentenced may request to participate in the program between one and two years after the person has been sentenced. In addition, the prisoner must voluntarily give up all rights to appeal. Id. Health concerns of an inmate donor are among the noted problems; however, in order to be accepted as a donor, each inmate requesting to participate must pass a thorough physical. Other more significant considerations are, "the difficulty of acceptance of non-family donations, security issues for moving dangerous inmates, and ethical concerns that organs are not for sale." Id. Also, the article noted one benefit would be that "possible savings could occur by reducing the number of death sentence appeals." Id. For the actual text of the proposed bill, see LIFE FOR LIFE, 1998 Mo. House Bill No. 1670 (SN) (West, WESTLAW through 1998 Mo. 89th General Assembly) (Proposed Official Draft 1998).

VI. CONCLUSION

The United States and the various states have passed many laws and regulations to try to increase the supply of cadaveric organs. Unfortunately, thousands continue to die while waiting for suitable life saving organs. Many experts look abroad for help. Japan’s law, which is the most stringent, is of no real help. China’s practice of killing prisoners and harvesting their organs without informed and voluntary consent is clearly no option. Singapore’s and the other countries’ presumed consent laws may indeed prove useful. The various states, however, will have to declare that the interests of saving lives outweigh personal autonomy. Although this may be conceived of at least legally, lack of public support may caution those holding public office to back off of their constituents’ personal autonomy.

The United States should let the new Referral and Request regulation run its course, as it is directed at solving the many problems that currently hinder cadaveric organ supply. A significant problem is that many times the decedent’s next-of-kin are either not requested to consent, or when they are questioned, they refuse to consent. Those refusals are sometimes based on common fears that their loved one’s doctors will hasten death in order to procure desperately needed organs to save another’s life. Other refusals stem from the way in which they were asked to consent or the quality of care their loved one received before the pronouncement of death. The new Referral and Request regulation will provide well-trained and experienced organ procurement staff who will help to alleviate many of these fears. The staff will alleviate these fears by educating and counseling the decedent’s next-of-kin in order to obtain consent. Also, the Referral and Request regulation was just one of four elements of a joint initiative to increase the supply of cadaveric organs. Once the other elements are implemented, other problems related to the public’s fears and misunderstandings may also be resolved. Sticking to this initiative will help facilitate an increase in cadaveric organs without trammeling personal autonomy.

216. See supra Part II(E).
217. See supra Part II(D).
218. Id.
219. Id.
220. See supra Part II(E).
221. Id.
222. See TRANSPLANT NEWS, supra note 77.
INTERNATIONAL CONTROL OF BIOLOGICAL WEAPONS

Scott Keefer*

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I. INTRODUCTION

Following the breakup of the Soviet Union and resulting decline in fear of nuclear war, attention has shifted to other threats that remained in the background during the superpower confrontation. Fear of biological warfare uniquely fits the new evolving world. International instability characterizes the post-Cold War world. Additionally, the demise of the Soviet Union created a vacuum in American policy perceptions. With no great power threat, American attention has focused on rogue states and international terrorist organizations. Furthermore, unlike nuclear weapons, biological weapons are relatively inexpensive and easy to conceal. States unable to afford an atomic weapons program can still develop this “poor man’s atom bomb.” Non-state actors such as international terrorist organizations, domestic hate groups, and millennial cults can procure ingredients necessary to create homemade biological weapons. With Boris Yeltsin’s 1992 revelation of the existence of a Soviet offensive biological weapons program in the 1970s and 1980s, and the 1995 Tokyo subway sarin nerve gas attack, concerns increased over the threat of biological war.¹

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Faced with the growing risk posed by these weapons of mass destruction, various proposals have emerged to counter biological warfare. Debate focuses on the relative cost and value of preventive measures. These measures range from increased criminalization of acts preceding the use of biological weapons to curative measures such as biological disaster training for first response medical personnel and stockpiling of antibiotics. Due to the high cost of curative measures and the uncertainty of their efficacy, some commentators liken these measures to the 1950s movement to provide bomb shelters as a solution to the menace of nuclear war. The alternative to developing curative measures requires strengthening of international norms regarding the development and use of biological weapons.

The United States has led an initiative to strengthen the Bacteriological (Biological) and Toxin Weapons Convention (BWC) of 1972 through creation of a Protocol. The proposed Protocol, slated for completion by the end of 1998, would create stronger mechanisms to monitor state enforcement of existing treaty obligations. The new Protocol may eventually borrow verification and inspection features from those contained in the Chemical Weapons Convention (CWC).

However, the BWC intentionally lacked specific provisions for verification and inspection in its initial form. Differences in the history of chemical and biological warfare and in the development, production and deployment of the two types of weapons may have led to the evolution of different legal norms. For any BWC Protocol to prove effective, measures should specifically counter biological weapons programs, not merely echo general international verification and inspection standards contained in other weapons control regimes.

This paper will analyze the prospects for successful strengthening of the biological weapons control regime. The first section of this paper will explain

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3. Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction, Apr. 10, 1972, 26 U.S.T. 583, [hereinafter Bacteriological (Biological) and Toxin Weapons Convention].


the current international threat of biological warfare, detailing the types of biological weapons that pose a threat and the possible users of these weapons. The second section will trace the history of biological warfare. Next, the paper will outline early developments of international law to meet the threat of biological warfare and then detail the current international legal standard contained in the BWC. After describing the existing biological weapons control regime, this paper will examine the ongoing debate concerning stricter international standards and will analyze elements required to strengthen the BWC. This debate generally concerns equitable North-South power distribution within the international community, as well as potentially invasive verification procedures. The development of international law since entry into force of the BWC will provide a backdrop to the current drafting of the BWC Protocol. This paper will then examine the proposed Protocol and the legal standard currently being negotiated. The development of international law of war reflects the interplay of technology, conflicting national interests and moral standards. In order to succeed in influencing behavior, legal norms must address these factors.

II. THE CURRENT THREAT OF BIOLOGICAL WAR

The current threat of biological warfare is twofold. State use of biological weapons is the first threat. Use of weapons by non-state actors, including international terrorist organizations, constitutes the second threat of biological warfare. Each threat requires distinct counter-measures. A millennial cult like Aum Shinrikyo, already anticipating an apocalypse, might not be dissuaded, while a state may respond to the counter-threat of massive retaliation. In addition, in order to punish an international terrorist organization by linking it to a state, a government must accumulate proof, which is time consuming and often inconclusive.

6. Richard Danzig & Pamela B. Berkowsky, Why Should We Be Concerned About Biological Warfare?, 278 JAMA 431, 431 (1997). See also Robert P. Kadlec, supra note 1, at 355. Aum Shinrikyo, a Japanese cult intent on bringing the end of the world, developed chemical weapons like those it used in a crowded Tokyo subway as well as anthrax and botulism toxin for mass attacks on civilians to cause chaos. Id. at 354.

7. Id. See also George W. Christopher, Biological Warfare: A Historical Perspective, 278 JAMA 412, 416 (1997). In addition to the problem of proof required to connect an act of biological terrorism to a state actor, the interval of time may create difficulties for retaliatory action by reducing the legal justification of self-defense. The international standard for self-defense was recognized by Great Britain and the United States following a British attack on an American vessel, the “Caroline,” Destruction of the “Caroline,” MOORE, 2 A DIGEST OF INTERNATIONAL LAW 409-414, in BARRY E. CARTER & PHILLIP R. TRIMBLE, INTERNATIONAL LAW 1293 (2d ed. 1995). The Caroline dictum states the international standard of self-defense: “While it is admitted that exceptions growing out of the great law of self-defense do exist, those exceptions should be confined to cases in which the necessity of that self-defense is instant, overwhelming,
In addition to a distinction between possible weapons users, distinctions exist among the weapons potential of biological agents. An army might employ biological weapons for battlefield use against an enemy army or against a large civilian population. The slow, uncontrollable nature of some biological weapons limits potential battlefield use, creating an uncertainty regarding possible infection and the length of time required to debilitate an army. The types of biological agents vary in lethality, incubation period, and in the ability to spread. Possible agents include viruses such as ebola, marburg, yellow fever, equine morbillivirus, and bacteria such as anthracis, brucella, clostridium botulinum, francisella tularensis and yersinia pestis, as well as rickettsiae, fungi and toxins derived from biological agents. Some diseases caused by...
biological agents such as staphylococcal enterotoxin B have an incubation period of only one to six hours, while others like brucellosis and Q fever may take over a month to develop.  

Several devices, including bombs, missiles, and aerosols, may deliver biological agents. An examination of Iraqi delivery systems shows development of 250-400 pound bombs capable of carrying sixty to eighty-five liters of botulinum toxin, anthrax or aflatoxin.  

By 1990, Iraq had prepared approximately 150 of these weapons. Iraq also armed twenty-five SCUD missiles with biological agents prior to the Gulf War of 1991. However, exploding warheads ineffectively deliver biological agents as explosion generally does not deliver the aerosolized particles more than several meters and can infect few people. 

Aerosol delivery systems deliver biological agents more effectively, by delivering biological agents to a wider area, and by delivering biological agents in smaller particles more capable of being carried by the wind. The aerosol weapons’ drawbacks include the need for sophisticated airplanes with dispersal systems, air superiority over the target, as well as accurate meteorology to determine favorable wind and weather conditions. Terrorists could attack using crop dusting aircraft or trucks equipped with spray tanks, by placing aerosol canisters in air-conditioning systems of major buildings, or by directly contaminating bulk food supplies.

The United States believes several nations are developing offensive biological warfare programs similar to that developed by Iraq before the 1991

are the most toxic compounds known to man, 100,000 times more toxic than sarin by weight.  

Patients that survive from botulism toxin usually do not develop resistance due to the very small amount of toxin needed to cause symptoms. Staphylococcal enterotoxin B causes fever, headache, chills, and myalgia after an incubation period of one to six hours, but is seldom fatal and patients can return to their normal routines after one to two weeks. Q fever has an incubation period often to forty days, and is followed by various symptoms including fever, chills, headache, and weight loss, but is rarely fatal.
Gulf War. The West doubted Russian compliance with the BWC following Russian revelations in 1992 of prior violations of the BWC despite being a signatory and one of three depository states of the BWC. These doubts increased with the decline in the Russian economy, raising questions about the government's ability to pay personnel, thus preventing them from selling their services to the highest bidder. Despite the presence of United Nation's inspectors, Iraq could still revitalize its biological weapons program on short notice. In addition, the United States suspects China, Syria, Iran, Egypt, Libya and Taiwan of developing some biological weapons program. Besides these countries, India, Pakistan and North Korea either have the domestic biotechnology industry capable of developing biological weapons or could develop them within the next ten years. The United States currently believes the threat of a state sponsored biological terrorist attack is low; although, the possibility of non-state extremist groups, similar to the Japanese Aum Shinrikyo, acquiring weapons of mass destruction is greater. Ironically, American superiority in conventional weapons may lead poorer nations and non-state actors to develop biological weapons as a means of redressing the imbalance.

III. HISTORY OF BIOLOGICAL WARFARE

The use of biological weapons in war extends back to the beginning of history, before modern understanding of the weapons. Early uses revolved around the spread of infection from corpses, animal carcasses, and filth as well as the use of biotoxins. The ancient Athenians used biological warfare as

20. Id.
21. Id. See also Zilinskas, supra note 12, at 422-23.
22. 1997 ANNUAL REPORT: ADHERENCE TO AND COMPLIANCE WITH ARMS CONTROL AGREEMENTS, supra note 19, at 10-11. It is interesting to note that accusations of violations of the BWC are not always made by the United States against rogue states: In June of 1997, Cuba alleged that the United States violated the BWC by dispensing a crop-destroying insect over Cuba, leading to formal and informal consultations. Id.
26. George W. Christopher, supra note 7, at 412. Often armies placed carcasses in wells and other water sources to prevent the use of water supply by enemy armies and civilians during extended sieges or campaigns. Id.
early as 600 BC, contaminating a stream with "helleborous roots," a poisonous type of lily root, causing illness when the opposing city drank the water.27 Hannibal catapulted pots containing poisonous snakes against enemy ships, and Carthaginian generals poisoned wine before retreating to debilitate advancing foes who then looted the camp and drank the wine.28

Disastrous use of biological weapons occurred in the early and middle modern ages, when armies released highly infectious diseases without hope of containment. In the 1346 siege of Caffa, on the coast of the Crimea, a besieging Mongol army catapulted corpses infected with plague into the city.29 As the city fell and the citizens fled to Italy, they carried the plague throughout Europe, eventually killing one quarter of Europe’s population.30 In 1763, British troops traded smallpox infected blankets to Native Americans under the orders, “[y]ou will do well to try to inoculate the Indians by means of the blankets, as well as to try every other method that can serve to extirpate this execrable race.”31 Apparently, the blankets proved effective, as smallpox epidemics hit Mingoe, Delaware and Shawanoe tribes the following year.32

There have been other less sophisticated uses of biological warfare in recent history. In the American Civil War, retreating Confederate forces drove farm animals into ponds and shot them to contaminate water supplies an advancing army would use.33 In the Vietnam War, Viet Cong troops smeared feces on pungi sticks in the early 1960s to infect any unwary soldier who stepped on a stick.34 Many states make claims of “poisoning the well” in the course of conflicts.35

Highly sophisticated uses of biological weapons are new to this century. In the First World War, Germany used anthrax and glanders, an infectious horse bacterium, to infect livestock of Allied and neutral nations.36 German agents

27. PAUL CHRISTOPHER, supra note 7, at 202.
28. Id. at 202-03.
29. Id. at204.
30. Steinbruner, supra note 8, at 86. See also George W. Christopher, supra note 7, at 412. This account of the use of infected corpses may oversimplify the spread of the plague in Europe, as other carriers may have been at work. Id.
32. PAUL CHRISTOPHER, supra note 7, at 204. Again, other contacts between Native Americans and settlers may have also spread the disease, and the blankets would have proved inefficient sources of contagion. George W. Christopher, supra note 7, at 412.
33. PAUL CHRISTOPHER, supra note 7, at 205.
34. George W. Christopher, supra note 7, at 412.
36. George W. Christopher, supra note 7, at 413.
targeted Romania, Argentina and United States livestock to prevent their sale to the Allies, as well as French cavalry horses and mules in the Mesopotamian theater of war. Unlike other instances of biological warfare, German use in the First World War targeted animals, not humans.

Between the World Wars, various nations conducted experiments with biological weapons, including Belgium, Canada, France, Great Britain, Italy, the Netherlands, Poland and the Soviet Union. Japanese military went the next step during the Second World War, developing and using modern biological weapons against Chinese civilians. Japan centered its biological weapons research in Unit 731, developing plague, cholera and typhoid agents, and experimenting on prisoners of war and Chinese civilians. The Japanese prepared several devices for delivering biological agents, including a bacterial bomb, a defoliation bacilli bomb, weather balloons able to cross the Pacific, and submarine launched weapons. Japan also developed plans for germ-infected suicide troops to rush out among advancing American troops, spreading contagion.

The Allies also conducted experiments with offensive biological weapons during the Second World War, although no deployment of the weapons occurred. Great Britain tested anthrax on sheep on the Scottish island of Gruinard. The United States experimented with biological weapons for possible use against Japanese troops, civilians, and crops. The United States

37. Id.
38. Id.
41. Id. at 187-89, 257. The Japanese had planned on carrying out attacks, successfully sending test balloons as far as South Dakota and setting a tentative target date of September 22, 1945, for submarine launched biological agents. Id.
42. Id. at 256-57.
43. Robin Clarke & J. Perry Robinson, Research Policy: United Kingdom, in CBW: CHEMICAL AND BIOLOGICAL WARFARE 105, 108-09 (Steven Rose ed., 1968). British experiments also highlighted the dangers of the biological agents: as the anthracis bacillus is very stable and may remain dormant for up to one hundred years, the island of Gruinard was uninhabitable following the experiments. Id. British efforts to decontaminate the islands with formaldehyde and seawater only occurred in 1986. Christopher, supra note 7, at 413. The danger that would result after widespread use of anthrax in war would dwarf the landmine problem, as contagion could potentially remain decades after the end of a conflict.
44. ALLEN, supra note 40, at 178-83. The United States planned production of anthrax bombs at
did not rule out the first-use of chemical weapons, and there is little reason to
believe moral compulsion would prevent American use of biological weapons.\textsuperscript{45} During the 1944 Normandy invasion, the American army provided its troops with antidotes to potential German biological weapons.\textsuperscript{46}

Since the Second World War, the United States' position has evolved from experimenting with biological weapons to rejecting them. By the time the United States renounced the use of biological weapons in 1969, the American military had developed numerous biological agents for use in war, including the highly lethal anthrax and botulism.\textsuperscript{47} Throughout this period, the United States conducted secret experiments on American cities to test the spread of aerosolized particles.\textsuperscript{48} Although the Soviet Union and several communist nations leveled accusations of biological warfare against the United States, the charges were unsubstantiated.\textsuperscript{49}

By 1969, the American military recognized both the limited battlefield value of biological weapons, and the potential for other nations to use these weapons for purposes of mass destruction.\textsuperscript{50} By ending development of biological weapons and forbidding their use even in retaliation of biological warfare, the United States helped to develop an international standard against any use of biological weapons. The outlawing of biological warfare would preserve the American strategic position as a nuclear power, as cheaper, easy to build biological weapons could give poorer nations a leveler to the nuclear bomb.\textsuperscript{51}

Russia did not hold the same opinion of biological weapons as the United States and continued to develop biological weapons for both battlefield and

\begin{itemize}
\item the rate of 500,000 per month, and experimented with biotoxins to be used on Japanese rice, cereal, and sweet potato crops. \textit{Id.}
\item \textsuperscript{45} \textit{Id.} at 177-78.
\item \textsuperscript{46} \textit{Id.} at 181-82. Hitler reportedly forbid the development of biological weapons, but research was conducted by the Germans, including testing on prisoners in concentration camps. George W. Christopher, \textit{supra} note 7, at 413.
\item \textsuperscript{47} George W. Christopher, \textit{supra} note 7, at 414. In addition, the Central Intelligence Agency had prepared its own biotoxin weapons, including a stockpile of cobra venom, possibly for use as an assassination weapon. \textit{Id.}
\item \textsuperscript{48} LEONARD A. COLE, THE ELEVENTH PLAGUE: THE POLITICS OF BIOLOGICAL AND CHEMICAL WARFARE 18 (1997). The Pentagon admitted conducting general tests between 1949 and 1968 over San Francisco, Minneapolis, St. Louis, Key West, and Panama City, Florida, as well as conducting more focused experiments in the New York City subway, the Washington, D.C. National Airport, and the Pennsylvania Turnpike. \textit{Id.} Simulants designed to replicate the spread of biological agents were delivered by aerosol dispersal. George W. Christopher, \textit{supra} note 7, at 414. The covert experiments in San Francisco resulted in an outbreak of urinary tract infections at Stanford University Hospital, causing one death. \textit{Id.}
\item \textsuperscript{49} George W. Christopher, \textit{supra} note 7, at 415.
\item \textsuperscript{50} Steinbruner, \textit{supra} note 8, at 89.
\item \textsuperscript{51} George W. Christopher, \textit{supra} note 7, at 415-16.
\end{itemize}
strategic use.\textsuperscript{52} Russia admitted in 1992 to continuing an offensive biological weapons program, even following ratification of the BWC.\textsuperscript{53} The 1979 anthrax outbreak near a Soviet facility in Sverdlovsk provided an early indication of a continued Soviet biological weapons program.\textsuperscript{54} No confirmation of Russian battlefield use of biological weapons exists, but Russia did develop biotoxins as assassination weapons.\textsuperscript{55}

South Africa also developed biological agents as assassination weapons before ratifying the BWC.\textsuperscript{56} The South African Truth and Reconciliation

\textsuperscript{52} Steinbruner, supra note 8, at 89. Strategic use of weapons refers to the non-battlefield actions designed to eliminate a nation's ability to wage war, such as the destruction of factories necessary for producing weapons.

\textsuperscript{53} See Joint U.S./U.K./Russian Statement on Biological Weapons, Sep. 14, 1992, in Biological Weapons, 1 (visited Oct. 23, 1999) <http://www.acda.gov/factsheet/wmd/bw/joint.htm>. Russia agreed to dismantle its weapons program, although the program is believed to employ 25,000 to 30,000 technicians, down from a high level of 55,000. George W. Christopher, supra note 7, at 416. Suspicion over Russian intentions remain even today, despite greater transparency within Russia. See Frontline: Plague War: Interviews: William S. Cohen, 5-7 (visited Oct. 13, 1999) <http://www.pbs.org/wgbh/pages/fron...shows/plague/interviews/cohen.html>. The United States government believes that despite good intentions of Russian President Boris Yeltsin, political factors in Russia prevent the total dismantling of the biological weapons program. Id.

\textsuperscript{54} George W. Christopher, supra note 7, at 416. The outbreak was believed to be responsible for 64 deaths over a six week period. Frontline: Plague War: The 1979 Anthrax Leak, 1 (visited Oct. 13, 1999) <http://www.pbs.org/wgbh/pages/frontline/shows/plague/sverdlovsk/>. Dr. Kanatjan Alibekov, former Deputy Director of Biopreparat, the Soviet biological weapons program, stated that the accident resulted from the failure to replace an exhaust filter at the facility, and that if the wind had been blowing in the other direction, toward Sverdlovsk, the death toll could have been as high as hundreds of thousands. Dr. Kanatjan Alibekov, Frontline: Plague War: The 1979 Anthrax Leak: 1 (visited Oct. 13, 1999) <http://www.pbs.org/wgbh/pages/fron...ws/plague/sverdlovsk/alibekov.html>.

\textsuperscript{55} George W. Christopher, supra note 7, at 416. The Bulgarian secret service assassinated Georgi Markov, a Bulgarian emigré living in London, stabbing him with an umbrella infected with ricin. Jeffrey D. Simon, supra note 18, at 429. Certain easily developed biological agents, like ricin, are more effective for individual attacks than mass attacks, as they have little infectious qualities. Id. Iraq easily developed ricin in the late 1980s and early 1990s as it is a naturally occurring toxin from the castor bean plant. Zilinskas, supra note 12, at 419-20.

\textsuperscript{56} Frontline: Plague War: What Happened in South Africa?, 1 (visited Nov. 1, 1998) <http://www.pbs.org/wgbh/pages/frontline/shows/plague/sa/>. Interestingly, the managing director of a South African biological weapons facility asserted that the siege mentality of the apartheid government in South Africa created conditions where researchers felt justified in developing weapons. Dr. Daan Goosen, Frontline: Plague War: Interviews: 6-7 (visited Nov. 1, 1998) <http://www.pbs.org/wgbh/pages/frontline/shows/plague/sa/goosen.html>. Similar justifications could be made by other isolated and threatened regimes, such as Sadam Hussein's Iraq. Even after considering the ethical ramifications of biological warfare, South African developers reached the conclusion that "[t]here isn't much of a difference if you use a gun to kill someone or if you use a more refined product to do that." Id. at 2. Francisco de Vitoria described a situation known as "invincible ignorance" in which a party to a dispute is not capable of discerning the objective morality of his position and assumes his position to be just. See Paul Christopher, supra note 7, at 62-63. Soldiers are presumed to be shielded from the guilt of an unjust war by invincible ignorance, but
Commission is currently investigating allegations relating to past biological weapons programs that may have included development of weapons used in the Rhodesian civil war in the late 1970s. Except for possible intervention into the Rhodesian civil war, South Africa designed its weapons program against its own population to secure white minority rule. The South African program apparently targeted black political leaders and may have included infertility toxins aimed at reducing the black population.

In the recent Persian Gulf War, Iraq deployed anthrax, but did not use it in battle. Although Iraq possessed SCUD missiles armed with biological agents, they did not arm any of the thirty-nine SCUD missiles fired on Israeli cities during the war with biological weapons. The use of weapons of mass destruction in the conflict would probably have triggered a response with nuclear weapons by the United States. The United States currently applies deterrence, the Cold War policy used to prevent nuclear war, against potential biological warfare aggressors, which possibly influenced Iraqi behavior during the 1991 Persian Gulf War.

an issue arises to what extent a scientist or doctor may be shielded from guilt for participating in an unjust war such as one to sustain an apartheid government. Id.


59. Steinbruner, supra note 8, at 87. It should be noted that the United States and France sold Iraq anthrax and other biological agents during the 1980s. Zilinskas, supra note 12, at 419. Tighter international controls on transfers could have prevented these sales.

60. Zilinskas, supra note 12, at 422. Reportedly, Iraq would have used biological weapons had Baghdad been attacked with nuclear weapons. Gene Warfare-Unless We Keep Our Guard Up, 348 LANCET 1183 (1996) available in LEXIS, Genmed Library, Alljnl File. This position regarding the use of weapons of mass destruction would not differ from the American position regarding nuclear weapons. See also Legality of the Threat or Use of Nuclear Weapons, supra note 7, at ¶97.

61. Frontline: Plague War: Interviews: William S. Cohen, supra note 53, at 3-4. We have always taken the position that should we be attacked by any power with a nuclear weapon, certainly we have the capacity to respond accordingly. We have also indicated to any country who would threaten our forces or our people with chemical or biological weapons that they would be met with a devastating response that would be quite swift and overwhelming. There is no designation of what that might entail, but it is very clear that it would be a very destructive force that they would be met with. Id.
Non-state actors have also used biological warfare in the past and could present a great challenge for future control of biological weapons. Terrorist organizations, cults, and hate groups provide the largest risk of non-state use of biological weapons. For unclear reasons, in 1984, the Rajneeshee cult poisoned salad bars in Oregon with salmonella in 1984, causing 751 cases of enteritis and forty-five hospitalizations. At the time of its discovery in 1995, the Japanese cult Aum Shinrikyo developed a biological weapons program including anthrax and botulism to the testing stage, also in 1995, American authorities caught and convicted two members of a Minnesota militia group planning an attack on government officials with ricin, a lethal toxin used in assassinations. In 1996, an Ohio man connected with hate groups was able to obtain samples of the plague through the mail, by ordering it from a laboratory.

IV. ATTEMPTS TO CONTROL BIOLOGICAL WEAPONS

Legal controls on biological weapons evolved contemporaneously with modern development of the weapons. Early prohibitions of biological weapons in war forbid the use of poisons for ethical reasons. Modern sources of

62. George W. Christopher, supra note 7, at 416.
63. Kadlec, supra note 1, at 354.
64. Danzig, supra note 6, at 432. See also George W. Christopher, supra note 7, at 416.
65. Id. Frontline interviewed the Ohio man, Larry Wayne Harris, for a program that aired Oct. 13, 1998. In the interview, Harris describes the ease of obtaining plague and anthrax from natural sources. Frontline: Plague War: Transcript, 4 (visited Oct. 1, 1999) <http://www.pbs.org/wgbh/pages/frontline/shows/plague/etc/script.html>. Also interviewed was an individual calling himself “Uncle Fester” who provides recipes for ricin and other biological agents on the Internet. Id. at 3-4.
66. The customary law regarding poison was spelled out in Lieber’s Code in 1863. Lieber’s Code was an American army field manual and not an international treaty, but reflected the international rules of war. “The use of poison in any manner, be it to poison wells, or food, or arms, is wholly excluded from modern warfare. He who uses it puts himself out of the pale of the law and usages of war.” RICHARD SHELY HARTIGAN, LIEBER’S CODE AND THE LAW OF WAR 48, 58 (1983), cited in PAUL CHRISTOPHER, supra note 7, at 205-06. See also Francis Lieber, Instructions for the Government of Armies of the United States in the Field, Art. 16, cited in THE LAWS OF ARMED CONFLICTS: A COLLECTION OF CONVENTIONS, RESOLUTIONS AND OTHER DOCUMENTS 6 (Dietrich Schindler & Jiri Toman eds., 1973). “When he fights with his foes in battle, let him not strike with weapons concealed (in wood), nor with (such as are) barbed, poisoned or the points of which are blazing with fire.” THE LAWS OF MANU (G. Bühler, trans. 1886), reprinted in 25 THE SACRED BOOKS OF THE EAST 230, 251-2 (1975) cited in Chemical and Biological Weapons Historical Documents: The Manu Smrti (visited Oct. 23, 1999) <http://www.sipri.se/cbw/docs/cbw-hist-smrti.html>. The Manu Smrti is an early code adopted by ancient Aryan tribes in the Indian subcontinent... and most of all, they shall not construct any poisoned globes, nor other sorts of pyrotechnic inventions, in which he shall introduce no poison whatsoever, besides which, they shall never employ them for the ruin and destruction of men, because the first inventors of our art thought such actions as unjust among themselves as unworthy of a man of heart and a real soldier. C. SIEMIENOWICZ, GRAND ART D’ARTILLERIE 234 (1650) cited in Chemical and Biological Weapons Historical Documents: Pledge (visited Oct. 23, 1999) http://www.sipri.se/cbw/docs/cbw-hist-pledge.html>. This was a late medieval pledge by German gunners.
international law place the obligation not to use biological weapons on the state, rather than on the individual.\textsuperscript{67} A shift from ancient codes of moral obligation to modern notions of reciprocal obligations made the legal standard relative to the circumstances of war. However, the many instances of crude biological warfare exemplified a counter-trend of moral relativity in pre-modern times, as often troops felt justified in using any weapon at their disposal to defeat an enemy. The British justification and use of smallpox against Native Americans is an example of this willingness to use any means necessary to defeat an enemy.\textsuperscript{68}

Modern controls on biological warfare evolved from controls on chemical warfare. Before the twentieth century, states had not yet developed modern biological and chemical weapons, and diplomats could only guess the form of use of such weapons.\textsuperscript{69} In 1899, delegates to the Hague Conference prepared

\begin{quote}
Note these three prohibitions set down obligations for soldiers, not merely leaders. The moral duty of soldiers in war, \textit{ jus in bello}, creates a stronger prohibition of biological warfare.
\end{quote}

\textsuperscript{67} Considering . . . [T]hat this end would be exceeded by the employment of arms which uselessly aggravate the sufferings of disabled men, or render their death inevitable; [I]that the employment of such arms would therefore be contrary to the laws of humanity; [I]the contracting Parties engage mutually to renounce, \textit{in case of war among themselves}, the employment . . . of any projectile . . . which is either explosive or charged with fulminating or inflammable substances. . . . [I]his engagement is obligatory only upon the contracting or acceding parties thereto, . . . it is not applicable with regard to non-contracting powers. . . . [I]t will also cease to be obligatory from the moment when, in a war between contracting or acceding parties, a non-contracting party . . . shall join one of the belligerents.

\textsuperscript{68} Declaration of St. Petersbourg of 1868 to the Effect of Prohibiting the Use of Certain Projectiles in Wartime, Nov. 29, (Dec. 11) 1868, 1 AM. J. INT’L L. 95 (Supp. 1907). See also Chemical and Biological Weapons Historical Documents: St. Petersburg, (visited Oct. 1, 1999) <http://www.sipri.se/cbw/docs/cbw-hist-petersburg.html>. The obligation contained in this Declaration specifically prohibited the use of “fulminating” substances, referring to chemical weapons, but the obligation regarding the use of chemical weapons gives insight into biological weapon control, as both modern chemical and biological weaponry were in an infant state at this point and can be considered together. Declaration of St. Petersbourg of 1868. The Declaration of St. Petersbourg of 1868 only refers to the obligations states have regarding these weapons, not of soldiers. \textit{Id.} While the Preamble reflects an older belief that these weapons are “contrary to the laws of humanity,” the obligation contained in the Declaration only extends to states contracting to the Declaration. \textit{Id.} This Declaration gives an early example of the “no first use” principle, which forbids the use of certain weapons unless another nation uses them first. \textit{See Paul Christopher, supra note 7, at 205-08. States are not absolutely forbidden from using prohibited weapons, and in certain situations may even use them against other contracting parties to the Declaration. Declaration of St. Petersburg of 1868. See also Brussels Conference of 1874, Project of an International Declaration Concerning the Laws and Customs of War, Aug. 27, 1874, art. 13(a), \textit{cited in The Laws of Armed Conflict}, supra note 66, at 29; The Laws of War on Land, (Oxford Manual) Sep. 9, 1880, arts. 8(a) & 9(a), \textit{cited in The Laws of Armed Conflict}, supra note 66, at 38. See supra note 31.}

\textsuperscript{69} Diplomats and military leaders at the 1899 and 1907 Hague Conferences, vaguely glimpsing the future of war, defined limits on air power in terms of prohibitions of “discharge of projectiles and explosives from balloons” and limited naval warfare in a manner only barely discerning the potential of weapons like the submarine. Hague Declaration (IV) -Projectiles From Balloons, July 29, 1899, 32 Stat.
a Declaration Concerning Asphyxiating Gas (Hague Declaration (IV) of 1899). It limited the use of projectiles, "the object of which is the diffusion of asphyxiating or deleterious gases," but it did not outlaw the use of chemical agents themselves. Diplomats could expand the term "deleterious gases" to include biological agents, despite lack of specific mention of biological weapons. The Hague Convention Respecting the Laws and Customs of War on Land of 1907 (Hague Convention (IV) of 1907) expanded on the obligations from the earlier Hague Declaration (IV) of 1899 by specifically forbidding the employment of poisoned weapons. However, since this obligation still only applied to parties to the Convention, states formed no general rule of international law before World War I.

Following the First World War, a flu epidemic struck the war-weary world, causing more deaths than the Great War. The great destruction wrought by disease exemplified the danger of illness, leading statesmen to include biological weapons specifically by reference in the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare (the Geneva Protocol of 1925). The Geneva Protocol of 1925 forbid the use of biological weapons by extending the prohibition on "asphyxiating, poisonous or other gases" to "bacteriological


70. Hague Declaration (IV) - Concerning Asphyxiating Gas, supra note 69. Like the Declaration of St. Petersburg, the Hague Declaration (IV) only applied in cases of war between two parties to the Declaration, and was not effective if a non-contracting state was involved in a war. Thus, no absolute ban on the weapons was created by 1899.

71. A United States delegate to the Hague, Admiral Alfred Thayer Mahan, opposed controls on poisonous gas as there was no experience to show whether gas might be more humane than existing weapons. DAVIS, supra note 69, at 119. Ultimately, the United States did not sign this Declaration. Id. at 196. See also PAUL CHRISTOPHER supra note 7, at 206. Apparently, Admiral Mahan thought that asphyxiation by gas was no more inherently cruel than asphyxiation by water, a fate suffered by sailors in sunken ships. DAVIS, supra note 69, at 119.


73. 8,000,000 soldiers died in the First World War, with approximately 8,000,000 additional civilian casualties, while 20,000,000 died from the influenza epidemic of 1918. Steinbruner, supra note 8, at 85.

methods of warfare.” The Geneva Protocol of 1925 prohibited the use of biological weapons, but did not outlaw their development. This either reflects a belief that states could not legitimately develop outlawed biological weapons, or implicitly states a no first-use policy, which allows nations to develop biological weapons in response to acts of biological war.

The United Kingdom, Soviet Union and France announced reservations to the Geneva Protocol of 1925, specifically stating a no first-use policy regarding chemical and biological weapons. While these reservations reflected experience with chemical weapons in the First World War, and the expectation of the future use of chemical weapons, the reservations also watered down obligations regarding biological weapons. In addition, two major nations did not ratify the Protocol—the United States and Japan. This also weakened the Geneva Protocol of 1925, as contracting parties would more likely confront a major power with far-flung military commitments than a smaller nation unlikely to intervene in world affairs. However, despite development of biological weapons, widespread use did not occur during the Second World War, the significant exception being Japanese use of plague against Chinese villagers.

The lack of biological warfare, combined with the legal proscription in the Geneva Protocol of 1925, might have developed a customary principle of international law. A sufficient number of nations ratified the Protocol to make observance widespread and the absence of biological warfare in the Second World War is evidence of opinio juris, showing states believed they were bound by custom. Thus by the 1960s, widespread evidence of a customary norm existed. However, even if a customary rule existed, the reservations to

75. Id.

76. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, cited in THE LAWS OF ARMED CONFLICT, supra note 66, at 116, 119. See also Kadlec, supra note 1, at 352.

77. As over 120 nations signed the Geneva Protocol of 1925, a prohibition on first-use would in most cases create a general prohibition, unless a contracting party met one of the few nations that failed to ratify the Protocol. PAUL CHRISTOPHER, supra note 7, at 207.

78. Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, cited in THE LAWS OF ARMED CONFLICT, supra note 66, at 111-14. See also Kadlec, supra note 1, at 352.

79. See supra note 39.

80. The Preamble to the BWC reaffirms “adherence to the principles and objectives” of the Geneva Protocol of 1925 and expresses a norm created by the Protocol. Bacteriological (Biological) and Toxins Weapons Convention, supra note 3, at Preamble. However, Article VIII states “nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol,” implying that any obligation created by the Protocol had to be actively assumed by the contracting party and did not exist as a rule of law outside such assumption of obligations. Id. at art. VIII.

81. 120 nations ratified the Geneva Protocol of 1925. See supra note 77. I. Brownlie finds a statement of customary law in a General Assembly Resolution stating “[t]he General Assembly
the Geneva Protocol of 1925 expressed by several states would constitute exceptions by these states to the customary rule of law. The reservations of three major world powers in particular significantly weakened the power of the custom.

The American decision in 1969 to end development of biological weapons, and the United States unilateral statement renouncing all use of the weapons, opened the door to negotiations of a stronger rule of international law. Initially, Russia blocked separate proceedings for biological and chemical weapons, but eventually agreed to negotiate separate conventions. Negotiations led to the BWC in 1972, which contained strong prohibitions on the development and stockpiling of biological weapons. Unlike the earlier Geneva Protocol of 1925, Russia, the United States, and the United Kingdom, the three major world powers essential for the success of the Convention, ratified the BWC. The BWC is currently the primary legal instrument controlling biological weapons, ratified by 141 nations.


83. SIPRI, SIPRI: CONTINUITY AND CHANGE 1966-1996, 49-63 (1996), cited in Continuity and Change: Chemical and Biological Warfare, History of the SIPRI CBW Project, 5 (visited Oct. 1, 1999) <http://www.sipri.se/cbw/research/cbw-continuity.html>. Evidently, Russia believed in a military use of biological weapons after the United States determined they were of no battlefield value, leading Russia to continue its offensive biological weapons program even after ratification of the BWC. Steinbruner, supra note 8, at 89.

84. Bacteriological (Biological) and Toxin Weapons Convention, supra note 3, at art. I.

85. For an updated list of ratifications to the BWC, see Ratifications to the BTWC, (visited Oct. 1, 1999) <http://www.brad.ac.uk/acad/sbtwc/keytext/okrats.htm>.

genetically, may create hazards to biodiversity and pose conventional risks to the environment. As the Convention provides channels for resolving conflicts and allegations of biological weapon use or development, these sources of legal controls should be considered in the context of the regime established by the BWC. The next section will detail the provisions of the BWC and the proper application of other international legal standards to the biological weapons regime.

V. THE BIOLOGICAL WEAPONS CONVENTION OF 1972

The BWC regulated the production, development and stockpiling of biological weapons, but did not specifically regulate the use of these weapons. Implicitly, nations agreeing not to produce or possess biological weapons would be unable to use them. The BWC meshed with the Geneva Protocol of 1925, as the former regulated production of biological weapons but not their use and the latter prohibited their use but not their development. The BWC created a stronger legal standard by virtue of ratification by all five permanent Security Council members, contrasting the lack of great power adherence to the earlier legal standard. Unlike any prior regulatory system, the regime created by the BWC explicitly outlawed biological weapons as a class of weapons.

The BWC specifically mentions the Geneva Protocol of 1925, reaffirming the principles previously developed regarding biological weapons. In addition, the BWC placed further control of chemical weapons on the international agenda by listing effective prohibition of chemical weapons as an

87. Convention on the Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques, Dec. 10, 1976, 1108 U.N.T.S. 151, 31 T.S. 333, T.I.A.S. No. 9614. “Environmental modification techniques” is defined as “any technique for changing-through deliberate manipulation of natural processes-the dynamics, composition or structure of the earth, including its biota . . ..” Id. at art. II. The genetic modification of biological agents may be considered modification of biota. See also Convention on Biological Diversity, June 5, 1992, 31 I.L.M. 818.

88. Bacteriological (Biological) and Toxin Weapons Convention, supra note 3, at art. V, VI and VII.

89. However, several nations had declared reservations to the Geneva Protocol allowing retaliatory use of biological weapons and could slip through the regulations of both treaties. See supra notes 76 and 77. See also Graham S. Pearson, The Complementary Role of Environmental and Security Biological Control Regimes in the 21st Century, 278 JAMA 369, 369 (1997).

90. Representatives of 97 nations signed the BWC in 1972, placing the new standard well on its way to meeting widespread state acceptance necessary for development of customary international law. Bacteriological (Biological) and Toxin Weapons Convention, supra note 3. However, notably absent from the list was China, a non-party to the BWC until the 1980s. Id.

91. Kadlec, supra note 1, at 351.

92. Bacteriological (Biological) and Toxin Weapons Convention, supra note 3, at Preamble, art. VIII.
objec\textsuperscript{tive.93 Parties also included provisions in the BWC to allow for amendments to the Convention and Conference of State Parties to consider technological changes and to negotiate controls on chemical weapons.94 Clearly, the Parties intended control over biological and chemical weapons to be an ongoing process, heavily influenced by scientific developments and requiring an integrated legal framework.

The BWC contains general legal controls, with all the substantive regulations being contained in the first ten articles of the Convention.95 Parties agree not to "develop, produce, stockpile or otherwise acquire or retain" biological agents for other than peaceful or defensive purposes.96 Whereas the Hague Declaration of 1899 only banned possession of weapons capable of delivering chemical agents, the BWC banned possession of both the agent and means of delivery, creating a stronger control.97 States must divert existing reserves of biological weapons to peaceful purposes or destroy them.98

Article III of the Convention prohibits the Parties from transferring any element of biological weapons to any recipient, and Parties must refrain from encouraging or aiding any state or international organization in developing biological weapons.99 Additionally, Article IV mandates that Parties prevent
development of any element of biological weapons within their jurisdiction.\textsuperscript{100} Together, Articles III and IV require national controls to prevent non-state actors from acquiring the means to carry out biological warfare and prohibits international development of biological weapons. The BWC promotes non-proliferation as well as disarmament. However, the Convention stresses implementation of these measures in a manner to allow economic development and cooperation in preventing disease.\textsuperscript{101} Parties may exchange scientific information and equipment for peaceful purposes.\textsuperscript{102}

In case of an accusation of non-compliance, Parties may lodge a complaint with the United Nations Security Council, which may then conduct an investigation.\textsuperscript{103} Parties have the obligation to consult and cooperate in solving a problem relating to the BWC, including a specific obligation to cooperate in an investigation undertaken by the Security Council.\textsuperscript{104} After the Security Council determines a violation of the Convention endangers a Party, all Parties must either "provide or support assistance" to the endangered Party if requested.\textsuperscript{105} These provisions of the BWC create a basic mechanism for any needed verification and inspection provisions, as well as sanctions and other collective action required by circumstances.

The BWC contains elements allowing the evolution of more defined regulation of biological weapons. The BWC forbids the possession of elements of biological weapons for other than "prophylactic, protective or other peaceful purposes," which is sufficiently flexible to permit defensive development of antibiotics and other biological warfare counter-measures.\textsuperscript{106} This language is also broad enough for creating standards defining specific biological agents with no justification for peaceful purposes. Parties could amend provisions of the BWC requiring cooperation with any Security Council investigation to allow stronger verification and inspection standards ensuring compliance with Convention obligations. Finally, the regular conferences required by the BWC and the provisions allowing amendment of the Convention would provide nations with the framework for upgrading existing biological weapons controls. Given proper motivation of the international community, Parties could strengthen the provisions of the BWC to further prevent the risk of biological warfare.

\begin{thebibliography}{100}
\bibitem{100} See Kadlec, \textit{supra} note 1, at 353.
\bibitem{101} See Kadlec, \textit{supra} note 1, at 353.
\bibitem{102} See Kadlec, \textit{supra} note 1, at 353.
\bibitem{103} Bacteriological (Biological) and Toxin Weapons Convention, \textit{supra} note 3, at art. VI.
\bibitem{104} See Kadlec, \textit{supra} note 1, at 353.
\bibitem{105} Bacteriological (Biological) and Toxin Weapons Convention, \textit{supra} note 3, at art. VII.
\end{thebibliography}
VI. DEVELOPMENT OF INTERNATIONAL REGULATIONS

Following entry into force of the BWC in 1975, the Parties have held four review conferences in 1980, 1986, 1991, and 1996. After the end of the Cold War, momentum to strengthen weapons control increased. The Persian Gulf War of 1991 and attendant risks of biological warfare increased attention on the need to prevent states from acquiring weapons of mass destruction. At the review conference in 1991, Parties established an Ad Hoc Group of Governmental Experts (VEREX) to study verification measures to strengthen the BWC. VEREX issued a report analyzing various verification measures in 1994, and the Parties held a Special Conference to discuss further action. The Parties created an Ad Hoc Group to consider binding verification measures to the BWC.

The Parties to the BWC held the Fourth Review Conference in November and December of 1996. Among the issues considered at the Fourth Review Conference, the Parties discussed the work of the Ad Hoc Group as well as a proposal put forward by Iran. The Parties stated that effective verification measures as discussed by the Ad Hoc Group could reinforce the BWC. At the Fourth Review Conference, Iran noted the BWC does not explicitly prohibit the use of biological weapons and proposed an amendment providing a direct ban on all use of biological weapons.

In the Final Declaration, the Parties agreed that use of biological weapons would violate Article I. The Parties also discussed the ban on use of biological weapons concerning Articles IV and VIII. As several states retain...
reservations to the Geneva Protocol of 1925 allowing retaliatory use of biological weapons, the Conference noted that these were "totally incompatible with the absolute and universal prohibition" of biological weapons and called for withdrawal of reservations. The Parties considered the direct statement in the Final Declaration banning all use of biological weapons as signifying the state of international law, and as an alternative to amending the BWC.

The delegations also discussed control of non-state possession of biological weapons at the Fourth Review Conference. The Parties held Article III of the BWC prevented transfer of agents or weapons to any recipient, including transnational terrorists and subnational groups like millennial cults. The Conference also stressed that under Article IV each Party should adopt penal legislation to apply within the jurisdiction of the state.

Among other issues discussed by the Parties in the Fourth Review Conference was international environmental law. The Conference noted the importance of the Rio Declaration and Convention on Biological Diversity to controls on biological warfare, in particular to implementation of Article X. The interlinking of technology transfers, biodiversity and international development creates an area of overlap that may influence further development

117. Id. at 22-23. See also supra note 76.

118. Some delegations to the Fourth Review Conference stated the ninth paragraph of the Preamble of the BWC prohibited use. Fourth Review Conference, supra note 109, at 38. This paragraph reads: "[d]etermined, for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons." Bacteriological (Biological) and Toxin Weapons Convention, supra note 3, at Preamble. Other delegations believed amending the BWC would open it to further amendments, thereby weakening the regime. Fourth Review Conference, supra note 109, at 39. Any amendment would require ratification by individual states, opening the BWC to the possibility of becoming a two-tier system in which only some of the states explicitly banned the use of biological weapons. Id.


120. Id. at 16-17.

121. Id. at 17-18. The Final Declaration stated explicitly that states had an obligation under the BWC to prevent use of biological weapons in terrorist or criminal activity. Id. at 17. The use of Article IV to require penal legislation had been questioned previously. Criminalizing BW, CHEMICAL WEAPONS CONVENTION BULL. Mar. 1996, at 1, (visited Oct. 13, 1999) <http://www.fas.harvard.edu/~hsps/>. International criminal liability for acts of biological warfare or terrorism would return ethical responsibility to individuals, similar to premodern regulation of the use of poisons. Id. See generally, supra note 66.

122. Fourth Review Conference, supra note 109, at 24-25, 36. The Rio Declaration stated that "[w]arfare is inherently destructive of sustainable development. States shall therefore respect international law providing protection for the environment in times of armed conflict and cooperate in its further development, as necessary." Rio Declaration on Environment and Development, supra note 86, at Principle 24. The Convention on Biological Diversity requires states to "facilitate access for . . . technologies that . . . make use of genetic resources and do not cause significant damage to the environment." Convention on Biological Diversity, June 5, 1992, art. 16 (1), 31 I.L.M. 818. These two documents preserve access to biotechnology while Article X of the BWC similarly guarantees the right to transfer biological agents and technology for peaceful purposes. Bacteriological (Biological) and Toxin Weapons Convention, supra note 3, art. X.
of biological weapons controls. In addition, differences of opinion between developed and developing nations produced different negotiation positions, the developing nations desiring freer access to recent medical technology. The Parties also disagreed on the BWC provision for United Nations Security Council control over investigations, as the great powers would have a potential veto over investigations of their own conduct.

Finally, the Parties discussed enhanced verification mechanisms at the Fourth Review Conference. The Parties noted that the Ad Hoc Group was preparing the basic framework for a legally binding mechanism to strengthen the BWC. The Parties also noted the problem of time constraints when setting a new goal of completion of Ad Hoc Group work by the Fifth Review Conference of 2001.

The Ad Hoc Group has held sessions since January 1995 to consider a new Protocol to strengthen the BWC. Many nations, including the United States, have placed goals for completion of the Protocol by the end of 1998.

123. See United Nations, Centre for Disarmament Affairs, supra note 93, at 79.
124. Id. at 78.
125. Fourth Review Conference, supra note 109, at 29. Arguments had been made that the mandate of the Ad Hoc Group did not allow a protocol to be the outcome of discussions. Vorobiev, supra note 109.
128. In his 1998 State of the Union Address, President Clinton spoke on the BWC Protocol: "Last year, the Senate ratified the Chemical Weapons Convention to protect our soldiers and citizens from poison gas. Now we must act to prevent the use of disease as a weapon of war and terror. The Biological Weapons Convention has been in effect for twenty -three years now. The rules are good, but the enforcement is weak. We must strengthen it with a new international inspection system to detect and deter cheating. . . ."

Currently, the Parties have held four sessions of the Ad Hoc Group in 1998. In all likelihood, the Parties should complete a Protocol to the BWC within the next year. The new Protocol will radically alter the biological weapons control regime. The new Protocol will aid resolution of situations involving violations of the BWC, like the ongoing struggle by United Nations inspectors to detect Iraqi transgressions. Given the horror of biological weapons, the current international trend will be to ratify the Protocol. States refusing to ratify may focus attention on their position and be likely targets for heightened international scrutiny. These non-parties to a Protocol may also find quarantine placed around them, preventing the sale of dual-use technology necessary for development of health standards. This will also prove an incentive for states to ratify the Protocol.

Several essential issues effect negotiations on the Protocol to the BWC. The standard of verification measures, including declarations and visits involve aspects of national security, trade secrets and power disparities between strong and weak nations. Nations are also debating strict or loose definitions of biological agents, facilities and allowable quantities of agents.

The primary means of verifying compliance with the BWC are declarations and visits. Parties would declare facilities, agents and activities effecting the subject of the BWC and would authorize inspection visits, including random routine visits of declared facilities and challenge visits to resolve accusations of non-compliance. A "loose" regime of verification measures would provide ad hoc decision-making, fitted to the circumstances of each case, while a "strict" regime would require greater political negotiation to reach agreement on Protocol provisions. In addition, in a "loose" regime, nations that are more powerful would have greater political influence than smaller, weaker nations, creating a biased regime disproportionately reflecting the interests of the large states.


131. Vorobiev, supra note 109, at 3.
However, creation of a “strict” regime codifying all banned agents, weapon systems, and maximum allowable agent levels may defeat the purposes of the Protocol by failing to list all possible agents that exist or may be discovered in the future. For instance, the United States and the United Kingdom disagree with Russia over the value of threshold quantities for biological agents. The Western nations claim maximum levels are deceptive, as other nations can quickly develop small amounts of biological agents into large quantities.132 “Strict” definitions of agents may not advance the interest of security and disarmament.

The United States has also raised concerns about the expectations of security that would arise from completion of the Protocol. A nation could hide violations by developing dual-use facilities using biological agents for peaceful purposes as a cover for a weapons program, as Russia did after ratifying the BWC.133 However, states can use the issue of verification as a cover for political issues, as mistrust underlies political differences.134 In addition, on site verification would prove a great obstacle for a potential violator to overcome. For a Party to conduct weapons research at a declared facility, where random visits may occur, the Party must know what to hide. They also must know that the risk of personnel engaged in legitimate activities at the facility leaking information will make dual-use facilities hard to conceal.135 For a Party to conceal a weapons program at an undeclared facility would require absolute secrecy, posing more difficulties than a dual-use facility.136

In addition to the issue of verification, states with advanced biotechnology industries worry about the confidentiality of visits and the possibility of leaks of trade secrets. Parties could misuse routine inspections of declared facilities to uncover corporate secrets improperly.137 The Protocol needs safeguards to

132. UNITED NATIONS, CENTRE FOR DISARMAMENT AFFAIRS, supra note 93, at 73.


134. President Reagan stated the issue as “[t]rust but verify” when beginning START negotiations with the former Soviet Union; verification requires trust and simultaneously increases trust, allowing greater control of arms. Frederic S. Pearson, The Global Spread of Arms: Political Economy of International Security 81 (1994). In addition, nations armed with nuclear weapons would retain a favorable balance of military strength over the covert biological weapon producing state. MacEachin, supra note 133, at 1.

135. MacEachin, supra note 133, at 2. See also The Problems of Chemical and Biological Warfare at 49-63, (1975) cited in SIPRI, SIPRI: Continuity and Change 1966-1996, supra note 83, at 5. In an experiment conducted by SIPRI to determine the ability of microbiologists to hide an offensive biological program in a dual-use facility, scientists rated the chances of a team familiar with the facility uncovering the program: The average response was 50%, with the percentage stated by scientists involved in the inspection 20% higher than the response by scientists not directly involved. Id.


137. Id.
protect sensitive information before it will gain the support of nations with large biotechnology industries. States with less developed biotechnology industries fear lower representation on inspection teams and technical support staff. These states want employment of staff based on geographical representation of all states, while the need for the highest trained employees may prevent an equitable distribution.\(^\text{138}\)

VII. PROTOCOL TO THE BIOLOGICAL WEAPONS CONVENTION

The current rolling text of the BWC Protocol reflects the concerns of the parties to the BWC. The Protocol has a sufficiently "strict" text to prevent political manipulation of standards by large powers and enough flexibility to address evolving circumstances. The Rolling Text of the Protocol currently contains twenty-three articles, covering 119 pages, as well as 138 pages of annexes, appendices and attachments providing detailed provisions. This large text contrasts sharply with the ten pages of articles in the BWC.\(^\text{139}\) The Protocol, as currently drafted, reflects the "strict" approach to verification with specific lists of agents, weapons, and quantities of agents and inspection standards. However, the Protocol retains flexibility, as the text has not definitively determined levels of agents and parties can amend these and add other agents.

The Protocol includes several general areas. Article III provides the primary verification rules. Article III, Parts (A) through (D) covers lists of agents, toxins, equipment, threshold levels and necessary declarations of these items and related activities.\(^\text{140}\) Article III, Parts (E) and (F) address visits, investigations, and procedures for resolving issues arising from activities...
related to the BWC. Article IX establishes an international organization designed to carry out the diplomatic and technical tasks related to the Protocol. Article IV protects the security of information obtained in visits and inspections. Articles V, VI and XII provide procedures for settling disputes, ensuring compliance and protecting against biological weapons attacks.

Other articles consider definitions of terms, the relationship of the Protocol to international law, exchange of technical information for peaceful purposes, national implementation of the Protocol and procedural aspects. Absent from the current draft of the Protocol is text for Article I, concerned with general provisions, and Article VIII, stating confidence-building measures.

The Protocol establishes an international organization. The Organization includes three main bodies: the Conference of States Parties, the Executive Council and the Technical Body. The Conference of States Parties serves as the primary organ of the organization, the Executive Council makes decisions regarding compliance matters and the Technical Body conducts the actual inspections and visits. All Parties to the Protocol are eligible to occupy any office of the organization, and the organization cannot deprive any Party of membership.

The Conference of States Parties consists of representatives of each Party. This Conference determines the budget for the organization, elects members to the Executive Council, appoints a Director-General to the Technical Body, takes measures to ensure compliance with the Protocol and adopts rules of procedure submitted by the Executive Council. The Conference of States

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141. *Protocol, supra* note 139, at 43-71, art. III (E), (F).
142. *Id.* at 90, art. IX.
143. *Id.* at 72, art. IV.
144. *Id.* at 75, 76, and 107, arts. V, VI, XII.
146. *Protocol, supra* note 139, at 15, 89, arts. I, VIII.
147. *Id.* at 90, art. IX (A) ¶1. The organization is simply titled the Organization for the Prohibition of Bacteriological (Biological) and Toxin Weapons, [hereinafter the Organization]. *Id.*
148. *Id.* at 90, art. IX (A) ¶4. The exact names have not been determined. The proposed text contains several alternatives in brackets. The provision in Article IX lists the bodies as "the Conference of the States Parties, the [Executive] [Consultative] [Council] and the Technical [Secretariat] [Body]." *Id.* For ease this paper will refer to them by the simplified names Conference of States Parties, the Executive Council, and the Technical Body.
149. *Protocol, supra* note 139 at 90, 91, 94, art. IX (A)-(C) ¶¶2, 10, 25.
150. *Id.* at 93-94, art. IX (B) ¶24. In addition, the Conference of the States Parties appoints independent experts to a Scientific Advisory Board. The text contains two proposed versions; in one experts will be selected based on expertise, in the other on the basis of geographic representation of the Parties. *Id.* at 94, art. IX (B) ¶24 (f).
Parties will meet in regular annual sessions, as well as special sessions when convened. Each Party receives one vote, and the Conference of States Parties makes decisions by a majority of members present for procedural matters and consensus on substantive issues. If the Conference of States Parties cannot attain consensus after a special twenty-four hour recess, the Protocol only requires a vote of two-thirds of the members present.

The Executive Council consists of an undetermined number of members, serving a term of two years, some elected and some selected by rotation, paying regard to geographic distribution. Executive Council members select their own chair and vote similarly to the Conference of the States Parties. The members of the Executive Council are responsible to the Organization, not to member states; thus, the Council will serve a less political role than the Conference of States Parties. The Executive Council supervises the Technical Body; coordinates cooperation, consultation, and clarification among the Parties; addresses non-compliance by Parties; determines requests for visits; conducts relations with the Parties; and submits operational manuals to the Conference of States Parties for approval. The Executive Council may also bring issues to the attention of the United Nations Security Council for further action.

The Technical Body includes a Director-General and other scientific, technical and administrative personnel required by the body. The Technical Body will carry out verification measures as well as other functions assigned by the other bodies of the Organization. These tasks include processing

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151. Protocol, supra note 139, at 91, art. IX (B) ¶¶12, 13.
152. Id. at 92, art. IX (B) ¶¶18-20.
153. Id. at 94, art. IX (C) ¶25. Proposed text might also include importance of biotechnology industry and political and security interests as factors for determining members. Id. Members shall be distributed among five geographic regions: Africa, Asia, Eastern Europe, Latin America and Western Europe and other states. Id. at 94-95, art. IX (C) ¶¶25-26. Distribution on this basis will equitably represent the nations of the world as a whole but may not adequately represent states with developed biotechnology industries, as many of these nations are concentrated in Western Europe and the “Other States” region. A bracketed proposal would restore balance by making the significance of the national biotechnology industry a factor in determining members from each region. In this proposal, one-third of the seats of each region will be occupied by the states with the largest biotechnology industries. Protocol, supra note 139, at 96, art. IX (C) ¶28. These states could enjoy a similar status as permanent Security Council members, reflecting the position of the largest states.
154. Id. at 97, art. IX (C) ¶¶32-35.
155. Id. at 97, art. IX (C) ¶36.
156. Protocol, supra note 139, at 97-98, art. IX (C) ¶37.
157. Id. at 99, art. IX (C) ¶39bis (a).
158. Id. at 102, art. IX (D) ¶47.
159. Id. at 99, art. IX (D) ¶40.
declarations by Parties, analyzing data on disease outbreaks, developing operation manuals and assisting in visits.\textsuperscript{160} Like the Executive Council, the Technical Body is responsible to the Organization, not the Parties, allowing greater neutrality in visits and verification tasks.\textsuperscript{161}

Under the verification regime, Parties must declare various facilities, agents, and work conducted on biological agents to the Organization to promote full knowledge of state activities and ensure compliance. Parties must declare agents, equipment, and threshold levels of agents to the Organization upon ratifying the Protocol, and yearly following the initial declaration.\textsuperscript{162} In addition, Parties must declare all past offensive or defensive programs after ratifying the Protocol and declare all present defensive programs yearly, including the results of research.\textsuperscript{163} Parties must declare certain other facilities yearly, including vaccine production facilities, maximum biological containment laboratories, and high biological containment facilities.\textsuperscript{164} The Protocol even requires Parties to declare non-vaccine facilities engaged in producing medicines or chemicals having the capacity to grow agents above a specified rate.\textsuperscript{165} Thus, any facility capable of rapidly developing biological agents must be declared.

In addition, Parties must declare various actions that could develop biological weapons capability or assist in proliferation of biological weapons. Parties must declare certain work with listed agents, including the capacity for handling large quantities of agents, any work with certain highly dangerous agents, application of genetic modification, or aerobiology.\textsuperscript{166} Parties must make yearly declarations of international transfers of listed agents.\textsuperscript{167} Parties must also declare suspicious disease outbreaks even if they are only similar to diseases caused by listed agents but are undiagnosed.\textsuperscript{168}

\textsuperscript{160} Id. at 99-101, art. IX (D) ¶¶41-42.

\textsuperscript{161} Protocol, supra note 139, at 103, art. IX (D) ¶¶50-51.

\textsuperscript{162} Id. at 25-28, art. III (A) ¶1, (B) ¶1, (C) ¶1-4, & (D) ¶¶1-2.

\textsuperscript{163} Id. at 28-30, art. III (D), Subparts (A) & (B) ¶¶3, 4, 7, 8.

\textsuperscript{164} Id. at 30-35, art. III (D), Subparts (C)-(E) ¶¶9, 12.

\textsuperscript{165} Id. at 39-41, art. III (D), Subpart (G) ¶¶15-16.

\textsuperscript{166} Protocol, supra note 139, at 36-39, art. III (D), Subpart (F) ¶¶13-14. “Work with listed [biological] agents and toxins” includes “research, development, production and diagnosis using listed [biological] agents ... including the study of properties of biological agents ... detection and identification methods, genetic modification, aerobiology, prophylaxis, treatment methods and maintenance of [registered] culture collections.” Id. at 36, art. III (D), Subpart (F), n. 23. Aerobiology is defined as “[t]he study of aerosols comprising particles of biological origin.” Id. at 37, art. III (D), Subpart (F), n. 25.

\textsuperscript{167} Id. at 41, art. III (D), Subpart (H) ¶18. This would prevent future sales of agents similar to sales by the United States and France to Iraq in the 1980s. See supra note 59.

\textsuperscript{168} Protocol, supra note 139, at 41, art. III (D), Subpart (I) ¶20. This could not only help identify acts of biological warfare but also allow detection of leaks from declared or undeclared facilities like the
Exceptions do apply to declarations, including exceptions for vaccine facilities devoted solely to animal consumption on premises; non-vaccine facilities devoted solely to waste treatment or manufacture of soaps; and fertilizer or food products facilities working with listed agents for the purpose of diagnosis of disease or hygiene testing. These exceptions do not provide significant loopholes for hiding offensive biological weapons programs. The Protocol still requires declarations of high containment and maximum containment facilities. Any lower level facility would pose risks to the local environment if development of weapons occurred, allowing attention to be focused on them. In addition to other declarations, states must submit titles of national legislation regulating access to pathogen storage buildings and access to areas in which an outbreak of infectious disease occurs. These declarations set legal ground work for any needed visits and allow effective verification.

The Protocol sets out four types of visits, including random, clarification, request, and voluntary. A set number of randomly selected visits to declared sites will occur each year distributed evenly among the five geographic groups of states. Parties will have only a limited number of hours’ notice before the visit, discouraging attempts at hiding non-compliance. Clarification visits will remove ambiguity in declarations of Parties and promote thoroughness and honesty in declarations. In addition, a state may request a voluntary visit to build confidence in the regime or to resolve any concern related to biological weapons.

The Protocol specifies that inspection teams will carry out all visits in the least intrusive manner. In addition, Article IV of the Protocol specifically requires the organization to take every precaution to protect the confidentiality of information gathered in visits. Within limited privileges and immunities, Parties can hold employees of the organization civilly liable for harm caused by unauthorized disclosure of confidential information. These provisions allow

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169. *Id.* at 31-32, 38-39, 40, art. III (D), Subparts (C), (F), (G) ¶¶10, 14, 16.
170. *Id.* at 42, art. III (D), Subpart (K) ¶24.
171. *Id.* at 46, art. III (F) ¶1.
172. *Id.* at 46-47, art. III (F), Subpart (A) ¶¶2, 4.
173. *Protocol, supra* note 139, at 47, art. III (F), Subpart (A) ¶7.
174. *Id.* at 47-48, art. III (F), Subpart (B) ¶8.
175. *Id.* at 49, 50, art. III (F), Subparts (C), (D) ¶¶18, 23.
176. *Id.* at 47, 49, 50, art. III (F), Subparts (A)-(C) ¶¶3, 9, 22, 31.
177. *Id.* at 72, art. IV ¶1.
178. *Protocol, supra* note 139, at 73, art. IV ¶6. The Organization shall maintain the privileges and immunities necessary for the exercise of its functions, but agreements between the individual Parties and the Organization shall define the extent of these privileges and immunities. *Id.* at 103-104, art. IX (E) ¶¶53-57.
a strong verification regime to exist without compromising the security required for business interests. These measures can achieve greater compliance, as fear of damage to biotechnology industries will not dissuade Parties from ratifying the Protocol.

In addition to the visits authorized under the Protocol, provisions specifically address investigations of non-compliance concerns. Parties may request field investigations for alleged use of biological weapons or facility investigations for other breaches of the BWC. A Party may request investigation regardless of the ownership of the facility, allowing investigation of private companies as well as non-state actors. Parties can request a non-compliance inspection for conduct involving a non-party to either the Protocol or the BWC, although in the latter case, the Organization shall cooperate with the United Nations Secretary General. To request an investigation, a State Party must first attempt to resolve the issue through direct consultation and cooperation; if this does not resolve the conflict, the Party must provide information substantiating a claim of non-compliance.

The Director-General determines that if the request for investigation has met the requirements to proceed further, the Executive Council will vote to initiate action. If the Executive Council decides to begin an investigation, the Director-General shall issue a mandate to an investigation team for the conduct of the investigation. The Party being investigated shall provide access to determine non-compliance, subject to its constitutional limitations regarding proprietary rights and searches and seizures. The investigated Party shall have the right to limit access to sensitive areas unrelated to the investigation.

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179. Id. at 56, art. III (F), Subpart (A) ¶4. In addition, language has been proposed to allow investigations of transfers of biological agents or weapons. Id.

180. Id. at 57, art. III (F), Subpart (A) ¶6.

181. Protocol, supra note 139, at 57, art. III (F), Subpart (A) ¶¶7-9. Proposed language would also require cooperation with the United Nations Security Council, reflecting tension between large and small states over the proper body to address non-compliance concerns. Id.

182. Id. at 58, art. III (F), Subpart (C) ¶¶11, 13. States should include any information on the non-complying Party, circumstances surrounding the alleged event, location of any relevant facilities and evidence of an outbreak of disease. Id. at 59-61, art. III (F), Subpart (C) ¶¶16-19.

183. Protocol, supra note 139, at 62-63, art. III (F), Subpart (E) ¶¶21-26. The Protocol has two proposals for voting, one of which requires either a two-thirds or three-fourths majority vote to begin an investigation, the other requiring a three-fourths majority vote to halt an investigation. Id. at 63, art. III (F), Subpart (E) ¶26. The former type is known as a "green light" procedure, the latter as a "red light" procedure. Pearson, supra note 138, at 5. The ultimate type of voting procedure adopted in the Protocol will have a major impact on completion of investigations.

184. Protocol, supra note 139, at 63, art. III (F), Subpart (F) ¶29.

185. Id. at 64, art. III (F), Subpart (G) ¶32.

186. Id. at 64, 65, art. III (F), Subpart (G) ¶¶34, 35. However, proposed language concerning investigation of biological weapon use would require an investigated Party to allow members of an
The investigation team will issue a Final Report, which the Executive Council shall consider when deciding whether non-compliance has occurred.\textsuperscript{187}

If the Executive Council determines that non-compliance has occurred, it shall "take measures to redress the situation and to ensure compliance" including recommending action to the Conference of States Parties.\textsuperscript{188} The Conference of States Parties shall take measures to redress the situation, including restricting or suspending the non-complying Party's rights under the Protocol, recommending collective measures to other Parties or bringing the matter to the attention of the United Nations General Assembly or Security Council.\textsuperscript{189} A Party subject to attack by biological weapons or threatened by acts of non-compliance may request assistance from the other Parties, who must provide assistance.\textsuperscript{190}

Several aspects of the Protocol to the BWC are noteworthy. First, the Protocol would provide rapid response to any threat of biological warfare. The various bodies of the Organization must respond to requests for investigation within hours of receiving them.\textsuperscript{191} In addition, the Protocol reflects

\textsuperscript{187} Id. at 68, art. III (F), Subpart (G) ¶55. An investigated Party can also take measures to protect sensitive facilities being investigated for other breaches of the BWC, including limiting inspection through the use of random selection of buildings to be inspected or shrouding of sensitive pieces of equipment. Id. at 68-69, art. III (F), Subpart (G) ¶57. Access may be limited by the investigated state, but the investigated Party has the obligation to demonstrate that the areas of limited access were not related to non-compliance concerns. Protocol, supra note 139, at 69, art. III (F), Subpart (G) ¶58.

\textsuperscript{188} Id. at 69, 70, art. III (F), Subparts (H), (J) ¶60, 62-63. The Executive Council also may determine if the request for investigation had been abused, and may consider further action under applicable international law, including sanctions, if it is determined the process was abused. Id. at 70-71, art. III (F), Subpart (J) ¶¶63-64, 66. While the investigated State Party and the requesting State Party may participate in the review process, they shall have no vote. Id. at 71, art. III (F), Subpart (J) ¶67.

\textsuperscript{189} Id. at 71, art. III (F), Subpart (J) ¶67.

\textsuperscript{190} Protocol, supra note 139, at 75, art. V ¶¶1-4.

\textsuperscript{191} Id. at 77-78, art. VI ¶¶7-10. "Assistance" includes "coordination and delivery ... of protection against biological and toxin weapons." Id. at 76, art. VI ¶1.
international politics, particularly reflecting desires of large and poor nations differently than the CWC.\textsuperscript{192} Many features of the Protocol require greater representation of developing nations than other treaties. Finally, the Protocol recognizes other sources of international regulation, including international environmental law, and accepts goals beyond non-proliferation and disarmament, including development.\textsuperscript{193}

\textbf{VIII. CONCLUSION}

The Parties may complete the current rolling text to the BWC Protocol within the next year. A move from a "loose" regime under the BWC to a "strict" regime will be the likely result of the new Protocol. A new international regime shall create disincentives to continue covert biological weapons programs. Non-complying states would likely find themselves quarantined from the rest of the international community, preventing the flow of needed technology and scientific information. The regime will use the United Nations Security Council to prevent states and non-state actors from building effective weapons programs.

Concerns about a strengthened verification regime should not prevent the United States from ratifying the Protocol. America's healthy biotechnology industry would receive greater protection under the Protocol than under the current BWC. In addition, the United States would gain greater security through tougher compliance verification. Other states would have greater representation in the organization established by the Protocol than they would under the current regime, which places much of the decision making power with the United Nations Security Council. Provisions reaffirming the necessity of technology transfers will prevent the Protocol from interrupting the growth of developing states. The Protocol must retain flexibility to adapt to changes in the biotechnology field as they occur. In that respect, the Protocol lists of biological agents and weapons must be capable of quick amendment. Overall,

\textsuperscript{192} Cf. Chemical Weapons Convention, supra note 5, art. VIII (D) ¶45 with Protocol, supra note 139, at 102, art. IX (D) ¶48, requiring geographic distribution of the technical staff to be a factor in hiring. In many respects, the Protocol mirrors the Chemical Weapons Convention. See also Pearson, supra note 138, at 8-9.

\textsuperscript{193} Article VII states the Protocol will not be used to impede trade and development, and Parties must endeavor to promote the peaceful advancement of science internationally. Protocol, supra note 139, at 80-81, 83, art. VIII (B), (C) ¶¶3, 6. The Organization shall maintain a relationship with agencies engaged in implementing Agenda 21 and the Convention on Biological Diversity, including sharing information on biological agents, genetically modified organisms, and biosafety practices. \textit{Id.} at 86, art. VIII (E) ¶11. \textit{See also} Agenda 21, June 13, 1992, U.N. Doc. A/CONF. 151/26 (1992).
the prospects for biological weapons control will improve greatly with the completion of the new Protocol while addressing a variety of other state interests, including development and protection of property rights.

There are other reasons to favor international regulation of biological weapons as a first line of defense. Some commentators believe large countries need not fear verification as they have nuclear weapons to deter attackers, while, the smallest and weakest countries have little to lose, as verification will not change their strategic position. Only the medium states would see potential diminution of their position. However, there are distinctions between nuclear weapons and biological weapons that reduce the value of nuclear deterrence. Deterrence is effective when it assures an opposing state an attack will result in retaliation. A state can detect a nuclear attack before detonation of any weapons; in addition, the attacker, the time of attack, and the potential targets can be determined very quickly allowing immediate response. With a biological weapon attack, the exact time of attack and target can be determined only by investigating backward following an outbreak of disease. Unless an attacker admits launching an attack, the victim and international community must determine the identity of the aggressor. In the midst of a major epidemic, preservation of forensic evidence might not be a high priority for medical responders. Faced with the uncertainty of a response, a potential attacker might not be deterred. Any retaliation using nuclear weapons would probably occur months after the initial biological weapon attack, as the victim would need to build a case against the aggressor to justify massive retaliation. An immediate, unreasoned response would risk international condemnation if a state could not present convincing evidence. Thus, nuclear deterrence probably cannot adequately prevent biological warfare.

The issue of proof arises with spurious claims of biological warfare alleged for propaganda value. Throughout the Cold War, the United States and Soviet Union accused one another of biological weapons use, although neither state gathered sufficient evidence to prove or disprove allegations. The verification regime created by the Protocol could provide objective proof, discouraging biased investigations and false claims while determining actual

196. George W. Christopher, supra note 7, at 415. For instance, the United States accused the Soviet armed forces of using “yellow rain,” an aerosolized form of a biological agent, in Laos, Cambodia, and Afghanistan, but could not prove allegations because of the inability to investigate adequately in remote regions; ultimately the natural occurrence of bee feces was found to be a more likely cause of the “yellow rain.” Id.
uses of weapons.\textsuperscript{197} Furthermore, the verification body established by the Protocol could employ former Soviet researchers; utilizing scientists experienced in biological weapons programs while preventing these impoverished scientists from selling their skills to the highest bidder.\textsuperscript{198}

Finally, the political will to control biological weapons exceeds the desire to control other weapons of mass destruction. International custom forbids the use of biological weapons in war, while the status of nuclear weapons remains unclear.\textsuperscript{199} Nations retain large nuclear arsenals and the political value of attaining nuclear power status remains. The nuclear weapons tests exchanged between India and Pakistan in the spring of 1998 highlight the attractiveness of nuclear power status to some states.\textsuperscript{200} Biological weapons lack the prestige value of nuclear weapons; biological weapons have no image comparable to a nuclear test for populations to consider. No commensurate domestic political gains would result from a nation admitting to perfecting a biological arsenal. Given the limited utility of biological weapons for battlefield use, biological weapons would not be worth the international condemnation that would follow discovery of a biological weapons program. The only major use of biological weapons would be as weapons of terror and mass destruction. Because of the peculiar status of biological weapons and the lack of political or military incentive to acquire them, most nations would be more likely to accept international regulation.

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\textsuperscript{197} \textit{Id.} at 414-15. North Korea and China accused the United States of using biological weapons during the Korean War, but would not allow investigation by neutral organizations such as the Red Cross or World Health Organization; when the United States introduced a resolution in the U.N. requesting an investigation, the Soviet Union vetoed it, preventing the United States from clearing itself and resulting in a loss of good will. \textit{Id.}

\textsuperscript{198} While many Russian scientists are uncomfortable with significant career changes, particularly those scientists who have devoted their lives to research, creative attempts have been made to convert facilities to peaceful technologies, including the transformation of a research facility in Obelisk to a brewery. Anne M. Harrington, \textit{Redirecting Biological Weapons Expertise: Realities and Opportunities in the Former Soviet Union}, 29 CHEMICAL WEAPONS CONVENTION BULL. Sept. 1995, at 3-4, (visited Oct. 19, 1999) <http://www.fas.harvard.edu/~hsp/>. Private investment may be insufficient to convert the former Soviet program since many Western companies will not invest in old Russian facilities with poor safety standards. \textit{Id.} at 4. There is historic precedent for employing biological weapons scientists; upon being offered a biological weapon by an Italian chemist, Louis IV of France gave him a pension on the condition he never reveal his discovery. \textit{Paul Christopher, supra} note 7, at 205.

\textsuperscript{199} \textit{See, generally Legality of the Threat or Use of Nuclear Weapons, supra} note 7.

\textsuperscript{200} Like the dreadnought battleship that created rivalry among European and Latin American powers early in the century, prestige weapons like nuclear bombs often serve little security purpose. India and Pakistan evidently felt the domestic political benefits of the tests outweighed the international repercussions in the form of economic sanctions. Often the drive to acquire nuclear weapons is based on these domestic political factors, not actual security interests: For instance, some claim French nuclear policy only serves the purpose of preserving the French seat on the United Nation Security Council rather than any real security interest. George Perkovich, \textit{Nuclear Proliferation}, FOREIGN POL.'Y, Fall 1998, at 12, 16.
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These circumstances should help momentum continue on strengthening international regulation of biological weapons. The Parties should complete the Protocol within the next few years, and if they carefully tailor verification measures to promote compliance while protecting privately owned technology, the new regime should enjoy widespread support. If the provisions of the Protocol include protections of valid national interests, states will register few objections to the Protocol. The unique international factors surrounding biological weapons control will allow nations to support greater international control.
I. INTRODUCTION

As more and more foreign nationals attempt entry into the United States by sea, legal scholars and lay persons have become interested in issues related to alien rights. This topic has also created much controversy because litigants are challenged with issues of first impression and the courts are pressed to interpret a very complicated immigration statute. This paper seeks to address the complexities of the recently enacted Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA") as it relates to the interdiction of aliens on the high seas.
II. UNDOCUMENTED ALIENS INTERDICTED IN UNITED STATES INTERNAL WATERS: DO SUCH ALIENS HAVE RIGHTS UNDER THE IMMIGRATION AND NATIONALITY ACT?

Whether an alien interdicted in United States waters has an entitlement under the United States immigration laws depends on whether the alien qualifies as an "applicant for admission" under Section 235(a)(1) of the Immigration and Nationality Act ("INA"), as amended by IIRIRA.  

IIRIRA, sometimes also referred to as The Reform Act, has created the new category of "Aliens Treated as Applicants for Admission" under section 235 of the INA. An alien's classification within that category determines whether such alien has a right to be heard, or whether he may be summarily repulsed, or returned without any procedural requirements attendant to the INA.  

In determining whether an alien qualifies as an applicant for admission, it is necessary to examine section 235(a)(1) of the INA which provides as follows:

(1) Aliens Treated as Applicants for Admission -  

An alien present in the United States who has not been admitted or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters) shall be deemed for purposes of this Act an applicant for admission.

Based on the clear language of section 235(a)(1) of the INA, it appears that

1. The term "Undocumented Aliens" refers to those aliens lacking a visa or other authorization for lawful entry into the United States.

2. The term "Internal Waters" is defined for purposes of domestic law under 33 U.S.C. § 2003 as "[t]he navigable waters of the United States shoreward of the navigational demarcation lines dividing the high seas from harbors, rivers, and other inland waters of the United States and the waters of the Great Lakes on the United States side of the International Boundary." This could include, for example, such locations as the straits between the Florida Keys, portions of the Chesapeake Bay, or even the upper reaches of the Potomac River.

3. It is significant to note that the amendments to the INA enacted by the Reform Act have supplanted the technical term "entry" for "applicant for admission" as a legal threshold for such procedural entitlements. Therefore, prior to IIRIRA, this issue would consider whether such an alien effected an "entry" within the meaning of the INA and is thus entitled to deportation proceedings. Before enactment of the Reform Act, an alien's "entry" into the United States was generally regarded as a prerequisite to his entitlement to deportation. Yang v. Maugans, 68 F.3d 1540, 1547 (3d Cir. 1995).

4. IIRIRA § 302(a).

5. This includes a removal proceeding under INA section 240, in the case of certain applicants for admission whom the inspection officer determines are "not clearly and beyond a doubt entitled to be admitted." See INA § 240.

6. INA § 235(a)(1).
aliens who are "present in," or have "arrived in" the United States, are deemed applicants for admission. Upon a finding that an alien is an applicant for admission, subject to the INA, the result is either admission to the United States or removal from the United States.

This conclusion raises the question whether an alien interdicted on a vessel in the internal waters of the United States, before he has disembarked on dry land, shall be deemed present in the United States or to have arrived in the United States. It is conclusive that the wording of section 235 yields a negative answer to that question.

Section 235 considers certain circumstances where an alien is "brought to the United States after having been interdicted in United States internal waters." If an unlanded alien interdicted in United States waters still must be brought to United States soil, it follows that Congress did not deem that an alien to be present or to have physically arrived in the United States at that time. Rather, Congress provides that the unlanded alien interdicted in United States waters must be taken ashore to dry land before actual arrival. As a result, this arrival must occur before he acquires the right for treatment as an applicant for admission.

This offers the conclusion that unlanded aliens interdicted in internal waters do not constitute applicants for admission, and therefore do not require inspection or screening pursuant to section 235(b). It necessarily follows that such aliens are not entitled to removal proceedings under section 240. If the examining officer determines that the interdicted alien qualifies as an applicant for admission and is not "[c]learly and beyond a doubt entitled to be admitted," the next step is removal proceedings. In contrast, those aliens who do not land on United States soil do not constitute applicants for admission and do not

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7. Under the law, once an alien has legally entered the United States, that individual has certain rights adjudicated only pursuant to a full removal hearing. However, if the individual is found in the United States but never legally entered within the meaning of section 101 of the INA, the alien can be excluded through the summary process of a removal hearing.

8. Removal Proceedings will be discussed in length in Part VI.

9. INA § 235(a)(1).

10. The definition of "United States" currently followed does not include waters or airspace subject to the jurisdiction of the United States. 8 U.S.C. § 1101(a)(38). Furthermore, as emphasized in a recent Third Circuit Court of Appeals opinion, it cannot be said that the current definition implicitly includes territorial waters. Yang, 68 F.3d at 1548. The court in Yang noted that the definition of United States prior to the 1952 enactment of the INA did include "waters . . . subject to United States jurisdiction." This ascribed considerable significance to the absence of waters from the current definition concluding that the "physical presence" requirement of the former "entry" test is satisfied "only when an alien reaches dry land." Id. at 1548-49.

11. The amended INA's substitute for deportation proceedings.

12. IIRIRA § 302(a), INA § 235(b)(2)(A).
require inspection or screening by an immigration officer.  

The conclusion on this issue is a reflection of numerous Court decisions which interpret the ambiguous concept of "physical presence in the United States" in deciding whether aliens had effected an "entry" under the pre-Reform Act provisions of the INA. These judicial decisions demonstrate that an arriving alien's mere presence in United States waters does not establish the requisite physical presence in the States unless and until the alien has physically "landed" on United States soil.  

The text of the amended section 235 of the INA is consistent with this holding in that it declines to associate presence in United States waters with presence in the United States. Accordingly, both the text of the amended INA and pertinent judicial precedents confirm the view that an unlanded alien is not entitled to removal proceedings, or any other proceedings under the INA, merely because he is apprehended in the internal waters of the United States. Only when such an alien has reached the United States or physically "brought to the United States" does he attain the status of an "applicant for admission" and initiate the procedural requirements linked to that status.  

III. THE APPREHENSION AND TEMPORARY CUSTODY OF UNLANDED ALIENS IN UNITED STATES INTERNAL WATERS: DOES THIS CONSTITUTE AN ARREST?  

Section 287 of the INA empowers any officer or employee of the Immigration and Naturalization Service ("INS") to make a warrantless arrest of "[a]ny alien who, in his presence or view, is entering or attempting to enter the United States in violation of any law or regulation made in pursuance of any law regulating the admission, exclusion, or expulsion of aliens." This possibly suggests that if INS officers apprehend aliens within internal waters who are entering or attempting to enter the United States, they are obligated to bring them to a port of entry for the initiation of administrative proceedings. However, pursuant to the following analysis, section 287(a)(2) does not entail that; merely by interdicting aliens within internal waters, the INS is required to initiate administrative proceedings against those aliens. 

13. Section 235(a)(3) of the amended INA provides, "All aliens (including alien crewmen) who are applicants for admission or otherwise seeking admission or readmission to or transit through the United States shall be inspected by immigration officers." 
14. Yang v. Maugans, 68 F.3d at 1546-49; Zhang v. Slattery, 55 F.3d 732, 754 (2d Cir. 1995), cert. denied, 116 S.Ct. 1271 (1996) ("an alien attempting to enter the United States by sea has not satisfied the physical presence element... until he has landed"). 
15. The reference "brought to the United States" refers to dry land. 
16. IIRIRA § 302(a), INA § 235(a)(1). 
Pivotal for this analysis is the concept of an arrest. To aid in construing the application of the immigration statute, concepts and procedures drawn from the criminal law can provide helpful analogies. One view may hold that an interdiction at sea will constitute an arrest under section 287(a)(2), at least when an INS officer takes the occupants of a vessel into custody or subjects them to actual restraints.\textsuperscript{18} Using case law as precedent to apply this view, aliens would be afforded, at a minimum, the inspection procedure called for by INS regulations.\textsuperscript{19} Additionally, as a practical matter, this entitled such aliens to a removal hearing.\textsuperscript{20}

While conceding that such an argument is plausible, it is not necessarily persuasive. In the criminal context, an arrest normally “eventuates in a trip to the station house and prosecution for the commission of a crime.”\textsuperscript{21} More generally, an “arrest” is not simply any deprivation of liberty under color of law; rather, it is a seizure and subsequent detention of the person arrested for the purpose of instituting some form of legal process against that person.\textsuperscript{22} It further “[r]equires an intent on the part of the arresting officer to bring a person into custody to answer for a crime charged.”\textsuperscript{23} As will be discussed below, INS interdictions of aliens within the territorial waters of the United States do not involve taking aliens into custody and holding them for further legal proceedings. Further it is not considered an “arrest” as the traditional understanding of the term.

Unfortunately, several of the most common techniques of statutory construction are not instrumental in interpreting INA § 287(a)(2). Neither the statutory text nor the regulations under it provide significant guidance. Case law, at best, provides marginal guidance. Ultimately, this analysis will turn on an account of the purposes of the section 287, and on harmonizing it with other INA provisions.

\textsuperscript{18} Certain criminal cases reflect such a contention. \textit{See}, \textit{e.g.}, \textit{Henry v. United States}, 361 U.S. 98, 103 (1959) (on facts of case, arrest took place when federal agents stopped car); \textit{Douglas v. Buder}, 412 U.S. 430, 431-32 (1973) (under State law, “arrest: required either taking into custody or actual restraint.”).

\textsuperscript{19} \textit{See} 8 C.F.R. § 287.3 (1993).

\textsuperscript{20} 8 C.F.R. § 287.3 provides that if the examining officer is satisfied that there is prima facie evidence that the arrested alien entered or attempted to enter the country illegally, that officer “[s]hall refer the case to an immigration judge for further inquiry in accordance with Parts 235 and 236 of this chapter or take whatever other action may be appropriate or required under the laws or regulations applicable to the particular case.”

\textsuperscript{21} \textit{Terry v. Ohio}, 392 U.S. 1, 16 (1968).

\textsuperscript{22} \textit{United States v. Seslar}, 996 F.2d 1058, 1060 (10th Cir. 1993) (arrests “are seizures characterized by highly intrusive or lengthy detention”).

The definitional section of the INA, section 101 does not include a definition of "arrest," nor do the INS regulations in the Code of Federal Regulations. Case law fails to clarify, through definition or illustration, whether the interdiction of aliens within the territorial waters constitutes an arrest. Two cases in a related area provide help in answering this question. In the first case, a district court held that the seizure of a vessel is not an arrest of the vessel's crew. Even if one assumes that a seizure of the JOSE GREGORIO vessel occurred on March 21, that seizure did not constitute an arrest of the defendants. The United States District Court for the Southern District of New York found the three essential elements to evidence an arrest were lacking. These elements include the fact that the Coast Guard officers did not restrain them physically, curtail their liberty while aboard the ship, or conduct a search of their persons. No arrest of the defendants occurred on March 21. In the court's view, an arrest did occur the following day, when the Coast Guard boarded the vessel and placed two of the defendants under guard after finding bales of marijuana.

In the second case, the United States District Court for the District of Maine ruled that no arrest of an individual occurred when Coast Guard officers approached a vessel and informed crew members on deck that they intended to inspect the vessel for compliance with all United States laws. The court noted

25. 8 C.F.R. § 287 (1993). The regulations do, however, define the meaning by the reference in Section 287(d)(1) to "an alien who is arrested by Federal, State, or local law enforcement official for a violation of any law relating to controlled substances." "The term 'arrested,' as used in section 287(d) . . . means that an alien has been -- (1) Physically taken into custody for a criminal violation of the controlled substance laws; and (2) Subsequently booked, charged or otherwise officially processed; or (3) Provided an initial appearance before a judicial officer where the alien has been informed of the charges and the right to counsel." 8 C.F.R. § 287(g).
27. The Coast Guard patrol boat CAPE STRAIT was on routine patrol off Sandy Hook on March 20, 1980. Following instructions from the Coast Guard's Station, the officers were on alert for a vessel, the JOSE GREGORIO, suspected of smuggling. On the morning of March 21, the CAPE STRAIT sighted the vessel. Defendant's argued that JOSE GREGORIO was seized on the afternoon of March 21, upon the arrival of another Coast Guard cutter and that the seizure resulted in an arrest of their persons. The court found to the contrary that the seizure of the vessel did not result in an arrest. Id.
28. Id.
29. Id.
30. Id. at 1274.
31. United States v. Whitmore, 536 F. Supp. 1284, 1284 (D. Me. 1982). On Sunday, July 12, 1981, the Coast Guard cutter POINT HANNON was on a routine law-enforcement and search-and-rescue patrol near the coast of Maine. The Commander noticed a sailboat (RELENTLESS) outside United States territorial waters approaching. Finding it unusual for a sailing vessel to be approaching the coast of Maine from the open sea, the Coast Guard paid special attention to their direction. Within two miles of POINT HANNON, the Coast Guard decided to investigate. As they neared RELENTLESS, the Commander could smell what
that "[w]hen a stop ends and an arrest begins has been the subject of numerous judicial decisions." Here, even when the Coast Guard boarded the vessel with a display of fire arms and drug kits, the stop did not convert into an arrest. "Utilization of force in making a stop will not convert the stop into an arrest if precipitated by the conduct of the individual being detained." The arrest occurred only after the discovery of the suspect behind a curtain below decks, standing in front of numerous bales of marijuana. That scenario created probable cause for the defendant's arrest.

The Coast Guard cases suggest that law enforcement officials may stop a vessel, board it with fire arms, and even search it, without ultimately placing those aboard under arrest. As discussed above, case law does not draw a definitive line on this issue. Each situation is unique and involves the weighing and measuring of contrary indicators.

IV. EXECUTIVE ORDER 12,807 - A COMPARATIVE LOOK AT INTERDICTIONS IN INTERNATIONAL WATERS

The background and purposes of Executive Order 12,807 ("Order") are described in the landmark Supreme Court decision Sale v. Haitian Ctr. Council, Inc. Although the Order, frequently referred to as the "Kennebunkport Order," is not limited to a specific nationality of aliens, it did respond to the mass exodus from Haiti caused by the September 1991 military coup against the Aristide government. Many of these Haitians fled their country to escape severe political persecution by military and paramilitary forces. Within a month, the number of refugees fleeing Haiti by boat dramatically increased, outstripping the ability of the Coast Guard to process and safely accommodate them collectively. The terms of the Order provided for the repatriation of

he believed from prior experiences and training to be marijuana. After a confrontation with defendant, the Coast Guard boarded RELENTLESS. The trail of a strong odor of marijuana led to bales of the substance. The Commander ordered the seizure of RELENTLESS and the arrest of its crew.

32. Id. at 1299, quoted in United States v. White, 648 F.2d 29 (D.C. Cir. 1981).
33. Id.
34. Id. quoted in United States v. Beck, 598 F.2d 497, 501 (9th Cir. 1979).
35. Id. at 1300.
37. President Bush issued the Order from his vacation home in Kennebunkport, Maine.
38. Id. at 2554-56.
39. Id.
40. During the six months after October 1991, the Coast Guard interdicted over 34,000 Haitians. Because of the increase in crossings, the Coast Guard established temporary facilities at the United States Naval Base in Guantanamo Bay, Cuba to process the Haitians. The temporary facilities, however, had a capacity of only about 12,500 persons. In May 1992, the Coast Guard intercepted 127 vessels with 10,497 undocumented aliens. The United States Navy determined that no additional migrants could safely be
undocumented aliens without the benefit of any screening process. The Order reads in pertinent part as follows:

The President has authority to suspend the entry of aliens coming by sea to the United States without necessary documentation, to establish reasonable rules and regulations regarding, and other limitations on, the entry or attempted entry of aliens into the United States, and to repatriate aliens interdicted beyond the territorial sea of the United States.\(^4\)

President Bush’s promulgation of Executive Order 12,807 precipitated another round of legal challenges. The Supreme Court resolved those challenges by holding that repatriating migrants to Haiti without first determining whether they qualified as refugees\(^4\) was not prohibited by either section 243 of the INA or Article 33 of the United Nations Convention Relating to the Status of Refugees.\(^4\) In an eight-to-one decision delivered by Justice Stevens, the Court found that since neither of those provisions contained extra-territorial applications, migrants interdicted at sea were not entitled to deportation or exclusion proceedings.\(^4\) Both Section 243 and Article 33 apply only to actions taken by the United States within its own territorial waters. Therefore, nothing in domestic or international law prevents the President or the Attorney General from involuntarily repatriating undocumented aliens interdicted at sea even though some may have valid claims for political asylum.\(^4\)

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41. The Order further reads in relevant part as follows:

(2) The international legal obligations of the United States under the United Nations Protocol Relating to the Status of Refugees (citations omitted) to apply Article 33 of the United Nations Convention Relating to the Status of Refugees do not extend to persons located outside the territory of the United States; (3) Proclamation No. 4865 suspends the entry of all undocumented aliens into the United States by the high seas; and (4) there continues to be a serious problem attempting to come to the United States by sea without necessary documentation and otherwise illegally. Exec. Order 12,807, 57 Fed. Reg. 23,133 (1992).

42. 8 U.S.C. § 1101(a)(42)(A) defines a “refugee” as “any person who is outside any country of such person’s nationality or, in the case of a person having no nationality, is outside any country in which such person last habitually resided, and who is unable or unwilling to return to, and is unable or unwilling to avail himself or herself of the protection of, that country because of persecution or a well founded fear of persecution on account of race, religion, nationality, membership in a particular social group, or political opinion.”

43. *Sale*, 113 U.S. at 2558.

44. As of April 1, 1996, “exclusion and deportation proceedings” were replaced with one consolidated proceeding known as “removal proceedings.”

45. *See also* Haitian Refugee Ctr., Inc. v. Christopher, 43 F.3d 1431, 1433 (11th Cir. 1995) (finding no statutory provision under the law of the Eleventh Circuit to prevent repatriation).
The instructions to the Coast Guard included directives to "return the vessel and its passengers to the country from which it came, or to another country . . . provided, however, that the Attorney General, in his unreviewable discretion, may decide that a person who is a refugee will not be returned without his consent." This language strongly suggests that the Coast Guard is assigned the lead role in enforcing the Order, and in particular, delegates to that agency the President's power to repatriate the aliens interdicted under the Order. Coast Guard officers acting pursuant to their general law enforcement authority are deemed agents of those executive agencies charged with administration of a particular law. When the Coast Guard interdicts aliens at sea, in order to assist in the enforcement of the INA, it is acting solely as the agent of the INS.

The primary difference between international sea interdictions and United States internal water interdictions is that undocumented aliens are not afforded any rights under the INA upon an international sea interdiction. They are deprived of any screening process and the Coast Guard, upon their discretion, can return the alien to the country from which they came.

V. THE INTERDICTION OF OUTBOUND CONVEYANCES WITHIN UNITED STATES JURISDICTION

The principle purpose of interdicting aliens on the high seas is to prevent illegal immigration and criminal alien smuggling. The traditional approach involves the apprehension of aliens headed to the United States. Another approach involves the apprehension of outbound vessels; vessels suspected of departing the United States for purposes of illegal alien smuggling. The question is whether the Coast Guard has the authority to stop a vessel departing the United States upon grounds to believe crew members are about to engage in illegal alien smuggling. Case law does not specifically address the issue of outbound interdictions. This is an issue of first impression. Courts, however, have addressed the issue of whether vessels engaged in illegal acts in international waters are within United States jurisdiction giving the Coast Guard authorization to search the vessel. Such illegal acts provide a direct analogy to illegal alien smuggling which has become more popular. An analysis of such case law follows.

46. Exec. Order No. 12,807 § 2(a).
47. 14 U.S.C. §§ 2, 89(b).
48. Id. See also United States v. One (1) 43 Foot Sailing Vessel, 405 F. Supp. 879, 882 (S.D. Fla. 1975). (The powers of the Coast Guard boarding officers as agents of other agencies under 14 U.S.C. § 89 "are in addition to and not a limitation on their powers to enforce laws as Coast Guard Officers.").
49. United States v. Padilla-Martinez, 762 F.2d 942, 945 (11th Cir. 1985).
50. For example, drug smuggling.
When the Coast Guard attempts to seize a foreign vessel, they must fully comply with certain standards set forth in 14 U.S.C. §89(a) which reads as follows:51

The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board examine the ship’s documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken.

Section 89(a) empowers the Coast Guard to “search and seize any vessel on the high seas that is subject to the jurisdiction or operation of any law of the United States.”52 In effect, the Coast Guard is not limited solely to the search of domestic vessels, but rather to those over which the United States has jurisdiction.53 Thus, merely because a vessel is of foreign registry or beyond United States territorial waters, does not mean that the vessel is also beyond United States jurisdiction.54 The United States has marked its position that its jurisdiction extends to persons whose extraterritorial acts are intended to have an effect within the sovereign territory.55 Consequently, if the members upon a vessel commit illegal acts that will subsequently effect the United States, the Coast Guard is within its jurisdiction to stop and seize the vessel.

Case law supports the notion that the Coast Guard may stop and board a foreign vessel in international waters under 14 U.S.C. §89(a) if it has “reasonable suspicion” that the vessel is engaged in criminal activity or any other non-criminal activity which will affect the United States negatively.56 Whether the Coast Guard has reasonable suspicion must depend on the “totality

52. Padilla-Martinez, 762 F.2d at 949.
53. Id. at 950.
54. Id.
55. Id., quoting United States v. Loalza-Vasquez, 735 F.2d 153 (5th Cir. 1984).
of the circumstances." If suspicion remains after the initial boarding and document check, reasonable suspicion is sufficient to justify the search of the common areas of a foreign vessel on the high seas. In *United States v. Pearson*, the Coast Guard stopped and seized a vessel in international waters whose intentions were to off-load its cargo of marijuana onto smaller vessels bound for the United States. Likewise, in *United States v. Meadows*, the Coast Guard had reasonable suspicion to board a vessel and investigate criminal activity in the Caribbean for marijuana cargo bound for the United States.

These types of scenarios require a case-by-case analysis and serve as a direct analogy to illegal alien smuggling. A generous amount of case law supports the Coast Guard and grants them, in the abundance of caution, the power to stop, search, and seize vessels conducting activity which will have a negative impact on the United States. Criminal activity in international waters has the specific intention to facilitate such unlawful activities in the United States. The effect of such crimes committed outside United States territory takes place in the United States for jurisdiction purposes, and, in terms of the regulation of immigration, it is unimportant where acts constituting the crime occur.

VI. REMOVAL PROCEEDINGS

IIRIRA was implemented last September and took effect on April 1, 1997, and it represents one of the most significant changes to United States immigration law in decades. Congress extended its plenary power to affect almost all immigrants and non-immigrants, whether in the United States legally

57. *Id.*, quoting *United States v. Reeh*, 780 F.2d 1541 (11th Cir. 1986).
58. *Id.*, quoting *United States v. Williams*, 617 F.2d 1063, 1089 (5th Cir. 1980) (en banc).
59. *Id.* at 871. While patrolling the waters of the Yucatan Peninsula, the Coast Guard received an intelligence report of a large vessel dead in the water with only a mast light on. Approaching with its lights out, the Coast Guard observed a rendezvous with a smaller vessel. The Coast Guard reasonably suspected drug interactions. Upon such actions, the overwhelming smell of marijuana necessitated a search. After a search, they discovered 17,500 pounds of marijuana. There was sufficient evidence to affirm that the smaller vessels were bound for the United States.
60. *United States v. Meadows*, 839 F.2d 1489, 1490 (11th Cir. 1988). The Coast Guard observed a vessel sitting very low in the waters of the Caribbean indicating the transportation of a heavy cargo. When in contact with the captain, he claimed that their purpose was fishing, contrary to the conspicuous lack of any fishing gear on board. The Coast guard officials also noticed apparently fresh damage to the vessel of the kind found when two ships meet on the high seas and bump, as frequently occurs when marijuana is off-loaded from a mother ship onto smaller ships for importation.
61. See also, *United States v. Lopez*, 761 F.2d 632 (11th Cir. 1985), *United States v. Padilla-Martinez*, 762 F.2d 942 (11th Cir. 1985); *Brulay v. United States*, 383 F.2d 345 (9th Cir. 1967); *United States v. Williams*, 464 F.2d 599 (2nd Cir. 1972).
or not.\textsuperscript{63} IIRIRA substantially amended the INA of 1952 and established a new summary removal process for the adjudication of aliens claims who arrive in the United States without proper documentation. The new rule reflected Congress's conclusion that thousands of immigrants venture to enter the United States illegally without the proper documentation each year.\textsuperscript{64}

The purpose of the new removal procedures serves to expedite the removal of aliens who clearly had no authorization for admission into the United States. These new rules separate removal proceedings into two distinct categories. Section 235 of the INA provides the qualifications for aliens subject to expedited removal in which an immigration inspector can order these aliens removed without a formal hearing before an immigration judge.\textsuperscript{65} On the other hand, describes the procedures for aliens subject to "regular," non-expedited removal proceedings which entitles them to a "full blown" hearing conducted by an immigration judge.

A. \textit{Section 235 - Expedited Removal}

Evidence of fraud, misrepresentation,\textsuperscript{66} or the lack of valid entry documents\textsuperscript{67} will automatically subject an alien to expedited removal and an order out of the country by the immigration inspector without further hearing or review.\textsuperscript{68} If the alien indicates an intention to apply for asylum or expresses a fear of persecution from their home country, the alien will be referred to an asylum officer\textsuperscript{69} for a "credible fear of persecution" determination followed by expeditious review by an Immigration Judge ("IJ"), if requested by the alien.\textsuperscript{70} The asylum officer will evaluate whether "[t]here is a significant possibility, taking into account the credibility of the statements made by the alien in support of the alien's claim and such other facts as are known to the officer, that the alien could establish eligibility for asylum."\textsuperscript{71} A person who

\begin{itemize}
  \item \textsuperscript{64} H.R. Rep. No. 104-469, pt. 1 at 158 (1996).
  \item \textsuperscript{65} Under the regulations, any removal order by an inspecting officer "must be reviewed and approved by the appropriate supervisor before the order is considered final." 8 C.F.R. § 235.3(b)(7).
  \item \textsuperscript{66} INA § 212(a)(6)(C).
  \item \textsuperscript{67} INA § 212(a)(7).
  \item \textsuperscript{68} INA § 235(b)(1)(A)(f). An applicant may, in the discretion of the Attorney General, be permitted to withdraw his or her application and depart immediately from the United States. \textit{Id.} § 235(a)(4).
  \item \textsuperscript{69} For purposes of expedited removal, an "asylum officer" is an immigration officer with professional training in country conditions, asylum law, and interviewing techniques comparable to the training the INS provides to its full-time asylum officers, and supervised by someone who has had such training as well as "substantial experience" adjudicating asylum claims. \textit{Id.} at § 235(b)(1)(E).
  \item \textsuperscript{70} \textit{Id.} § 235(b)(1)(A)(ii).
  \item \textsuperscript{71} \textit{Id.} § 235(b)(1)(B)(v).
\end{itemize}
demonstrates a credible fear shall be "[d]etained for further consideration of the application for asylum." The failure to demonstrate a credible fear renders an automatic order of removal and detention until removed.\textsuperscript{72}

A removal order issued by either an IJ or an immigration officer is equally effective. These expedited removal orders are generally not subject to judicial review. The only situation that necessitates review is through habeas corpus proceedings and those types limited to determinations of whether the petitioner is a foreign person; whether the petitioner was ordered removed under expedited procedures; and whether the petitioner can prove by a preponderance of the evidence that he or she is a lawful, permanent resident, refugee or asylee.\textsuperscript{73} Therefore, it is crucial that the process be subject to strict scrutiny by the public, advocate groups, and Congress. This ensures that the basic rights of all foreign nationals are preserved and that persons who face removal from the United States are given every opportunity to express any concerns at any point during the expedited removal process.

The consequence of an expedited removal order is that the alien is precluded from returning to the United States for a period of five years. If the alien is subject to a second or subsequent removal, the preclusion period is twenty years. Applicants for admission who have been removed and convicted of an aggravated felony\textsuperscript{74} will be permanently barred from entry into the United States.\textsuperscript{75} \textsc{IIRIRA} significantly amended the definition of "aggravated felony" to include any crime for which the term of imprisonment exceeds one year.\textsuperscript{76} Furthermore, this new definition of aggravated felony provides for retroactivity to varying degrees.\textsuperscript{77} Therefore, an alien may find an aggravated felony on his or her record even if the conviction was entered before the enactment of the statute.

\textbf{B. Section 240 - Non-Expedited Removal}

Aliens who cannot establish that their admissibility does not fall within the

\begin{itemize}
\item \textsuperscript{72} \textit{Id.} §§ 235(b)(B)(ii), (B)(iii).
\item \textsuperscript{73} INA. § 242(e)(2).
\item \textsuperscript{74} This bar applies even if the alien is not charged and removed as an aggravated felon.
\item \textsuperscript{75} Id. at § 242(a)(2)(C), 8 U.S.C. § 1252(a)(2)(c) (Supp. II 1996).
\item \textsuperscript{76} \textit{An aggravated felony} now includes certain crimes of violence, theft, burglary, racketeering, gambling offenses, counterfeiting, document fraud, commercial bribery, forgery or trafficking in vehicles with altered identification numbers, obstruction of justice, perjury, and bribery of a witness. Also included are crimes involving rape and sexual abuse of a minor and violations of laws relating to protecting the identity of an undercover agent. \textit{See IIRIRA, § 321 (1996).}
\end{itemize}
The scope of the expedited removal procedures of section 235(B)(1) are placed into regular removal proceedings under section 240.78 The statute gives the Attorney General the discretion, however, to apply expedited removal procedures to persons already present, but without having previous admission, and who would otherwise be subject to regular removal proceedings, unless they can establish continuous presence in the United States for the last two years.79

Once the INS chooses to charge an alien with removability under section 240, the INS initiates an administrative hearing before an IJ by filing a Notice to Appear ("NTA") for removal proceedings.80 The INS must decide after filing the NTA whether the alien will remain in detention until the hearing or released on bond.81

At the initial removal hearing before the IJ, the alien and the INS have the opportunity to present evidence and to cross-examine witnesses.82 The alien will generally testify and plead to the allegations if he or she has not already pled.83 The burden of proof is initially on the alien to demonstrate lawful residence in the United States.84 The burden then shifts to the INS to prove deportability grounds.85 At the conclusion of the administrative hearing, the IJ must decide whether to issue an order of removal or to grant relief from removal.86 Either party maintains the option to appeal an adverse decision by the IJ to the Board of Immigration Appeals by either party.87

VII. CONCLUSION

It appears that the Congress is moving toward stricter immigration practices as evidenced by the enactment of IIRIRA. It will be interesting to see what direction the INS will take to enforce the provisions of IIRIRA. It appears that the Congress has given the INS the tools to deter illegal immigration, and whether these tools will be utilized remains to be seen.

78. An exception exists for crewman and stowaways, who are not eligible for such proceedings. See INA § 235(b)(2). Stowaways may apply for asylum but cannot apply for admission. See id. § 235(a)(2). In addition, a provision in the statute exempts Cubans who arrive by air. Expedited removal procedures may not apply to "an alien who is a native or citizen of a country in the Western Hemisphere with whose government the United States does not have full diplomatic relations and who arrives by aircraft at a port of entry." Id. § 235(b)(1)(F). Such persons would be placed into regular removal proceedings.


81. Id. at § 236(a), 8 U.S.C. § 1226(a) (Supp. II 1996).


83. 8 C.F.R. § 242.16(b) (1997).


86. Id. at § 240(c)(1)(A), 8 U.S.C. § 1229a(c)(1)(A).

87. 8 C.F.R. § 242.21(a) (1997).
A SURVEY OF FLORIDA LAW GOVERNING FOSTER CARE IN COMPARISON TO THE UNITED KINGDOM AND CANADA

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I. INTRODUCTION

A grand jury report issued in the spring of 1998 provided that the children of Broward County, Florida, placed in the protection of the Department of Children and Families ("DCF"), are in peril.¹ This report gives great insight into the workings of an agency on the brink of collapse. This is not the first grand jury report issued on the well-being of Broward County’s children. Grand juries were called in 1981, 1984, and 1986 to investigate issues such as abuse at detention centers, children in the court systems, and services provided for dependent children.² All three reports found significant problems, yet the system has not improved.³ Although Broward County ranks among the worst counties in Florida for providing adequate services for abused, neglected, or abandoned children, this is a statewide problem.⁴ As a result, the Florida

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2. Id. at 2.
3. Id. at 15.
4. According to § 1, abandonment is when no provisions for a child’s support are made and no effort to communicate with the child is made sufficient to evince a willful rejection of parental obligations. Fla. Stat. § 39.01(1) (1999). According to § 2, abuse is any willful act or threat that results in physical,
Legislature mandated a statewide initiative to improve the system.\textsuperscript{3} The State Attorney, DCF, the Broward County Sheriff’s Office, children’s rights advocates, and various volunteer organizations are in search of alternative methods to guarantee the health and safety of every child in the state’s custody.

An analysis of international children’s services reveals that the United States is not alone in dealing with the difficulties of addressing the problems of inadequate foster care. Child social services, such as foster care and protective services, are in crisis on a global scale. Investigating various international child welfare systems enables one to identify problems common to many countries. Logic tells us that it is impossible to create an effective solution without correctly identifying the problem. Looking at implemented solutions of Canada and the United Kingdom will bring a global perspective into the arena of childcare.

This article will begin with an overview of a typical United State’s children’s social services system. Broward County represents an example of a system in distress because of the adversity it faces and the massive restructuring that is currently being implemented. The reader will learn how a child progresses through the system to ultimately end up in a flawed foster care system. Next, a discussion about efforts employed by the United Kingdom and Canada to address these problems is presented.

II. HOW A CHILD ENDS UP IN FOSTER CARE AND THE PROBLEMS ASSOCIATED WITH THE PROCESS.

Chapter 39 of the Florida Statutes governs all legal proceedings relating to children. The legislative purpose of the chapter is "[t]o provide for the care, safety, and protection of children in an environment that fosters healthy, social, emotional, intellectual, and physical development; to ensure secure and safe custody; and to promote the health and well being of all children under the state’s care."\textsuperscript{6} The purpose of the statute is broad and difficult to implement. The problems facing Broward County demonstrate the complexity involved with attempts at designing a system to handle the complex needs of children in foster care.

\textsuperscript{5} Broward County, Fla. Grand Jury, \textit{supra} note 2, at 25.

\textsuperscript{6} FLA. STAT. § 39.001(1)(a) (1999).
This Florida statute gives DCF jurisdiction in all matters where a child has been abused, abandoned, or neglected.\textsuperscript{7} DCF’s failure to effectively perform its delegated duty is the source of the problem in Broward County. An overview of the steps used by DCF to move a child through the system will help illustrate this problem.

A. \textit{Cycle of Neglect}

This cycle begins with the reporting and investigation process. Suspected or known cases of abuse, neglect, or abandonment are reported to the state’s Child Abuse Hotline.\textsuperscript{8} The hotline then reports the cases to the appropriate DCF District.\textsuperscript{9} Through its protective services division, DCF investigates the reports and issues a determination of either unfounded, valid, or required court intervention.\textsuperscript{10} If the complaint is deemed valid, DCF will first provide the family in-home social services, such as counseling and education to avoid removing the child or children from the home.\textsuperscript{11} In cases where the risk of harm to a child is high, the investigator will require court intervention.\textsuperscript{12} Two types of petitions can be made to the court at this juncture.\textsuperscript{13}

First, Florida law requires DCF to file a petition for shelter.\textsuperscript{14} This is done in emergency situations when a child needs alternative housing immediately.\textsuperscript{15} Pursuant to Florida law, this must be done within twenty-four hours of the child’s removal.\textsuperscript{16} The court can order the child to return home in order to preserve the family unit. Alternatively, the court can order the child to remain in state custody to prevent the child from enduring further abuse or neglect.\textsuperscript{17}

Second, a dependency petition can be filed. DCF files a dependency petition to obtain “...a permanent, judicial resolution of the alleged abuse or neglect problem.”\textsuperscript{18} This is commonly referred to as a child becoming a “dependent” of the state.

\begin{itemize}
\item \textsuperscript{7} \textit{Fla. Stat.} § 39 (1999).
\item \textsuperscript{8} Broward County, Fla. Grand Jury, \textit{supra} note 2, at 4.
\item \textsuperscript{9} \textit{Id.}
\item \textsuperscript{10} \textit{Id.} at 5.
\item \textsuperscript{11} \textit{Id.}
\item \textsuperscript{12} \textit{Id.}
\item \textsuperscript{13} Broward County, Fla. Grand Jury, \textit{supra} note 2, at 4.
\item \textsuperscript{14} \textit{Fla. Stat.} § 39.402(2) (1999).
\item \textsuperscript{15} \textit{Id.} at § 39.402(1)(a).
\item \textsuperscript{16} \textit{Id.} at § 39.402(8)(a).
\item \textsuperscript{17} Broward County, Fla Grand Jury, \textit{supra} note 2, at 5.
\item \textsuperscript{18} \textit{Id.} at 6.
\end{itemize}
In extreme instances of child neglect or abuse, DCF will initiate proceedings for the termination of parental rights. In such cases, "the issue is whether the child will be permanently taken away from custody of the parent or parents and placed for adoption in the custody of DCF." A child ordered dependent will remain dependent until the court relinquishes custody or until the child turns eighteen. Upon finalization of the termination of parental rights, DCF automatically places the child for adoption.

DCF places children who are in their physical custody into two distinct types of housing: shelter and foster care. A child is sent to "shelter" upon removal from his or her home. Shelters resemble foster care homes; however, they exist to provide a removed child a temporary residence until a more permanent placement can be secured. DCF places the child in foster care when he or she needs out-of-home care for an extended period of time or becomes eligible for adoption. Foster homes intend to serve as a surrogate family for the child. DCF’s goal, achieved through appropriately placing a child, is to provide the child with stability and permanency in one setting. Unfortunately, children are often bounced from one foster home to another, directly undermining the goal of stability. This bouncing effect is attributable to the difficulty DCF faces trying to place a child in a home that serves his or her best interests. Furthermore, the lack of well-trained foster parents, combined with a high number of physically, emotionally, or mentally-handicapped children, increase the chances of a failed placement.

Although the 1998 grand jury cited problems throughout Broward County’s children’s social services, it found particular danger in the foster care system. Having worked for a children’s rights advocate, I had the opportunity to witness these problems first hand. The lack of organization and communication within DCF was immediately apparent.

One instance of institutional neglect by DCF was so severe that the child had over 30 placements in four years. Because of his severe emotional handicap, DCF contended they could not find an appropriate setting for the child. In lieu of permanency, essential to his rehabilitation, he was bounced

19. Id. at 7.
20. Id.
21. Id.
23. I had the opportunity to work for Andrea Moore, Esq, a children’s rights advocate, during the summer of 1999. She represents physically, mentally, and emotionally disabled foster care children on a pro bono basis to ensure their statutory rights are protected. I helped her advocate for appropriate foster care placements and appropriate educational resources.
24. Due to the sensitive nature of the case and to protect the identity of the child the name of the child, the case number, and any other identifying characteristics have been purposely omitted.
between foster homes. He lived in family homes, group homes, residential treatment facilities, hospitals, and even juvenile justice centers. Because of the child's constant movement, he never received the psychological treatment or basic education he required. As a result, the child is functionally illiterate and has few personal or social skills, and may continue to be a danger to himself and others once discharged from foster care.

Similar situations have been documented. The 1998 grand jury report discusses many instances of children being abused and neglected while in the custody of DCF.

One foster care mother allowed her child to miss nearly half a school year. Instead of forcing the child to attend school or reporting the problem to his caseworker, she allowed him to pay her a quarter a day as an alternative to attending classes. As a result of this lack of supervision and prior abuse, the child can barely read or write. Additionally, the same foster care mother frequently had other children run away from her home. However, because of the large number of children she cared for combined with a shortage of placements, DCF never reprimanded her for her behavior nor prevented her from being a foster care provider.

Another foster care mother gave her foster child a whistle to blow in case an older child living in the house sexually attacked him. Obviously, a better solution would have been to notify the caseworker so that the children could be separated before such an incident arose.

There are also problems with abuse of children in residential treatment facilities. Most treatment facilities are privately owned, but are under contract with the state to provide shelter and treatment for children in the state's custody. At one facility, the grand jury found mentally handicapped children being ridiculed by other children at the facility. They also found instances of employees beating children and even dragging them across the floor by their hair. Once secluded, they punched them repeatedly. Remarkably, there were more than twelve reports of abuse that remained unreported to the courts until weeks following the incidents.

26. Id.
27. Id.
28. Id.
29. Id.
32. Id.
33. Id.
34. Id.
In another case, a DCF caseworker allowed an abandoned child to live with his or her aunt. In most instances, leaving the child with a family member is beneficial to both the child and the parent, but in this case it was potentially fatal, for the aunt's husband was a convicted sex offender. Even so, the child lived with the couple for years.

The grand jury not only accused caseworkers of leaving children in dangerous homes, but also found evidence of falsifying records, and misleading judges. More astonishing was the number of cases where protective services (a division of DCF) determined a child was at high risk for abuse, neglect, or abandonment, but did nothing to help cure the problem.

Chapter 39 of the Florida Statutes provides certain general protections for children of the state. Most notably, it provides for protection from abuse, neglect, and abandonment. Unfortunately, most children under physical custody of the state are not afforded these statutory protections. The situations described above are all too common.

The Department of Children and Families, along with the private agencies whom DCF contracts with to provide emergency shelter and foster care, aspire to provide the statutory protections. However, lack of financial support undermines their efforts. Over the past two years the number of foster care

35. Sally Kestin, Children's Safety Net Collapsing; Grand Jury Finds Cash Strapped System Fails Kids Again and Again Series: Kids in Crisis, A Continuing Investigation, Fort Lauderdale Sun-Sentinel, November 17, 1998 at 1A.

36. Id.

37. Id.

38. Id.

39. FLA. STAT. § 39.001(3) (1999), provides General protections for children as follows:

(a) Protection from abuse, abandonment, neglect, and exploitation.

(b) A permanent and stable home;

(c) A safe and nurturing environment which will preserve a sense of personal dignity and integrity;

(d) Adequate nutrition, shelter, and clothing;

(e) Effective treatment to address physical, social, and emotional needs, regardless of geographical location;

(f) Equal opportunity and access to quality and effective education, which will meet the individual needs of each child, and to recreation and other community resources to develop individual abilities;

(g) Access to preventative services;

(h) An independent, trained advocate, when intervention is necessary and a skillful guardian or caregiver in a safe environment when alternative placement is necessary.

children in Broward County has increased by twenty percent. 41 Twelve percent 42 of Broward County’s children live in out-of-home care. 43 Logically, it would seem that Broward County should receive twelve percent of the state budget to fund these programs to correspond to the number of children who receive that type of care. However, in reality Broward County only receives eight and one half percent of the state budget allocated to out-of-home care. 44 Due to this shortage in funds, foster care homes have become overcrowded and understaffed.

The critical funding shortage also created a system of overworked, underpaid social workers, resulting in a high employee turnover rate. For example, every foster care worker in Broward County handles on average between forty and fifty cases. 45 State law mandates that caseworkers visit their foster children on a monthly basis. 46 Most caseworkers are forced to work approximately fifty-seven hours a week to manage their caseloads. 47 With a low salary averaging $25,000 each year and no overtime pay, it is easy to see why many caseworkers seek employment elsewhere. The State cannot afford to lose valuable social workers due to severely inadequate pay and bad working conditions. The state of disaster that Broward County’s foster care system is in makes this loss even harder felt.

III. MOVING TOWARDS PRIVATIZATION

One of the proposed solutions to Florida’s foster care crisis is privatization. 48 The Florida Legislature gave DCF two years to make the transition towards privatization in 1998. 49 The 1998 grand jury was not convinced that this change will solve the problems of a system on the verge of collapse. 50 First, the allegations of abuse by workers at private facilities are numerous enough to indicate that private care is not better than public care. 51 Second, there is no guarantee that additional funding will be provided to

41. Broward County, Fla. Grand Jury, supra note 2, at 18.
42. Id.
43. Id. Out of home care includes children in foster homes, residential group care, and children in the Independent Living Program.
44. Broward County, Fla. Grand Jury, supra note 2, at 18.
45. Id.
46. Id. at 17.
47. Id. at 18.
50. Id.
51. Id. at 26.
support the switch from the public to the private sector. Third, child advocates fear that agencies will simply turn away special needs children. Additional concerns, such as the state’s ability to monitor these programs and lack of incentive for the organizations to report abuse, have also been cited.

During the summer of 1999, the State Attorney’s Office sponsored a Foster Care Summit to address Broward County’s near state of emergency. Privatization ranked among the top issues addressed at this summit. While many concerns were identified, few feasible solutions were provided. Many observers in attendance at this summit believe that an increase in funding, with proper allocation, may assist in resolving these problems.

Unfortunately, money cannot solve the faults of the entire system. Accountability is needed in addition to increased funding. Regular reviews should be conducted on all agencies involved in child welfare. For example, “[e]mployees should never be allowed to keep their jobs after falsifying records or reports to the court.” Unfortunately, even though several caseworkers were accused of practicing such heinous behavior, most of them still retained their jobs.

IV. A LOOK AT THE UNITED KINGDOM’S AND CANADA’S FOSTER CARE SYSTEM

A. United Kingdom

The Children’s Act of 1989 governs the removal and accommodation of children by police in cases of emergency in the United Kingdom. Surprisingly, this statute gives the police great discretion in removing children and caring for them during the interim of removal and emergency shelter. The statute uses language such as “reasonable” and “practicable” to describe the requirements of removal and care. It provides that when there is reasonable cause to believe that the child will suffer significant harm, the police may remove the child from his or her home. It goes on to require the constable to inform local authorities and the child’s guardians of the removal as soon as “reasonably practicable.” The Act allows for visitation or contact from the parents when the officer believes that it is “reasonable” and in the “best

52. Id.
53. Id.
55. Id.
56. Id.
57. Children’s Act of 1989 Ch. 46 (1989) (Eng.).
58. Id.
59. Id. at Ch. 46(3) (Eng.)
interests” of the child. Clearly, from the language of the statute, the United Kingdom provides its police very little guidance for the removal and care of these children in emergency situations.

Section 31(2) of the Children’s Act of 1989 lays out the criteria the court uses when deciding whether to issue a care order. Two separate elements must be proven in order for the court to grant the order. First, the child must be suffering or likely to suffer significant harm. Second, the harm must be attributable to either the care given to the child or to the care likely given if the order is not granted. It is clear to see how the language of this statute can be confusing. Because of its vague nature, the courts have experienced great difficulty with interpreting this statute.

The case of Lancashire County Council v. A; Lancashire Council v. B clarifies the standard the British court uses for granting a care order in the face of neglect or abuse of a child. In this case, applications were made on behalf of two children for care orders. The children were not related, and the child’s mother cared for them. Medical records and testimony by the children’s guardians could not establish the original cause of abuse. As a result of insufficient factual evidence, the judge dismissed the application as to the second child. The judge remarked, “[a] conclusion that the child is suffering or is likely to suffer harm must be based on facts, not just on suspicion.” At this point, with both elements met, courts may grant an order placing the child in foster care until a determination for family reunification or adoption occurs.

The entire paragraph may be helpful since this is merely the conclusion: "These are among the difficulties and considerations Parliament addressed in the Children Act of 1989 when deciding how, to use the fashionable terminology, the balance should be struck between the various interests.” As I read the Act Parliament decided that the threshold for a care order should be that the child is suffering significant harm, or there is a real possibility that he will do so. In the latter regard the threshold is comparatively low. Therein lies the protection for children. But, as I read the Act, Parliament also decided that proof of the relevant facts is needed if this threshold is to be surmounted. Before the section 1 welfare test and the welfare ‘checklist’ can be applied, the threshold has to be crossed. Therein lies the protection for parents. They are not at risk of having their children taken from them and removed into the care of the local authority on the basis only of suspicions, whether of the judge or of the local authority or anyone else. A conclusion that the child is suffering or is likely to suffer harm must be based on facts, not just suspicion.
In the United States, if the care order is granted the child will be placed into foster care. While every country aspires to have them receive better care by the government than the care they received at home, that is not the case. The following case illustrates similar problems the United Kingdom is experiencing with her foster care system.

In Barrett v. Enfield London Borough Council, the court was given the daunting task of deciding whether to allow an appeal from a dismissal. In usual circumstances, this task is not so daunting. However, in this case the plaintiff was a child suing the local authorities for negligently caring for him while in their custody. The plaintiff filed suit after leaving the custody of the local authorities at the age of eighteen. Plaintiff had been in their custody since the age of ten months. During his childhood, he was placed in nine different settings ranging from foster homes to group therapy homes. Additionally, he had five different social care workers and in one year, he had no social worker.

Plaintiff alleged that the local authorities breached their duty to act as a parent. In particular, he alleged:

... [they] negligently failed to safeguard his welfare, negligently made two placements with foster parents, moved him six times to different residential homes between 1976 and 1988, failed to make arrangements for his adoption, failed to provide him with proper social workers, failed to provide appropriate psychiatric advice and failed to make proper arrangements to reunite him with his mother.

The plaintiff claimed that these alleged breaches of duty are the cause of his severe psychiatric problems, which caused him to injure himself and led to his abuse of alcohol. Furthermore, the plaintiff claimed that both a statutory and common law breach of duty occurred. The district court judge dismissed the case. In deciding whether to allow the appeal, the House of Lords considered the impact that holding public officials liable for institutional neglect would have on public policy. Ultimately, the court granted the appeal.

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71. Id. at 193.
72. Id.
73. Id. at 201.
74. Id.
75. Barrett, 3 All ER 193 at 201.
76. Id. at 196.
77. Id.
78. Id.
79. Barrett, 3 All ER 193 at 196.
Citing to Lord Woolf in *X and ors (minors) v. Bedfordshire CC* the court noted:

"[T]hat to hold a local authority or its agents liable in cases such as the present would be to encourage a 'safety first' approach by social workers which would be detrimental to children in care as a whole, i.e. it would be bad public policy."  

This statement, provides great insight into the policy ideas behind the United Kingdom’s child protection laws.

The statement made by Lord Woolf implies that the court’s first concern is to keep family units intact. If the United Kingdom held state officials liable for negligence in the care of their dependent children, it would likely lead to a transition in policy. Rather than concentrating on keeping family units intact, case workers would remove more children for fear of being liable if these children were subsequently harmed. Alternatively, the goal of Florida's children’s social services statute changed to “safety first” after numerous allegations of children being left in abusive or neglectful homes. This switch in policy represents one of the causes of Florida’s overcrowded foster care system. Deciding which of the two evils is the lesser is a futile endeavor. The problems with leaving a child in an abusive home, and hoping that counseling and rehabilitative services will help are obvious. Many times those services are rejected by the parents or are simply ineffective. However, removing a child and submitting him to state care could be equally traumatic. As illustrated by the above case law, the United Kingdom experienced similar shortcomings with their children’s social services.

To alleviate some of the child social services problems prevalent in the United Kingdom, Parliament instituted its first national standards for foster care. The impetus for setting the standards was the murder of a thirteen-year-old child by her foster father. These new standards strive to provide the best quality care possible to the United Kingdom’s foster children. For example, these standards aim to match children with the most appropriate foster family, improve education for foster care children, provide better training for foster

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80. *Id.*


82. *Broward County, Fla. Grand Jury, supra note 2, at 10.*

83. *UK Government: First National Standards for Foster Care, M2 Presswire, June 22, 1999.*


85. *Id.*
care workers, provide support and supervision, and accept only the most qualified candidates to work in the foster care system.\footnote{86}{Id.}

To ensure meeting these goals, the United Kingdom included in its national standards a law requiring local authorities to run police checks on all potential foster care workers.\footnote{87}{David Brindle, Councils Urged To Ver Foster Families, The Guardian (England), June 22, 1999.} This applies to any member of a foster family who is over the age of ten. By the year 2001, "[a]dults should have to account for all time since leaving school, including paid employment, voluntary and leisure activities, and should provide a chronological record of all places of residence."\footnote{88}{Doug Beazley, Report Says Kids Placed In Marginal Foster Homes, The Edmonton Sun (Canada) at 8, August 7, 1999.} If the applicant cannot provide the information, he or she will be precluded from being a foster care provider.

The United Kingdom's enactment of national foster care standards represents a step in the right direction. Implementing stricter standards for foster care will ensure a more qualified population of foster care providers. While these stricter standards seek to protect the best interests of the child, problems such as the overcrowding of approved foster homes may result. To counter this problem, efforts should be made to increase recruitment of competent foster care providers.

B. Canada

Inadequate child social services epitomize a global problem. Like the United Kingdom, Canada suffers from its own problems with its foster care system. Alberta, Canada, represents another area which felt the effects of a poorly funded foster care system.\footnote{89}{Id.} Due to the lack of economic support from the government, Alberta was forced to send its most vulnerable children to live with families not equipped to handle them.\footnote{90}{Id.}

Many children benefiting from social services have severe psychological problems and desperately need rehabilitative services. This holds true in the United States as well as in Alberta, Canada. Often foster parents are unable to handle these types of problems, due to the lack of adequate training provided to them. Ultimately, children coping with serious psychological trauma are branded as trouble kids merely because they did not receive the appropriate social services, such as early intervention. By the time they are placed into foster care, these problems are difficult to overcome by their inexperienced, or
improperly trained foster parents. Geoff Sherrott gives an apt description of a typical foster child’s experience:

A child placed in a foster home enters into a setting that on its face appears to be intended to replace her family. This natural assumption is reinforced by the lack of any other apparent role for the foster parents; clearly they are not intended to help her deal with the original abuse or its long-term effect, as foster parents are neither expected nor required to have any specialized education or training. Yet, if any problems arise between the child and her foster family, a scenario not difficult to imagine, given both the harm that has been inflicted on her and the foster parents’ lack of training she is moved to another foster home.\(^9^1\)

Alberta experienced such problems. Government officials, foster parents, and children’s rights advocates blamed the system’s restricted budget for social service inadequacies. Trish Brady, President of the Edmonton and District Foster Family Association, stated that “very often these kids suffer mental illness, drug abuse, [and] memories of child abuse. It takes training to deal with these children, and a lot of foster parents are covering the cost of training themselves.”\(^9^2\)

Alberta recognized its faults and began implementing new programs that address the systems shortcomings. On April 22, 1999 the Sun Country Child and Family Services Regional Authority took over the role of Alberta Family and Social Services.\(^9^3\) It took two years of planning to insure a smooth transition.\(^9^4\) The major change is theoretical. Sun Country will use a “grassroots approach to service delivery.”\(^9^5\) This agency will provide such services as screening and investigation, foster care, residential resources, adoption, disabled children’s services, childcare services, family violence services, and education. Additionally, it will provide family court intervention, prevention, and early intervention programs.\(^9^6\) Alberta hopes that its community-based approach will resolve some of the important issues currently affecting child social services.

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92. *Id.*
94. *Id.*
95. *Id.*
96. *Id.*
V. CONCLUSION

As Florida, particularly Broward County, prepares to alter the agency that handles children’s social welfare, it is important that local officials examine the successes from other parts of the world. While the problems in the United States’ are not identical to those identified in the United Kingdom and in Canada; many similarities exist. Like Alberta, Canada, we are suffering with the effects of an under-funded foster care program. Similar to the United Kingdom, we are experiencing problems with the quality of our foster care providers. A closer examination of the programs implemented by these countries may provide the legal practitioner with valuable knowledge as to improving the Untied State’s system. For example, we should examine whether a set of statewide foster care standards, similar to the type employed in the United Kingdom (which include setting high standards for foster care providers) would address the problems currently affecting our system. Additionally, we should look to the Canadian system of privatization, which uses a grassroots approach to see if that would adequately fulfill the United State’s needs. Another important issue to address when designing a new system relates to adopting an approach that will utilize caseworkers most efficiently. Perhaps curing the current low pay scale, and insuring that no employee feels overworked represents two essential steps that must be taken to provide foster children with the care they need and deserve.

The nurturing of the world’s children cannot be left to an under-funded, over-stressed bureaucracy. It is essential that we take a stand and insist on the implementation of more effective programs that are designed to provide children with optimum care.
1999 PHILIP C. JESSUP
INTERNATIONAL LAW MOOT COURT
COMPETITION

Case concerning Cultural Identity and Intellectual Property

THE REPUBLIC OF BRETORIA
APPLICANT
V.
THE KINGDOM OF PAGONIA
RESPONDENT

SPRING TERM 1999
On Submission to the International Court of Justice

BRIEF FOR APPLICANT
MEMORIAL FOR APPLICANT

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I. STATEMENT OF JURISDICTION

The Government of the Republic of Bretoria and the Kingdom of Pagonia have agreed to submit by Special Agreement the present controversy for final solution to the International Court of Justice pursuant to Article 36, paragraph 1 of the Statute of the International Court of Justice, in relation to Article 40, paragraph 1, of the Statute of the Court. In accordance with Article 36, the jurisdiction of the Court comprises all cases which the parties refer to it. Neither party has entered any reservation.
II. QUESTIONS PRESENTED TO THE COURT

1. Whether Civil Law No. 51 constitutes an expropriation.

2. Whether customary international law requires a minimum standard for the treatment of aliens when the State expropriates their property.

3. Whether Civil Law No. 51 lacks a public purpose or is discriminatory, and therefore constitutes an unlawful expropriation.

4. Whether appropriate compensation as the equivalent of full compensation should be regarded as customary international law.

5. Whether the fair market value method is required as the most recommendable standard under international law.

6. Whether the principle of non-discrimination on grounds of national origin, translated in economic terms as national treatment, has been crystallized into customary international law, or should at least be seen as a recently emerged principle of international law.


8. Whether free trade should allow a cultural exception.

9. Whether a lack of development may be invoked to justify the abridgment of internationally recognized human rights.

10. Whether the PCC Regulation constitutes an expropriation.

11. Whether The PCC is competent to enact the PCC Regulation.

12. Whether a mere regulation without a sanction can be the invoked as force majeure.

13. Whether international law requires a minimum standard of copyright protection.

14. Whether the afforded protection to copyright owners by Pagonia is sufficient under international law.

15. Whether the protection of intellectual property rights by Pagonia is discriminatory.
III. SUMMARY OF THE PLEADINGS

Applicant respectfully holds that Pagonian Civil Law No. 51 and its implementing Acts: the Regulation of the Pagonian Communication Commission and the Resolution of the Minister of Culture, are illegal under international law. Furthermore, the protection afforded to copyright owners by Pagonia is insufficient under international law. Applicant requests compensation for the losses suffered by its citizens as a result of these Acts and the copyright infringements.

Although Pagonia is not a member of the GATT, the WTO, WIPO, the Berne Convention, and other international agreements or treaties, except for the UN Charter and the Vienna Convention on the Law of Treaties, Applicant submits that many issues in the present case are in the realm of customary international law. The customary rules governing this dispute are binding upon Pagonia in accordance with article 38 of the Vienna Convention on the Law of Treaties.

As to the first claim, Civil Law No. 51 stipulates that "foreign ownership of a regulated entity shall be prohibited". Expropriation of alien property is allowed under international customary law if a minimum standard is fulfilled. The requirements for the minimum standard are not met in the present case. First, Civil Law No. 51 lacks a public purpose. Second, there is discrimination between foreigners and nationals, as only foreigners are prohibited to hold a majority interest in the Pagonian cultural industries. In addition, the law creates a discrimination amongst foreigners, as overseas Pagonians are not citizens, but are excluded from the strict regime of Civil Law No.51. Third, the compensation for expropriation is not appropriate. The only appropriate compensation in accordance with customary international law is full compensation. Full compensation is to be calculated
according to the fair market value of a going concern. Therefore, Bretoria argues that Civil Law No.51 is an unlawful expropriation under international law, and that compensation is accordingly payable to Bretoria.

As to the second claim, the Regulation of the Pagonian Communication Commission and the Resolution of the Minister of Culture are contrary to international law, since they create a preference for goods and services produced and sold in Pagonia. The Acts run counter to the principle of non-discrimination between nationals and aliens, translated in economic terms as national treatment. In addition, the Acts are in violation of the Principle of Free Flow of Information, which is considered a basic human right and a rule of customary international law. These violations of international law cannot be justified by the cultural argument, invoked by Pagonia. On the contrary, the Acts seem to be inspired by economic rather than cultural purposes. The Acts are indeed not effective in preserving Pagonian Culture, and Bretoria submits that free trade is one of the best ways to foster a nation's cultural identity. At any rate, the protection of cultural identity cannot be invoked to deny fundamental human rights. Finally the PCC Regulation constitutes an unlawful expropriation and does not provide for any sanction. Therefore, force majeure cannot be invoked to justify the breach of contracts. For all these reasons compensation is due to Bretoria.

As to the third claim, the Kingdom of Pagonia does not provide effective copyright protection to foreign copyright owners, as required by the customary standards existing in international law. Additionally, in one third of Pagonia's regions there is a clear violation of the principle of non-discrimination on grounds of nationality by the judicial entities. Therefore, Applicant requests compensation as well as assurances and guarantees of non-repetition of the copyright infringements in Pagonia's underground markets.
IV. STATEMENT OF FACTS

Applicant, the Republic of Bretoria ("Bretoria") is a developed nation with the largest entertainment industry in the world. Bretoria has furthermore demonstrated an interest in foreign investment, particularly in the cultural sector of Pagonia.

Respondent, the Kingdom of Pagonia ("Pagonia") can be characterized as a developing country. The vast majority of its population is rural and uneducated. Until 1975 Pagonia was ruled by a totalitarian regime. The 1975 revolution overthrew this regime and established a new government by democratic elections. The political change had great effect in the social and economic field: society moved rapidly towards an overall liberalization of the country. The negative side-effects of this evolution were, amongst others, the creation of an underground market for unlicensed copies of foreign language audio and videocassettes. A WIPO Panel concluded that this resulted in a $100 million losses in revenue a year, of which 30% would have gone to Bretorians. These copyright infringements lack specific sanctioning in Pagonian law.

After the revolution, Bretorian companies began to invest substantially in Pagonian cultural industries. In fact, many Bretorian media distributors concluded contracts with the four Pagonian television networks for the airing of television programs and films, and Bretorian publishers started selling Bretorian periodicals directly to retail establishments in Pagonia.

In 1988 Ms. Crispell, a native-born Pagonian citizen founded the Pagonian Cultural Watch Group in order to promote the "glorious culture of Pagonia". She acquired a majority interest in a publishing company, engaged solely in the publication of Pagonian language literature. Finally, she became a member of the Pagonian Parliament and under her initiative,
Civil Law No. 51 was adopted by the Pagonian Parliament. It is precisely this law which has considerable consequences for Bretorian companies. The law provides that non-Pagonians shall not have a majority interest in commercial entities providing goods and/or services in the cultural sector of the Pagonian economy. Non-Pagonians who do must divest themselves of that interest within 90 days upon the effective date of the law. After that 90-day period the Government of Pagonia acquired the majority interests remaining in the hands of foreign investors and auctioned those interests off to bidders of Pagonian nationality.

Shortly after the Law came into force, the Pagonian Communication Commission adopted a regulation pursuant to Civil Law No. 51 which provided for a minimum Pagonian content of 75% in radio and television broadcasts. As a result, the contracts between the Pagonian TV networks and the Bretorian media distributors were canceled without any compensation for the Bretorians on the grounds of the doctrine of force majeure.

Finally, the Minister of Culture adopted a resolution requiring that foreign language periodicals only be sold in bilingual versions. This Resolution applies only to foreign publishers. Benjamin Publications, a large Bretorian publisher of periodicals affected by the resolution, approached the Bretorian Government and requested an official protest against this policy. At the same time the Bretorian Association of Copyright Owners complained to the government about the uncontrolled copyright infringements occurring in Pagonia. At this point the Republic of Bretoria decided to contact the Government of Pagonia with a view to solving the problems facing Bretorian citizens in their dealings with Pagonians.

In order to resolve the dispute in a neutral manner, both States have decided to submit the dispute to the International Court of Justice.
V. PLEADINGS

Applicant respectfully requests that this Honourable Court

1. Declare Civil Law No. 51 illegal under international law, and order Pagonia to compensate Bretoria for the losses suffered by its citizens as a result of this act

1.1. Civil Law No. 51 is illegal under international law

1.1.1. Civil Law No. 51 constitutes an expropriation of alien property

Expropriation of alien property is described as the compulsory taking of property of foreign private persons by a State. Civil Law No. 51 constitutes such a taking. Indeed, an individual may be deprived of his property by the transfer of the title directly to the state (article 2e), but also by a forced sale (article 2d). Moreover, an expropriation may extend to any right which can be the object of a commercial transaction, i.e., freely sold and bought, and thus having a commercial value. This includes shares in companies.

Customary international law has laid down a minimum standard for the treatment of aliens which allows the expropriation of alien property only if it is for a public purpose, if it is non-discriminatory and if an appropriate compensation is paid. None of these

1 R.WALLACE, International Law, 1997, p.184
3 Amoco case, 15 Iran-USCTR, p.189(1987)
6 Chorzów Factory, 1926 PCIJ Publ., Series A. No. 7 (1926), p. 22; Chilean Copper Case, 12 ILM, p. 275-277 (1973)
requirements are satisfied by Civil Law No. 51.

1.1.2. Lack of public purpose

Expropriations in which foreign assets are taken for anything else than a public purpose are unlawful under international law. In the present case, the motive behind the Act is one of commercial interest and not one of "preservation of culture". The financial self-interest of Miss Crispell seems to have had a firm hand in the drafting of Civil Law No. 51. A valid public purpose cannot consist of purely financial motives. Besides, it is extremely hard to define culture, let alone to preserve or promote it. Regardless of this difficulty, Applicant questions to what extent Pagonian owned businesses will want to abandon the laws of supply and demand for the sake of their culture.

1.1.3. Discrimination

Civil Law No. 51 prohibits solely non-Pagonian natural or legal persons from holding a majority interest in the Pagonian cultural sector. If alien property is expropriated, while the property of nationals remains unaffected, then that act is discriminatory. Moreover, there is a discrimination between foreigners since overseas Pagonians, as non citizens and thus foreigners, still have the right to acquire a majority interest in the cultural sector under Civil

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Law No.51. However, it is a well settled rule of customary international law that discrimination in the field of expropriation is unlawful. If this Honourable Court would nonetheless not consider non-discrimination to be an absolute requirement, Applicant submits that differentiation should at least be reasonably related to the public purpose. As outlined above, Applicant contests Respondent's public purpose.

1.1.4. Inappropriate compensation

The only appropriate compensation for the present expropriation is full compensation, i.e. the full value of the property taken. Applicant asserts that this compensation standard is part of international customary law.

State practice. United Nations General Assembly Resolution No. 1803 of 1962 declares that in case of expropriation of foreign property an appropriate compensation shall be paid in accordance with international law. According to extensive judicial and arbitral practice and legal scholars, appropriate compensation as defined in this GA Resolution is the equivalent of full compensation, at least as a starting point. General Assembly Resolutions

Foreign Property', 35 AJIL (1941), p.249.

11 BP case, 53 ILR 297, p.329 (1973); INA Corporation case, 8 Iran-USCTR, p.378 (1985); J.H.HERZ, l.c., p.249; R.HIGGINS, l.c., p.298.

12 Amoco case, 15 Iran-USCTR, p.189 (1987); O.SCHACHTER, o.c., p.319.


14 Sedco case, 9 Iran-USCTR, p.204 (1987); AIG case, 4 Iran-USCTR p.96, 105 (1983)

that are adopted with a near unanimous vote are considered part of state practice.\textsuperscript{16} GA Resolution No. 1803 had the full support of both developed and developing countries. It was overwhelmingly adopted by 87 votes to 2, with 12 abstentions.\textsuperscript{17} The general practice is emphasized by the fact that a considerable number of recipients of foreign capital are willing to enter into treaties for the protection of investments which commonly contain a provision for the payment of full compensation.\textsuperscript{18}

The adoption of GA Resolution No. 3281 of 1974\textsuperscript{19} has in no way disturbed this uniform and long\textsuperscript{20} practice since it can only be regarded as a \textit{de lege ferenda} formulation.\textsuperscript{21} The view expressed by GA Resolution No.3281 cannot at all be accepted as an expression of \textit{opinio iuris} since it runs counter both to the interpretation given by some leading supporters of this Resolution\textsuperscript{22} and to the position taken by many of the developed countries.\textsuperscript{23} Moreover,

\begin{itemize}
\item \textsuperscript{17} D.J.\textsc{Harris}, \textit{Cases and Materials on International Law}, 1998, p.549; A.\textsc{Mouri}, \textit{o.c.}, 1994, p.360.
\item \textsuperscript{18} I.\textsc{Brownlie}, \textit{o.c.}, p.545; B.\textsc{Claggett}, 'Just Compensation in International law: The issues before the Iran-United States Claims Tribunal', \textit{4 Valuation} (1987), pp.71-73
\item \textsuperscript{19} Charter of Economic Rights and Duties of States, General Assembly Resolution No. 3281 (XXIX) of 12 December 1974, \textit{14 ILM} (1975), p.251
\item \textsuperscript{20} Chorzów Factory case, \textit{PCIJ Publ}, Series A, (1928) No 13, p.47; Hull Formula (U.S. Secretary Cordell Hull), in G.\textsc{Hackworth}, \textit{Digest of International Law}, Vol. 3, 1942, pp.655-665
\item \textsuperscript{21} Texaco case, \textit{17 ILM}, p.389 (1977); Sedco case, \textit{9 Iran-USCTR.}, p.186 (1987); C.\textsc{Tomuschat}, 'Die Charta der wirtschaftlichen Rechte und Pflichten der Staaten', Vol. 36 \textit{ZaoRV} (1976), p.470
\item \textsuperscript{22} J.\textsc{Castaneda}, 'La Charte des droits et devoirs économiques des Etats', \textit{Ann. fr. de droit int.} (1974), p.54
\end{itemize}
judicial and arbitral decisions have continued to rely on the standard as set out in Resolution No. 1803 of 1962.24

*Opinio iuris.* The corpus of international decisions involving expropriation is much greater than that involving any other issue of international economic law. By expressly agreeing to have these disputes determined *by law*, states have shown a persuasive evidence of a genuine *opinio iuris.*25 The judicial and arbitral decisions relied on herein reflect the very great confidence of States in the rule of full compensation.26 Furthermore, Third World countries have increasingly recognized foreign investment as vital to their economic development. A partial compensation could only be expected to deter such investment.27

One may argue that large-scale expropriations might create some problems for a State's ability to pay full compensation, by causing "an overwhelming financial burden".28 This is not so in the case at hand. The burden of full compensation will not be borne in its entirety by the Pagonian State alone. The Pagonian buyers of the expropriated interests will automatically pay a part of the total sum. The Pagonian State only has to provide the surplus in order to grant Bretorian owners a full compensation. Arbitrators indeed are not likely to

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23 O. SCHACHTER, *o.c.*, p.322


25 P.M. NORTON, *l.c.*, pp.503-505; D.J. HARRIS, *o.c.*, p.60.


reduce the amount of an award because of the economic effects on the expropriating State.\textsuperscript{39}

Valuation. The fair market value method is recognized as the most recommendable standard.\textsuperscript{30} This valuation method can best be defined as the price that a willing buyer and a willing seller would reasonably have agreed on as fair, at the time of the taking, and absent any coercion of either party.\textsuperscript{31} Applied to the instant case, this would be the amount which a willing buyer would have paid a willing seller for the shares of a going concern.\textsuperscript{32} A business enterprise is a "going concern" when, before the expropriation, it has reached a certain ability to earn revenues, and when it has the prospect of continuing that status by keeping such an ability in the future.\textsuperscript{33} The entertainment industry is a typical "booming sector" in Pagonia. Furthermore, it is beyond dispute that there was a fair market until the day of the taking. Besides, this fair market does not have to exist in reality, but might also be purely hypothetical.\textsuperscript{34}

The value of a going concern encompasses not only the physical and financial assets of the undertaking, but also intangible valuables which contribute to its earning power, such as contractual rights, goodwill and commercial prospects.\textsuperscript{35} Therefore, Bretoria cannot possibly accept the offered compensation, which was calculated on the basis of the net book value

\textsuperscript{39} P.M.NORTON, \textit{I.c.}, p.490

\textsuperscript{30} C.BROWER & J.BRUESCHKE, \textit{The Iran-United States Claims Tribunal}, 1998, p.539

\textsuperscript{31} \textit{Sedco} case, 9 \textit{Iran-USCTR}, p.182

\textsuperscript{32} \textit{INA Corporation} case, 8 \textit{Iran-US CTR}, p.380 (1985)

\textsuperscript{33} \textit{Amoco} case, 15 \textit{Iran-USCTR}, pp.250 & 270 (1987)

\textsuperscript{34} \textit{Ebrahimi} case, Vol.7 No. 4 \textit{WTAM} (1995), pp.205-299 (1994)

\textsuperscript{35} \textit{Amoco} case, 15 \textit{Iran-USCTR}, p.264 (1987)
method. Many scholars and judicial and arbitral decisions have rejected the use of this method to value expropriated enterprises. Therefore, the value of the expropriated shares equals the fair market value of the "regulated entities" valuated as a going concern in proportion to the percentage of the expropriated shares in the going concern.

1.2. Compensation

Summarizing, an expropriation is unlawful if it is not for a public purpose and if it is discriminatory. As these conditions are fulfilled in the present case Applicant claims the restitution in kind or if impossible the fair market value of the undertaking plus the profits that would have been made had the taking not occurred, until the date of the judgment.

Subsidiary, if this Honourable Court were to consider the taking to be lawful, Applicant maintains that still an appropriate compensation i.e. the fair market value of the undertaking at the time of the dispossession, is due. Since Bretorian citizens were only accorded the net book value or a lower price during the first 90 days, Applicant respectfully submits that the remainder is still to be paid.

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39 Amoco Case, 15 Iran-USCTR, p.189§193 (1987)

40 Amoco Case, 15 Iran-USCTR, p.189§197 (1987)
2. Declare the Acts taken in implementing Civil Law No. 51 illegal under international law, and Order Pagonia to compensate Bretorian citizens for the losses suffered as a result of these Acts

2.1 The Acts taken in implementing Civil Law No. 51 are contrary to international law, insofar as they create a preference for goods and services produced and sold in Pagonia

Recent decades have shown an enormous liberalization of international trade. The primary multilateral trade agreement governing more than 80 per cent of world trade is the GATT.\(^{41}\) This agreement has been incorporated in the WTO in 1995 in order to help trade flow as freely as possible.\(^{42}\) As of December 20, 1998, 133 countries were members of the WTO, 31 countries have applied for membership, and among these (potential) members many developing countries.\(^{43}\) Also, Pagonia itself is taking a stand on the international scene in favor of free trade, since it is making efforts to become a member of the Regional Association of Trading States (RATS), a union of countries moving towards the establishment of a free-trade area. Indeed, many free trade agreements have been and are being entered into between nations and international organizations.\(^ {44}\) This state practice has

\(^{41}\) J.E.HARDERS, \textit{i.e.}, p.426.


been strongly supported by the UN, stating that multilateral trade liberalization and regional economic integration processes are important prerequisites for economic growth and development for all countries. It is widely agreed today that liberalizing trade enhances welfare, attracts foreign investment, brings new jobs and that self-interested national economic policies often result in instability and conflict in international relations.

The principle of non-discrimination based on national origin is one of the basic pillars of the international economic order. This principle is confirmed by the UN Charter. Although it only mentions the non-discrimination principle as to race, sex, language and religion, these grounds do not form an exhaustive list. This is supported by the addition of other grounds, such as national origin in article 2 of the Universal Declaration of Human Rights (UDHR) and in other human rights instruments. Moreover, article 26 of the Vienna Convention on the Law of Treaties, to which both Bretoria and Pagonia are parties, stipulates that every treaty has to be performed in good faith, i.e. not only according to its letter, but

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49 Artt. 2 and 26 ICCPR; Art. 2(2) ICESCR; Art. 14 ECHR; Art. 2 African Charter; Art. 1.1 American Convention.
also according to its spirit. As this Honourable Court has recognized in its Namibia
Advisory Opinion a distinction based on grounds of national origin which constitutes a
denial of fundamental human rights, is a flagrant violation of the purposes and principles of
the Charter. Universal human rights are accorded to everyone, including to foreigners,
except when they are explicitly excluded. It is widely agreed that the protection against
discrimination, granted under the UDHR has become part of international customary law.

Since the principle of non-discrimination is applicable to every sector of human
interaction, Applicant submits that this includes the sector of international trade. Trade
discrimination disturbs the development of international trade and economic growth and
injures the friendly relations between States. This principle of non-discrimination between
nationals and aliens, translated in economic terms as national treatment, has been repeated in
bilateral and multilateral trade agreements throughout the world. Therefore, it has been
crystallized into customary international law, or should at least be seen as a recently emerged

51 South West Africa/ Namibia (advisory opinion), ICJ, ICJ reports, p.45§131 (1971)
53 J.DELBRÜCK, l.c., p.420; W.McKEAN., o.c., p.276.
55 K.HYDER, Equality of Treatment and Trade Discrimination in International Law, 1968,
pp.4-7.
56 H.VAN HOUTTE, The Law of International Trade, 1995, p.6; Art.3 GATT; Art.1703
NAFTA; Art.7 MERCOSUR, Art.17 CEFTA, Art.4 AFTA; See also OECD, Declaration by
the Governments of the OECD Member Countries of 21 June 1976 on International
principle of international law.\textsuperscript{57}

Acts such as the PCC Regulation have the effect of a quantitative restriction.\textsuperscript{58} The quota also affects the offering for sale, the sale and the purchase of foreign television programming in comparison with domestic programming. This is apparent from the fact that Pagonian television networks have terminated en masse the existing television contracts with Bretorians.

Since the Minister’s Resolution is not applicable to domestic publishers, these persons have strictly speaking the opportunity to publish in the Bretorian language only, which could be an economic advantage. The demand of foreign language material in Pagonia is indeed quite high, and due to the bilingual requirement, the costs of foreign publishers will increase dramatically in comparison with those of the Pagonian publishers.

\textbf{2.2. In addition, the Acts taken in implementing Civil Law No. 51 violate the Principle of Free Flow of Information}

The Acts are in conflict with the principle of the free flow of information, because they violate the freedom of expression and the right to receive information.

The Universal Declaration of Human Rights was the first international instrument to recognize the freedom of expression. This right is deemed to include the “freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless of frontiers” and is generally accepted to cover the press and


\textsuperscript{58} J.D.DONALDSON, “‘Television without Frontiers”: the Continuing Tension between Liberal Free Trade and European Cultural Integrity’, 20 \textit{FILJ} (1996), pp.119-120.
broadcasting. The Declaration was enacted by the General Assembly of the UN on December 10, 1948. Of the 57 members, 48 voted in favor, none voted against, seven abstained, two were absent. At the time of adoption of the UDHR only few developing countries were members of the UN, but those countries did not vote against or abstain from voting on the Declaration. Quite a number of them even participated in the drafting process.

Although it is widely recognized that the Declaration originally did not intend to create binding obligations for member-states, the Declaration may today be regarded as reflecting international customary law.

The UN General Assembly reaffirmed its commitment to the free exchange of information and ideas by enacting the ICESCR and the ICCPR. This principle was further repeated by the ECHR, the CCSE (Helsinki Accords, Copenhagen Document, Charter of Paris), the African Charter and the American Convention. Many scholars and judges have furthermore shown an unqualified commitment to the idea of an unregulated "market place

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60 B. SIMMA (ed.), o.c., p. 782.

61 ibidem, p. 783.


63 Article 15 ICESC; Article 19 ICCPR.

64 Article 10 ECHR; Article 9 African Charter; Article 13 American Convention.
of ideas". The principle of free flow of information has thus achieved the status of a universally recognized human right, and may be enforceable and binding as customary international law. Customary law is always applicable to non-signatory states pursuant to Article 38 Vienna Convention on the Law of Treaties.

Regulations such as the PCC, on its face, violate the free flow of information. Restrictions of this principle generally require a lawful act of the State and must be necessary, implying a rational relationship between the restriction and the purported reason for the same. Applicant first of all maintains that the Regulation should have been adopted by the Minister of Culture, who is the competent power to promote Pagonian culture in the cultural sector of the Pagonian economy. Furthermore, the Regulation is not necessary to protect Pagonian culture, as will be established below. Conversely, there are other means which would protect Pagonian cultural identity more effectively. Finally, it is highly questionable whether the quotas constitute a proportionate exception. Bretoria maintains that a lower quota, applied not just during prime time, but during the 24-hour day would have a

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68 Article 29(2) UDHR; Article 19(3) CP Covenant; Article 10(2) ECHR.
better chance of meeting the standard of proportionality.69

The Resolution of the Minister of Culture clearly violates the freedom of the press. This view is supported by the French Constitutional Court, which ruled that an identical French law70 violated the freedom of expression.71 Furthermore, the Resolution infringes upon the freedom to receive information: Bretorian publishers will have to balance the costs of translating their magazines into Pagonian, and the revenues they will earn from selling those magazines in Pagonia. As Pagonia is a small country with an estimated population of 10 million, and relatively few educated people, it is highly likely that the majority of Bretorian publishers will not undertake the difficulties of publishing bilingual magazines, but will simply eliminate Pagonia as an exporting partner.

2.3 The Cultural Argument is not a valid exception to free trade and the national treatment requirement, nor a justification for violating the principle of free flow of information

Applicant submits that, notwithstanding the general importance of culture, its preservation and development, these factors do not in the present case justify the conduct of Pagonia. The Acts seem to be inspired by economic rather than cultural motivations.

First, the Acts are not effective in encouraging and safeguarding Pagonian culture. National culture and the cultural content of audiovisual goods and services are so difficult to


measure, that regulations restricting the content based on the national origin of audiovisual material, provide only dubious cultural benefits. The PCC Regulation requires 75% of the content of programming aired by Pagonian broadcasters during prime time listening and viewing hours to be Pagonian in origin. Hence, the quota targets the origin of the program and not the cultural merit or social acceptability. Moreover, piracy and new technologies such as satellites are likely to undermine the alleged cultural effect of the PCC Regulation. With respect to the Resolution of the Minister of Culture, the “preservation of the Pagonian language” is not the rationale behind the law. This is obvious from the fact that Pagonian publishers still have the opportunity to publish solely in a foreign language, thus rendering the purpose of the Act meaningless.

Second, Applicant asserts that free trade in cultural products may be considered one of the best ways to foster a nation’s cultural identity. Governments have at times viewed free trade as a necessary condition of cultural development. It is even arguable that such trends will build stronger bridges for mutual understanding and world peace. Investment is


75 UNESCO Agreement on the Importation of Educational, Scientific and Cultural Material (“Florence Agreement”), UNTS 1734.

76 M.JUSSAWALLA, l.c., p.387.
another means through which a country's cultural and economic development is stimulated. Many governments therefore encourage a policy of foreign investment, by creating a climate of stability where contractual obligations are honored.\textsuperscript{77} Pagonian legislation has precisely the adverse effect.

Finally, even if the Court were persuaded by the Pagonian cultural argument, Bretoria strongly maintains that the protection of cultural identity in the name of sovereignty does not justify a denial of human rights, \textit{in casu} the violation of the free flow of information.\textsuperscript{78} The UN World Conference on Human Rights in 1993 decided by consensus that "the lack of development may not be invoked to justify the abridgment of internationally recognized human rights".\textsuperscript{79}

2.4 The PCC Regulation constitutes an unlawful expropriation

There is a virtual consensus that property encompasses contractual rights. This is confirmed 'by general principles of law,'\textsuperscript{80} arbitral and judicial decisions\textsuperscript{81}, leading text

\begin{itemize}
\item \textsuperscript{77} I.SHIHATA, 'The Role of Business Development', 20 \textit{FILJ}(1997), p.1577.
\item \textsuperscript{81} Chorzów Factory, PCIJ Publ. Series A, No. 7, p. 307 (1926); Flexi Van-leasing, Inc. v. The Government of the Islamic Republic of Iran, Award No. 54-36-1, 13 Iran-U.S. CTR, p.324.
\end{itemize}
books,\textsuperscript{82} and investment treaties.\textsuperscript{83} Consequently, an expropriation may consist of the taking of contractual rights. It is generally accepted that interference with property, while still falling short of nationalization, may amount to a taking even if no such intention is asserted or is denied.\textsuperscript{84} The intent of the Government is less important than the effect of the measures on the owner, and the form of the measures of control or interference is less important than the reality of the impact.\textsuperscript{85} The issue is fairly clear: interference which significantly deprives the owner of (the use of) his property amounts to a taking of that property. \textit{In casu} the Pagonian Government interferes to the extent that Bretorian contractors have lost their contractual rights to performance by the opposite party. The PCIJ has ruled in \textit{Chorzów factory} that a governmental decision, causing a breach of contract between private parties was considered to be an expropriation of contractual rights.\textsuperscript{86}

Furthermore, the scope of expropriation evolves in time and follows the new developments in commercial transactions. The ICSID Convention protects investments which cover not only the traditional forms but also the more novel methods of investments


\textsuperscript{83} Treaty of Amity, Economic Relations, and Consular Rights, 8 U.S.T. 899, 284, UNTS No. 4132, p.311; ICSID Convention, 17 \textit{UST} 1270, 575 UNTS 159 (1965)


\textsuperscript{86} \textit{Chorzów Factory, PCIJ Publ. Series A, No.7} (1926)
such as service contracts. Indeed, expropriated contractual rights need not necessarily be connected to the expropriation of tangible property.

Finally, Applicant stresses that this expropriation, in analogy with Civil Law No. 51, has no public purpose and that it is discriminatory. Even more, the appropriateness of the compensation does not even come into question, since not one Pagonian Shuttle of compensation has been paid.

2.5. The breach of contracts is not justified by force majeure

Force Majeure is a general principle of law recognized by most peace loving countries and confirmed by judicial and arbitral decisions. It is well settled that force majeure can be invoked only if the party breaching the contract cannot reasonably be required to expose himself to the risk of incurring the sanction provided for the compulsory regulation, here the PCC Regulation. A mere Regulation without sanction does not release the contract party of his contractual performance. The PCC regulation does not provide for a sanction. Therefore, the decisions of Pagonian courts, are unlawful under international law.


88 Amoco Case, 15 Iran-USCTR, p.159 (1987)


2.6. Compensation

Applicant claims the restitution of the cancelled contracts. Subsidiary, Applicant claims the full compensation of the losses suffered by its citizens, *i.e.* the price agreed upon for the broadcasting contracts and the lost profits and additional costs for the bilingual requirement.

3. Declare the protection afforded to copyright owners by the Kingdom of Pagonia insufficient under international law, and Order Pagonia to compensate Bretoria for the losses suffered by its citizens as a result of copyright infringements in Pagonia

3.1. Pagonia does not provide the minimum protection to copyright owners

The unauthorized copying of copyright materials for commercial purposes, in short piracy, is a common phenomenon in Pagonia. Under the general rules of international law every state has the obligation to provide proper administration of civil and criminal justice with regard to aliens, including apprehending and prosecuting those wrongfully causing injury to aliens. It is widely accepted that a state’s international responsibility is in issue if an alien’s property is looted. Denial of justice exists when a reasonable and impartial man would readily recognize the insufficiency of the activity of judicial entities. Although Pagonia is not a party to any copyright convention, Applicant submits that every state is required by

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92 WIPO (ed.), *o.c.*, 1997, p.166.


international customary law to provide effective legal protection for foreign copyright owners.

State Practice Numerous international copyright conventions show that an international framework of copyright protection has steadily developed. These conventions all contain provisions pursuant to which States are directly or indirectly obliged to provide adequate enforcement measures to protect copyrights.\textsuperscript{97} Furthermore, the provisions on sanctions for violations of copyrights should be implemented properly by the enforcement authorities.\textsuperscript{98} Intellectual property rights stimulate economic growth, increase revenues from international trade and promote private investment.\textsuperscript{99} They are an essential tool for underwriting a democratic culture.\textsuperscript{100} A majority of developed and developing States, have become party to one or more copyright conventions.\textsuperscript{101} More than half of the States party to the Rome Convention are developing countries, which is not surprising since it is in their interest to ensure protection and promotion for their rich cultural heritage.\textsuperscript{102}

\begin{flushleft}
\textsuperscript{97} Artt. 15, 16, 36 Berne Convention; Artt. I and X Universal Copyright Convention, Art. 14 WIPO Copyright Treaty; Art. 23 WIPO Performances and Phonograms Treaty; Artt. 41-61 TRIPs. See also Artt. 1701, 1702 and 1714-1720 NAFTA.

\textsuperscript{98} WIPO (ed.), o.c., pp.334-335.


\textsuperscript{101} WIPO (ed.), o.c., pp. 394, 445 and 452.

\end{flushleft}
Applicant submits that the fact that piracy may occur in some countries, is not detrimental to this general and uniform practice. As this Court ruled in the Nicaragua Case "it is sufficient that instances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule". Undoubtedly, the international framework of copyright protection has been developed in order to counter piracy in an ever more effective way.

*Opinio iuris* Applicant maintains that the state practice of adequate copyright protection is supported by the *opinio iuris* necessary to constitute a rule of customary international law. First and foremost, copyright has been accorded the status of a human right in article 27 of the Universal Declaration of Human Rights. This principle is repeated in article 15(c) of the ICESCR. Furthermore, according to article 8 of the UDHR everyone is entitled to protection by an *effective* remedy by the competent national tribunals for acts violating fundamental rights. As set out above, the UDHR is now widely accepted as a 'Magna Charta of humankind' and as customary international law. Moreover, the *opinio iuris* appears from the constant practice of UN organs such as UNESCO and WIPO. In addition, the Berne safeguard clause, laid down in the UCC in order to prohibit an exodus from the Berne Convention to the lower standard of protection of the UCC, is *not applicable* to developing countries. They are consequently allowed to choose between the Berne Convention and the

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103 Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua Case), ICJ, ICJ Reports 1986, p.98 § 186 (1986)


UCC. Nevertheless, *none* of the developing countries has opted to withdraw from the Berne Convention in favor of the UCC. Bretoria maintains that this proves the recognition of these countries that the state practice of copyright protection reflects a legal obligation.

Bretoria asserts that the provisions of the Pagonian Criminal Code and their implementation do not meet the standard of an adequate protection of foreign copyright owners as required by this rule of customary international law. Assuming the lack of a functioning unit for alleged thefts of an intangible property as well as of any records of such prosecutions, and taking into account the huge piracy problem and the complexity of piracy prosecutions, Applicant questions the effective enforcement by the judicial organs. Moreover, in one third of Pagonia’s regions there is no enforcement in favor of foreign copyright owners at all. Finally, Bretoria questions the effective possibilities to obtain compensation for piracy, which is at least equally important from the point of view of the copyright owners.  

3.2. Alternatively, the protection of copyrights by Pagonia is discriminatory

Applicant maintains that in one third of Pagonia’s regions, the provisions of the Pagonian Criminal Code for theft are effectively enforced with regard to intangible property only to protect Pagonian authors and composers. Applicant asserts that the conduct of the judicial entities in these regions violates the principle of non-discrimination on grounds of nationality. The principle of national treatment, according to which works originating in one country are to be accorded the same copyright protection abroad as granted to nationals, is

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107 Article XVII of the UCC and the Appendix Declaration Relation to Articles XVII.


109 WIPO (ed.), *o.c.*, p. 333.
one of the basic principles of the numerous copyright conventions,\textsuperscript{110} thus, supported by a general and uniform state practice. Furthermore, it is generally recognized that aliens should be entitled to equal protection of the law and equal protection against any discrimination in violation of the Universal Declaration of Human Rights.\textsuperscript{111} As outlined above, copyright is recognized as fundamental right in Article 27(2) UDHR.\textsuperscript{112} Indeed, the principle of non-discrimination on grounds of national origin is violated indeed if a distinction is made on such grounds, thereby constituting a denial of fundamental rights.\textsuperscript{113} The applicability of the principle of non-discrimination on grounds of nationality related to copyrights has recently been explicitly confirmed by the European Court of Justice.\textsuperscript{114}

The non-discrimination principle demands both equality in law and equality in fact.\textsuperscript{115} Although the latter can be excluded if different treatment is necessary, this exception has to


\textsuperscript{111} Preamble and Art. 5.c GA Resolution A/Res/40/144 of 13 December 1985, Declaration on the Human Rights of Individuals who are not Nationals of the Country in which they Live; J. DELBRÜCK, 1995, p.420


\textsuperscript{113} \textit{South West Africa/ Namibia} (advisory opinion), ICJ, \textit{ICJ rep.}, p.45 §131 (1971)


\textsuperscript{115} M.N.SHAW, \textit{o.c.}, p.214.
be objectively and reasonably justified. There is no reasonable justification why Pagonia should in reality solely protect Pagonian authors and composers, the more so since Bretorian authors and composers primarily have to seek relief in the Pagonian Courts, thereby recognizing the exclusive jurisdiction of Pagonia within Pagonian territory.

3.3 Compensation for the losses suffered by Bretorian citizens as a result of copyright infringements

Every internationally wrongful act of a State, including a violation of customary law, entails the international responsibility of a State. Although Respondent will certainly claim that the Pagonian Criminal Code provides adequate protection, the lack of effective legal protection of foreign copyright owners and the discriminatory conduct of the judiciary entails Pagonia's responsibility.

The reparation must as far as possible wipe out all the consequences of the illegal act. First and foremost, Applicant claims a compensation to the amount of the revenue lost by Bretorian copyright owners the past three years, an estimated amount of $100 million. In addition, Applicant requests assurances and guarantees of non-repetition by the set up of special enforcement units in all Pagonian regions, as well as by an non-discriminatory conduct of the prosecutors.

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116 Minority Schools in Albania, PCI Publ., Series A/B, No. 64, p.19 (1935); American Law Institute's Restatement of Foreign Relations Law, 1987, section 722 (2), comment c); O. SCHACHTER, o.c., p.316; M.N.SHAW, o.c., pp.205-206.


120 Chorzów Factory case, PCIJ Publ, Series A, (1928) No 13, p. 47.
4. Conclusion and Prayer for Relief

Applicant, the Republic of Bretoria, respectfully requests this Honourable Court:

1. to declare the acts of the Kingdom of Pagonia assertedly taken to protect Pagonian cultural identity illegal under international law, and to order Pagonia to compensate Bretoria for the losses suffered by its citizens as a result of such acts; and

2. to declare that the protection afforded to copyright owners by the Kingdom of Pagonia is insufficient under international law, and to order Pagonia to compensate Bretoria for the losses suffered by its citizens as a result of copyright infringements in Pagonia.

3. to order the payment of a simple interest and to determine the rate and the date from which it should be awarded.

Respectfully submitted,

Agents for the Applicant
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>African Charter</td>
<td>African Charter on Human and Peoples' Rights</td>
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<tr>
<td>AFTA</td>
<td>Agreement on the Common Effective Preferential Tariff Scheme for the Asean Free Trade Area</td>
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<tr>
<td>AIDI</td>
<td>Annuaire de l'Institut de Droit International</td>
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<tr>
<td>AJIL</td>
<td>American Journal of International Law</td>
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<td>American Convention</td>
<td>American Convention on Human Rights</td>
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<tr>
<td>Ann.fr.dr.int.</td>
<td>Annuaire français de droit international</td>
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<td>ArizJICL</td>
<td>Arizona Journal of International and Comparative Law</td>
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<td>Berne Convention</td>
<td>Berne Convention on the Protection of Literary and Artistic Works</td>
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<td>BYIL</td>
<td>British Yearbook of International Law</td>
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<tr>
<td>CCSE</td>
<td>Conference on Cooperation and Security in Europe</td>
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<tr>
<td>CEFTA</td>
<td>Central European Free Trade Agreement</td>
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<td>CERDS</td>
<td>Charter of Economic Rights and Duties of States</td>
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<td>CJTL</td>
<td>Columbia Journal of Transnational Law</td>
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<td>Charter of Paris</td>
<td>Conference on Security and Co Operation in Europe, Charter of Paris for a new Europe and a new era of democracy, peace and unity</td>
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<td>Copenhagen Document</td>
<td>Conference on Security and Co Operation in Europe, Document of the Copenhagen meeting of the Conference on the Human dimension</td>
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<td>Declaration</td>
<td>Universal Declaration of Human Rights</td>
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<td>Duke J.Comp.&amp;Int'l L.</td>
<td>Duke Journal of Comparative and International Law</td>
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<td>Acronym</td>
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<tr>
<td>EPIL</td>
<td>Encyclopaedia of Public International Law</td>
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<tr>
<td>EuZW</td>
<td>Europäisches Zeitschrift für Wirtschaft</td>
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<tr>
<td>ECLR</td>
<td>European Competition Law Review</td>
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<td>ECHR</td>
<td>European Convention for the protection of Human Rights and Fundamental Freedoms</td>
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<td>ECR</td>
<td>European Court Reports</td>
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<td>EJIL</td>
<td>European Journal of International Law</td>
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<td>ELR</td>
<td>European Law Review</td>
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<tr>
<td>Florence Agreement</td>
<td>UNESCO Agreement on the Importation of Educational, Scientific and Cultural Materials</td>
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<td>FILJ</td>
<td>Fordham International Law Journal</td>
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<td>GA</td>
<td>General Assembly</td>
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<td>GATT</td>
<td>General Agreement on Tariffs and Trade</td>
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<td>GYIL</td>
<td>German Yearbook of International Law</td>
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<td>HICLR</td>
<td>Hastings International and Comparative Law Review</td>
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<td>Helsinki Accords</td>
<td>Final Act Conference on Security and Co Operation in Europe</td>
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<td>ICCPR</td>
<td>International Covenant on Civil and Political Rights</td>
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<td>ICESCR</td>
<td>International Covenant on Economic, Social and Cultural Rights</td>
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<tr>
<td>ICJ Rep.</td>
<td>Reports of the International Court of Justice</td>
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<td>ICSID</td>
<td>International Center for the Settlement of Investment Disputes</td>
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*i. e.*

*id est*}

<p>| ILM      | International Legal Materials                              |</p>
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<tr>
<td>ILR</td>
<td>International Law Reports</td>
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<tr>
<td>Iran-USCTR</td>
<td>Iran-United States Claims Tribunal</td>
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<td>JDI</td>
<td>Journal de Droit International</td>
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<td>J.Int'l Arb.</td>
<td>Journal of International Arbitration</td>
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<tr>
<td>JMJCIL</td>
<td>John Marshall Journal of Computer and Information Law</td>
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<td>JWIP</td>
<td>Journal of World Intellectual Property</td>
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<td>JWTL</td>
<td>Journal of World Trade Law</td>
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<tr>
<td>Law&amp;Pol'y Int'l Bus.</td>
<td>Law and Policy in International Business</td>
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<tr>
<td>MERCOSUR</td>
<td>Treaty establishing a common market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Paraguay</td>
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<td>MJIL</td>
<td>Michigan Journal of International Law</td>
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<td>Minn.J.Global Trade</td>
<td>Minnesota Journal of Global Trade</td>
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<td>NAFTA</td>
<td>North American Free Trade Agreement</td>
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<td>NILR</td>
<td>Netherlands International Law Review</td>
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<td>OECD</td>
<td>Organization for Economic Co Operation and Development</td>
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<td>PCIJ</td>
<td>Permanent Court of International Justice</td>
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RdC  Receuil des Cours
RIAA  Reports of International Arbitral Awards
RDAI  Revue de Droit des Affaires Internationales
Rome Convention  International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Unions
Santa Clara L. Rev.  Santa Clara Law Review
The Third Channel  The Third Channel. Journal of International Communication of the International Broadcasting Society
TRIPs  Agreement on Trade-Related Aspects of Intellectual Property Rights
UCC  Universal Copyright Convention
UDHR  Universal Declaration of Human Rights
UN  United Nations
UN Charter  Charter of the United Nations
Valuation  The valuation of nationalized property
Vand.L.R.  Vanderbilt Law Review
Virg.J.Int'l L.  Virginia Journal of International Law
WIPO CNRT  WIPO Copyright and neighboring rights and treaties
WIPO Copyright Treaty  WIPO Copyright Treaty and Agreed Statements Concerning the WIPO Copyright Treaty
WIPO Performances and Phonograms Treaty  WIPO Performances and Phonograms Treaty and Agreed Statements Concerning the WIPO
<table>
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<tr>
<td>WTAM</td>
<td>World Trade and Arbitration Materials</td>
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<td>WTO</td>
<td>World Trade Organization</td>
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<td>YJIL</td>
<td>Yale Journal of International Law</td>
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<td>YLJ</td>
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<td>Za6RV</td>
<td>Zeitschrift für ausländisches Recht und Völkerrecht</td>
</tr>
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Performances and Phonograms Treaty
VII. Table of Authorities

1. Treaties and Other International Instruments


Charter of the United Nations, 1945, 892 UNTS 119


UNESCO Agreement on the importation of educational, scientific and cultural materials (Florence Agreement), 1950, UNTS 1734


Vienna Convention on the Law of Treaties, 1961, 1155 UNTS 331

Convention on the Settlement of Investment Disputes between States and Nationals of other States, 575 UNTS 159(1965)


Final Act Conference on Security and Co Operation in Europe (Helsinki Accords), 1 August 1975, 14 ILM(1975), p.1292

OECD Declaration by the Governments of the OECD Member Countries on International Investment and Multinational Enterprises, 1976, http://www.oecd.org


Treaty establishing a common market between the Argentine Republic, the Federative Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Paraguay (MERCOSUR), 1991, 30 ILM(1991), p.1041


Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs), 1994, WIPO CNRT, Vol. III

WIPO Copyright Treaty and Agreed Statements concerning the WIPO Copyright Treaty, 1996, WIPO CNRT, Vol. III


2. UN Resolutions and Documents

General Assembly Resolution 1803 (XVII) of 14 December 1962, GAOR, 17th Session, Suppl. 17(1962), p.15


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Cases before the Permanent Court of International Justice

Chorzów Factory, PCIJ Publ., Ser. A. No. 7(1926)

Chorzów Factory, PCIJ Publ., Ser. A. No. 13(1928)

Minority Schools in Albania, PCIJ Publ., Series A/B, No. 64, p 19 (1935)

Cases before the International Court of Justice

Advisory Opinion on Nuclear Weapons, 35 ILM, p.809§70 (1997)

Barcelona Traction Light and Power Company, ICJ Reports, p.106(1970)

Case concerning Military and Paramilitary Activities in and against Nicaragua (Nicaragua Case), ICJ Reports, p.14§186(1986)

North Sea Continental Shelf Cases, ICJ Reports, p.3§71(1969)

South West Africa/Namibia (advisory opinion), ICJ reports, 1971, p.16

Arbitral Awards

Abrams vs. US, 250 U.S., p.630, dissenting opinion of Holmes J,(1919)


Ananconda-Iran, Inc. and The Government of the Islamic Republic of Iran, Iran-USCTR, p.199(1986)

Blount Brothers Corp. and the Government of the Islamic Republic of Iran, Award No. 215-52-1, 10 Iran-USCTR, p.74(1986)


Chilean Copper Case, 12 ILM, p.275(1973)

Flexi Van-leasing, Inc. and The Government of the Islamic Republic of Iran, Award No. 259-
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IN THE
INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE, THE HAGUE
THE NETHERLANDS

CASE CONCERNING
CULTURAL IDENTITY AND INTELLECTUAL PROPERTY

REPUBLIC OF BRETORIA
APPLICANT

v.

KINGDOM OF PAGONIA
RESPONDENT

SPRING 1999

MEMORIAL FOR THE RESPONDENT
1999 PHILLIP C. JESSUP INTERNATIONAL LAW
MOOT COURT COMPETITION BRIEFS

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CASE CONCERNING CULTURAL IDENTITY
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STATEMENT OF JURISDICTION

Pagonia and Bretoria have submitted the settlement of their dispute by special agreement to this Court, and both parties have accepted the jurisdiction of this Court. Accordingly, this Court has jurisdiction pursuant to art. 36(1) of the Statute of the International Court of Justice.
STATEMENT OF FACTS

The Kingdom of Pagonia is a small, developing nation with a rich cultural, linguistic, and religious heritage. [Clarifications No. 1, 3; Compromis at 10, 2.] Prior to 1975, Pagonia was almost entirely isolated from the outside world. In 1975, Pagonia overthrew its totalitarian regime and took the first steps toward democratic government and a privatized market economy. [Compromis at 3-4.] Other than joining the United Nations in 1965 and expressing interest in membership in a regional trade association in recent years, Pagonia has steadfastly followed its own path – outside the agenda of international organizations. [Clarification No. 3, Compromis at 27, 29.]

Pagonia's cultural sector was not prepared for the foreign invasion that followed the overthrow of the old regime. After the revolution, foreign language and literature courses have become the most popular courses at Pagonian universities, while enrollment in Pagonian language and literature classes has fallen by half. [Compromis at 5.] There was a substantial influx of foreign language books, audio materials, and videocassettes, with significant sales through an underground market. [Compromis at 5-6.] And the cultural sector, especially in publishing and television broadcasting, came more and more under foreign domination. By 1991, a majority of the annual net income of Pagonia's cultural sector was from the sale of imported foreign language material, and soon thereafter, every Pagonian firm in the cultural sector but one had foreign owners. [Compromis at 10, 14.]

In 1988, Pagonians concerned with the threat to their culture and heritage formed the Pagonian Cultural Watch Group. This group aimed to prevent the dilution of Pagonian culture by the foreign invasion. [Compromis at 11.] Such concerns were apparently widespread among the Pagonian people – democratic elections in 1994 propelled the group's founder, Madeleine Crispell,
to Parliament with a mandate of preventing the pollution of Pagonian culture. [Compromis at 15.]

Ms. Crispell proposed a number of bills directed at the Pagonian cultural sector. [Compromis at 16.]

Although Ms. Crispell had inherited a majority interest in an entirely Pagonian-owned publishing company that devoted itself to the production of Pagonian language literature two years after founding the Pagonian Cultural Watch Group, her continued ownership interest in this company after her election to Parliament presented no problem under Pagonian law. [Compromis at 12, 14; Clarification No. 4.]

In 1997, other democratically elected members of the Pagonian Parliament joined with Ms. Crispell in passing a bill that became Civil Law No. 51. [Compromis at 16.] This law responded to the foreign invasion of Pagonia’s cultural sector by prohibiting foreign majority ownership of companies operating in the cultural sector and by authorizing Pagonia’s Ministry of Culture and regulatory agencies to take other steps to protect Pagonian culture. [Compromis at 16.]

With respect to foreign majority ownership, the law provided for voluntary sale by foreign majority owners within a given period, after which the Ministry of Culture could acquire remaining foreign majority interests for “book value” as shown on the companies’ balance sheets and then auction these interests to Pagonian nationals with a proven commitment to Pagonian culture. [Compromis at 16; Clarification No. 12.] Some foreign investors arranged sales immediately after the law passed. Others waited out the prescribed period and received compensation as determined by Pagonian courts based on independent expert valuation reports. [Compromis at 17-19.]

With respect to the other provisions of the law, the Ministry of Culture enacted a regulation to ensure that imported periodicals could not publish exclusively in foreign languages. [Compromis at 23.] In addition, the Pagonian Communications Commission adopted regulations providing for
minimum Pagonian content in radio and television broadcasts based on a complicated formula to
countify content. [Compromis at 20.] In this new regulatory framework, the four Pagonian television
networks, all privately owned, cancelled contracts for foreign television programs and films that they
felt were no longer needed. [Compromis at 21; Clarification No. 6.]

The Republic of Bretoria, a developed nation of 46 million people, has the largest
entertainment industry in the entire world. [Clarifications No. 1, 3; Compromis at13.] Bretoria has
made a number of complaints to Pagonia on behalf of Bretorian corporations operating in Pagonia’s
cultural industry. Bretorian investment had constituted roughly one quarter of the foreign investment
in the Pagonian cultural sector. [Compromis at 13.] Bretoria has alleged “expropriation” of this
investment. [Compromis at 25.] Forty-two per cent of television programs broadcast in Pagonia in
the last seven years have been Bretorian. [Clarification No. 17.] Bretoria has alleged “expropriation”
of rights under television contracts. [Compromis at 25.] And a particular Bretorian publisher,
Benjamin Publications, had taken exception to the requirement of selling bilingual products in
Pagonia. [Compromis at 24.] Bretoria has alleged breaches of supposed international trade
principles. [Compromis at 25.]

In addition, Bretoria has complained that some of its nationals have allegedly had unlicenced
copies of their copyrighted materials sold on Pagonia’s underground market. [Compromis at 25.] Despite its circumstances as a developing country, Pagonia has taken steps against the underground
market. Pagonian criminal law provides for the prosecution of those who commit a theft of
intangible property, and there have been many successful prosecutions of copyright pirates under this
law. [Compromis at 9, Clarification No. 7.] Moreover, Pagonian civil law provides a possible
remedy for copyright infringement via an action akin to “conversion”. [Clarification No. 15.]
Nonetheless, Bretoria has also taken it upon itself to claim compensation for Bretorian copyright holders. [Compromis at 28.]

To settle the dispute by neutral adjudication, Pagonia consented to Bretoria’s demand that the dispute be submitted to the International Court of Justice. [Compromis at 27-28.] The parties submitted a joint compromis pursuant to art. 40(1) of the Statute of the International Court of Justice.
QUESTIONS PRESENTED

Pagonia asks the Court:

1. Whether Pagonia’s cultural policy was legal under international law;
2. Whether Pagonia’s limitation of foreign ownership in its cultural sector was lawful;
3. Whether Pagonia is obligated to compensate Bretorian production companies whose contracts were cancelled by Pagonian television companies;
4. Whether Pagonia’s actions violated any applicable standard of national treatment;
5. Whether Pagonia’s copyright protection is consistent with international law.
SUMMARY OF THE PLEADINGS

Pagonia has the right to have a cultural policy. Pagonia’s sovereignty and the Pagonian people’s right of self-determination include the right to pursue cultural development. Pagonia’s specific policies are consistent with the practice of numerous states that have developed similar or identical policies.

Pagonia’s limitation of foreign ownership in its cultural sector is consistent with international law. Pagonia has an inherent right to expropriate or nationalize, and the Charter of Economic Rights and Duties of States identifies a principle of deference to an expropriating state’s domestic law. In the alternative, because it acted lawfully by expropriating for a valid public purpose and without unacceptable discrimination, Pagonia did not have to provide a *restitutio* level of compensation. Rather, it had only to provide compensation that was appropriate considering all relevant circumstances. Pagonia’s payment of book value met this standard and higher standards as well.

Pagonia is not obligated to compensate the Bretorian television companies whose contracts were cancelled. Contractual rights not tied to tangible assets have not been and are not now recognized as property for the purposes of the law of expropriation.

Pagonia is not liable for a breach of any applicable “national treatment” standard. Pagonia has not signed any treaty committing to this standard. There cannot be a customary norm of national treatment, because trade is about special economic relationships that do not give rise to custom. Further, even if custom could apply, Bretoria has failed to prove the *opinio juris* for national treatment being custom.

Even if there is a national treatment requirement, Pagonia’s cultural policy is not subject to it. Pagonia is a persistent objector and thus outside any custom that exists. Further, there is no XVI
consensus that national treatment applies to the cultural sector, so it is effectively outside any custom that exists. Moreover, when Pagonia protected its cultural sector, it protected an industry under grave threat, thus qualifying for a valid exception to national treatment.

Finally, Pagonia’s protection of copyright complies with international law. First, Bretoria’s complaint to this Court is inadmissible because Bretorian nationals have not exhausted their local remedies. Second, because it is bound neither by treaty nor by custom to a minimum standard of copyright protection, Pagonia is free to determine its own standard. Third, even if Pagonia is subject to international norms, it meets the most stringent standards. Pagonia has effective criminal and civil remedies that are available to nationals and non-nationals alike.
Pagonia has a right under international law to develop its own cultural policies to protect its cultural identity.

Pagonia is a sovereign state, and the people of Pagonia have a right to self-determination. The International Court of Justice has recently strongly affirmed the principle of self-determination. The special significance and universal acceptance of the right of self-determination have led to its recognition as a norm of customary international law and jus cogens.

The Pagonian people's right of self-determination includes their right to "pursue their economic, social and cultural development." The Pagonian people acted through the democratic process to pursue the cultural development flowing directly from their right of self-determination. The Committee on Economic, Social and Cultural Rights has interpreted art. 15 of the International Covenant on Economic, Social and Cultural Rights as implying that a state has both a right and a duty to promote and protect its culture from foreign cultural influences. Pagonia's cultural policy promotes and protects Pagonian cultural identity by implementing changes in three areas. First, the policy brings Pagonia's cultural industry under the control of Pagonians who have committed themselves to promoting Pagonian culture in the operation of their businesses by mandating majority

1 Charter of the United Nations, 26 June 1945, art. 1, para. 2.
Pagonian ownership of firms in Pagonia’s cultural sector. Second, the policy takes back control of Pagonian airwaves by introducing cultural content requirements on radio and television broadcasts. Third, the policy ensures that Pagonians can read in their own language by requiring that foreign magazines be bilingual in format, with Pagonian as the dominant language.6

Pagonia’s measures under Civil Law No. 51 are consistent with the practice of many states which have exercised their sovereign rights to protect their cultural identities. For example, with respect to foreign ownership, the United States, like Pagonia, has recognized the perils of foreign influences on the cultural sector and restricts foreign ownership of media corporations.7 The United Kingdom’s latest version of its Broadcasting Act maintains similar restrictions.8 Many other OECD countries also have limits on foreign ownership in their cultural sectors.9 South Africa has recently implemented restrictions on foreign ownership of television licensees.10 Further, numerous states have enacted content requirements or other measures of cultural protectionism.11 These specific examples of state practice show that Pagonia’s acts, flowing directly from Pagonia’s status as a sovereign state and the Pagonian people’s right of self-determination, are legitimate.

6 Compromis at 16; Clarification No. 12; Compromis at 20, 23.
7 47 U.S.C. s. 310(b) (1994).
9 Organisation for Economic Co-Operation and Development, National Treatment for Foreign-Controlled Enterprises (Paris: OECD, 1993) at 63-64 (Australia), 74 (Canada), 87-88 (France), 91 (Greece), 111 (Portugal).
II. Pagonia has lawfully limited foreign ownership in its cultural sector.

A. Pagonia had a right to alter the ownership in its cultural sector based on its sovereignty and right to cultural self-determination.

Pagonia's sovereignty and the Pagonian people's right of self-determination imply a right to alter the ownership in Pagonia's cultural sector. Highly qualified legal publicists have stated that nationalization or expropriation measures are lawful exercises of state sovereignty. International tribunal decisions have held that a state's right to nationalize or expropriate is both unquestionable and universally accepted and have asserted that this right is derived from a state's national sovereignty. The right of states to expropriate or nationalize has been recognized in United Nations General Assembly Resolutions, which provide persuasive evidence of international law. Pagonia is entitled to expropriate foreign interests in its cultural sector.

United Nations General Assembly Resolution 1803 has been advocated by developed countries as a statement of the customary international law standard for a lawful expropriation, requiring a valid public purpose, non-discrimination, and a minimum standard of compensation.

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referred to as "appropriate compensation". Although this standard was once representative of customary international law on expropriation, this is no longer the case. These principles have been explicitly challenged and rejected by developing states. There can be no custom where a substantial number of states do not accept the provisions and do not feel themselves bound by them. Since Resolution 1803 has the support of only developed states with similar types of economic systems, it can no longer represent a statement of customary international law.

Extensive support among developing countries for the Charter of Economic Rights and Duties of States demonstrates a rejection of Resolution 1803's standards. The Charter "is regarded by many states as an emergent principle, applicable ex nunc." It asserts that every state has the right "[t]o nationalize, expropriate or transfer ownership of foreign property" while paying "appropriate compensation that takes into account all circumstances that the State considers pertinent." It does not include any requirements for a valid public purpose or non-discrimination,

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17 Texaco Case, supra note 13; Aminoil Case, supra note 16; Amoco Case, supra note 13; SEDCO Case, supra note 16.


20 Wallace, supra note 18 at 187.

21 Brownlie, supra note 12 at 542.

22 GA Res. 3281, supra note 14, art. 2, para. 2(c).
and it provides that any controversy over the amount of compensation payable for a nationalization should be resolved under the domestic law of the nationalizing state. 23

As a sovereign state and a developing country, Pagonia claims the deference granted by the Charter of Economic Rights and Duties of States. Pagonia acted to regain control over its cultural sector by ensuring that its owners were committed to Pagonian culture. 24 Pagonia developed a compensation standard for cultural firms, and its courts carefully administered this standard, even to the extent of using independent valuations. 25 Pagonia acted within its sovereign rights.

B. In the alternative, Pagonia met stringent standards in altering the foreign ownership of its cultural sector.

1. Pagonia has altered the ownership in its cultural sector for a valid public purpose.

Some international judicial and arbitral decisions assert that for expropriation to be lawful, it must have a valid public purpose. 26 However, it has been held that:

A precise definition of "public purpose" for which an expropriation may be lawfully decided has neither been agreed upon in international law nor even suggested. It is clear that, as a result of the modern acceptance of the right to nationalize, this term is broadly interpreted, and that states, in practice, are granted extensive discretion. 27

Invalid public purposes include purely financial purposes (although financial considerations will not

23 GA Res. 3281, supra note 14.

24 Clarification No. 12

25 Compromis at 16, 19.


27 Amoco Case, supra note 13 at para. 145.
always be sufficient to negate a valid public purpose) and purely extraneous political purposes.\textsuperscript{28}

Even if a valid public purpose is necessary for a lawful expropriation, the test is easily satisfied.\textsuperscript{29}

Pagonia has a valid public purpose: the critical need to protect and promote its distinctive cultural identity in the face of the serious threat posed by foreign cultural influences. The circumstances in Pagonia support this public purpose.\textsuperscript{30} In the years since Pagonia has allowed foreign cultural products, demand for Pagonian cultural products has been displaced by an immense demand for foreign cultural products: by 1991, a majority of the annual net income of Pagonia’s cultural sector was generated by sales of imported foreign language material. While foreign language and literature courses have become the most popular at Pagonian universities, enrollment in Pagonian language and literature classes has fallen to one-half of pre-revolution levels. Since 1991, massive foreign investment in Pagonia’s cultural sector has resulted in increased foreign control over Pagonian culture. Pagonia’s goal in altering this foreign ownership is to ensure that those controlling the companies are committed to the promotion of Pagonian culture.\textsuperscript{31}

When assessing whether a state has a valid public purpose, it is not necessary to search for the “real” purpose or “some subjective purpose motivating the state or the persons who have supreme power in a state.”\textsuperscript{32} The facts reasonably support Pagonia’s stated public purpose, making

\textsuperscript{28} \textit{Amoco Case}, supra note 13 at para. 145; \textit{BP Case}, supra note 26.

\textsuperscript{29} \textit{Amoco Case}, supra note 13 at para. 146.

\textsuperscript{30} Compromis at 7, 10, 5, 13.

\textsuperscript{31} Clarification No. 12.

a search for some other "real" reason unnecessary. Any consideration of whether Ms. Crispell stands to gain personally from Pagonia's regulation of its cultural sector is irrelevant and unnecessary.

2. Pagonia's cultural policy does not violate any non-discrimination requirement.

Although non-discrimination has been accepted as a requirement for a lawful expropriation\(^3\), arguments on discrimination have not been predominant in expropriation cases.\(^4\) Some degree of discrimination is acceptable if it relates to the public purpose.\(^5\) In the Amoco Case, nationalization did not offend the non-discrimination requirement even though the policy was aimed at foreign owners in Iran's petroleum industry, because the discrimination fit closely with Iran's valid public purpose of preserving natural resource revenue for its own development.\(^6\) In the Liamco Case, the arbitrator held that although Libya's policy discriminated against foreign owners, this was necessary for it to preserve ownership of its own petroleum resources.\(^7\) To be unlawfully discriminatory, a measure must be a "purely discriminatory measure".\(^8\) The non-discrimination requirement allows states the freedom to enact policies that have an element of discrimination.

Pagonia's policy does not discriminate against foreign owners in an unacceptable way. Under Pagonia's ownership policy, foreigners are prohibited only from holding majority interests

\(^3\) Amoco Case, supra note 13; BP Case, supra note 26; Liamco Case (Libyan American Oil Company v. Libya) (1981), 20 I.L.M. 1; Aminoil Case, supra note 16.

\(^4\) Wallace, supra note 18 at 187.

\(^5\) Amoco Case, supra note 13 at para. 145.

\(^6\) Ibid.

\(^7\) Liamco Case, supra note 33.

\(^8\) Ibid. at 59.
in companies in the cultural sector.\textsuperscript{39} Although this draws a distinction between nationals and non-nationals, it does not offend international law since it is inextricably linked with Pagonia's valid public purpose. At no point do the Pagonian measures target a specific group of foreigners, such as Bretorian nationals.\textsuperscript{40} Pagonia's restrictions are simply necessary for Pagonia to ensure that those owning majority interests in cultural industries are committed to promoting Pagonian culture.\textsuperscript{41}

C. Pagonia provided foreign owners who gave up their interests in Pagonia's cultural sector with appropriate compensation with regard to all circumstances.

1. The standard of compensation required under customary international law is appropriate compensation with regard to all circumstances.

Because it meets public purpose and non-discrimination requirements, Pagonia's alteration of ownership in its foreign sector was a lawful expropriation. The distinction between lawful and unlawful expropriation is important as "the rules applicable to the compensation to be paid by the expropriating state differ according to the legal characterization of the taking."\textsuperscript{42} This follows the approach taken in the Chorzów Factory Case, and has been recently reaffirmed.\textsuperscript{43}

For a lawful expropriation, a state need only provide compensation that equals the value of the undertaking at the time of the taking rather than \textit{restitutio in integrum} (the value of the

\textsuperscript{39} Compromis at 16.

\textsuperscript{40} Compromis at 16.

\textsuperscript{41} Clarification No. 12.

\textsuperscript{42} Aminoil Case, supra note 16.

\textsuperscript{43} Chorzów Factory Case (Indemnity) (Merits) (Germany v. Poland) (1928) P.C.I.J. (Ser. A) No. 17, 46; Aminoil Case, supra note 16.
undertaking plus a margin for lost profits). The distinction between lawful and unlawful expropriations has been used when determining the standard of compensation required: "all awards which adopted the standard of *restitutio* relate to expropriation found unlawful."

For a lawful expropriation, the traditional standard of "appropriate compensation" without regard to circumstances has been rejected. The standard of appropriate compensation considering the circumstances "peculiar to the particular case" has been accepted even where tribunals have stated that "appropriate compensation" is the standard. Highly qualified legal publicists acknowledge the general shift in the standard to this middle path, approaching the standard advocated by developing countries that maintains that equitable considerations must be taken into account. The expropriating state may consider factors like an inequality of power between the expropriating country and foreign investors, the economic situation in the expropriating country, or past profits of the foreign investors. Because Pagonia’s expropriation of foreign interests in its cultural sector was lawful, Pagonia is only obligated to provide appropriate compensation considering all circumstances and does not have to include a measure for lost profits.

44 Amoco Case, *supra* note 13 at para. 197.


46 See *supra* note 18.

47 Aminoil Case, *supra* note 16 at para. 144.


2. Pagonia's payment of book value met the standard of appropriate compensation in all circumstances.

Pagonia compensated Bretorian nationals who gave up their interests in cultural sector industries according to the standard of “book value”, or the value of assets carried on the company’s balance sheet—cost less accumulated depreciation—which is consistent with the definition of book value according to the World Bank. Book value is the standard of compensation advocated by developing countries such as Pagonia. It represents an appropriate standard considering the circumstances such as Pagonia’s critical need to protect its culture. A standard of compensation like book value is justifiable based on principles of sovereignty and self-determination and particularly where a state acts for legitimate aims of public interest.

Book value does not include a margin for lost profits. Industrialized countries advocate the Discounted Cash Flow (DCF) method, which takes into account future profitability. Book value has an advantage over DCF in that it is “easily and objectively assessed”. Further, compensation for a lawful expropriation does not require compensation for future profits.

A recent economic study has shown that the net book value advocated by developing

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53 Stauffer, supra note 51.

54 Amoco Case, supra note 13 at para. 249.

55 Amoco Case, supra note 13; Chorzów Factory Case, supra note 43; Aminoil Case, supra note 16.
countries and the discounted cash flow method advocated by developed countries are equivalent except in circumstances where profits are either exceptionally low or exceptionally high. Bretorian investors in Pagonia did not face such extreme situations, so book value unequivocally met the standard of appropriate compensation considering all circumstances.

III. Pagonia is not obligated to compensate Bretorian television companies whose contracts were cancelled by Pagonian television firms.

Pagonia's content regulation of television and radio broadcasts has not resulted in an unlawful expropriation. The cancellation of contracts with Bretorian television companies did not result in a loss of property. Under the traditional definition of property for the purposes of expropriation, contractual rights that are not tied to tangible assets are not recognized. Although there has been a move to recognize certain contractual rights as property rights, this recognition has been only in special circumstances and is not part of customary international law.

A long line of authority considers contractual rights expropriated only if they are "so closely related to the physical assets seized as to be useless without the physical assets themselves." The cancelled television contracts relate only to a right to provide a service and are not connected with any physical property. Because expropriation law does not consider the cancellation of contracts a taking of property, Pagonia is not obligated to compensate the Bretorian television companies.

56 Stauffer, supra note 51.

57 Wallace, supra note 18 at 185.

58 Starrett Housing Corp. v. Iran (Interlocutory Award) (U.S. v. Iran) (1984), 23 I.L.M. 1090.

59 Texaco Case, supra note 13; Aminoil Case, supra note 16.

60 G. Christie, supra note 32 at 316; Chorzów Factory Case, supra note 43; Norwegian Claims Case (Norway v. U.S.) (1922), 1 R.I.A.A. 307; Starrett Housing Case, supra note 58 at 1117.
IV. Pagonia’s acts did not violate any applicable norm of “national treatment.”

A. Pagonia is not subject to any international norm of “national treatment”.

1. Pagonia has exercised its sovereign right not to sign any international treaty committing it to national treatment.

Although there exist international treaties that impose national treatment obligations, these treaties create no obligations for non-signatories. Pagonia’s sovereign equality includes the right to choose its own path, including the right not to be bound by treaties it has not signed.

2. No custom applies to Pagonia’s special economic relations.

Pagonia, as a sovereign state, chooses whether and to what extent it wishes to trade with other states. Legal obligations on trade come from treaties rather than from custom. National treatment applied to trade is an operational standard that Pagonia can choose whether or not to implement. These are standards “referring to differential economic relationships.” Pagonia need not trade on particular terms or at all simply because it has done so in the past, as a choice not to trade is not subject to any customary legal rule. Even a leading authority supporting the derivation

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62 Charter of the United Nations, supra note 1, art. 2, para. 1.


66 Ibid. at 105.
of custom from treaties acknowledges for these reasons that "[a] treaty such as the General Agreement on Tariffs and Trade that institutionalizes trade is...incapable of giving rise to rules of customary law binding upon nonparties." Pagonia's cultural policies are not subject to customary international norms on trade because trade is about special economic relationships.

3. Even if custom could apply to Pagonia's special economic relations, there is no customary norm of national treatment.

Pagonia cannot be subject to a customary norm of national treatment because no such norm exists. To establish a customary norm, Bretoria must conclusively prove both widespread state practice and opinio juris: a subjective acceptance of the practice as legally obligatory. Even if treaties including national treatment establish practice, there must be an "argument...from which it could be deduced that States recognize themselves to be under an obligation towards each other...".

In the North Sea Continental Shelf Cases, the International Court of Justice held against the formation of custom in the context of a norm enshrined in a multilateral treaty. The mere presence of a provision in a multilateral treaty does not show opinio juris — there must be solid evidence from outside the treaty. For example, in the Nicaragua Case, the International Court of Justice could find customary international law equivalent to the principles contained in treaties only by finding,

67 Ibid. at 105-106.

68 The Steamship Lotus (France v. Turkey) (1927), P.C.I.J. (Ser. A) No. 9 at 26, 28; North Sea Continental Shelf Cases, supra note 19 at 44.

69 The Steamship Lotus, supra note 68 at 23.

70 Supra note 19.

71 Ibid. at 43-44.

72 Supra note 15.
in United Nations resolutions, formal statements of *opinio juris*. This principle applies analogously in the present context. Bretoria has failed to put forward any such evidence.

**B. If Pagonia is subject to a national treatment requirement, then Pagonia’s acts taken to protect its cultural identity are not subject to this requirement.**

1. **Pagonia has acquired the status of a persistent objector to national treatment.**

   This Court must not assume that Pagonia has acquiesced to any custom of national treatment. Pagonia’s choice not to sign any treaty requiring national treatment is a clear sign of its objection to the national treatment principle. Although Pagonia has expressed interest in joining the Regional Association of Trading States, this does not indicate support for national treatment in general, as there is no evidence that this is a principle of the association at all, and even if it were, it would be a special privilege within the region.

   The objection of a single state matters precisely because international law rests on consensual foundations: “It results from [the perfect equality of nations] that no one can rightfully impose a rule on another.” A state that dissents from a developing custom is not bound by the customary rule.  

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The International Court of Justice has affirmed that a customary rule does not apply to a state that has always opposed the rule. Since Pagonia, as a sovereign state, has objected to the national treatment principle, any custom of national treatment would not apply to Pagonia.

2. Pagonia's cultural protection measures are not subject to national treatment.

Pagonia remains acutely aware of the connection between national memory and national independence. When the cultural sector that preserves national memory had only one fully Pagonian firm left, when 42% of Pagonian television programming came from a single foreign country, and when even the Pagonian power to read Pagonian language and Pagonian memories was threatened by a drastic fall in the study of Pagonian literature and an influx of foreign literature and magazines, the Pagonian people acted democratically to preserve their national independence.

Pagonia's cultural policy is legitimate in international law because there is no consensus for requiring national treatment in the cultural sector. Treaties implementing national treatment contain exceptions for specific cultural products, commitments to the development of programs and


80 Compromis at 14.

81 Clarification No. 17.

82 Compromis at 5-7.

83 Canada – Chile Free Trade Agreement, 5 December 1996, 36 I.L.M. 1067, Annex C-01.3, s. 3(a) (exempting measures in Schedule VII of Customs Tariff, R.S.C. 1985, c. 41 (3d Supp.), which include measures on cultural products).
regulations to promote social and cultural development, and general exemptions for the cultural industry. The idea of incorporating cultural services into the GATT framework has been set aside due to European Union opposition. France indicated that it would not sign a GATT that included the cultural industry. Numerous other states have also indicated their opposition to trade commitments without cultural exemptions, including Australia, Canada, Egypt, India, Norway, Sweden, and most Third World states. A significant portion of the world denies any opinio juris for the application of trade rules to cultural industries.

Moreover, Pagonia's cultural policy is specifically grounded in state practice. Article IV of the original GATT endorsed the notion of screen quotas on cinemas, the dominant mass media of the time. Since then, states have implemented the same policy of cultural content quotas with

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89 General Agreement on Tariffs and Trade, 30 October 1947, 55 U.N.T.S. 194, art. IV [hereinafter GATT 1947].
respect to television. Even such an advocate of cultural commercialization as the United States requires that cable services carry local content, and the United States Supreme Court has recently upheld this as *inter alia* "promoting the widespread dissemination of information from a multiplicity of sources."\(^90\) Content quotas for television and/or radio exist in numerous states, including Canada, the European Community as a whole, the United Kingdom, virtually every other European state, Australia, and South Africa.\(^91\) Pagonia claims the same right to defend its airwaves.

Pagonia's magazine regulation serves a related purpose of ensuring that writing is available to Pagonians in their own language. Foreign publishers flooding Pagonia's magazine market with their wares are dangerous to Pagonian culture. Moreover, any influence that could affect literacy in the Pagonian language when Pagonia already struggles with education\(^92\) is a particular threat. Pagonia reacted to this threat to preserve its language, memory, and independence.

Pagonia's policy is based on cultural criteria. Pagonia's radio and television content requirements use a complex formula to determine cultural content\(^93\) that could potentially include works by overseas Pagonians. Although the magazine regulation draws a distinction between nationals and non-nationals, Pagonia underlines that the regulation is part of a larger cultural policy

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\(^92\) Compromis at 1.

\(^93\) Compromis at 20.
designed to achieve the objectives of cultural preservation. The European Court of Justice has held, on an analogous public morality exception, that on matters going to the deepest values of a society, there must be a margin of appreciation given to restraints on trade; each state must act in the context of its particular sociocultural situation. Pagonia has acted in the context of a culture under threat. Its cultural policy fell within an area not subject to national treatment.

3. **Pagonia's protection of an industry in jeopardy is not subject to national treatment.**

Pagonia's cultural industry as a whole was under grave threat before Pagonia implemented its cultural policy. Income in the cultural sector came predominantly from sales of foreign language material, and every firm in the cultural sector but one was under foreign ownership. Although Pagonia's acts might benefit one individual, Ms. Crispell, this does not make Pagonia's acts corrupt, but illustrates the serious situation in which just one Pagonian was left in control of a cultural sector firm. Pagonia faced a very real threat of losing this industry entirely to foreign control.

Treaties that include national treatment requirements also include exceptions ranging from general exceptions for public policy reasons to GATT's specific provision allowing the suspension of a GATT obligation like national treatment where a product is being imported "in such increased quantities and under such conditions as to cause or threaten serious injury to domestic producers...of like or directly competitive products." Bretoria cannot hold Pagonia to national treatment standards

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95 Compromis at 10, 14.


97 General Agreement on Tariffs and Trade: Multilateral Trade Negotiations Final Act Embodying the Results of the Uruguay Round of Trade Negotiations, 15 April 1994, 33 I.L.M.
without letting Pagonia use the exceptions that accompany national treatment. Pagonia's acts to preserve a threatened industry were justified under a valid exception to national treatment.

V. Pagonia complies with international law on its protection of copyrights.

A. Bretoria's complaint about copyright infringements is inadmissible before this Court since there has been no exhaustion of local remedies.

A fundamental precept of international law states that "there can be no question of denial of justice...as long as justice has not been appealed to...". Local remedies must be exhausted prior to adjudication of a dispute before an international body. The plaintiff state must prove that there are no effective local remedies before it takes a claim to the International Court of Justice. Bretoria has failed to meet this fundamental requirement for the admissibility of a claim.

Brownlie notes that "it is not possible to assume that no remedy exists in municipal law" where there is any reasonable possibility of a remedy. The duty to exhaust local remedies extends even to a duty to advance novel causes of action. Pagonia's law includes a cause of action similar to...
to the common law tort of conversion,\(^{105}\) which provides a remedy for an unlawful dealing with property. No Bretorian national has used this tort to make a claim for copyright infringement. By bringing their claims immediately to the International Court of Justice, Bretoria puts its citizens above the Pagonian rule of law and asserts for them a special privilege of going immediately to the highest court in the world.\(^{106}\) In international law, however, there is no breach and thus no admissible claim where there has been no exhaustion of local remedies.\(^{107}\)

B. Pagonia’s decisions about copyright protection represent an exercise of its domestic jurisdiction.

1. The lesser developed country exceptions to international norms of copyright protection imply that no international norm binds Pagonia.

Pagonia qualifies under United Nations definitions as a less developed country.\(^{108}\) As such, if it were party to the major international conventions on copyright protection, it would qualify for substantial exceptions. The Berne Convention exempts states that declare themselves to be developing countries from duties to provide full copyright protection.\(^{109}\) Under the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), developing countries and states in transition from command to free market economies have the right to delay their compliance with

\(^{105}\) Clarification No.15.

\(^{106}\) M. Sørensen, Manual of Public International Law (London: Macmillan, 1968) at 584 (rejecting such tactics as “an affront to the independence of the local sovereign and to the authority of its laws and tribunals over all persons subject to it.”)


\(^{108}\) Clarification No. 1.

most provisions of the agreement for five years, a period of time that had not even expired for these states at the time of the complaint against Pagonia, and least developed countries have the right to delay their compliance by ten years or longer.\textsuperscript{110}

If Pagonia were a signatory to conventions on the protection of intellectual property, it would have a legal right to make a reservation from requirements to protect intellectual property. The International Court of Justice has held that an ability to make a reservation from requirements suggests that these requirements cannot have crystallized into customary law.\textsuperscript{111} Pagonia asserts that a state choosing not to sign intellectual property treaties should not be subject to more onerous obligations than if it had signed these agreements.

2. \textbf{There is no customary international norm of copyright protection.}

The nature of agreements on copyright protection and the circumstances of their negotiation suggest that there is no customary international norm of copyright protection. The opening article of the \textit{Berne Convention} makes clear that its intent is to create a "Union" rather than to enunciate general norms.\textsuperscript{112} The TRIPS Agreement, as part of the Uruguay Round of GATT, embodies only a set of negotiated mutually beneficial concessions.\textsuperscript{113}

To bind Pagonia by custom, Bretoria must establish widespread practice by states and that

\textsuperscript{110} Annex 1C to GATT 1994, \textit{supra} note 97, arts. 65, 66(1), 66(2) [hereinafter TRIPS].

\textsuperscript{111} \textit{North Sea Continental Shelf Cases}, \textit{supra} note 19 at 39-40, 42.

\textsuperscript{112} \textit{Berne Convention}, \textit{supra} note 109, art. 1.

this practice flows from opinio juris, a belief that the practice is obligatory. But there is no widespread opinio juris for copyright protection. Developing countries in general were unenthusiastic participants in the TRIPS negotiations. Major states often practice copyright protection only in response to threats rather than any opinio juris. For example, although China has signed and started implementing memoranda agreeing to protect intellectual property, it agreed to do so only hours before threatened American trade sanctions would otherwise have gone into effect. Moreover, even after the TRIPS Agreement, Southeast Asian nations have specifically qualified the implementation of intellectual property arrangements as having to be "in a manner conducive to social and economic welfare."

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114 North Sea Continental Shelf Cases, supra note 19 at 44.
115 Thomas & Meyer, supra note 113 at 259.
3. **Pagonia has the right to make its own determinations on copyright protection.**

Sovereign states and self-determining peoples have the right to choose the kind of society they wish to develop. International law enunciates the duty to respect a state's sovereign right to govern its own domestic jurisdiction. Pagonia's choices about how to protect intellectual property and how to treat it as compared to other property reflect Pagonian traditions and values. Developing nations often have different understandings of private property and visions of how to foster creativity, as well as different implications for their societies from their recognition of copyright. Countries that are now developed did not have the same intellectual property protections when they were developing. The duty at international law to respect sovereign states implies a duty to respect Pagonia's right to make its own determinations on copyright protection.

C. **Even if a minimum standard of copyright protection exists, Pagonia has provided adequate and effective copyright protection that meets the most stringent norms of international law.**

The most stringent international legal norms of copyright protection are embodied in the TRIPS Agreement, a convention that Pagonia has not signed. These norms require the protection

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121 *I.C.C.P.R.*, *supra* note 4, art. 1, para. 1; *I.C.E.S.C.R.*, *supra* note 4, art. 1, para. 1.

122 *Charter of the United Nations*, *supra* note 1, art. 2, para. 7.


126 TRIPS, *supra* note 110.
of authors' rights from copyright infringement in certain ways.

The TRIPS Agreement indicates that there is no obligation to develop a special judicial system for intellectual property nor is there an obligation concerning the distribution of resources to intellectual property protection.\textsuperscript{127} With prosecutorial departments with some specialization in intellectual property protection in three of its nine regions,\textsuperscript{128} Pagonia rises well above international norms.

The most stringent norms of international law require only that states provide criminal remedies to provide a deterrent against wilful copyright piracy on a commercial scale, that states' civil judicial procedures be available to those alleging copyright infringement, and that states treat non-nationals in a non-discriminatory fashion.\textsuperscript{129}

Pagonia meets the first requirement. Under its theft laws, Pagonia has successfully prosecuted hundreds of persons guilty of copyright infringement and not necessarily just those involved on a commercial scale.\textsuperscript{130} The theft laws provide for both fines and substantial prison terms as deterrents, and some of those who committed more serious acts of piracy have been imprisoned.\textsuperscript{131}

Pagonia meets the second requirement. Pagonia's civil judicial procedures are available to those alleging copyright infringement. The country's legal system has a private cause of action

\textsuperscript{127} Ibid., art. 41(5).

\textsuperscript{128} Compromis at 9.

\textsuperscript{129} TRIPS, \textit{supra} note 110, arts. 61, 42, 3.

\textsuperscript{130} Compromis at 9; Clarification No. 7.

\textsuperscript{131} Clarification No. 14
similar to what is called "conversion" in common law regimes, thus allowing a civil suit where there has been a misappropriation of someone's intellectual property.

Pagonia meets the third requirement. Pagonia's legal system provides standing to non-nationals, as the facts show that non-nationals have argued in Pagonian courts. Although there is little evidence of Pagonian criminal prosecutions for thefts of non-nationals' copyrights, there is also no evidence of any discrimination against non-nationals.

Pagonia, despite its difficult circumstances as a developing country, meets stringent requirements of international law that it is not required to meet, providing adequate and effective copyright protection.

PRAYER FOR RELIEF

For the foregoing reasons, the respondent Government of Pagonia asks that this Honourable Court:

1. DECLARE that Pagonia's cultural policy was legal under international law, and in particular that Pagonia's cultural policy did not unlawfully expropriate and did not breach any applicable norm of national treatment; and

2. DECLARE that Pagonia cannot be held liable for a breach of international law on its protection of copyrights.

Respectfully Submitted,

Agents for Pagonia
Team 290 - R

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132 Clarification No.15.

133 Compromis at 19.