ARTICLES & ESSAYS

Deprivation, Despoliation and Destitution: Whither Environment and Human Rights in Nigeria’s Niger Delta? Dr. Bibiiya Lucky Worioka

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The Telebanking Contract in Swiss Law Cédric J. Magnin

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2001 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION DISTINGUISHED BRIEFS

Memorial for Applicant New England School of Law, United States

Memorial for Respondent University of Vienna, Austria
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DEPRIVATION, DESPOILATION AND
DESTINATION: WHITHER ENVIRONMENT AND
HUMAN RIGHTS IN NIGERIA'S NIGER DELTA?

Dr. Ibibia Lucky Worika*

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I. BACKGROUND AND INTRODUCTION

Upon the inception of the new civilian administration on May 29th
2000, after almost twenty years of military rule, President Olusegun
Obasanjo set up, *inter alia*, an eight-member Human Rights violation
Investigation Commission. This Commission is headed by a retired
Supreme Court Justice, Chukwudifu Oputa, and was empowered to
investigate and report to the government human rights abuses against
Nigerians by successive regimes between January 15, 1966 and May 28,
1999.

The Commission has since received several thousands of memoranda
by members of the public and other interest groups, which demonstrates
the magnitude of human rights violations within this period. While the
Commission appreciates the need to right past human rights abuses, it
realizes, also, that for the process to result in genuine national
reconciliation, there must be something more. It would require situating
incidents of human rights abuses within the context of national history.\(^1\)

This was the justification for expanding the scope of the Commission to
include ascertaining or establishing the causes, nature and extent of all
gross violations committed in Nigeria from the advent of the first military
*coup d'état*.\(^2\) This article is the result of a sociological investigation into
environment and human rights abuses in the Niger Delta of Nigeria.

This article sets out eight major Parts. Part One is the background
and introduction. Part Two states the scope, purpose and methodology of
the paper. Parts Three and Four deal with historical antecedence of human
rights abuses. In Part Five, the case studies are examined. Part Six is on
observations relevant to the cases stated. The analyses is undertaken in
Part Seven, while Part Eight concludes the paper with a body of
recommendations.

This article serves three main purposes: first, to bring forth the
nature and extent of environment and human rights abuses in the Niger
Delta of Nigeria to the international community; second, to fill an existing
gap in the methodology of environment and human rights jurisprudence by
adopting a sociological approach; and third, to prescribe possible solutions

\(^1\) See generally Background Paper on the Investigation of Human Rights Violations in
the South-South Zone, 1966-1999 prepared for the Meeting of Researchers at CASS on July 27,
2000.

BALL, *MODERN POLITICS AND GOVERNMENT* 22-233. (London: Macmillan) (1983); M. Ayua,
*Military Regimes and Constitutionallism in Nigeria* 2 *LAW SOC'Y REV.* 90, 90-94(1993) This
paper is an adaptation of a paper undertaken under the auspices of the Centre for Advanced
Social Science (CASS), whose services were engaged by the Commission to collaborate with it in
clarifying the history of the country with particular reference to incidents of human rights abuses.
to the vexing issue of environment and human rights violations in the Niger Delta of Nigeria.

II. SCOPE, PURPOSE AND METHODOLOGY

The broad areas the research focuses on are community/group rights deprivations, comprising environment, and human rights, which encompass social, political, economic, cultural/linguistic rights as well as access to justice. In particular, the following communities in the Niger Delta of Nigeria form the subject of this article: 1) the Ogonis; 2) the Ijaws of Bonny/Finima; 3) the Egi clan in Ogbaland.

Occasionally, however, some aspects of personal deprivations and destitution were considered in relation to the communities of Ogoni and Egi in Ogbaland.

The methodology adopted for this article is essentially a combination of community case studies and comparative theoretical analyses. Its investigative tool combines field survey and the use of questionnaires and personal interviews. In addition, there was desktop research to acquire secondary information for the purpose of analyzing human rights abuses resulting from oil and gas exploration and exploitation activities with particular reference to their environmental sustainability and quality of human life. These are all carried out within a descriptive, analytical, and prescriptive framework developed in seven major steps that have been outlined in the background to this article.

III. PERIODIZATION

Generally speaking, the period covered by this article is between January 1966 and May 28, 1999. This period reflects the expanded scope of the Commission. January 1966 to July 1966 witnessed Nigeria's first military government with Major Aguiyi Ironsi as head of the country's government. The second, which overthrew the first, was the counter-coup of July 1966 by young officers from the North and Middle Belt led by Lt. Colonel Gowon. This regime repealed Decree No. 34 of the Ironsi administration which sought a unitary system of government for the country. Gowon restored the federal constitutional framework and, when faced with the threat of secession by the then Eastern Region led by Lt. Colonel Odumegwu Ojukwu, he responded by creating twelve states with a view to undermining the secessionists' enclave.

Between May 1967 and 1969, the country was at war with itself. Human rights observance or violation during the civil war years, especially in the East and South-South geopolitical zones, can only be imagined.
Gowon's refusal to relinquish power to usher in civilian rule and his ineffectiveness in controlling his Lieutenants, especially Military Governors, were some of the reasons given for his overthrow in a bloodless coup in 1975. It is impossible in an article of this nature to recount all of the nation's history. It suffices to say that the nation witnessed thirteen years of military rule, which was only broken by the General Olusegun Obasanjo's administration's decision to hand over power to civilians in 1979. Because military regimes are generally antithetical to constitutionalism, complaints about human rights abuses during these dark ages of the nation's history were not uncommon.

The new civilian regime did not last long. It was quickly terminated by the duo of Generals Mohammadu Buhari and Tunde Idiagbon. Alhaji Shehu Shagari's administration was toppled on the 31st of December 1983 after he had won a controversial second term. Nigerians thus witnessed their second regimented journey in military rule with all its attendant implications for human rights. This military regime was itself short-lived. It was unexpectedly overthrown by General Ibrahim Babangida in what is popularly described as "a palace coup" in 1985. Babangida held the reigns of power from 1985 to 1993, the longest reign by any particular ruler. This regime also witnessed the first palpable discontent from the oil-producing areas of the Niger Delta.

IV. THE NIGER DELTA

The Niger Delta of Nigeria is one of the world's largest wetlands, covering an area of approximately 70,000 square kilometers. It comprises a number of characteristic ecological zones ranging from the sandy coastal ridge barriers, brackish or saline mangroves, fresh water permanent and seasonal swamp forest, to lowland rain forest. This area is also completely traversed and criss-crossed by a number of tributaries and distributaries to the main River Niger, forming along its course, streams, rivulets and canals.

The tides of the Atlantic Ocean and the flood waters of the River Niger are the most influential variables in determining the hydrology of the Niger Delta. Accordingly, the area is highly sensitive to changes in water quality (salinity and pollution) and quantity (flooding).

The population of the Niger Delta is estimated to be between seven and twelve million people, most of whom are heterogeneous. They are the Izons (Ijaws), Isokos, Urhobos, Itsekiris, the Ilajes, Ogonis, Andonis, ...
Ibibios, Orons, Efiks, Anangs, Ekpeyes, Ikwerres, and others. These people depend for the most part on fishing and small-scale subsistence farming for their livelihood. The Niger Delta is also very richly endowed in oil and gas deposits. However, unsustainable industrial activities such as chemical, manufacturing, and the oil and gas industries, especially the last, have combined to exacerbate the stress on the already fragile natural environment. This situation is further compounded by the unwillingness of the federal government and its foreign joint venture partners to sincerely integrate environmental concerns into their development projects.

The Environmental Impact Assessment Act 1992 appears to be observed more in breach than in compliance. The recent controversy surrounding the proposed dredging of the River Niger without adequate recourse to the environmental impact on the Niger Delta is demonstrable of the federal government's doublespeak. Also worthy of mention is Obasanjo's desire to actualize his own blueprint for the development of the Niger Delta on his own terms and in the face of overwhelming opposition from the peoples' elected representatives as well as that of other interest groups in the Niger Delta.

The problems of the Niger Delta can, indeed, be summed up in three Ds: deprivation, despoliation and destitution. The various ethnic groups in the Niger have long been deprived of their natural resources by the federal government, which has literally seized the oil and gas deposits within their territory for itself. It has achieved this through the instrumentality of the Petroleum Act of 1969, the Land Use Act of 1978, and the Nigerian Constitution of 1999. The recent decision by the South-South Governors to control and own their resources also demonstrates the extent to which Niger Deltaians have been pushed to the wall. For this same reason, Ken Saro-Wiwa, an Ogoni environmental activist, was taunted, vilified, and subsequently hanged under some spurious charges before a tribunal whose constitution left much to be desired.

The Niger Delta, which is otherwise rich in flora and fauna including some rare species of wild flowers, birds, ants, aquatic and wild animals, now hosts an increasing variety of heavily polluting industries. The intricate processes of aerial survey, exploration drilling, appraisal drilling, and production of oil and gas characteristic of the petroleum industry, for instance, have impacted negatively on the Niger Delta environment. The effects include soil degradation, water contamination and pollution, deforestation resulting from oil infrastructural damage, air and noise pollution, distortion of the ecology and loss of biodiversity, and general despoliation of the environment.

The combined effects of deprivation and despoliation is destitution. The Niger Delta is now synonymous with poverty resulting from social,
economic and environmental dislocation. The impact of frequent oil spills, gas flares and other chemicals introduced into the Niger Delta environment is to render the soil infertile and at the same time polluting the creeks, rivers and rivulets. The people's basic livelihood of farming and fishing is thereby undermined, a situation that further impacts their morale, including their spiritual and ethical values, especially when juxtaposed with the affluence exhibited by oil and gas industry workers. It is no wonder that the Niger Delta's teeming unemployed youths have become increasingly restive.

The federal government's response has always been to threaten fire and brimstone and actually carry out such threats. The destruction of Umuechem by the Nigerian Mobile Force in the early 1990s, the siege on Ogoniland by the then Rivers State Internal Security Task Force in the mid- to late 1990s, the frequent clashes between MOPOL 19 squad and Egi youths, the land battle between federal troops and Egbesu youths in Ijaw land, and the recent devastation of Odi all lend credence of the federal government's arm-twisting tactics.

The significance of oil to the nation's economy has, however, not been lost on the indigenous peoples of the Niger Delta, especially the Ogonis, Ijaws, Ikwerres Efik, Ibibios, and Urhobos. They have often felt a certain sense of marginalisation as their "God-given" resources have been and continue to be exploited without a commensurate regard for the environmental impact of oil and gas operations, a situation compounded by the lack of basic social amenities.

The Babangida regime's answer to this was the creation of the Oil Mineral Producing Areas Development Commission (OMPADEC) in 1992. Babangida 'stepped aside' sometime in 1993 after setting up an Interim National Government (ING) headed by Chief Ernest Shonekan. The ING was itself toppled by General Sani Abacha in December 1993. Many of the human rights abuses associated with oil exploration and exploitation and their negative environmental impact became noticeable during the reign of General Sani Abacha, presumably because the Nigerian State decided to meet resentment and opposition with crude force. General Babandida was, perhaps, much more subtle in dealing with such issues. Abacha died on the 8th of June, 1997, the first Nigerian leader to die while still in office. His successor, General Abdulsalami Abubakir, enthroned the new civilian regime under General Olusegun Obasanjo's Presidency. Though this article covers the period from January 1966, many of the issues highlighted and discussed were manifestations of the early 1970s right up to the late 1990s, more particularly in the latter period.
V. CASE STUDIES

A. Ogoni

Ogoni is located within Rivers State in the Niger Delta region. Ogoni people are surrounded by other minority ethnic groups: the Wakirike (Okirika), Andoni, Opobo, and Ndoki. It is about 404 square miles in size and consists basically of six kingdoms: Eleme, Tai, Nyo-Khanna, Ken-Khana, Gokana and Babbe. They are said to contain about 500,000 people, representing roughly one half percent of the total Nigerian population. Ogoniland is endowed with a relatively spacious and fertile landmass and creeks, as well as with oil and gas deposits. The Ogoni economy is basically driven by subsistence farming and fishing.

Although Ken Saro Wiwa and his Movement for the Survival of the Ogoni People (MOSOP) had been at the vanguard in the campaign against environmental devastation by Shell in Ogoniland prior to 1995, it was not until he was hanged (along with nine other Ogoni activists) by the Abacha administration that the Ogoni issue took on an added international dimension. The global outrage over the executions of the Ogoni Nine resulted in the suspension of Nigeria from the Commonwealth of Nations, the resignation of Claude Ake from the Niger Delta Environmental Survey, and a continuing siege on Ogoniland by soldiers of what became known as the Rivers State Internal Security Task Force.

This research investigated the nature and extent of human rights violations in Ogoniland.4 A total of about thirty questionnaires were distributed. Of this number, twenty-five were later collected from respondents. The results of the questionnaire survey were quite revealing.

B. Bonny/Finima

Bonny is one of the riverine communities within the Niger Delta. It is situated south of Ogoniland at the fringes of the Atlantic ocean. Its immediate neighbors are the Andonis, Okrika, and Opobo peoples.

Bonny also serves as host to the over $3.8 billion (N360.54 billion) Nigerian liquefied Natural Gas Project (LNG), for which the people of Finima had to be relocated from the old Finima to the new site also

4. I discussed this with Chief Letam Duba of Bori in the Rivers State of Nigeria, who encouraged me to contact the Movement for the Survival of Ogoni People [hereinafter MOSOP] headquarters in Port-Harcourt. I then got in touch with Mr. Ledum Mitee, President of MOSOP, who posted a guard, to accompany me to Ogoniland. Next we chartered a taxi cab and did an on site inspection of some of the notable environment and human rights violation sites: Ejamah-Ebube in Eleme local government area; Kaa in Gokana Local Government Area, Biara also in Gokana Local Government Area; Yorla; and Bori. Having been to Kono, Tai, and Nyo-Khana, it was considered unnecessary to repeat those trips.
situated on the Island. Human rights violations in Bonny came to light in 1999 when the people protested on the 19th of September against the LNG management for its alleged refusal to implement the terms of an earlier Memorandum of Understanding (MOU). The MOU was entered into between the community and the principal partners to the LNG project for the provision of social amenities like pipe-borne water, good roads, schools, hospitals, and electricity on the island. The protesters then stopped the operation of the LNG for three days. The invitation of the military to the scene made matters worse: one Mr. Emmanuel Liblama was shot dead and several others were seriously injured and taken to various hospitals in the debacle. One Jack Adams, an expatriate, was said to have taken part in the shooting of the protesting youths.

The newly elected democratic government saw events unfolding in Bonny to be capable of sending wrong signals to foreign investors, a situation that informed the decision of the President to fly into the Island to broker peace with the youths. Olusegun Obasanjo also said the Federal Government would deal ruthlessly with any form of activity directed at creating problems for the economy. The youths allege that they were not given an opportunity to state their own case.5

C. Egiland

Egiland is a clan comprising about seventeen fairly large communities in Ogba/Egbema/Ndoni Local Government Area of Ahoada in the northern part of Rivers State. The area is mostly dominated by farmers with a well-organized social system. This was before 1962, when Safrap (now ELF Petroleum Nigeria Limited, a French company) discovered oil in the area. It discovered its first oil well at Obangi (code named OB 58) sometime in 1962.6 Oil has since been produced in this area, which also hosts a giant flow station. Other oil servicing companies in the area include Saipem Nigeria Limited and Ponticelli Nigeria Limited, both contracting firms to ELF.

Events that brought Egiland into the limelight occurred sometime on or about October 4th, 1993, when some aggrieved members of the community staged a protest against ELF (Nigeria) over what was perceived as the total neglect of the area. The security forces were invited at the instance of the company, and what started as an ordinary protest turned out

5. My guard, Sotonye Allison, an indigine of Bonny, took me to Bonny for a site inspection and distribution of questionaires (ten in number). We chartered a taxicab and went to the LNG site as well as the new settlement of Finima and asked relevant questions.

6. Currently, there are said to be over 62 oil wells. See Oil: Turmoil in the Niger Delta, 2 HUMAN RIGHTS DEFENDER, NO. 8, at 13 (1999).
to be one of the bloodiest in the Niger Delta. Many were either injured or killed. Since then, there have been sporadic and intermittent protests by members of Egi clan, which often result into the shutting-down of ELF operations in the area.7

VI. OBSERVATIONS

A. Ogoni

Human rights violations in Ogoniland are intertwined with environmental devastation resulting from over thirty years of oil and gas exploration and exploitation. Since most Ogonis depend on their land for subsistence agriculture including farming and fishing, it stands to reason that any environmental devastation is likely to impact negatively on the peoples’ social, economic and cultural rights. While such oil and gas exploration and exploitation activities are not peculiar to Ogoniland—evidence abounds of similar activities in other Niger Delta communities—the Ogoni issue is unique in the sense that they had the vision and nerve to challenge Shell and the Federal Government of Nigeria, while at the same time taking the issue unto the international arena. Consequently, they have suffered disproportionate stress: severe repression, killings, intimidation, detention, rapes and military occupation of their land.

At Eleme, environmental devastation is noticeable in the gas flares from the petrochemical complex, the Eleme flowstation, as well as from the Port-Harcourt Refinery Company (PHRC). In the same Eleme, the environmental degradation from Ejaimah-Ebubu oil spill of 1970, said to be caused by a mortar bomb blast on the Trans-Niger pipeline of Shell petroleum carrying crude oil to Bonny Terminal, can still be seen. It is indeed instructive that even after about thirty years after the spillage, the remnants of the spill as well as the contamination of farmlands can still be seen today.8

At K-Dere, where fifty-seven of the ninety-six oil well-heads were located, pipelines criss-cross the village.

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7 I discussed the Egi issue with two Egi sons, one in the Rivers State University of Science and Technology, the other in the University of Port-Harcourt, both of whom, however, preferred to remain anonymous. One of these persons assisted me in distributing the questionnaires (fifteen were distributed, ten were returned). I also had extensive discussions with a Human rights activist, Azibaola Robert Esq, a lawyer, whose non-government organisation [hereinafter NGO], Niger Delta Human and Environmental Rescue Organisation [hereinafter ND-HERO] had also done extensive field work in respect of the Egi crisis. The questionnaires returned were particularly revealing.

8. We observed that there is a Federal Environmental Protection Agency [hereinafter FEPA] technical van situated on the oil-spill site. It was not clear what this van was doing. The guards at the site said the van was sampling the texture of the soil with a view to remediation.
At Yorla, where a spill that occurred in 1994 after Shell was said to have ceased operation in Ogoniland, there's an appalling site showing the effects of oil spills and blowouts, and valuable land in Ogonis had been laid to waste.

At Kaa, houses have been riddled with bullets, vandalized, and laid to waste as a result of the operations of the Rivers State Internal Security Task Force.

At Biara-Gokana, a woman by the name of Kagbara Kalalolo is a living testimony to the sadism exhibited by members of the Rivers State Internal Security Task Force, who shot her left arm during one of their operations in the area.

Of the twenty-five questionnaire survey respondents, fourteen were males and eleven were females. All respondents were Ogoniland residents. They were all agreed that there were oil/gas installations in their communities for over twenty years. They all described the relationship between the Company (Shell Petroleum Company (Nigeria) Limited) and their respective communities as either “poor” or “very poor.” The elaborations on this answer were varied, but the thrust was that Shell was highly insensitive to the developmental needs of their host communities.

On the question, “What sector of your community’s life has the presence of the Company affected or impacted the most?,” twenty of the twenty-five respondents checked all of “Economic,” “Social,” “Cultural,” “Infrastructure,” and “Education.” The remaining five checked all of these and added “Environmental.” They all said that the impact referred to above was negative.

On the possible consequences of the continued operation or presence of the Company, their answers were varied. But, in summary, they all said it was going to deteriorate their environment and reduce their quality of life. They all believed that their individual or communal rights had been violated. On the nature of the violation, physical violence/abuse, rape and killings topped the list by a whopping twenty. Three others noted physical displacement and relocation, while two specifically said their houses were destroyed.

On the question of who violated their individual and communal rights, Military Personnel topped the list at seventeen. Some of these respondents also ticked “Company Staff” (12), while Government Officials,” “Company Contractors,” and “Fellow Villagers” were listed in that order. All the respondents said they made attempts at seeking redress, the thrust of which consisted of a non-violent protest aimed at drawing the Government and Company’s attention to their plight. They were all equally emphatic that nothing came out of their efforts.
B. Bonny/Finima

It takes about an hour to get to Bonny from Bonny waterside off Creek Road in Port-Harcourt. At the NLNG site, the area has an unusual military presence and closed-circuit monitoring security system all over the jetty and its environs. For every ten persons in Bonny at least three are security men. This is lost on the visitor because the security men are usually in plain clothes.

These security men are said to have been intimidating and harassing the entire people, not sparing the old and the very young, thus posing a concentration camp scenario. The newly built police station is also said to be one of the most fortified in the country now. There are also plans to build a naval base, which is intended to serve as additional security against threat by the villagers to the LNG project located there. Furthermore, because of the disproportionate military presence in Bonny, the arrest and detention of youths is quite common, and the police usually release their suspects only at very high and illegal monetary bail bonds.

True, I saw the military or mobile police presence in Bonny and it was quite obvious that we were being monitored especially at the jetty. But no questions were asked or arrests made. We were careful not to let them know that we were taking photographs of the LNG site together with the flare site. It is not certain what would have happened if the military men actually saw us taking pictures. I decided to take photographs of the flare site because my survey respondents complained generally of acid rain and poor quality of the drinking water.

C. Egiland

My investigations as well as observations confirm that ELF has been flaring gas into the Egi environment at very proximate distance to the diverse communities that make up Egi. This had been the case since the discovery of crude oil in the area. For instance, Obagi and Ogbogu communities are less than 100 meters away from the company’s flow station. Around this same area are two horizontal gas flare stacks that emit an average of 1.5 million cubic meters of gas into the atmosphere daily.

The Obite gas plant is situated right in the heart of the Obite community, a distance of about twenty-five meters away from the last building in the community. The environmental impact assessment on this project was belated. The gas well heads (Obewa cluster of nine gas wells)

9. A firm, Oasons Nigeria Limited was commissioned to embark on an EIA after strong reactions from the Egi people by which time the project was already being executed. Its paper was even more controversial and subsequently rejected by the Egi people. See generally, Efi in, Natives Out: Egi Clan, No One is Safe, A joint paper of human rights and environmental justice
are also situated about 100 meters from the Obiyebe community. There are also pipelines that crisscross the entire community.

My investigations also revealed that sometime in June 1998, the trio of ELF, Seipem and Ponticelli did actually unleash a regime of terror and violence on the people of Egi with the active connivance of one Joseph Wehabe, a project manager to Ponticelli, the then-commander of the Rivers State Internal Security Task Force (RSISTF) and the commanding officer of Mobile 19 Squad.¹⁰ Some of the victims of these various human rights abuses include the following persons: Mr. Nnandi Igila, Gideon Amadi, Romeo Ordu, Chidi Joshua, Princewill Obulor, Gospel Ogbuikwu, Confidence Igwe, Uche Victor, Bright Uchendu, Prince Ugo, John Ejah. These persons had at various times protested against the continued neglect of the community, its environment, and its human resources by ELF and its subcontractors.

Egi women have also in the past demonstrated against ELF and its subcontractors. Their specific demands included the protection of their environment from oil and gas pollution damage, employment of their husbands and children in the companies working in Egi, and the provision of social amenities in the community. In one protest, some of the women were violently dispersed by officers and men of the Nigerian Mobile Police. One Mr. Ozuroke was incidentally stabbed by a Mobile Police Officer in the process of urging one of the policemen to exercise restraint in dispersing the women, some of whom were forcibly shoved into gutters.

Against this backdrop, it was not therefore surprising that all ten respondents in Egiland—Shadrach Nnamdi, Nwaeremah George, Monday Udo, Amadike Okechukwu, Prince Chukwurundah Obuah, Ogu Evans O., Chief Hycenth Amakiri Ajie, Emegor N. Igwe, and two others who prefer anonymity—were of the view that the relationship between the company operating the oil/gas installations in their community and members of their communities can be described as either “Poor” or “Very Poor.” They were not, however, unanimous on the sector of their community’s life that the oil/gas company’s operations has impacted the most. Some thought it was social, others felt it was economic, and some others felt it was cultural or infrastructure. But all were convinced that the impact has been “Negative.” Again, they all agreed that their individual or communal rights were violated. They disagreed on the nature of the violation. Some

monitoring groups of the ND-HERO on the state of transnational repression of human rights of the Egi people in the Northern Rivers State, at 4-5.

¹⁰. My investigation also revealed that the Mobile 19 squad was the same outfit used to terrorize some parts of Ogoni land together with officers and men of the Rivers State Internal Security Task Force [hereinafter RSISTF].
felt it involved physical violence/abuse. Others said it included rape. Others said it included all of the above, including killings and physical displacement. Half of the respondents felt the perpetrators of these human rights violations were company staff (ELF was particularly mentioned) in connivance with fellow villagers and law enforcement agents. Eight of the ten respondents said that they made attempts to seek redress, and that this consisted of making representations to the Companies and Government, but that nothing came out of it.

VII. ANALYSIS

A. Introduction

All the cases investigated clearly indicate that the alleged human rights violations were offshoots of environmental degradation resulting from oil and gas exploration and development. Environmental degradation inexorably led to the loss of economic livelihood in the form of farming or fishing. Oil and gas exploration and exploitation then led to social and cultural dislocation. This was, however, not surprising, as Ved Nanda predicted that environment and human rights will become another big issue on the international law agenda in the next century. In Africa generally and especially in Nigeria, linkages between environmental protection and the promotion of human rights have become too glaring.

Beginning more effectively at Stockholm in 1972, environmental activism has been on the ascendancy, and has shown no signs of abating. While it is plausible to attribute this rise in global environmental awareness to the disasters of the 1980s, of which Africa has had its share, the unsustainable practices of industrial development may have triggered environmental consciousness in the first place.

In recent times, environmental activism has taken on an a new dimension: the human rights component. What, however, is the nature and scope of the linkage between environment and human rights? How can environmental resources such as oil and gas deposits be explored and...


12. The linkages between environment and human rights were first recognized and acknowledged in a UN resolution as far back as in 1968. See G.A. Res. 2398 a XXII U.N Doc. A/L553/Add.1-4 (1968). This resolution was adopted without objection of the fifty five member countries, including fifteen African countries (Algeria, Nigeria, Cameroon, the Congo, Brazzaville, Ethiopia, Ivory Coast, Kenya, Libya, Madagascar, Senegal, Sierra Leone, Somalia, Sudan and Zambia), in United Nations Year Book (U.N. Y.B), vol. 22, pp. 473-474.

exploited without violating the human rights of locals? More particularly, how can such rights be enforced?14

B. Nature, Scope and Genesis of the Linkage between the Environment and Human Rights

The nature of petroleum exploration and development, with its concomitant environmental impact, the fact that exploitation takes place mostly within countries with dictatorial central governments who are hesitant to concede a measure of autonomy to local oil bearing communities, recent developments in international human rights as well as environmental law and policy—including the activists role of non-governmental organisations—have all combined in varying degrees to reinforce the linkages between environmental protection and human rights.15

In Nigeria, the linkage between environment and human rights issues is intertwined with developments on the international scene. The Stockholm Declaration on the Human Environment was, perhaps, the first authoritative instrument which recognised the environment as an aspect of human rights. Principle 1 of that Declaration states that “man has the fundamental right to freedom, equality and adequate conditions of life in an environment of a quality that permits a life of dignity and wellbeing, and he bears a solemn responsibility to protect and improve the environment for present and future generations.”16 This declaration actually falls short of proclaiming a right to the environment.17 Besides, there was neither state practice nor opinio juris at the time in support of such proclamation.18

14. This debate has become significant as it may determine the premium to be placed on environmental and human rights issues in Africa's quest for economic self-sustenance through upstream petroleum investments. On the other hand, it could also enable upstream petroleum investors to appreciate the role they would have to play in order to continue to remain relevant in Africa's developmental efforts.

15. On the environmental impact of upstream petroleum investments and the problem of undemocratic governments controlling upstream petroleum investments in Africa, see chapter 3 supra. The vexed issue of granting some measure of autonomy to local oil producing communities is particularly noticeable in the Ogoni grievance against the Nigerian federal government. A parallel can be drawn in this respect with environmental and human rights incidents in Papau New Guinea (PNG), Ecuador, Colombia and Brazil. See G. S. Akpan, The Rise in Environmental and Human Rights Issues and Implications for Petroleum and Mineral Investments, Dissertation submitted for the Award of the Degree of Master in Law, CEPMLP, University of Dundee, Dundee, 1996/97 Academic Session, Chapter 4, at 39-55.


18. V. P. Nanda, supra note 11, at 62.
Again, considering that international attention at the time was focused on economic development and the cold war, it is not difficult to see why the right to the environment was not incorporated into the *corpus juris* of international law.

Even then, at the global level, there has been a growing body of evidence pointing to the recognition of the environment as a human right.19 As of 1990, the United Nations General Assembly had adopted a resolution on the "[n]eed to ensure a healthy environment for the well-being of individuals".20 Proposals were even submitted at the preparatory Committee meetings for UNCED, to include recognition of the right to a healthy environment in the final document.21 However, Principle 1 of the Rio Declaration simply states that "[H]uman beings are at the centre of the concerns for sustainable development. They are entitled to a healthy and productive life in harmony with nature."22 Some commentators see this as a regressive step in the development of the linkage between the environment and human rights in the international fora.23 Even if the Rio Declaration had taken a progressive step by recognizing the right to a healthful and clean environment, declarations and resolutions are weak sources of international law. They are not binding in character. While they may be useful in identifying common aspirations of the international

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20. This was at the sixty-eighth plenary meeting of the forty-fifth session. See G. A. Res. 45/94 (1990).


community and may gradually crystallize into binding international law norms, they could equally be discarded into the dustbin of history.24

Against this backdrop, some commentators are of the view that a human right to a “decent,” “healthful,” and “safe” environment must be recognized, if we are to address more seriously the problems of environmental degradation.25 In a nutshell, their proposition is that the right to the environment is one of the emerging “third generation” rights or “solidarity” rights.26 Weiss argues that this adds a temporal dimension to the environmental debate, and brings the concepts of intergenerational and intragenerational equity into sharper focus.27 Others think it would provide the framework necessary to encourage co-operation between private actors and governments of states.28

Having had their experience of slavery and colonialism, the immediate concern of African states shortly after independence was the eradication of all forms of racial discrimination and right to self-determination within the framework of the Universal Declaration of Human Rights.29 Subsequently, matters of economic self-sufficiency, cooperation, and development became high on the agenda.30 Consequently,

24. The NIEO was perhaps one of the resolutions that has been drowned by the wave of globalisation and liberalisation. Arguably, NIEO is still in the water and appears to have metamorphosed into environmentalism and sustainable development.


throughout the 1960s, right through the 1970s, the emphasis was on both first and second generation rights. By 1981, these rights were reaffirmed and, in addition, the environment as a human right was recognized in article 24 of the African Charter of Human and Peoples Rights, which provides that “[a]ll peoples shall have the right to a general satisfactory environment favorable to their development.”

Shelton suggests that the language of the charter reflects a general focus on collective economic and social conditions rather than individual rights. While this may well stem from Africa’s communal societies, the preamble provides that, “the reality and respect of peoples rights should necessarily guarantee human rights.”

Despite the lofty goal of this charter, it is instructive that it was not until the latest constitutional experiment of Nigeria that the right to a safe environment was recognized. Section 20 of the 1999 Constitution of the Federal Republic of Nigeria States that “[t]he State shall protect and improve the environment and safeguard the water, air and land, forest and wild life of Nigeria.” Even at that, it is important to note that this provision is non-justicable because it forms part of the fundamental objectives and directive principles of state policy in Chapter II of the constitution. No Nigerian citizen can go to court to enforce his/her right in respect of a violation or threatened violation of such provision. The fear of enshrining human and environmental rights in Nigeria is in the possibility of multiple suits against the federal government, or any of the tiers of government, by aggrieved individuals and communities. Yet in trying not to be categorical on it, the Nigerian government gives the erroneous impression that environment and human rights concerns are not fundamental in the policy thrust of the administration, whether civilian or military. As Ogolla submits, “the constitution of a country constitutes the first and primary level in its hierarchy of norms. Constitutional provisions, inter alia, underline national priorities and hence determines the direction and nature of future legislative policies and executive actions.”

32. Id.
33. This was obviously an improvement on the 1979 Constitution as amended, which stipulates that, “exploitation of human or natural resources for reasons other than the good of the community shall be prohibited,” Nig. Const. ChII, Art. 18.
C. From Environmental law to Environment and Human Rights in Africa?

Shortly after independence, petroleum-resource-rich African nations began the process of economic reconstruction and development by granting extensive oil concessions to multinational oil companies. Beyond doubt, petroleum exploration and development have become the mainstay of the economies of Angola, Algeria, Egypt, Libya and Nigeria, and have brought development to major cities in these countries. It has in equal measure brought untold hardship to oil producing communities, where the plague of oil pollution over the years has persistently threatened the environment, health and well being of the inhabitants.

In many states of Africa, effective regulation of the oil industry has been either nonexistent, piecemeal, fragmented, or devoid of effectiveness, leaving the inhabitants of oil producing communities to the vagaries of legal remedy. Environmental and human rights dimensions of petroleum exploration and development in Africa are particularly acute in the densely populated Niger Delta of Nigeria, where the bulk of Nigeria's onshore petroleum operations takes place. Oil-producing communities in Nigeria complain bitterly of their land and “God-given” resources taken away from them without adequate compensation. This would appear to be contrary to the basic provisions of the Universal Declaration of Human Rights under article 17 which provide, “1. Everyone has the right to own property alone as well as in association with others [and] 2. No one shall be arbitrarily deprived of his property.”

Now, on access to justice, Nigeria's inherited colonial common law of torts enables victims of oil pollution damage to seek limited judicial remedies. Following a denial of liability, a claimant is left with the

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35. There are several manifestations of abuse of environmental and human rights, which is not just limited to environmental degradation. Discrimination and deprivation of inhabitants of oil producing communities by both, the government, and the oil industry, overt and covert suppression and repression of dissent in these communities, which may eventually lead to death. See World Council of Churches, Ogoni: The Struggle Continues (1996). On the accusations of causing environmental devastation in the Niger Delta, see http://www.shellnigeria.com/issues/environ.html (last visited Oct. 6, 2001).

36. Section 1 of the Land Use Act 1978 vests all land within the territory of each state in the governor to be held in trust for the benefit of all Nigerians and, provides for compensation only in respect of the unexhausted improvements on the land under section 29(1).

37. In this respect, the environmental and human rights issues have some semblance with the abandoned property issue: they both deal with property deprivation. The only distinction is that the former is accompanied by environmental pollution, while the latter is not.

38. These are trespass to land, nuisance, negligence, and the rule in Rylands v. Fletcher. For a stimulating commentary on these remedies, see J. F. Fekumo, Civil Liability for Oil
option of pursuing these civil remedies, which are, to say the least, difficult to establish.\textsuperscript{39} Against this backdrop, a learned commentator has called for a human rights approach to the environment.\textsuperscript{40} This in turn raises several critical issues which were identified by Shelton: are human rights and environmental protection based on fundamentally divergent values? Would more conflicts and confusion arise from attempts to accomplish them? On the other hand, do they represent complimentary social values that serve to further the other’s objective?\textsuperscript{41}

In terms of objectives, it is obvious that whereas the promotion and protection of human rights can enhance freedom, justice and peace, the goals of environmental law are not so clear. Gormley suggests that the purpose of environmental law is to benefit mankind.\textsuperscript{42} Shelton is, however, skeptical of such a human centered approach, which is bound to view the environment only from its economic utility to humans.\textsuperscript{43} The argument is that the environment is an end in itself, requiring protection for its own sake and that existing human rights law do not provide adequately for the environment.

In practical terms, African countries have participated actively in the promotion of international human rights and environmental law. In the former, they have achieved limited successes in the areas of the right to self-determination, and against racial discrimination, although there is still a deep chasm between oratorical rhetoric and practical reality. In the latter, their collective and respective positions are far from understood.

As developing countries, the argument that environmentalism is an orchestrated master plan by some interest groups in the North to continue


\textsuperscript{39} A claimant is usually required to discharge a formidable burden of proof with respect to causation, foreseeability, and damage. Even where he succeeds, the amount of compensation often awarded by the Nigerian courts is, more often than not, inadequate. In addition, injuries arising from denial of property rights, peaceable enjoyment of property, family life, diminution of economic well-being, threat to life, and damage to the environment are either under assessed, or completely overlooked.

\textsuperscript{40} \textit{See, e.g.}, P. D. Okonmah, \textit{Right to a Clean Environment: The Case for the People of Oil-Producing Communities in the Nigerian Delta}, 41 J. AFR. L. 43-67.


\textsuperscript{43} \textit{Id.}
to stultify their economic growth must be appealing. Besides, the fact that the North has contributed in no small measure to the global environmental crisis has diluted the resolve of the less economically advanced nations (LEANs), including Nigeria, to advance environmental causes. Moreover, implementing environmental measures—whether at the global, continental, regional, or national level—entails economic cost, which most African countries cannot afford. Against this backdrop, it is not difficult to appreciate why environmental concerns in developing countries are considered to be hypocritical.

It would appear though that environmental concern is a luxury only rich industrialized countries of the North can conveniently afford. Besides, strong environmental activism only emerged in these countries long after they had become industrialized, a stage which most African countries have yet to attain. What is even more puzzling is that many of the industrialized world’s environmental concerns have very little or nothing to do with imminent threats to its inhabitants’ well-being, much less environmental and human rights problems of developing countries of Africa. This is the more reason why environmentalists of the North are accused of naiveté in their campaigns against pollution in developing countries.

Incidentally, no amount of criticism would eliminate the potential global ecological crisis. Ironically, the consequences of such crisis would not be proportionately spread among nations on the basis of their contribution to the environmental problem in the first place. Furthermore, developing countries of Africa, Asia and Latin America are worst-placed financially and technically to tackle any such ecological crisis and, as such, should be concerned about taking preventative measures. Granted that in Africa, economic development should take precedence over environmental protection, such development could still be achieved in an environmentally sustainable manner. The only other alternative appears to be a “vicious circle of stunted economic growth as a result of environmental degradation.”

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44. See e.g., T. Waelde, Environmental Laws Towards Mining in Developing Countries, 10 J. ENERGY & NAT. RESOURCES L. 340 (1992). Also, a Channel 4 documentary serial entitled Against Nature, transmitted 30/11/97, 17/12/97 and 14/12/97 in three parts, altogether running into three hours, justified this view. See also the illuminating article, Development and the Environment: Dirt Poor, THE ECONOMIST (Mar. 19, 1998), at 1.

45. Id.

46. People worry about whether carbon-dioxide might lead to a warmer climate next century, or whether genetically engineered crops might have unforeseen consequences for the ecosystem. THE ECONOMIST, supra note 44, at 1.

47. P. D. Okonmah, supra note 40, at 60.
Some commentators have nevertheless been very critical about the proliferation and almost anarchic manner in which the province of human rights is being expanded. However, considering that at the time of the Universal Declaration it would not have been possible for mankind to anticipate all the manifest possibilities and future impact of industrial development on the environment, there seems to be no justification to refuse a logically deducible solution that is practically implementable to a teething problem on the simple ground that it has been “conjured up.”

There are other queries. For instance, the foundation of environmental protection suggests broader interests than human rights. How then would the former ambit be properly delineated? Would it also include those of future generations? Environmental protection would seem to surpass the mere protection of human rights, as it most certainly includes nature and the entire ecosystem. But the recognition that mankind’s survival depends upon a clean, safe and healthful environment equally places the claim to a clean environment on the human rights agenda. Besides, the fact that the environment does suggest broader interests should not detract from the legitimacy of a right to a clean environment.

Furthermore, while some may quarrel with the idea of operationalizing future generations’ right to the environment, the Philippines Supreme Court had no difficulty whatsoever in recognising this right in Minors Oposa v. Secretary of the Department of Environment and Natural Resources (DENR). This was a class action brought by minors for and on behalf of themselves and generations yet unborn, claiming a violation of their right to a healthful ecology. In associating this right with


50. D. Shelton, supra, note 23, at 133.

51. A. D’Amato, Agora: What Obligation Does Our Generation Owe to the Next? An Approach to Global Environmental Responsibility, 84 AM. J. INT’L L. 191-194 (1990), (using Parfits thesis, which maintains that every single person alive 100 years from now will be an entirely different individual from the person he or she would have been had we not intervened in the environment).

the twin concepts of intragenerational responsibility and intergenerational justice, the plaintiffs urged the court to cancel all existing timber licenses in the country and for an injunction restraining the DENR "from receiving, accepting, processing, renewing or approving new timber license agreements," which they claimed were responsible for "a host of environmental tragedies," such as drought, flooding, water shortages, massive erosion, salinization of the water table, and the disappearance of the indigenous Filipino cultures. The Supreme Court had no difficulty in reversing the lower court's order, after a careful consideration of the relevant Philippine legislation, and holding that the petitioners had the "locus standi necessary to sustain the bringing and maintenance of this suit." However, this case must be distinguished on its merits. With the possible exceptions of Angola, Congo and Ethiopia, it is very doubtful whether, if similar facts were to present themselves in other major African petroleum-producing counties and especially in Nigeria, the same decision would have been reached. This is because, unlike the Philippines, Nigeria has no express constitutional provision on the right to a clean or healthful environment. The problem is further compounded by the fact that even at the continental level, the African Commission on Human Rights, Africa's equivalent of the European Court of Human Rights and the Inter-American Human Rights Commission do not give any binding decisions on human rights violations. Against this background, how would aggrieved Africans enforce the right to a healthful environment? This would be the basis of recommendations in the next section.

53. Id. at 177.
54. Id. at 177-78.
55. Id. at 200.
56. See Phil. Cost., Art II., Sec. 16, which explicitly provides that, "The state shall protect and advance the right of the people to a balanced and healthful ecology in accordance with the rhythm and harmony of nature." Id. at 187. Although Nigeria has formerly ratified the Banjul Charter in the African Charter of Human and Peoples Rights Ratification and Enforcement Act, L.F.N. 1990, it would require an imaginative and bold judiciary to come to the same conclusion in the absence of a justiceable constitutional entrenchment. 57. Admittedly, this presumes that, the "aggrieved Africans" would be easily identified. When the chips are down, this may turn out to be one of the most contentious of issues. Should they be "indigenous" to the oil producing communities? It is instructive that, no precise and universally acceptable definition of the term currently exists, despite the efforts of the World Bank, United Nations Development Programme [hereinafter UNDP] and the ILO at endeavouring to provide a definition. While some commentators consider it significant, to have a provisional reference that would enable international organizations to easily identify beneficiary groups, and thereby improve the targeting of their activities, others question the possibility or desirability of arriving at a universal definition, which can hardly capture the diversity of indigenous peoples around the world. For the former view see K. Karl, The EU Listens to the
VIII. RECOMMENDATIONS AND CONCLUSION

A. General Recommendations

In view of the current predicament, in which the Banjul Charter makes no provision for the enforcement of environmental rights guaranteed under Article 24 of the charter, efforts would have to be co-extensive at the international and national levels if this right is to be realized.

The first logical step would be to create an African Court of Human Rights on the continent, similar to the European and American models. Interestingly, a draft protocol prepared by experts on the establishment of such an African Court of Human and Peoples’ Rights was considered in December, 1997. The protocol, which has been adopted, “defines the


organization, jurisdiction and function of the African Court of human and peoples' rights. It also enumerates those entitled to submit cases to the court, the composition of the 11 judges of the court to be elected for a six-year term." It is not now certain what has become of this protocol, as nothing has been said or heard about it after the adoption of the protocol.

Even when such a court is finally established, there would be a perennial need for the UN Commission on Human Rights to complement efforts at the continental level. Indeed, developments at the international level may have given further impetus to the efforts on the continent. The paper of the linkage between environmental and human rights by the Special Rapporteur, Madam Fatma Zhora Ksentini, and her final paper (to which is annexed) a Draft Declaration of Principles on Human Rights and the Environment is evidence of both the legitimacy and legality of the need for effective enforcement in order to safeguard environmental rights from incessant violation.

Again, until such a time when most African countries shall become parties to the Optional Protocol to the international convention on civil and political rights, another plausible option would be to continue to rely on the local judiciary within states to give a purposive construction to existing civil and political rights enshrined in all national constitutions. What this

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63. In this regard, African courts could borrow a leaf from the Constitutional Court of India, which found that: "The right to life is a fundamental right under article 21 of the constitution and it includes the right of enjoyment of pollution-free water and air for full enjoyment of life. If anything endangers or impairs that quality of life in derogation of laws, a citizen has the right to have recourse to article 32 of the constitution for removing the pollution
means in practical terms is to hold that the right to life, which is guaranteed in all African constitutions, is itself dependent on many other elements of the environment, such as clean water, food and shelter, and that environmental quality is directly related to the full enjoyment of this right. A corollary to this is to hold that the right to privacy may be endangered by a high level of intolerable noise or air pollution. Critics would be quick to point out that such an activist judiciary is likely to extend the scope and nature of civil and political rights beyond those originally contemplated. Richard Desgagne examined European case law, which all pointed to the fact that the ambit of environmental protection achievable through human rights litigation is narrow because environmental damage was not itself a cause of action, but is linked to a protected right. Understandably, human rights and environmental protection share common objectives, but not all environmental issues can be formulated in terms of human rights violations.

Even then, strengthening the scope of certain procedural rights could aid the enforcement of environmental rights. These procedural rights include the right to information about activities that may adversely affect the environment for persons who are likely to be affected by such activities, the right to participate in the decision-making process for actions likely to result into environmental harm, and the right of recourse before administrative or judicial agencies. Clearly, this would simply be an attempt to translate Principle 10 of the Rio Declaration into the domestic legislative framework by Nigeria.
However, considering the difficulties associated with enforcement of the human right to the environment, coupled with the fact that there are limits to what the law can achieve, reliance would also have to be placed on the social responsibilities of international oil companies. Among the factors which make this a necessity are that (a) they have enormous resources, which could easily be used to neutralize attempts to effectively control their behavior; (b) their secretive tendency makes information about possible emissions of hazardous substances difficult to ascertain; (c) even when reliable information is forthcoming, they have the capacity to stall criminal proceedings and pay punitive fines, or indeed to retain the best legal experts; (d) on the other hand, imposition of heavy fines would make final consumers and the local economy worse-off. These and other hindrances militate against confidence in the national judicial systems.

The Draft United Nations Code of Conduct on Transnational Corporation (UNCCTC) was partly an attempt by the international community to infuse in industry this sense of social responsibility toward their host states on the one hand, and on the other, to regulate the treatment of multinational corporations by host states. Clauses 41-43 deal with environmental protection, requiring transnational corporations (TNCs) to comply with host state regulations and policies on environmental protection, due regard being given to relevant international standards. TNCs are to make available to host governments environmental information relating to their operations and products, and to be responsive to efforts to develop and promote national and international standards for the protection of the environment. Admittedly, the idea of good corporate citizenship is not sacrosanct, as it may be an avenue to indulge in matters wholly extraneous and of no direct or indirect benefit to the company.

opportunity to participate in decision making process. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided," 31 I.L.M. 878 (1992).


70. Id. at 79.


However, the concept of enlightened self-interest may be relevant in enabling shareholders to appreciate the long-run benefits of good corporate citizenship. In the words of Sir Arvi Pabo, "[s]uch an approach does not empower managers to indulge in their own whims, powers or privileges at the expense of owners, nor does it indulge in the 'greed is good' brigade for whom social responsiveness is an irrelevancy." In fairness, some oil companies in Africa have made some commendable efforts at discharging their social responsibilities, which they have not been shy to advertise. However, these token gestures are not always regular, consistent, or done in a coordinated way with adequate and enlightened communal participation. Besides, when they are done grudgingly, this has a negative effect on communal appreciation.

Furthermore, a social impact assessment (SIA) must be contemporaneous with the EIA at the beginning of oil and gas operations. Along with effective communal participation, it would be difficult if not

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74. Chevron, Mobil, Agip, and Shell have, through their Health, Safety and Environment or Public Relations departments, engaged local communities in some social services such as providing scholarships, building hospitals, providing pipe-borne water, renovating schools etc. See e.g., *Shell in Society 1995*, a publication of the Group External Affairs (SLBPA).

75. Such responsibilities may be said to be discharged grudgingly when the company makes it plain that it is not its responsibility to provide such service, thereby 'rubbing-in' the impression that, the community should be grateful for any token gesture.

76. Both government and industry could further explore the possibility of a social management plan (SMP), a social monitoring, papering and provision of information as well as a social audit at the conclusion of operations. In the alternative, these should be expressly integrated into the prevailing EIA requirements in existing legislation for the avoidance of doubt. On the factors supporting the integration of social concerns into the planning and implementation of privately financed projects within developing countries, see K. McPhail and A. Davy, *Integrating Social Concerns into Private Sector Decisionmaking*, The World Bank Discussion Paper No. 384, 1998, pp. 1-58.

77. Effective communal participation can be equated with the participatory rural appraisal (PRA) schemes in India, Pakistan and the far east currently being undertaken under the auspices of the WWF and the Institute of Development Studies (IDS). It involves enabling rural communities to take charge of their own affairs with minimum direct interference, save for the purposes of supervision. Even such supervision is undertaken in a very respectful and coordinated way, taking into consideration the sensitivities of the rural communities. See the 25-minute video, *Who Holds the Stick: Behaviour and Attitudes in PRA*, by the Development Perspectives for the WWF and the IDS. This should be contrasted with the unsuccessful attempt by the Nigerian federal government to establish an Oil Mineral Producing Areas Development Commission (OMPDEC) for the purposes of developing the oil producing areas. One of the criticisms against the Commission was that it was controlled by the federal government which funded it, instead of allowing local communities to take charge of their own affairs.
impossible to allege that industry has been negligent in incorporating the social dimensions of its investment operations.

B. Specific Recommendations

These recommendations are based on the results of a questionnaire survey conducted in Ogoniland, Bonny/Finima and Egiland, as well as on interviews and the results of the focus group discussion. 78

1. Ogoniland

Thirty questionnaires were altogether distributed in Ogoniland. Of this number, twenty five were returned. Twenty of the respondents (eighty percent) were emphatic that the state should identify those who perpetuated the human rights abuses in Ogoniland, prosecute and punish them accordingly. In particular, the commanders of the then Rivers State Internal Security Task Force, officers and men of Mobile Force 19 who carried out those horrible incidents of human rights abuses, were mentioned in the focus group.

Respondents recommended that all those who suffered one form of physical abuse or the other should be compensated by the Nigerian State. Where the victims are dead, their relations should be compensated as a token of government's concern and sympathy for the plight of the oppressed Ogonis. It was also suggested that the paper of the United Nations Human Rights Commission special repertoire on Ogoniland be adopted and implemented by the Nigerian federal government as a demonstration of its sincerity to right the wrongs inflicted on the Ogonis. It was also suggested that Shell should carry out an environmental audit of its operations in Ogoniland to determine the level of environmental degradation suffered by the Ogoni peoples and, compensate adequately before returning to Ogoniland. Finally, respondents suggested that this development project in Ogoniland should not be undertaken without an environmental impact assessment to determine the suitability of the project in question, and also that popular participation of the indigenous people of Ogoni should be internalized as an aspect of project execution.

2. Bonny/Finima

Six out of the ten respondents in Bonny/Finima believe that the human rights situation in Bonny has improved and described the relationship between the community and the companies operating in Bonny, more

78. The focus group discussion comprised two lawyers, one environmental scientist, one administrator, an accountant and two social scientists. The discussion was held at the Faculty of Law, of the Rivers State University of Science and Technology Common room.
particularly NLNG and Mobil, as satisfactory. But this contrasted rather sharply with the impressions from the focus group discussion. Those present felt that Bonny is saturated with plain-clothes policemen from the State Security Service (SSS), and that one in every five people in Bonny is a policeman. The recommendations therefore tended towards remedying this situation: first, that the State should reduce the presence of its security apparatus and operatives on the Island as everyone suspect every other person as belonging to the SSS. The implication of such heavy security presence is to give the impression that the Island is under siege, thus confining the freedom of movement of innocent persons.

Second, following the stoppage of the first shipment of the LNG from Bonny by the youths over what they perceived as a reneging by the company of the terms of the MOU undertaken between the companies and Bonny community, a Bonny youth was killed by a foreign worker said to be a white man in the company of the police. Thereafter, three other youths were shot by the Nigerian Police. Respondents say the families of these youths should be compensated adequately. Further, respondents say those who shot at the youths should be prosecuted and punished, including the expatriate worker said to be one Mr. Jack Adams.

Further, respondents claim that there should be even development at Bonny. Current development, especially roads, are too narrow and only serve as links to the companies’ operational sites.

Finally, it is recommended that natives of Bonny should be employed at all levels by the companies. The current situation where even cleaners are employed from one or more of Nigeria’s major ethnic groups when Bonny youths are unemployed does not augur well for a harmonious relationship.

3. Egiland

Due to some unavoidable reasons, it was not possible to retrieve most of the questionnaires (about fifteen) distributed in Egi clan. However, these recommendations are based on interviews of Egi sons and daughters, on-site inspection and the focus group discussion: a proper Environmental Impact Assessment of the Obite Gas Plant should be undertaken with the participation of CBOs and NGOs in the Rivers State. An Environmental Audit should be undertaken for of all other Egi communities with ELF and Agip facilities. ELF should create an enabling environment for genuine dialogue with the Egi people with other NGOs in Rivers State in attendance. Adequate compensation should be paid to the families and

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79. Contrast this with the statement of the photographer who accompanied me, who stated that at least two out of every ten persons in Bonny are spies from the State.
communities whose land had been “compulsorily acquired” by ELF and its sub-contractors. Basic social amenities like quality pipe-borne water, electricity, and good roads, schools and hospitals should be provided for the Egi people.

There should be resettlement of the communities hosting the Obite Gas Plant like Finima in Bonny. The 1993 agreement between ELF and the Egi clan should be implemented. EPNL should stop the divide and rule tactics in Egiland while evolving a proper consultation and channel of communication between it and the communities.

Finally, for all three communities, those who have suffered personal distress, humiliation or assault to their persons must necessarily be compensated. The recent hearings of petitions before the Oputa Panel on Human Rights Violations would seem to be tailored along the lines of compensating those who have suffered grave personal violations. This is to be encouraged to deter continuing human rights violations in the future.
I. INTRODUCTION

Knowledge of the history of conflict of laws in Nigeria, the ideas behind its development, and the numerous problems that beset the application of its principles, is in itself the history of the socio-economic structure of the society, between feudalism and capitalism. Conflict of laws often found more fertile soil for germination in societies with capitalist tendencies, like the Italian city-states of the fourteenth and fifteenth centuries. Its historical context identifies the themes that matter in the development of laws in Nigeria.

In Egypt, Rome and the Greek city-states, citizens had dealings, contacts and commercial intercourse with foreigners which ought to have raised the question of conflict of laws in disputes arising from such intermingling and transactions. The Egyptians traded with the Greeks; the Romans traded with most parts of their world, *e.g.*, the Carthaginians and Europeans; and the Greek city-states traded among themselves and with their neighbors. What was the law applied by the courts of each of these ancient peoples in the settlement of disputes which had foreign elements? It does not seem that clear choice of law rules as known today were developed and applied by the courts of these ancient states. However, it appears that disputes which arose from intercourse with foreigners were settled in a peculiar manner by means of treaties and bilateral agreements.

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under which the application of the local legal system was extended to foreigners. For instance, under the bilateral agreement between Rome and Carthage, law applicable to Roman citizens alone, *jus civile*, was extended to Carthaginians. In addition, Rome appointed a special magistrate, the *praetor peregrinus*, to adjudicate disputes between Romans and foreigners or between two foreigners in Rome. However, the *praetor peregrinus* did not settle such disputes on the basis of rules analogous to contemporary choice of law rules in conflict of laws, but relied on general notions of fairness and justice. The body of law emanating from the *praetor peregrinus*’s decisions formed the part of Roman law known as *jus gentium*.

But it was in the Italian city-states in the Middle Ages that a scientific approach was adopted toward the solution of disputes arising from transactions and intercourse with foreigners. They had separate courts, laws and magistrates for that purpose. The city-states were legally and politically independent and had huge trading transactions and intercourse among themselves. A citizen of Bologna would conclude a contract in Padua, with a citizen of Modena, to be performed in Florence. Such transactions had contacts with four city-states whose laws were not necessarily identical with respect to issues arising from the contract. The question became, “what law was applicable to such disputes?” The Roman jurists of this period, the glossators of whom Accursius is an example, tried to answer such questions by means of glosses on the Justinian Code. However, this approach was fictitious because that Code did not have choice of law rules.²


2. A celebrated seventeenth century writer stated:
It often happens that transactions entered into in one place have force and effect in the territories of a different state, or have to be adjudicated upon in another place. Moreover, it is well known that the laws of every nation differ in many respects, for since the breaking up of the provinces of the Roman Empire, Christendom has been divided into almost innumerable nations, not subject to one another and not sharing the same system of government. It is not surprising that there is nothing on the subject in Roman law, for since the sovereignty of Rome extended to all parts of the world and was regulated by a uniform law it could hardly give rise to a conflict of different laws.

The post-glossators, e.g., Bartolus, approached the question of applicable law engendered by intercourse with foreigners from the perspective of statutory doctrine. A statute was used by the post-glossators to refer to all laws of a city, whether the laws emanated from custom, legislative enactment, or executive acts. Under statutory doctrine, a statute was real if things were mentioned first, and personal if persons were mentioned first. Real statutes applied to all things within the territory of the sovereign who enacted the statute and had no force outside the territory of that enacting sovereign. Personal statutes followed a person everywhere and had force within and outside the territory of the enacting sovereign. By this analysis, a court in Modena, for instance, could apply the personal statute of Padua but not its real statute. It was often a matter of great controversy whether a statute was real or personal. Is a statute on conveyance of land to minors real because it mentions land, or personal because it mentions persons?

This statutory doctrine approach continued in France in the sixteenth century. France also had the problem of conflict of laws arising from its diversity of regional laws, i.e., coutume, mainly written, which varied from province to province and had to apply to inter-provincial trade. The foremost exponents of the statutory doctrine in France were Charles Dumoulin (1500-1566), who established the principle that the law mutually intended by the parties, or presumed to have been intended by them, should apply to disputes arising from their contract; and D'Argentre (1519-1590), who added a third class of statute: mixed statutes, i.e., statutes that mentioned both persons and things. He considered mixed statutes to be in the nature of real statutes which did not have extra-territorial application.

This statutory doctrine—adopted in the Italian city-states, in France, in Germany, and later in America by Samuel Livermore—bears close resemblance to modern choice of law rules. Choice of law rules, e.g., lex domicilii, lex contractus, and lex loci delicti, ensure that in certain circumstances the court of a country could apply foreign law as providing the rule of decision. Likewise, the statutory doctrine gave extra-territorial effect to foreign law where such law was personal, as defined above. In the same way that a modern court can hold that legitimation is governed by lex domicilii, and therefore should apply foreign law if it is the law of domicile, a court in Padua would apply the statute of Modena if it dealt with the legitimation of Modena citizens, i.e., was a personal statute and gave effect to it.

However, the Dutch theorists in the seventeenth century, notably Paul Voet (1619-1677), Ulrich Huber (1636-1694) and Johannes Voet (1647-1714), did not base the solution for conflict of law problems on the statutory doctrine. They resorted to the comity doctrine as the basis of their solution to disputes arising from international transactions or intercourse. The Netherlands, like France, were divided into independent provinces with their own separate legal systems. Intercourse among these provinces and between them and other countries ensured the emergence of conflict of laws problems. The Dutch jurists tried to respond to such problems on the basis of the comity doctrine, under which foreign law was applied by reason of the comity or friendly relations existing between nations. The implication seems to be that a Dutch province applied a foreign law, *e.g.*, English law, not on the basis of lucid choice of law rules but solely on the ground of whether or not friendly relations existed between the province and England. What happened when, for instance, the relationship between it and England became frosty? Would English law then be inapplicable? We know today that courts give recognition to foreign law in order to obviate the injustice that would arise by doing the contrary. When courts apply foreign law, it is not out of any courtesy or respect to the foreign country. For instance, when a court holds that a marriage celebrated in a foreign country would be determined, as to its formal validity, by the foreign law, it so holds not because of any friendly relationship or respect for that foreign country but because of the injustice that might arise if the local law was applied to determine the validity of that marriage. It could be that under the local law the marriage is formally invalid, though formally valid by the foreign law under which it was celebrated. The result could be that the children of the marriage might be legitimate, *i.e.*, by virtue of valid celebration of the parents' marriage.

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5. Huber writes:

For the purpose of unfolding the difficulty of this particularly intricate subject we shall formulate three maxims which, being accepted as undoubtedly it appears they should be, seem to clear the way for us for the solution of the remaining questions. They are these:

1. The laws of every sovereign authority have force within the boundaries of its state, and bind all subject to it, but not beyond.

2. Those are held to be subject to a sovereign authority who are found within its boundaries whether they be there permanently or temporarily.

3. Those who exercise sovereign authority so act from comity that the laws of each nation having been applied within its own boundaries should retain their effect everywhere so far as they do not prejudice the power or rights of another state or its subjects.

Huber, *supra* note 2.
under the foreign law, but illegitimate under a local law which had no connection with the celebration of the marriage in a foreign country.

The point is that in The Netherlands the comity doctrine was employed in a way similar to the modern function of choice of law rules, i.e., used as the basis for the application of a foreign law to a case having a foreign element.

It was in England and America in the nineteenth and twentieth centuries that choice of law rules as we know them today were developed for conflict of laws. Instead of approaching the question of conflict of laws from the perspectives of the statutory and comity doctrines, the judges in these countries applied judicially developed rules of selection, i.e., choice of law rules, to such questions. For instance, in Holman v. Johnson, Lord Mansfield observed:

There can be no doubt, but that every action tried here must be tried by the law of England; but the law of England says, that in a variety of circumstances with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern.\(^6\)

Thus, \textit{lex loci contractus} as a choice of law rule was recognized and applied in that case. Some of the jurists responsible for the formation of conflict of laws rules, both in England and America, include J. Story, C. Kent, A. V. Dicey, G. Cheshire, J. Westlake, and F. Harrison.\(^7\)

II. PRE-COLONIAL NIGERIA

Where then is Nigeria in this configuration of conflict of laws history? As an independent nation on October 1, 1960, Nigeria gained its sovereignty from British colonial rule.\(^8\) In 1914, the northern and southern parts of the country, hitherto separately administered by British colonial government, were amalgamated by Sir Frederick Lugard. Before colonialism the amalgamated territories consisted of politically and legally independent tribes. Earlier, about 1898, Flora Shaw, who later became

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7. Works by these jurists include: \textsc{Commentaries on the Conflict of Laws} (1834); \textsc{Commentaries on American Law} (1873); \textsc{The Conflict of Laws} (Acollina et. al. eds., 1993); \textsc{Private International Law} (P.M. North & J.J. Fawcett eds., 12th ed.1992); \textsc{Private International Law} (N. Bentwich ed., 7th ed. 1925), \textsc{Jurisprudence and Conflict of Laws} (1919).

Lady Lugard, had suggested in an article for The Times that the several British protectorates on the Niger be known collectively as Nigeria.⁹

Long before the arrival of the British colonists on the territory now known as Nigeria, and the subsequent colonization of the people thereof, the geographical area now called Nigeria had been the abode of strong and independent kingdoms. As Crowder put it:

Within its frontiers were the great kingdom of Kanem-Borno, with a known history of more than a thousand years; the Sokoto Caliphate which for nearly a hundred years before its conquest by Britain had ruled most of the savannah of northern Nigeria; the kingdom of Ife and Benin, whose art had become recognized as amongst the most accomplished in the world; the Yoruba Empire of Oyo, which had once been the most powerful of the states of the Guinea Coast; and the city-states of the Niger Delta, which had grown partly in response to European demands for slaves and later palm oil; the largely politically decentralized Igbo-speaking peoples of the south-east, who had produced the famous Igbo-Ukwu bronzes and terracottas; and the small tribes of the Plateau, some of whom are descendants of the people who created the famous Nok terracottas.¹⁰

In Nigeria, the history of the legal science known as conflict of laws has been largely neglected by the few Nigerian jurisprudential writers on the subject.¹¹ Their discussion of the subject starts from the date when English law was received into Nigeria:¹² 1863 for Lagos and 1900 for the rest of the country. No serious inquiry has been made on the position before the reception statutes. Nigerian writers seem to content themselves with an a priori conclusion that the Nigerian pre-colonial legal regime did not have conflict of laws rules¹³ and, by extension, such problems. It seems therefore a Sisyphean task for the legal historian to attempt a construction or exposition of conflict of laws in pre-colonial Nigeria.

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10. CROWDER, supra note 9, at 11.
13. AGBEDE, supra note 11, at 28; YAKUBU, supra note 11, at 25.
Our initial survey of the general history of conflict of laws teaches us that two factors must be simultaneously present before any issue of conflict of laws can arise: social and economic interaction by people of different sovereign states, and a diversity of legal regimes. The whole history of conflict of laws is intertwined with these factors. Until people begin to cross their national, state, local, or tribal boundaries and intermingle with one another, there can be no foreign element in disputes. As Merrill noted:

The introduction of steam power for purposes of locomotion by sea as well as by land, and the employment of telegraph wires and submarine cables, have led to a marvelous increase in travel and commercial intercourse, and to corresponding increase and complexity in the relations existing between numerous individuals, and the governments and laws of states other than their own. The vast immigration from almost all parts of Europe to America, with a view to permanent settlement and naturalization, the establishment by thousands of individuals of their residences in foreign countries without any transfer of allegiance, and the extra-territorial operations of numerous corporations, have given rise to many interesting and important questions growing out of the conflict of laws.14

The *ius gentium* in ancient Rome was the product of transnational movements. Such movements, and the subsequent intermixture between people of different legal backgrounds, gave birth to conflict of laws in the Italian city-states of the fourteenth century and later in France, The Netherlands, Germany, England, and the United States and Canada. According to the recent authors of Cheshire and North: "The *raison d'être* of private international law is the existence in the world of a number of separate municipal systems of law—a number of separate legal units that differ greatly from each other in the rules by which they regulate the various legal relations arising in daily life."15 Pavel Kalenský echoed the same sentiment:

It is generally known that most textbooks and systems raise as the conditions of the origin and existence of private international law on the one hand the fact that there exist in

the world parallel to each other many sovereign states with different legal systems and, on the other hand, that the citizens of these states, who are non-sovereign subjects, i.e., natural and legal persons, establish contacts and relations of civil law [or family law], labour law or procedural character. Of course, it should be seen that the two aforesaid preconditions are far from being static and that in the past decades they have undergone a very dynamic development.16

Many questions arise in the application of the above principles to the Nigerian situation: first, were there contacts and dealings between the various independent primordial and pre-colonial Nigerian tribes? Second, were those tribes regulated by different and divergent legal rules or customary laws? Third, if the answer to both of the above is yes, then how was the ensuing conflict of laws resolved? Here, we shall explore possible answers to the above questions.

Within the northern part of Nigeria, there had flourished the Kanem-Bornu Empire, the Sokoto Caliphate, and the Hausa states of Gobir, Katsina, Rano, Daura, Kano, Zaria, Kebbi, Zamfara, Nupe, and Gwari. There were intermingling, communication and contacts among these groups. There was from earliest times intensified commercial intercourse among these northern Nigerian kingdoms and states, and between them and the outside world, especially with Algeria and Morocco through the Sahara desert. The corollary was the introduction of Islam to the northern part of Nigeria in about the eleventh century. According to Crowder:

West Africans participated eagerly in the growing trans-Saharan trade, which brought them much needed salt from the desert, as well as clothes, weapons, horses and beads. The new states of the Western and Central Sudan also traded among themselves. Kano cloth, for instance, was to become much prized throughout the Western and Central Sudan. One of the most extraordinary achievements of these empires, from the accounts of Arab travelers, was their maintenance of security of trading conditions over vast areas of West Africa. Probably the most important results of the Sahara trade were the penetration of the Sudan by Islam and the introduction of writing.17

17. CROWDER, supra note 9, at 25.
The introduction of Islam to the northern part of Nigeria meant the regime of Islamic law," as both are axiomatically inseparable. Even today, Islamic law is the personal law of Moslems in the northern part of Nigeria." The common application of Islamic law in northern Nigeria left no room for choice of law problems. The legal system was a monistic one, analogous to the unitary legal system in England, which, in the formative stage of conflict of laws, frustrated the doctrine's growth and development in that country.

Even before the introduction of Islam in northern Nigeria, about 1080 A.D., trading contacts had existed among the various tribes in the northern part of Nigeria, and between each of them and the outside world. The trade was by means of barter. In this pre-Islamic period, one would expect that the commercial intercourse amongst these northern Nigeria tribes and the outside world must have engendered some conflict of laws problems. However, that was not to be. The economic system of exchange, i.e., barter, left little room for substantial disputes requiring choice of law considerations.

There were also trading contacts between the tribes in the northern region of Nigeria and the kingdoms of the forest in the southern part of Nigeria, especially the Yoruba kingdom. According to a leading authority on Yoruba history:

Light and civilisation with the Yorubas came from the north with which they have always retained connection through the Arabs and Fulanis. The centre of life and activity, of large populations and industry was therefore in the interior, whilst the coast tribes were scanty in number; ignorant and degraded not only from their distance from the centre of light, but also through their demoralizing intercourse with Europeans, and the transactions connected with the oversea slave trade.

Crowder made the same point when he said that "[i]ndeed there is strong reason to suppose that from an early stage Hausa and Yoruba traded with each other." Again, the trade was by barter. As argued below, the

20. That was the year a Kanem king, Mai Hume, converted to the Islamic faith. Islam was introduced into the neighboring Hausa states in the fourteenth century.
22. CROWDER, supra note 9, at 43.
barter system did not yield disputes that warranted the application of conflict of laws rules.

Thus far, the indigenous legal system, i.e., customary laws of these tribes and kingdoms, had no occasion to ponder conflict of laws problems. Economic activities carried on by a system of barter where, presumably, the goods were exchanged on the boundary lines, and which could hardly have given rise to substantial disputes in the area of conflict of laws. As Diamond noted, "barter presupposes something of an objective standard of values, a preliminary stipulation as to the form which the return is to take, and an instantaneous return."21 The inability of this medium of exchange to raise disputes which would have necessitated a discussion of choice of law in pre-colonial Nigeria is evidenced by Diamond's postulation:

To sum up, the only commercial transactions of importance, except among tribes who possess currency, are ready barter and credit barter, and among the few tribes who use currency, cash sale and loan of money are added. There is little else. Of these transactions, ready barter and cash sale produce little litigation.24

Thus, in the northern part of Nigeria, the barter system and the subsequent unitary legal system resulting from the introduction of Islam hindered growth and development for rules of conflict of laws.

However, this conclusion presupposes that the barter transaction went on smoothly and successfully, that the parties involved in the exchange were mutually satisfied with their bargains, and that no objections were raised by any of them after the barter transaction. For instance, a Kano man in pre-colonial Nigeria subject to Islamic law as his customary law exchanged his horse for the gold of a Gao man in Western Sudan who was subject to Gao customary law. The Kano man was happy with the gold and the Gao man was happy with his horse. No dispute arose, and therefore no question of whether Islamic law or Gao customary law was applicable to that transaction arises.

However, if we complicate these facts, a lot of difficulties interpose. Assume that the Kano man subsequently discovered that the gold he received in exchange for his horse was not genuine, and that he felt cheated and wanted his horse back. His Islamic law, in furtherance of our assumption, allowed him to get back his horse in the circumstances. On the other hand, the Gao man was not inclined to return the horse and relied on his customary law which, for instance, provided that after an exchange

24. Id. at 400-01.
of the goods in a barter transaction, the parties were automatically discharged from any liabilities arising from the contract, and goods already exchanged could not be returned.

The above facts face two conflicting systems of law: Islamic law and Gao customary law. Also, the parties involved in the case were subject to these two divergent legal systems. Whether the action was brought in Kano or Gao, there would be the same question: which of the two systems of customary law would provide the rule of decision? If the barter transaction had taken place in a third tribal territory, e.g., the Yoruba Kingdom of Oyo, the complexity would double because the question would be whether it is the Yoruba customary law, Gao customary law, or Islamic law that should govern the case. There is no doubt that the type of barter we are analyzing is of a litigable nature and could raise questions within the province of conflict of laws, i.e., the question of choice of law.

It is not clear how these pre-colonial tribes and kingdoms resolved the type of questions raised by the above hypothetical case. In other words, there seems to be no evidence that specific choice of law rules, or other ascertainable rules of selection of the applicable law, were applied. The absence of this evidence suggests that barter transactions giving rise to litigable disputes must have been few in those pre-colonial times. This can only be explained on the basis that the actual exchange in a barter transaction must have been preceded by long and detailed negotiations between the parties, during which they tried to ascertain the quality of their individual goods, terms of exchange, and allowances for unexpected or latent defects.

This level of circumspection and wisdom on the part of the traders is expected, knowing that one or both of the traders involved in the barter transaction might have come from a long distance that involved travel for weeks or months. For instance, it was likely that the man from Gao (present day Ghana in West Africa) must have traveled for several weeks or months on the back of a camel, the only means of transportation at that time, across the Sahara desert before getting to Kano (in the present day Nigeria). It is therefore not unexpected that such a man would try to obtain the most favorable bargain and take care of the most minute aspect of the contract, especially with respect to latent defects in the articles of exchange. For instance, if he reasoned that the horse might have a latent disease, and that returning it after the barter exchange might be legally and practically impossible because of the distance involved, he might decide only to accept the horse in exchange for an inferior merchandise in his store instead of his gold, and then take the horse as he found it.

The Kano man would likely operate on the same reasoning. He knew that his customer came from Gao, a faraway land, and that getting back his
exchanged horse, if things went wrong, might be practically impossible in the circumstances. He would then take care to bargain in such a way that, if the gold turned out to be fake, he would not lose completely. For instance, he could subject the gold to the strictest examination and could even hire local experts to examine it for him. If he had doubts he could refuse to accept the gold in exchange. But if he decided to take the risk, then he could accept the gold only in exchange for an inferior article of his, other than his horse, and live with the consequences of his bargain.

The above type of circumspection naturally would leave little room for litigable disputes arising from barter. However, where this level of prudence was not exercised, the scenario changes and the problem of the applicable system of law comes to the fore. We have already said that there seems to be no evidence that any rules of selection of the applicable law were applied by these tribes, but we can speculate that such disputes might have been settled on the basis of the local law, i.e., the lex fori. In other words, the court where the action was brought would apply the customary law of the tribe to which that court belonged. This hypothesis is based on the fact that in pre-colonial times, the legal systems of the above tribes were elementary. The means of communication and travel were at the rudimentary stage, mainly by horses and camels. In fact, the camel was metaphorically called "the ship of the desert."

The judicial system was also basic. Some, like the Hausas and Yorubas, had something like formal courts, while the Ibos lacked any formal court structure and settled disputes democratically. These early legal systems, without law reporting, juristic writing, or publication and distribution of legal commentaries, coupled with the difficulties in communication and travel, must have inhibited cross-fertilization of legal ideas and were unlikely to have generated adequate knowledge of legal systems obtainable in other tribes. Proof of other tribal or customary laws must have been difficult, if not impossible, in the circumstances. Even in modern times, judges do not envy legal situations requiring proof of a foreign law.25 One can then guess how absurd it must have been to expect

25. In a situation that required an English judge to establish what was the law of Spain on a particular point, the judge lamented:

It would be difficult to imagine a harder task than that which faces me, namely, of expounding for the first time either to this country or to Spain the relevant law of Spain as it would be expounded by the Supreme Court of Spain, which up to the present time has made no pronouncement on the subject, and having to base that exposition on evidence which satisfies me that on this subject there exists a profound cleavage of legal opinion in Spain and two conflicting decisions of courts of inferior jurisdiction.

DUKE OF WELLINGTON, GLENTAR V. WELLINGTON AND OTHERS 515 (1947).
a court of one tribe to establish by proof the customary law of another tribe, probably in a faraway land.

Consequently, one would imagine that the court of each tribe applied its tribal or customary law to disputes between a member of its tribe and a foreigner or between one foreigner and another. That was the law with which it was most familiar. Therefore, if such a local court ever assumed jurisdiction in the matter, it would apply its tribal law. On this postulation, one could generally say that litigable disputes arising from barter transactions in the pre-colonial period must have been rare, and must have been settled on the basis of the lex fori: the local law of the tribe in which the action was brought.

The Ibos in the eastern part of Nigeria also had contacts with their neighbors in the Middle Belt and the various city-states of the Niger Delta. These contacts were mainly by way of trade carried on by barter. According to Dr. Osmund Anigbo:

The Hausa\Yoruba traders can be regarded as the oldest settlers in the Ibagwa community [Ibo tribe]. Oral tradition traces the permanent settlement to the history of a long war fought between Ibagwa Aka on the one hand and a combined force of Obukpa, Iheakpu Awka and Itchi on the other. The Hausa and Yoruba tribes had been frequenting the Nkwo market, bringing with them horses, dried fish and talismen. The market offered palm oil in exchange.26

On the relationship between the Ibos and the city-states of the Niger Delta in the south southern part of Nigeria, Obaro Ikime stated, “The mode of life of the Itsekiri people (one of the tribes on the Niger Delta) has been determined by their environment. The Itsekiri are primarily fishermen and, like their Ijo neighbours, are known as suppliers of fish and ‘crayfish’ to the peoples of the hinterland (i.e., the Ibos).” And Crowder added that, “the Ijo traded with the peoples of the hinterland, who were mainly Igbo and Ibibio . . . . The Ijo exported dried fish and salt, which they panned in the salt water creeks, to the peoples of the hinterland, in exchange for vegetables and tools, particularly those made of iron.”28

28. CROWDER, supra note 9, at 60.
As we have already noted, this type of trading contact based on the barter system could not, generally speaking, generate conflict of laws problems. However, this is subject to the misgivings expressed on the litigable aspects of barter, based on the hypothetical case above. Generalizing on the socialization pattern in pre-colonial Nigeria, Dr. Eteng opined, “Periodic markets, themselves symbolizing the underdevelopment of the pre-colonial distributive and exchange systems, provided occasions for barter and information and diplomatic exchanges among contiguous communities.”

We can now posit that for problems of conflict of laws to arise from inter-tribal or trans-boundary contacts, such contacts must be of such quality and intensity as to affect personal or family status or profoundly entail commercial contracts of a litigable nature. These factors were seemingly absent in the tribal contacts we have so far examined. Kalenský rightly points out:

[I]n order for private international law to progress further, it was necessary for the initial, sporadic contacts between non-sovereign subjects subordinated to the laws of different states and juridically exceeding the boundaries of a single jurisdiction to grow to a certain level both quantitatively and as regards the general and essential character of such contacts for the life of society.

Obviously, this required a level of contact lacking in pre-colonial Nigerian societies. Because the prevailing economic system of barter entailed an instantaneous exchange and gave little room for disputes, there was no question, for instance, of a contract concluded in the Yoruba kingdom between Hausa and Yoruba merchants being litigated in the local courts of Kanem-Bornu or Benin Kingdom. However, this is only with respect to simple barter transactions that were concluded successfully without disputes thereafter.

Though we have reasoned above that most barter transactions in the pre-colonial period must have belonged to this class, i.e., raised non-litigable disputes, it is entirely possible that some barter transactions might have given rise to litigable disputes. In that case, the analysis above on the suggested method of solution is also germane here. There is no authoritative evidence that at this period people from one tribe domiciled or permanently resided in another tribe, e.g., a Yoruba man in the

29. I.A. ETENG, CHANGING PATTERNS OF SOCIALIZATION AND THEIR IMPACT ON NATIONAL DEVELOPMENT 348 (1980).
30. KALENSKÝ, supra note 16, at 29.
thirteenth century or earlier taking up permanent residence in the Ibo area. The insularity of the Nigerian pre-colonial tribal societies, the difficulties in communication and travel, and the differences in language, manners, culture, and political organizations, must have made inter-tribal residence or settlement unattractive. As such, intercourse among pre-colonial Nigerian tribes must have been superficial and transitory. Concomitantly, the local jurists of these tribes never had the opportunity to ponder the application of their local or customary laws to foreigners. Equally untested was the resourcefulness of Nigerian customary laws in resolving cases with foreign elements. However, one writer has confidently asserted, to the contrary, that Nigeria's customary law has rules of conflict of laws:

The problem of choice of law arises in court where citizens have relations or transactions with foreigners. It also arises where this arises extra-territorially. The solution is often found in established rules of conflict of laws or what is sometimes called private international law. There is even here a greater problem of this kind because customary laws mainly vary from place to place and as between families or kindred. There are however areas of common ground. Nonetheless it cannot be suggested that customary law is devoid or \[\text{sic}\] rules for solving issues of conflict of laws.\(^3\)

This is quintessential \textit{a priori} reasoning. Suffice it to say that the analysis thus far challenges Onyechi's postulation. But he might well be right with respect to some barter transactions that could actually give rise to disputes, as shown in the above hypothetical case of a barter exchange between a Kano man and Gao man.

However, Onyechi did not tell us how customary law resolved such disputes with multi-tribal contacts. What were those customary law "rules for solving issues of conflict of laws?" Is there any evidence of them? These points were not addressed by him but, as already examined in detail, insofar as litigable disputes arose from barter transactions it seems that such disputes were settled by the customary law on the basis of \textit{lex fori}. It is for the reasons canvassed above that we agree with P.C. Lloyd's conclusion:

With each Yoruba group claiming that its own customary law differs from that of its neighbours there seems to be

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scope for conflicts of laws. In fact such conflict does not seem to have arisen. This is partly because the alleged differences in law between the traditional kingdoms refer often to variant customs and not to any differences in the basic legal system. Land cases are always heard by the court within whose area of jurisdiction the land is situated and they are judged according to the local law. It is conceivable, though I recollect no case, that a stranger might claim that in his home town a grant of land similar to that he gained in his new settlement would confer greater rights; but the rights granted to a stranger are those usual in the grantor’s town, and the stranger well knows this. Cases involving the divorce or inheritance laws are almost invariably taken by strangers to their home towns for settlement.32

It remains to add that the legal situation did not change even with exploration of the River Niger and the emergence of the British merchants on the coast of Nigeria about the sixteenth century, which led to trading relationship between members of the coastal tribes of Nigeria and the British traders. This relationship ultimately resulted in the political subjugation of the Nigerian people.

III. CHRONICLE EVIDENCE FOR COMMERCE AND CONFLICTS

During the era of slave trade, which reached its peak about the seventeenth and early nineteenth centuries, and its Victorian replacement with legitimate trade, the British merchants maintained the economic system of trade by barter. The implication of this system for conflict of laws in Nigeria has already been noted, and justifies the lengthy quotation of James Barbot, describing the operation of the barter system between the British merchants and Nigerian coastal middlemen:

The king had on an old fashion’d scarlet coat, laced with gold and silver, very rusty, and a fine hat on his head, but bare-footed; all his attendants showing great respect to him and, since our coming hither, none of the natives have dared to come aboard of us, or sell the least thing, till the king had adjusted trade with us.

We had again a long discussion with the king and Pepprel his brother, concerning the rates of our goods and his customs. This Pepprel, being a sharp blade, and a mighty talking Black, perpetually making objections against something or other, and teasing us for this or that Dassy, or present, as well as for drams, etc., it were to be wish'd that such a one as he were out of the way, to facilitate trade . . . .

Thus, with much patience, all our matters were adjusted indifferently, after their way, who are not very scrupulous to find excuses or objections, for not keeping literally to any verbal contract; for they have not the art of reading and writing, and therefore we are forced to stand to their agreement, which often is no longer than they think fit to hold it themselves . . . . We adjusted with them the reduction of our merchandize into bars of iron, as the standard coin, viz: one bunch of beads, one bar . . . . The price of provisions and woods was also regulated.

Sixty king's yams, one bar; one hundred and sixty slave's yams, one bar; for fifty thousand yams to be delivered to us. A butt of water, two rings. For the length of wood, seven bars, which is dear; but they were to deliver it ready cut into our boat. For a goat, one bar. A cow, ten or eight bars, according to its bigness. A hog, two bars. A calf, eight bars. A jar of palm oil, one bar and a quarter.33

The last clause of the first paragraph above, "or sell the least thing, till the king had adjusted trade with us," is explained by the detailed examples which show that Barbot was not referring to conflict between the customary laws of the Nigerian tribes on the coast and English law. Barbot was just describing the nature of the barter transaction between the English merchants and Africans, which a further passage from him will illustrate.

Barbot's account herein generally shows that the trading system, if it was limited to the type of instantaneous exchange implied in the passage, was immune to commercial disputes of any litigable nature. This is evident from the fact that actual exchange in the barter transaction referred to by Barbot was preceded by days of negotiations during which every

aspect and detail of the contract were mutually agreed by the parties. Barbot recounted:

On the twenty fifth in the morning, we saluted the Black King of Great Bandy, with seven guns; and soon after fired as many for captain Edwards, when he got aboard, to give us the most necessary advice concerning the trade we designed to drive there. At ten he returned ashore, being again saluted with seven guns; we went ashore also to compliment the King, and make him overtures of trade, but he gave us to understand, he expected one bar of iron for each slave more than Edwards had paid for his; and also objected much against our bafons, [sic] tankards, yellow beads, and some other merchandise, as of little or no demand there at that time.

The twenty sixth, we had a conference with the King and principal natives of the country, about trade, which lasted from three a-clock till night, without any result, they insisting to have thirteen bars of iron for a male, and ten for a female; objecting that they were now scarce, because of the many ships that had exported vast quantities of late. The King treated us at supper, and we took leave of him.

The twenty seventh the King sent for a barrel of brandy of thirty five gallons, at two bars of iron per gallon; at ten we went ashore, and renewed the treaty with the Blacks, but concluded nothing at all, they being full of same mind as before.

The twenty eight, we sent our pinnace up the river to Dony, for provisions and refreshments; that village being about twenty-five miles from Bandy. Transacted nothing with Blacks of Bandy all this day.

The twenty ninth, had three jars of palm-oil, and being foul weather, did not go ashore.

The thirtieth, being ashore, had a new conference which produced nothing; and then Pepprell, the King's brother, made us a discourse, as from the King, importing, He was sorry we would not accept of his proposals; that it was not his fault, he having a great esteem and regard for the
Whites, who had enriched him by trade. That what he so earnestly insisted on thirteen bars for male, and ten for female slaves, came from the country people holding up the price of slaves at their inland markets, seeing so many large ships resort to Bandy for them; but to moderate matters, and encourage trading with us, he would be content with thirteen bars for males, and nine bars and two brass rings for females. Upon which we offered thirteen bars for men, and nine for women, and proportionally for boys and girls, according to their ages; after this we parted, without concluding anything farther.

On the first day of July, the King sent for us to come ashore, we staid there till four in the afternoon, and concluded the trade on the terms offered them the day before; the King promising to come the next day aboard to regulate it, and be paid his duties.  

The above apparently shows that Barbot was describing the trading conditions of barter between the European merchants and African traders. That transaction carried with it the potentiality of conflict of laws problems because the two groups, Europeans and Africans, were subject to at least two different systems of law. There is no doubt that disputes arising from such transactions would have raised the question of choice of law: is it the African system of law or the system to which the European merchants were subject that would provide the rule of decision? But it seems that the occurrence of the above type of problem or dispute was mitigated by the detailed and lengthy negotiations that preceded the actual barter exchange. With the type of transaction described by Barbot, in which the parties mutually came to satisfactory terms before the actual exchange, disputes which would have necessitated conflict of laws problems were practically avoided. If the entire barter transaction on the Nigerian coast was carried on solely on the basis of Barbot’s description, i.e., with mutually accepted negotiated terms followed by instantaneous exchange of goods, one would have been tempted to conclude that conflict problems did not arise. However, things did not remain entirely as Barbot described. He gave another side of the barter transaction: credit barter, which was full of potentialities for conflict of laws problems.

According to Barbot, the European merchants gave credits in the form of goods to the African Kings and merchants. The Africans paid back the

34. Id. at 459.
credit with slaves and other commodities needed by the Europeans. The credit system existed probably to facilitate trade and ensure that the European merchants spent less time on the African coast; with the credits the Africans would keep the slaves and other goods ready before the Europeans made a return trip. Barbot described the credit system:

We also advanced to the King, by way of loan, the value of a hundred and fifty bars of iron, in sundry goods; and to his principal men, others, as much again, each in proportion of his quality and ability.

To captain forty, eighty bars. To another, forty. To others, twenty each.

This we did, in order to repair forthwith to the inland markets, to buy yams for greater expedition; they employing usually nine to ten days in each journey up the country, in their long canoes up the river.3

The questions then become: did the Africans pay back the credits or fulfil their own obligations under the credit barter? If not, how did the European merchants react or enforce payments? If so, did the method of enforcement generate disputes? How were those disputes settled? Which legal system was applied to the settlement of such disputes? Barbot's account did not answer most of the above questions, but he described the method of repayment:

It is customary here for the King of Bandy to treat the officers of every trading ship, at their first coming, and the officers return the treat to the King, some days before they have their compliment of slaves and yams aboard. Accordingly, on the twelfth of August, we treated the King, and his principal officers, with a goat, a hog, and a barrel of punch; and that is an advertisement to the Blacks ashore, to pay in to us what they owe us, or to furnish with all speed, what slaves and yams they have contracted to supply us with, else the King compels them to it. At that time also such of the natives as have received from us a present, use to present us, each with a boy or girl-slave in requital. According to this custom we treated the Blacks ashore on the fifteenth of August, and invited the

35. Id. at 460.
Portuguese master to it, as also the Black ladies; the King lending us his musick, to the noise of which we had a long diversion of dances and sports of both sexes, some not unpleasing to behold . . . .

On the twenty second, we let fly our colours, and fired a gun, for a signal to the Blacks, of our being near ready to sail, and to hasten aboard with the rest of the slaves, and quantity of yams contracted for.23

Barbot has just described the custom by which the Africans paid back their loans or discharged their own obligations under the credit barter transaction. According to him, the African King ensured that the African merchants paid back their loans and in fact enforced repayment in that he, “compels them to it.” That is clear.

But what of the loan given to the African King himself? How was repayment by the King enforced and by whom? Where the African King refused to pay back his loan and a dispute naturally resulted, what law was applied to the resolution of that dispute? Barbot did not give any clue to the answers for the above questions. His silence on the point may well mean that the African King himself was not found wanting in repaying his own loan. Otherwise, he would have recorded such an important event which would have had the effect of disrupting trade and adversely affecting the relationship between the European and African merchants. One thing seems to be clear: disputes which resulted or would have resulted from such credit transactions involving people from different legal and political backgrounds obviously belonged to the field of conflict of laws. As we shall see later, the frequency of similar disputes in the nineteenth century led to establishment of a special type of court called “the court of equity,” not in any way connoting the Chancery Court in England which developed its principles of equity.

Again, during this era, the British merchants merely conducted their transactions on the Nigerian coast without any settlement or intention to settle in the Nigerian territory. This is particularly true in the early periods of their presence in Nigeria, i.e., about the fifteenth and sixteenth centuries. The African land, its peoples and cultures, were strange to them. Malaria resulting from mosquito bites ensured a very high mortality rate on the part of the foreigners. This was such a serious impediment to settlement that most parts of West Africa, including Nigeria, were euphemistically called the “white man’s grave.” It was not until the

36. Id. at 463.
British merchants started residing in Nigeria on a more permanent basis, probably following the discovery of the malaria prophylactic chloroquine in the early nineteenth century, that serious and full disputes of a conflict of laws nature began to arise.

Trade disputes between Nigerian merchants and British traders led to the latter’s call to their home government for help and protection. The British government reacted by appointing a first British Consul, John Beecroft, to Nigeria in 1849. He was himself a British merchant and already familiar with the trade and politics of the Niger Delta. The consul’s primary duty was to protect the lives and property of the British traders. We shall presently discuss how the conflicts between the British and Nigerian merchants were settled.

Having described, as the primary evidence allows, the extent and effect of social and economic interaction in Nigeria to the period of the arrival of European traders, mainly British, the next step is to establish the existence of the diversity of tribal or customary laws in pre-colonial Nigeria.

IV. CUSTOMARY LAW AND SYSTEMS

There is no doubt that each of the various pre-colonial Nigerian tribes had, and still has, its own tribal, native, or customary law which exclusively applied to it, and was different in some ways from the customary legal system applicable in another tribe. Even today one speaks of Yoruba customary law, Ibo customary law, and the Islamic law that is applicable in the northern part of Nigeria. According to Justice A.G. Karibi-Whyte, “the various customary laws are indigenous to the ethnic groups and were formulated by them to meet the different social challenges in their development over the ages. Islamic law does not enjoy the same natal origin, and like English law is exotic.” Similarly, then-Justice Dan Ibekwe stated extra-judicially:

In the beginning, the various communities which made up what is today known as Nigeria were developing in their own simple ways. It is however, correct to say that those communities were not integrated as is the case now. In the process of time, each community had evolved into

37. IKIME, supra note 27, at 14.
38. Id.
an organized society. Each had its customary law and, in many cases, there were sanctions behind such law.

Since different social, political and even religious structures obtained in these tribes, the customary laws emanating therefrom were bound to diverge. As Yntema put it:

In early times, when the legal order was intimately connected with actual or supposed kinship groups and was part of the peculiar religious and social structure of the particular community, law was inalienably personal. It was inconceivable, for example, that the *ius civile*, the common law of the Roman citizenry, should be available to a *peregrine* in Rome or, *vice versa*, that an Athenian in Attica should claim the protection of some barbarian custom. This identification of local law with the interests of the social group has by no means disappeared.

Similarly, Ezra Zubrow opined that "[t]his universality of legal systems is probably matched only by their diversity. They range from systems based on kinship to property, from secular to religious principles, and from consensual to dictatorial impositions. Different societies have differing mixes at various times." Finally on this point, Professor Nwabueze has stated, "It should be explained that customary law is not a single body of law throughout the country. Far from that being the case, customary law is as various as the number of independent communities comprised in Nigeria.

It should be emphasized that the existence of a multiplicity of tribal or customary laws in pre-colonial Nigeria, and the exclusive application in a tribe of its customary law, did not generate legal pluralism. Legal pluralism implies the simultaneous existence and interaction of two or more different systems of law, one of which is superior to the others. In pre-colonial Nigeria, where the customary law of a tribe was the only

applicable law, the question of interaction with or subservience to any other law did not naturally arise.

Although the pre-colonial Nigerian societies had their different customary laws, i.e., existence of legal diversity, the emergence of conflict problems of choice of law depends on the view one takes of the apparently superficial social and economic interaction, and on the impact of the barter based economic system. In other words, if one takes the view that the barter system actually led to disputes, that is a strong argument for the existence of conflict of laws problems at that period; but a contrary view of barter may mean that conflict of laws problems did not exist. We have already examined both perspectives. However, whatever dispute arose, between individuals from different tribes or between natives and European traders, it was settled in a clearly identifiable pattern and without reference to any judicial process.  

This naturally takes us to the last question: what was the mode of resolution of disputes, if any, arising from inter-tribal contacts? The first approach will be to tackle the mode of dispute resolution before the advent of Europeans. Thereafter, we shall examine the style of dispute resolution in the colonial era.

The argument here on dispute resolution in pre-colonial Nigeria is without prejudice to the earlier suggestion that the lex fori was likely applied to disputes of a conflict of laws nature. The following is in the nature of an alternative argument. In pre-colonial Nigeria, disputes that resulted from the superficial inter-tribal contacts were not referred to any adjudicatory body. This might have been due to the ethnic and tribal nature of the different customary laws. During this period, violence was usually and freely resorted to in the settlement of such disputes. Few references will suffice. Professor Obaro Ikime stated:

The development of the palm oil trade had another effect on Itsekiri-Urhobo relations. Although through the system of pledges and ‘diplomatic marriages’ it was often possible to maintain friendly relations between the middlemen and the producers, disputes between the Urhobo and the Itsekiri were not always resolved peacefully. Sometimes the Itsekiri traders, offended by the non-fulfillment of promises made by their Urhobo customers sent their slaves, usually described as their ‘boys’ to raid the villages of the offenders concerned; the idea was that slaves taken

during such a raid would, by working for the Itsekiri, eventually make good the loss sustained by the non-fulfillment of the obligations previously agreed on. Once under way such raids tended to become indiscriminate, since the 'boys' did not always confine their depredations to specific individuals or villages. This practice usually referred to as 'chopping' was to be frowned upon by the British administration in the years after 1891.4'

Violence and self-help as dispute resolution methods were characteristic of "primitive" law. They were equally employed by the Greeks, as Vinogradoff noted:

As frequently happens in ancient law, distress was used as a means of obtaining justice by self-help. Another feature of the procedure was that distress or reprisals are not necessarily directed against one's opponent, but might be leveled against relatives of his or even against his countrymen at large. Such cases were considered as a justified taking of hostages.47

Gluckman added that "[i]n polysegmentary societies there may be no authoritative means of settling disputes between opposed segments and hence there is resort to vengeance or self-help."44

The advent of colonialism, at least initially, did not alter the above mode of dispute resolution. The Europeans naturally refused to submit to legal regulation by customary law, which was considered alien. However, Nwabueze submitted: "At first these foreign traders resorted to the traditional tribunals for the settlement of their disputes with the natives."49 No authority was cited for this proposition. What he said could have been true of Canada, but definitely not Nigeria. The Canadian position has been stated by Bradford W. Morse: "There is in fact a wealth of information indicating that early travellers, traders and colonists willingly chose to accept local Indian law as governing their affairs in the Canadian

46. IKIME, supra note 27, at 7.
47. P. Vinogradoff, Historical Types of International Law, in THE COLLECTED PAPERS OF PAUL VINogradOFF 260 (1928).
49. NWABUEZE, supra note 43, at 46.
Certainly this was not the position in Nigeria, because the prevailing barter system entailed instantaneous return which, generally speaking, hardly generated litigable dispute.

Again, this point is substantiated by the account of James Barbot: "they [Africans] have not the art of reading and writing, and therefore we are forced to stand to their agreement, which often is no longer than they think fit to hold it themselves." Thus, with this unequal bargaining power, the question of resort by the European traders to the customary laws or traditional tribunals did not arise and could not have arisen. Professor Crowder clearly made the same point:

The palm-oil traders were as rough a lot as the old slave traders, and well deserved their title 'palm oil Ruffians.' The African chiefs could not actually bring these traders before their own courts, so they resorted to the expedient of imposing collective punishment on the European community through the banning of trade. This was fairly effective, since conditions on the coast were such that most traders were very anxious to get back to Europe as quickly as possible, and could stomach no delays. The ban on trade was always absolute because of the strict control African chiefs exercised over their subjects. There was no 'scabbing' on the African part, to use a modern trade-union term. On the other hand, the Europeans found it difficult to combine effectively, since whenever a European community stuck out for lower prices, there was usually one of their number willing to trade at the African's price.

The imperative of some form of adjudicatory body to resolve disputes between African and European traders did not arise until the latter began to settle on a more permanent basis in the larger territory that became Nigeria. Consequent upon this settlement, disputes between Nigerian and British merchants increased. These disputes were clearly of the nature of conflict of laws since they naturally involved the question of which legal system, English or customary law, was applicable. Because the British

50. INDIGENOUS LAW AND STATE LEGAL SYSTEMS: CONFLICT AND COMPATIBILITY, COMMISSION ON FOLK LAW AND LEGAL PLURALISM, paper from the 11th Int'l Congress of Anthropological and Ethnological Sciences, Canada 334 (1983)
51. DIAMOND, supra note 23, at 393.
52. BARBOT, supra note 33, at 459-60.
53. CROWDER, supra note 9, at 123.
merchants were reluctant to employ the traditional process of dispute resolution, they appealed to their home government for help. This, as we have already noted, led to the appointment of the first consul, John Beecroft, whose primary responsibility was the protection of the lives and property of British traders in the Niger Delta.

The various consuls did not apply any judicial form of inquiry or technical rules of justice. Rather, they resorted to intimidation and violence against the Nigerian traders whenever there was a dispute between them and their British counterparts. The *modus operandi* of the British consul was graphically captured in the account of Ikime:

> But while he [John Beecroft] was actually in the district, the people of the town of Bobi, led by their chief Tsanomi, attacked and looted Horsfall's factory. The cause of the attack is not known but, judging from subsequent incidents, it is unlikely that it was undertaken out of sheer desire for loot. Beecroft was filled with great indignation. In a note to the naval authorities, he requested that a gunboat be sent to the Benin River to mete out condign punishment: 'the sooner a man of war arrives the more pleasing it will be for me, for these scoundrels must be well chastised with powder and shot.' This was characteristic. Beecroft was determined to leave no doubts as to the power and authority which the consul could bring to bear on these perennial disputes between white traders and the delta peoples. The gunboat requested did arrive, and Beecroft proceeded to bombard and burn down Bobi, thereby establishing the pattern of Afro-British relations in this as in other parts of the delta: whenever a dispute arose between British traders and the delta middlemen, the latter had almost invariably to face punishment irrespective of the rights and wrongs of the case."

No doubt, dispute settlement based on gunboat diplomacy hindered trade, and even social intercourse between Africans and Europeans. Both parties set out to find a formula for the resolution of such disputes with traces of foreign elements. This search resulted in establishment of a "Court of Equity" in 1854 for the adjudication of disputes between Africans and Europeans. It was composed of African middlemen and European supercargoes, the "foreign traders" as they were known, and presided over by the latter in monthly rotation. Its judgment was

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54. *Ikime, supra* note 27, at 15-16.
confirmed by the African king. The Court of Equity was described by Dr. Baikie, who explored the River Niger up to Lokoja in Nigeria:

A commercial or mercantile association was, by the exertions of captain Witt and others formed, the members being the chief white and black traders in the place, and the chair is occupied by the white supercargoes in monthly rotation. All disputes are brought before this court, the merits of the opponents are determined, and with the consent of the king, fines are levied on defaulters. If any one refuses to submit to the decision of the court or ignores its jurisdiction, he is tabooed, and no one trades with him. The natives stand in awe of it, and readily pay their debts when threatened with it.

Disputes before the Court of Equity obviously had a foreign element and were most likely to have involved the question of choice of law. Was it English law or African customary law that would provide the rule of decision? However, the Court of Equity did not decide disputes before it, based on any ascertainable pattern or system of law. Rather, it based its decisions on general notions of justice.

The emergence of these courts of equity in various parts of Nigeria after 1854, though they entertained problems in the nature of conflict of laws, did not lead to the introduction of a full system of conflict of laws or its rules in Nigeria. This is because the Court of Equity did not decide disputes before it on the basis of choice of law, i.e., by asking which of the potentially applicable laws would provide the rule of decision. It was historically in the nature of pure equity, as employed in the English court of Chancery, that the judge's "conscience" ruled according to reason and fairness.

On 30 July 1861, King Dosunmu of Lagos ceded Lagos to Acting Consul McKoskry, in return for a yearly payment of one thousand and thirty pounds sterling. Consequently, a governor was appointed for the newly-acquired colony of Lagos in the person of Henry Stanhope Freeman. This appointment marked the beginning of a permanent British colonial administration in Nigeria. Obviously, an administration of this nature required a complete legal system for effective operation. This led to the

55. See CROWDER, supra note 9, at 123.
introduction of English law in the colony of Lagos in 1863,\(^\text{58}\) subsequently extended to the rest of the country.\(^\text{59}\) By the Supreme Court Ordinance of 1863,\(^\text{60}\) the first Supreme Court was established for the colony of Lagos. This Ordinance was subsequently repealed and replaced with the Supreme Court Ordinance of 1876.\(^\text{61}\) This statute received into the colony of Lagos the common law of England, the doctrines of equity, and statutes of general application in force in England on 24 July 1874.

In 1900, both northern and southern Nigeria were declared British protectorates and a Supreme Court was established for each.\(^\text{62}\) The common law of England, doctrines of equity and statutes of general application in force in England on 1 January 1900 were received into each protectorate. The reception of English law was continued and confirmed by many statutes passed after Nigeria’s independence.\(^\text{63}\)

Thus, the reception of English law into the colony of Lagos in 1863 and the rest of the country in 1900 marked the introduction in Nigeria of complete and mature rules of conflict of laws derived from England.

V. CONCLUSION

This legal historical reconstruction has concentrated on the state of conflict of laws in Nigeria from the pre-colonial period to establishment of full British administration in Nigeria in 1863. The existence of conflict of laws during this period can be mirrored from the barter economic system and was conditioned by it. There were two arguments on the impact of barter: first, that barter was preceded by such circumspection, prudence and detailed negotiation that disputes of a conflict of laws nature which might have arisen were practically averted; and second, that the barter system, especially the credit barter, actually resulted, or was likely to have resulted, in disputes which belonged to conflict of laws. Disputes which came before the court of equity in the nineteenth century were clearly of a conflict of laws nature. To the extent that conflict of laws problems existed during the period under review, there was no clear evidence of the rules which were adopted in the resolution thereof. Apart from the

\(^{58}\) Ordinance No. 3 of 1863.


\(^{60}\) Ordinance No. 11 of 1863.

\(^{61}\) Ordinance No. 4 of 1876.

\(^{62}\) Supreme Court Proclamation No. 6 of 1900 (for Southern Nigeria), and Protectorates Court Proclamation No. 4 of 1900 (for Northern Nigeria).

traditional settlement by war; reprisals; gunboat diplomacy; and reference to the Court of Equity, which did not apply any systematic body of principles or rules, disputes of a conflict of laws nature were likely settled by application of the *lex fori*, because of the peculiar difficulty of proving foreign law during that period.

We conclude that a full system of conflict of laws, as we know it today, was introduced into Nigeria in 1863. The primary evidence for conflict of laws in Nigeria during the colonial period, which are still valid sources today, were the reception of English common law, doctrines of equity, and statutes of general application.
THE TELEBANKING CONTRACT IN SWISS LAW*

Cédric J. Magnin**

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* Editor’s note: This article was translated from the French original in November 2000. Several of this article’s Internet sources may be found on World Wide Web servers located in both the United States and Switzerland. Where possible, Uniform Resource Locator (URL) citations point to documents located on servers accessible from the United States. Where site security prohibits site access by Internet users located in the United States (as discussed in Section VI.A.4.b. of this Article) a notation has been made and the source may be obtained from the author.

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I. **INTRODUCTION**

Telebanking is a means of communicating with one’s bank with the aid of a computer connected to the Internet at any hour, day or night, anywhere in the world. It enables a customer to consult their account or transmit banking orders via the Internet. When a customer transmits a banking order via the internet, it is directly stored in the data processing system of the bank and then transmitted to the qualified person in order to carry it out. This method avoids a human intermediary that would normally redirect the orders within the bank to the appropriate person to be carried out.
Telebanking is financially interesting for both the bank and the customer, but it is not risk free. For example, in 1994, two Russians set up a fictitious bank, the European Union Bank Ltd., and stole approximately ten million American dollars. All the funds put under deposit were never found after the closing of the bank by the authorities of Antigua in August 1997.¹

The first Swiss company to offer a telebanking service was Crédit Suisse (Crédit Suisse Group AG). Other finance companies such as the Post Office and the Union of Swiss Banks (UBS AG) then followed suit. In the next two to three years, the majority of the major financial establishments will propose even more telebanking services at a reduced cost. The low cost of these services is the principal driving force of their development. For example, the use of the data processing department is in itself free, and the underlying contracts (the commission in the event of stock exchange operations and giro banking in the event of payments) are proposed at very competitive prices if they are carried out via the bank’s telebanking Internet site.

These competitive prices are possible because of the drastic reduction in costs. Specifically, a central computer has replaced human intermediaries or assignees within the bank.

Statistics show evidence that the electronic banking industry is still growing globally. In March 2001, the largest bank of Switzerland, UBS AG, had 586,000 customers under a telebanking contract, an increase from the last survey in December 2000 which reported 555,000 contracts. Moreover, 23% of all banking orders in Switzerland were placed online, and 13.8% of all stock exchange transactions booked in Switzerland were routed through e-banking transactions.²

Moreover, the UBS server experienced 1.5 million logins per month, 30,000 to 40,000 users per day, and 350 to 600 parallel sessions per day.

This trend is likely to continue at an exponential speed because everyone finds telebanking to be in their best interest. First, the banks save costs and gain new customers who are interested in technology, or simply eager to open up an account in a Swiss bank; second, customers pay much less for their banking services, and can place their orders or


consult their accounts at will, without having to telephone a manager who is absent or busy, or having to place an order at the window of the bank.

Moreover, the current trend is data processing, and particularly the Internet. According to a survey carried out by Nielsen Research Media and Commerce Net (NRM), among the seventy-nine million Americans who have been using the network for longer than sixteen years, more than twenty million say they buy products, and services on the network. On a worldwide scale, the number of Net surfers was approximately 242 millions in January 2000. Thus, there is an increasingly strong trend to move the services on this network, particularly banking services.

However, these new means of communication with banks pose many legal problems. For example, is bank secrecy maintained? Is the network properly protected to make it possible for transactions to be completed without being intercepted? Will a new form of electronic “hold-up” be developed, that creates a new race of criminals, commonly known as “hackers” or “data-processing tapers?” How can we qualify the network? What are the principal obligations of a bank to the customers in this new type of relationship? Is the customer or the bank legally protected from these new problems when the bank does not want to extend a guarantee, and shields itself from responsibility should problems arise? This is precisely what we will try to analyze while studying this new relationship, and the rights and obligations contained in a telebanking contract.

II. DESCRIPTION

A. What is Telebanking?

1. Definition

As its name indicates, telebanking makes it possible to conduct banking operations (“banking”) from a distance (“tele”). This concept should etymologically indicate the various ways of conducting banking operations from a distance. For example, by telephone, by mail, by fax or by data processing and data exchange over the Internet, or another data-processing network. These practices have restricted the use of the word “telebanking” to mean primarily banking operations conducted from a distance by means of a computer connected to a data-processing network, the most significant of these being the Internet. Thus, today the word “electronic banking” or “e-banking” is more widely used than “telebanking”.  

2. History

a. The Eighties

The first experiments with telebanking were conducted in the early 1980s. These experiments used national telematics data-processing networks like the Minitel in France, Compuserve in the United States and the Videotex in Switzerland. Some of the problems plaguing the system were attributed to these networks being slow, incompatible, and not being very user-friendly. Thus, these networks did not accommodate the needs of the standard user during this time period who sought a fast, sure, and financially interesting banking service that would make it possible to conduct banking operations from various countries.

b. 1995: The Birth and Development of the Internet

In 1995, everything changed with the advent of the Internet. As a result, telebanking services became faster, more user-friendly (complete with color and images), and internationally accessible. However, telebanking was still missing one crucial component to complete the evolution of the telebanking system - adequate security.

c. 1998: The Boom of Electronic Trade

It was not until 1998 that electronic trade started to attract a significant number of users. Until that date, only a marginal number of people "dared" to transmit their credit card numbers to a virtual store to make purchases or pay for a service. The increasing confidence of users in the security of the network did not start becoming visible until late 1998. During this period, there was an explosion of "online" credit card purchases during the holiday seasons. However, because these were not significant, it still did not appear that Internet users were ready to use the Internet to conduct significant banking operations.

d. November 1999: Massive Growth of the Offer of Telebanking

Today, we are watching the development of telebanking services at increasingly interesting prices. This is in response to the keen demand. This demand seems to be imminent, due to a combination of various factors. The most significant factor is the awareness, by the increasing number of Net users of the security of the network. Another factor is the unprecedented development of an economic sector, close to that of telebanking: electronic trade. Electronic trade is becoming a habit for most Net users. As a result, there are numerous companies that have specialized in the sale of items or services through the Internet. For
example, in 1998, amazon.com published a quarterly turnover of eighty million American dollars. One year later, during the same period, the turnover was 290 million dollars. In only one year, sales increased by 350%. In the year 2000, sales were predicted to border the billion dollar mark. This growing development of electronic trade for items of nominal value made it possible to compile statistics that reflected a very small proportion of cases of fraud involving credit card numbers when they are transmitted to a protected site. In addition, because credit card companies receive a commission on each transaction, they each have created a special fund which, in the event of fraud, will compensate fraud victims in order to encourage the consumer to communicate his number online.

As a result, potential telebanking customers can feel confident that use of their credit card to buy products, and services on the Internet, through a protected site, does not involve great risk. This contributed to convincing them that this would also be applicable to the banking services offered by telebanking means. In addition, the end of the economic crisis, and the explosion of the financial markets linked telebanking to technology, and Internet transactions. The constant increase in the number of small investors who are potential customers of “online banks” have strongly contributed to the development of telebanking, which appears to have a bright future.

3. The Offer is Available in Switzerland Today

This trend is reflected in Switzerland where there has been a sharp increase in the number of banking services, and Internet telebanking sites that were opened in the spring of 1999. For example, the Post Office opened the site www.yellownet.ch in the Spring of 1999; Crédit Suisse began offering its service www.youtrade.ch in the Summer of 1999; and the Union de Banques Suisses (UBS) started “tradepac” www.ubs.ch\tradepac in Fall of 1999. These three companies already had a functional telebanking service for quite some time, and they have constantly improved over the years. However, these three new Internet

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4. See generally Amazon.com, at http://www.amazon.com (last visited Nov. 29, 2001). Amazon.com is the world’s largest virtual shop. It sells books, music, toys and various other new or used items through its auction department.


sites represent a considerable improvement in tariffs, ease of use and speed. Because of their aggressive marketing operations, these three new Internet sites also show the will of their management to quickly convince a great number of potential customers to use their services. In addition, it should be noted that the banks now make a distinction between the traditional telebanking type service (accessible through the official and global server of the bank), and the specialized telebanking service (equipped with a proper name and without a direct relationship with the bank), which is accessible through a distinct Internet address.

Traditional telebanking makes it possible to inquire about one's account, to make transfers, to place Stock Exchange orders, and to inquire about courses or stock exchange information. Specialized telebanking makes it possible to carry out specific transactions: For example, to buy or sell in the stock exchange, to make transfers, and to apply for loans. It was created partly in reaction to the very competitive American banks which offer these services.

7. See generally UBS, Welcome to UBS Financial Services Group, at http://www.ubs.com (last visited Mar. 27, 2000) [hereinafter Welcome to UBS].

8. UBS is the first Swiss bank to offer a telebanking service not requiring the prior installation of any software. See generally id.

9. They are not bothered to buy full-page adverts in financial magazines and also in popular dailies such as Le Temps, Le Matin, or Tribune de Genève. Bill-posting campaigns in front of the universities like that of Geneva show these companies' intentions of reaching a very wide audience.


12. As an example, the American online broker E*trade enables its customers to buy shares and stock coded for example at the NASDAQ stock market for a token price of $19.95 (except for stock options) per transaction. Datek has a token price of $9.95 per transaction and even offers the latter free of charge to its customers if the order is not executed the minute after it is sent by the customer. Meanwhile, Crédit Suisse continue to receives very high commissions with regards to American companies; about 1.8% with the Federal stamp duties for small amounts. However, with its telebanking service, the commission amount dropped by about 50%, moving to 0.8% if the transaction is made on the Internet. This drop is significant but may not be enough to counter competition from American banks, which, on a transaction of $100,000 carried out at the NASDAQ, still offer an eighty times better value than a Swiss bank.
B. Material Required

The person wishing to use telebanking must fulfill certain prerequisites.

1. Bank Account

Initially, he must have a bank account in the bank that is providing him with this service. Therefore, all the usual checks, such as the identity of economic beneficiary, the origin of the funds, are made in order to prevent the deposit of proceeds from criminal activity.

2. Telebanking Contract

Secondly, he must sign a telebanking contract with his bank which sets out the rights and obligations of the customer, and limits the responsibility of the bank in the event of any loss that is suffered by the customer. This standard contract is available in all the branches of these banks or can be downloaded from the Internet.

3. Provider of Internet Accesses

Third, he must have a contract with an Internet access provider which will allow him to connect to the network either by telephone, cable, electricity or satellite. However, this condition is not necessary if the user does not wish to utilize his banking operations from his residence. Otherwise, he will still be able to use an Internet connection at his place of business or in an Internet cafe.

4. Computer

Fourth, he should have a computer that has a basic configuration, which can be different with each connection. Each bank announces, and sets its own general conditions, and terms. However, Internet telebanking sites are constantly being improved. They require tools that are increasingly more powerful and complex, to guarantee the security and to develop the range of banking services offered. The figures published under the general conditions of the banks at the time the telebanking contract is executed can only have an indicative value and must constantly be modified.

Currently, the Telebanking user of UBS., Crédit Suisse or the Post Office must have, at minimum, the following:

- a Pentium processor13 (for a PC)14 or Power PC (for a Macintosh15 computer);

13. It is the brain of the computer, which controls and runs all its operations.
• 10 Mb of space on the hard disk in order to back up the encoding software. However, this is no longer necessary for the last version of telebanking offered by UBS, which is the first Swiss bank to offer an access to telebanking services without preliminary software;

• 32 Mb of RAM to be able to correctly view the Internet pages of the telebanking site;

• A current operating system (Windows 95\98\2000\Me\XP, Windows NT 4.0 service pack 4, Mac OS 8.x, Unix or Linux); and

• A modem with the fastest possible speed so that communication with the Internet site of the bank is quick, and Internet navigation software as recent as possible to be able to follow the trend of the telebanking sites (Netscape 4.0 or superior, Microsoft Internet Explorer 4.0 or superior).

C. Security

1. Coded Transmission Between the Bank and its Customer

Swiss banks have a particular obligation to respect bank secrecy that the majority of the banks in foreign countries do not have. However, bank secrecy or not, information transmitted between a bank and its customer is highly personal and any bank, whether it is Swiss or not, must seek powerful software allowing it to cipher information passing through the

14. Abbreviation of “Personal Computer”: the single link between these computers is their inter-compatibility regardless of their label and account for about 90% of the computer market.

15. These computers are not compatible with PCs except for some specific applications having special “pathways.” They account for about 10% of the computer market.

16. Abbreviation of “Mega Bytes,” computer unit equivalent to one million ‘bytes’, each byte being itself made up of a combination of eight figures composed by zero and by one. A minimum space enabling to safeguard eighty million (=8*10^15) figures in the hard drive of the computer.

17. Name given to a computer devise used to store data in the computer.

18. Abbreviation of Random Access Memory.

19. Computer program running and presenting the software used by the computer in a specific way (e.g. Windows has a very friendly presentation in the form of windows, which is not the case for Unix, which is more appropriate for professionals).

20. Common name given to the apparatus that transforms the data which the user wants to transmit on the internet network in a format that enables it to travels on lines or on any other medium (modulator) and retransform data its receives in a format that is readable by the computer (demodulator).
network and to ensure its customers of the confidentiality of the information exchanged.

a. Encoding Software to be Installed on the Computer of the User

The first experiments in telebanking required the installation of special software to cipher the data on the user's computer. However, this solution is not very practical because it does not make it possible to carry out banking transactions on any other computer other than the one on which the software is installed. This is why banks are all replacing this software with an autonomous system of coding.

b. An Autonomous Encoding System: SSL

UBS was the first Swiss bank to propose to its customers a system of autonomous coding not requiring the installation of software on the computer of the user for it to function. The majority of the American banks offering the service of telebanking adopted it for a considerable time, and it is about to become the model for computer security. This system of coding, called Secure Socket Layer (SSL), is a public protocol which ciphers data passing between the Internet navigator used by the customer (Netscape, Explorer), and the server of the bank. The banks maintain that the "coding used currently enjoys a very high level of security", and "Protection obtained is an obstacle to professional hackers". "Generally, the Internet Banking system is safer than the usual procedures of sending payments, and orders through the post office". "It is a coding with 128 bytes (IDEA\RC4) or 168 bytes (3DES)." SSL is so powerful that the American authorities require government authorization for its export. This authorization is only granted to specific companies. Exportation of SSL, without authorization from the proper authorities, is considered, by the United States, to be exportation of an illicit weapon carrying a punishment of two years of imprisonment. Indeed, by using SSL in a communication system, it enables these types of criminals to communicate among themselves by using the code, while it provides some

21. This is still the case with Crédit Suisse's and the Post office's telebanking site.
22. See generally Welcome to UBS, supra note 7.
23. Based on an interview realized in October 1999 with UBS and Crédit Suisse legal departments.
25. This American law, which is not applied with flexibility, has been used to convict people.
certainty, and assurance the police could not intercept their conversations. This is precisely why the United States tries to ensure that terrorists or other criminals cannot use SSL for dubious purposes.

c. Financial Certificates

A “Financial Certificate” is a certificate which grants accreditation to the server. The Financial Certificate was established by an accreditation and certification office. The Financial Certificate certifies that the server to which the user is connected is authorized to use a system of coding (SSL or other), and the Financial Certificate attests the level of security employed by this system (40, 56, 128 or 168 bytes for principal coding which is currently used). The goal of the Financial Certificate is to prove to the user that he is actually communicating with his bank, and not with a pirate site. Additionally, each Financial Certificate has a “fingerprint” which is unique to it, and which can be checked by the user each time he is connected. Upon getting information from his bank or from the office of accreditation and certification, each user will know the official fingerprint of the telebanking site. This will enable the user to compare the fingerprint of the telebanking site with the fingerprint on the Financial Certificate to ensure that they match.

There are several offices of accreditation in the Internet sector, but one of the most recognized accreditation offices is the American company, Verisign. Verisign is mostly used by Swiss banks. When a customer connects himself to an Internet Telebanking site, the bank will send the customer a certificate issued by Verisign. The Telebanking site’s Internet navigator will then display information related to this certificate, and will ask the customer if he accepts it or not. The customer will be able to make his decision by comparing “the fingerprint” on the certificate sent with the official Financial Certificate, and particularly, the fingerprint on the bank’s Internet site. If they are identical, this means that the customer is confident that he will communicate, and send information directly to his bank, and not to the site of a professional hacker. He will be able to accept the certificate as soon as the user “clicks” on the icon labeled “Accept”. The communication will then be ciphered and the Internet navigator will code all information sent and will decode all information received. The customer is thereby given assurance that he is

26. See Why UBS e-banking classic is so secure, supra note 24.
communication with his bank and that the information transmitted will remain confidential. However, can the bank trust the user?

2. Verification of User’s Identity

For the banks to be sure that the person connected to their protected Internet Telebanking site is the account holder, or an authorized user of the account, the banks must verify his identity. For verification purposes, most banks will request that an individual customer provide three pieces of identifying information, and a corporate customer provide four pieces of identifying information.

   a. Contract Number

   The contract number is sent to the customer by registered mail after execution of the Telebanking contract. This ensures the bank that the user is a member of the circle of people who know that the contract number will be sent by mail. Obviously, this circle includes the customer of the bank; however, it also includes his spouse, children, the cleaning lady, a workman working in the house, or a robber.

   b. Password

   The bank also sends a password to its customer with a request that he modify the password immediately to a word of his choice. This will make it possible to ensure that the bank now communicates only with its customer or someone who knows him and was able to guess his password. This person could be his wife, one of his children, or a hacker. However, if the customer chooses a random password, memorizes it, and does not write the password anywhere, the risks of “hacking” this password are greatly reduced.

   c. List of Numbers or Numbers on Secur ID Card

   A number is placed on a list of ninety numbers or on cards called Secur ID cards. Both are sent to the customer through the mail. Using the number list, the customer will be able to validly connect to the Telebanking site. The customer will then cross out the number used for his current connection off the list, and use the next number on the list for the next session. However, because the numbers are contained on a list, it

29. Contrary to UBS that only uses the list of numbers to be crossed out, Crédit Suisse allows its customers to choose between either system.

30. It has the format of a credit card and has a liquid crystal screen, which displays a number.
is easy to photocopy it, enabling several to have the same number at the same time.

If the customer chooses to use the Secur ID cards, he will not be required to do anything once he is connected. The system will only display one number at a time and will change automatically every minute. This allows the bank to be sure that it is communicating with the person who holds that particular number. If the customer chooses a Secur ID card, only the person who is in possession of the card at the time of the connection has access to the number required for connection to the bank. However, if the customer loses his card, he can immediately request that UBS send him a new one. A potential thief would have to also know the customer’s personal password, and contract number in order to use the customer’s account without his knowledge.

3. Risks of Fraudulent Use of the Telebanking Account

The bank itself can be a fraud as seen in the notorious case of European Bank of Antigua\(^3\). The European Bank of Antigua enabled two Russians to gain more than ten million dollars in 1997 to the detriment of the unfortunate customers who opened an account at this bank.\(^3\) Thus, before signing a telebanking contract with a bank, and sending funds to a bank, it is wise to investigate the quality of the bank. If this investigation is not carried out, the user connected to the protected Internet telebanking site runs the risk of an unauthorized third party using his account without his knowledge. This situation can occur through the actions of the following three types of individuals: the staff of the bank, a computer hacker (hacker), and the user (if he is negligent by not taking the proper precautions to ensure that each session is confidential).

\(\text{a. Bank Staff}\)

The people who are at risk on the bank staff are the data-processing specialists who are responsible for the telebanking service because it is possible for them to connect themselves to the account of the customer.

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32. This massive fraud culminated in August 1997, in the collapse of the European Union Bank (EUB). The police at the time discovered that two mafiosi known to the police services, Alexandre Konanykhine and Mikehail Khodorkoueky were the developers of the world’s leading virtual bank as they had declared through aggressive advertising campaigns proposing tax-free interest rates of 9.91\%. The target customers were money launderers, as well as, people wishing to evade taxes. The bank of England and the American Bank of Idaho went into action and in August 1997, the Anti-gang authorities opened investigations for fraud. It was however late for the two criminals had already dismissed the banks’ five man staff and safely stashed away the ten million dollars which have never been recovered.
Crime statistics indicate that there is a rise in the attacks that are carried out with the help of an internal contact in the company. This is why data processing specialists must be supervised by a sufficiently dissuasive internal police system. While it is relatively easy for the data processing specialists of a bank to enter the account of the customer, and divert funds therefrom; it is also easy for the police to analyze the network and identify any fraudulent conduct on the part of data processing specialists. This is why only an effective monitoring of the data processing specialists makes it possible to prevent internal fraud, and creates a situation of a "cold war" that dissuades any fraud.

There are several ways that a data processing specialist within a bank can assume the customer's identity in order to use his account fraudulently. For example, he could enter the hard drive of the bank's computers which stores the contract numbers, passwords, and the algorithms that are used to generate the numbers "randomly chosen" for the number list or Secur ID cards of customers without the bank's computer being able to identify who hacked into it's hard drives. However, this is almost impossible because the bank's computers would have identified him before he was able to penetrate the hard drives. The machine will keep track of the person's identity by recording his name, the hour and the connection time, as well as the type of action that he takes. If such an action is automatically transmitted to and stored in a safe place, the trail of the fraud will be indelible and usable by the police. The only way to avoid being identified, would require the hard drives to be physically removed, and then analyzed from a computer that is not connected to the bank. However, if the security system that is in place is adequate, the removal of the hard drive will leave traces in the central computer of the bank, or in the designated safe place. The data processing monitoring systems, as well as the internal police devices of the bank, seem to be sufficiently dissuasive for the moment, and make these type of acts very rare. The prospect of the perpetrator being identified in the event of fraud effectively dissuades the data processing specialists who could be tempted to commit such an offense.

Major Swiss banks affirm that they have never been attacked to date. However, other sources have reported contrary information; specifically, that the banks would prefer to bear the burden of any damages, by

33. Based on October 1999 interview with UBS and Crédit Suisse legal departments.

34. There is one central point for carrying out a 'hold-up' the bank's computer server. Before the Internet, gangsters could choose their bank counter. In the event of a hold-up, customers avoided such a bank for a certain time and went to another to carry out their transactions. Today with Internet, in the event of fraud at the 'electronic counter' i.e., the
choosing not to publicly reveal the theft as opposed to tarnishing the image of the bank. Consequently, the banks which have a sufficiently dissuasive internal police mechanism in place, are less likely to be penetrated, and suffer fraud losses by means of an internal contact within the bank.

b. Professional Hackers

i. Decoding of the Transmission and Algorithm Discovery

As for the professional hackers, they work to “break” the encoding keys currently used by the banks in order to decode the SSL coding, and to intercept the data-processing keys authenticating the user. These hackers have the greatest computing power in the world called “CRAY” or “Supercomputer”, and recently spent more than one month, working at full capacity, to decode such a key. The user does not usually communicate for more than one hour, and often only for a few minutes with his bank to transmit his orders, and that the keys change each time (numbers on list to cross out or Secur ID cards). Thus, the ability to use the Telebanking account of a customer, without his knowledge, requires the hacker to record the “conversation” between the customer’s computer, and that of the bank, and then succeed in decoding it. This will give the hacker the customer’s contract number, and password.

Finally, the hacker obtains, through the contact from the bank, the algorithm which “randomly” generates the numbers on the list to cancel or that was displayed every minute on the Secur ID card. This enables the hacker to have all the data-processing keys of the customer. However, under such a theoretically possible option, the hacker would spend so much money to get the hardware necessary for the “hacking” that only the tapping of very significant bank accounts (of at least ten million dollars) would be profitable. Thus, the accounts with lower balances run a substantially lower risk of being the subject of such fraud.

35. The film ‘Entrapment’ released in the spring of 1999 acted out such a scenario: virtual ‘hold-up’ of a huge sum of money carried out using very expensive computer equipment.

36. Estimated minimum cost of the baseline equipment a hacker should have.
ii. Usurpation of the Identity of the Bank by Creating an Internet Mirror Site with an Official Fingerprint

A simpler means to obtain the data-processing keys of the customer of a bank is to set a data-processing trap to the bank.

a) The Print is Different from that of the Bank

Under this scheme, an Internet site identical to that of the bank would be created but would have a different fingerprint. A customer of the genuine bank would be requested to go to the trap site. While the customer is connected to the trap site, the trap site will communicate the data-processing keys to the hacker.

It is very easy for a hacker to completely recopy the site of a bank. All that the hacker has to do is: go to the bank's site, copy all the displayed pages and then paste them on his trap site. Moreover, in order to reassure the customer of the security of his information, the trap site of the hacker will have a fingerprint, and certification of server obtained at Verisign. [In order to simulate Verisign certificate, the hacker is only required to give the impression that his site wants to make an unspecified electronic trade requiring the use of coded transmissions, and to receive the credit card number.] Based on this information, Verisign will grant him the necessary certificate. As soon as the site is installed, the hacker will be able to send an electronic mail to the target customer of the bank informing the customer that the address of the Telebanking site has changed: for example, www.ubs.net instead of www.ubs.ch. If the customer accepts this electronic mail as true, he will then be connected to the trap site of the hacker which appears to be the official site of the bank. The customer will, in all confidence, then transmit his data processing keys through the trap site when he tries to access the Telebanking service. Then, the hacker only has to memorize these data-processing keys as they are being sent. This will give the hacker the ability to immediately use the data processing keys to connect to the genuine Telebanking site of the bank.

If the customer uses the number lists, the hacker will not even need to know the algorithm that generated the information. However, the hacker will only be able to connect to the Internet site of the bank. The next time the following number on the list of numbers will be required, and the hacker will not have access to this information unless he repeats the operation of the trap site, or obtains the algorithm that generated this figure. This would be almost impossible unless the hacker has a contact within the bank. On the other hand, if the customer uses a Secur ID card, the number obtained will be valid for only one minute. After this time
period passes, a new number will be generated. This will force the hacker to get the algorithm of the bank. Yet, in one minute, it is completely possible to memorize the number, and be immediately connected to the legitimate bank site. An easily programmable data processing program can even perform this function automatically. However, this hacking operation is based on one assumption, that the customer will fail to check the fingerprint of his bank, and the fingerprint which is communicated by Verisign during each connection. If the customer regularly verifies this information, he will realize immediately that he is not communicating with his bank. The customer will then refuse to communicate his data-processing keys, because he detects that he is communicating with a trap site.

b) When the Fingerprint on the Trap Site is Identical to that of the Bank

If the fingerprint on the trap site is identical to the fingerprint on the bank’s site, the hacker would have a higher success rate in convincing the customer to transmit his data processing keys through the trap site, because the customer would have no means of detecting the data processing trap. This is theoretically possible, but not practical. In order to get a fingerprint identical to that of the bank, there are only few means available to the hacker:

- To “break” into the Internet navigation program of the bank’s customer so that the customer will consider the pirate fingerprint as genuine; and the bank’s customer will see the same certification of the server when he is connected to the Internet trap site, as that published officially by the bank. Theoretically possible, this seems difficult. One should realize technically, Internet navigators are well designed and not easily modifiable.

- To “break” into the Verisign system itself requires the hacker to obtain from Verisign an authentic certificate that has the same fingerprint as the bank. This process seems technically improbable to the average person because it would require the hacker to have considerable means. Thus, it is very difficult to “break” the Verisign system.

iii. Placing Spy Data Processing Virus in the Customer’s Computer

A third means of obtaining the bank’s customer’s information would be to place a data-processing virus in the customer’s computer. This virus would track the “hidden” memory of the Internet navigator, and then back up the data-processing keys of the customer in a non-standard file which is
sent back to the hacker. This is the easiest plan to develop. However, this plan has problems. This plan would only put the hacker in possession of two of the three keys necessary: the contract number, and the password. The numbers intercepted by the data-processing virus would not be useful to the hacker because they could not be used during the next connection to the bank since the number changes each time. Thus, the hacker must get the algorithm generating the number, (a difficult operation, as previously discussed), and photocopy the list of numbers, or steal a Secur ID card. These operations are very risky for the data-processing hacker. Additionally, if the customer erases his "hidden" memory after each session, as recommended by the bank, it largely decreases the risks of infection by such a virus.

c. The Customer is Negligent in Taking the Minimum Necessary Precautions

Lastly, the customer himself represents the largest risk. Indeed, it is much simpler to steal the data-processing keys of the customer than to try to guess them, penetrate the hard drive of the bank, or "break" the encoding system transporting them. Consequently, by choosing an easily imaginable password; by writing it on any medium; by leaving a trail of information (such as his contract number or his list of numbers to cross out, or his Secur ID Card); by not verifying that the official fingerprint of the bank corresponds with that sent by the Internet site certificate during each session; or, lastly, by not erasing his hidden memory after each session, the customer runs a higher risk that his account will be used without his knowledge.

d. The Small" Non-Negligent Customer Runs Almost No Risk of Fraud

In conclusion, a non-negligent customer of the bank, who takes all the necessary precautions to ensure his data-processing keys are not discovered, and checks the fingerprint of the bank during each session has a very small risk that his account will be subjected to unauthorized use. While the probability that a hacker will penetrate the account of a non-negligent customer or that a bank clerk will use his data-processing keys without his knowledge is very low, the possibility still exists.38

37. Meaning having assets in account lower than the cost of the material needed by a hacker to pirate one's account. This amount always change depending on the technological breakthroughs in new increasingly sophisticated hacking gadgets.

38. This is why UBS set up a special security team responsible for constantly analyzing trends in encryption techniques and the means at the disposal of hackers.
However, given the high cost of these “hacking” operations, it is likely that only larger accounts, which contain balances higher than the cost of the hardware that is necessary for the hacking operations, could be affected. On the other hand, if the customer is negligent, he runs a significant risk that his bank account will be used without his knowledge.

4. Tax Risk

A very distinct risk is that tax authorities can discover an undeclared account of one of their taxpayers. The authorities do not have a significant budget to commission good hackers, and to provide the hackers with the necessary hardware to allow them to successfully carry out the hacking operation. Thus, the risk that an administration can intercept a communication between a bank and its customer, and decode if the communication was ciphered with some powerful coding system such as SSL is eliminated. This type of operation is illegal as declared in the Swiss Penal Code in Section 144ss.39

However, while the administrations cannot learn the content of the communication, they can determine the identity of those who are making the communication with little effort. [With this information, they can conclude, for example, that Mr. X, living in Zoug, declaring an income, and a fortune of 0. - - SFr., connects everyday between 2:30 p.m. and 10:00 p.m.40 to the Telebanking site of the UBS.] If phone-tapping is authorized by an examining magistrate due to suspicion that there has been a tax offense,41 it would be possible, through phone-tapping, to record the IP numbers42 and then question the Internet access provider as to the identity of its customer. Upon ascertaining the identification of the customer, the tax authorities can order the customer to request from the bank they suspect of having an account, a certificate attesting that he is not the economic beneficiary of any funds. If the customer does not comply with this request, the tax authorities will threaten the customer with


40. Opening hour of the American stock exchange.

41. Without the authorization of such a judge, it would be impossible to obtain these numbers through other means (for example civil procedure) since the federal law on telecommunication forbids the communication of IP numbers in order to protect the private life of individuals connected to the Internet.

42. No attribution for each Internet connection and through which can be determined which customer of the access provider is connected to the Internet, when, where, and for how long?
automatic taxation, or other any other measures needed to compensate for the damage caused by the commission of any tax offense.

Telebanking does not increase this type of a tax risk; on the contrary, it decreases it. A customer who attempts to defraud the tax department through facsimile or telephone orders to his bank, or his account manager, will also be controlled by tax inspectors. These types of transactions make it easier for the tax inspectors to trace the customer's accounts than if the customer conducts his Telebanking through the Internet. These types of transactions will allow tax inspectors to intercept the contents of the transactions that the customer transmits to his bank by facsimile or telephone. Normally, the tax inspectors would only be able to determine the sending, and receiving points of the communication if the customer places his banking orders through the Internet. Consequently, the tax risk remains, but is mitigated with Telebanking because the confidentiality of the information transmitted between the bank, and its customer is almost guaranteed, which makes only the identity of the recipient, and the sender discoverable.43

D. Services Offered

Banks currently offer a whole range of services that are accessible via Telebanking. In the future, all the services offered by a normal bank will be available on-line, including the following: loan services, leasing services, financial transactions analysis, Stock Exchange orders, transfers between accounts, blocking of credit card services, the ability to change personal information on the account, and the ability to order banknotes. This evolution is inevitable for banks in order to prevent losing market shares in these fields.

However, to date, banks offer the following services:

- Account information: balance, recent transactions, summaries, evaluation of deposits, etc.;

43. This also stands out clearly in Crédit Suisse's general conditions in telebanking. Article 6.2 states, “although data is transmitted in coded package form, those of the sender and addressee are however not coded...consequently, it is possible for a third party to draw conclusions therefore regarding the existence of a banking relation.” Crédit Suisse, Application for Use of Direct Net from Crédit Suisse, available at http://www.cspb.com/en/onlinebanking/documents/cspb_privat_vertrag_e.pdf (last visited Oct. 19, 2001) (Crédit Suisse form no. 114703, version 1.00) [hereinafter Crédit Suisse Application]. The last update of the agreement can be downloaded from Crédit Suisse website, http://www.credit-suisse.com, by clicking on “private clients,” then “online services,” then “directnet” or “online brokerage” and then by clicking on "download agreement."

- Payments: Transfer of accounts to bank or postal account in Switzerland or abroad;

- Stock Exchange: Immediate transmission of purchase orders, and sales of securities (shares, bonds, and on certain markets, options or warrants). Generally, the covered stock exchanges are the United States, London, Milan, and the Swiss stock exchange. In the long run, all stock exchanges will be covered;

- File transfer: Banks authorize transmission of global orders (transfers, Stock Exchange orders, check orders, etc.) written "off-line" by means of specific financial software, and then transferred to the bank in one block in the form of a coded file;

- Quotes: Raw materials, exchange, and stock exchange price (free). Warning by e-mail or through an SMS message sent on the nate! as soon as the price reaches a predefined lower or higher limit;

- News: Financial information published (free) by specialized agencies on the matter: Reuters, Bloomberg; and

- Support (Hotline): In the event of problems that occur in use, breakdown or technical disturbances, the banks usually provide the customer with a special telephone that is permanently accessible. This provides the customer with reassurance, and assists him in solving any possible problems.

**E. Advantages/Disadvantages**

1. Advantages

   a. Cost

   The advantageous cost of the operations is incontestably the most solid argument supporting the development of Telebanking. The overhead is low and all the commissions are reduced substantially (50% on the transfers and a percentage of reduction increasing proportionally with the amount of the transaction for the Stock Exchange orders).

   b. Speed

   Secondly, it is undeniable that a transaction transmitted through Telebanking will be carried out more quickly than a normal transaction because it removes a human being from the intermediary role, and replaces him with a computer that transmits the order directly to the trader's

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45 Swiss word for cellular telephone.
assignee. Except in the case of a computer breakdown, the customer will find it beneficial to place his order through a Telebanking service because this will enable him to avoid any delays due to the fault of the intermediary [receipt of several orders at the same time from several different customers by the intermediary, or absence of the intermediary at the time of receipt of the order, or at the time the order is transmitted].

c. Independence

Telebanking allows the customer to place his orders from anywhere. In most countries today, there is a computer within the vicinity that the customer can use to connect to the Internet; and which has the basic configuration necessary to place these orders.

d. Time Flexibility

Lastly, the customer can place orders at his convenience, even outside the normal business hours of the bank. This gives the customer the ability to conduct day trading on markets like the United States (open between 2:30 p.m. and 10:00 p.m., Swiss time) or Japan. Telebanking allows the customers to make stock exchange transactions professionally. Before telebanking, this ability was reserved only to the large account holders of the bank; now, this service is accessible to both large and small account holders.

2. Disadvantages

a. Customers Who Lack Minimum Data-Processing Knowledge

In order to use a Telebanking service, it is necessary for a customer to know how to use a computer, a mouse and to have minimum knowledge about browsing. Sometimes, this can block many potential customers interested in telebanking, because they are afraid of the idea of using a computer. However, most banks try to facilitate access to this service by simplifying, to the extent possible, the operations in order to allow all potential customers to use this service.

46. Buying and reselling the same day.

47. Before telebanking, "small customers" of the bank needed to call the bank during business hours to place their orders unless they had a special "phone banking" contract offered recently as an intermediate and supplementary measure to telebanking. The closing hour varied between 4:00 p.m. and 5:00 p.m., so it was virtually impossible for the customer to place an order while studying the market at the time of planning the order given that the American market opened its doors at 3:30 p.m. (Swiss time).
b. Security

It is clear that a risk of unauthorized use of a customer’s bank account by an unauthorized third party will exist either, through a Telebanking transaction, or during a transaction carried out by normal means. However, if the customer follows the instructions of the bank by taking the necessary precautions, this risk will be greatly reduced. Additionally, it should not be forgotten that when one communicates with his bank through traditional means, such as the telephone, fax or mail, there is also a risk of interception of the transaction. No transmission system is completely secure. The hold-up of the Post Office of Fraumunster in Zurich, the recent attack of a mail train in French-speaking Switzerland, and the many scandals related to illegal tapping demonstrate that there is always a risk of interception. Lastly, it is obvious that the telephone networks where words are exchanged are more exposed to phone-tapping than those where coded information (with a very high degree of security) is exchanged. Yet, the banks try to limit, or even try to exclude any responsibility in the event of hacking. We will analyze further the validity of the general conditions of the banks used to limit their responsibility in the event of hacking. In my opinion, certain limitations of responsibility are highly subject to criticism, are disproportionate, and thus, make them illegal.

III. FORMATION OF THE CONTRACT

A. In General

Generally, offer and acceptance form a contract. One of the protagonists presents to the other party an offer, i.e. the firm proposal to create a contract. This requires the recipient of the offer to accept the offer, refuse the offer or formulate a counter-offer. The conjunction of the offer, and acceptance creates the assent, which results in the formation of a contract. This practice introduced the system of the “request for offers” or “the invitation to make an offer” into this procedure. The “request for offer” proceeds in the following manner: one of contracting parties sends to the other a pre-formulated contract. If the recipient of this “request of offer” signs it, and returns it to the sender, the party will have tendered an offer for the acceptance of the other contracting party.

48. PIERRE ENGEL, TRAITÉ DE DROIT DES OBLIGATIONS [CONTRACTS LAW], p. 192s (1997)


B. Chronology of the Signature of a Telebanking Contract

Initially, the customer receives a “request of offer” from his bank containing the general conditions which are pre-formulated by the bank. The “request for offer” can be in response to a request from the customer, or the result of a marketing campaign of the bank. At this stage, the parties are not legally bound under the terms of 7 al.11 CO. Secondly, the prospective customer signs, and returns to the bank the document, which constitutes an offer, and legally binds him within the meaning of the Article. Thirdly, the bank signs the contract, and returns it to the customer with the data-processing keys that will enable him to start using the telebanking service. This represents the bank’s acceptance and forms a legal contract.

C. General Conditions

1. Concept

According to a concept retained by the Swiss legislature of 1881, a contract is negotiated, and discussed point by point. This practice often corresponds to reality. However, this practice has developed a new legal concept known as “contracts of adhesion”: one of the parties proposes a pre-formatted contract to which the other can only adhere. These contracts contain general provisions. These provisions are pre-formulated contractual clauses that describe in a general way, all, or part of the provisions contained in possible contracts. These provisions are not, in themselves, a source of the law of the contract; they are autonomous rules that have meaning only if the parties decide to integrate them into their contract. They are written in an abstract way, and have value only if they are accepted.

This hybrid character raises inherent difficulties, particularly in their interpretation. It should be noted that these general provisions can possibly be used to describe usual practices. The judge could be inspired to interpret, or supplement, a contract, provided that the contract is not the expression of a unilateral design. However, the introduction of these general provisions limits contractual freedom, since the customer’s


contract contain provisions which were not discussed.53 For this reason, general provisions will not receive an extensive interpretation; instead, these provisions will be given a rather restrictive interpretation. Because of their function in the economic life of the customer, the general provisions should not be interpreted literally. It is necessary to examine, on a case-by-case basis, the meaning, and goal of the provision in question. If, after such an interpretation, the disputed provision still remains unclear, this lack of clarity will be interpreted to the detriment of the contracting party who wrote the provision.54

2. The Inclusion of General Conditions in a Contractual Banking Relationship

To protect the party forced to adhere completely to the general provisions of a telebanking contract, without being able to negotiate them, Swiss Law stated that there is a need for the integration of these general provisions into the contract. Indeed, in order for it to be legally valid, both parties must agree that the general provisions supplement are integrated in the agreement which they made, thereby forming an integral part of the contract. There is total integration when the parties accept the general provisions’ conditions without them (“in block”), even if they have taken note of them. This process is, per se, illicit: it is not necessary that the parties knew of the contents of the provisions. The only requirement is that the text be available, and accessible to the parties. However, this process involves increased risks.55

3. General Conditions within the Framework of the Telebanking Contract

The general provisions of the telebanking contract are completely formulated by the bank, and they will be interpreted against the bank by the judge in the event of a dispute. Moreover, since the customer does not have the possibility of discussing the general provisions with the bank, there is total integration of the provisions. This increases risks for the customer who is forced to accept these provisions, that are sometimes very unfavorable to him, if he wants to carry out his banking operations via telebanking. The validity of the contents of these general provisions will

53. DANIEL GUGGENHEIM, LES CONTRACTS DE LA PRATIQUE BANCAIRE SUISSE [SWISS BANKING CONTRACTS LAW] 58 (2d ed. 1993); 468 LE DROIT DE OBLIGATIONS, supra note 52, at 59.
54. 468 LE DROIT DE OBLIGATIONS, supra note 52, at 61.
be addressed during the analysis of the responsibility of the bank contained in chapter VI of this article.

D. Offer

1. Definitions and Concepts

The offer is the first demonstration of will, regardless of the author. It is characterized by the fact that a person, the “pollicitant,” proposes to another a contract, making its creation dependent only on the acceptance of the other party.56 One characteristic of an offer is that it binds its author. The term describing this characteristic is the “obligatory rule of the offer.” The offeror puts the recipient in a position to create a contract by acceptance, which is the exercise of a general formative right.57

The offer comprises three distinct features:

- It is addressed to the recipient, i.e. to a determined or unspecified person;
- It expresses a legal will to create contract; and
- It should contain all the essential terms of the proposed contract.58

2. Contents

a. Reciprocal and Concordant

The offer and acceptance are governed by Article 3 of the Obligation Code [CO] and must be reciprocal and concordant, which results from Article 1 CO.59 They are reciprocal when the recipient of both the offer and acceptance is the author of the other. They are concordant when they express the assent of the parties to the same contract terms.60

b. Essential Elements of the Contract

For there to be assent, the first necessary element is that the two parties must have agreed on the essential points of the contract. The

58. Id. at 193.
60. Id. at 194.
essential points of the contract are those that must be understood in the "spirit of the parties" so that one is presented with a homogeneous, and autonomous agreement.

There are two kinds of essential elements: Objectively essential elements, and subjectively essential elements.

1) Objectively essential elements:

   a) Definition

   Objectively essential elements are the elements that should be included to individualize the contract. It is a matter of ascertaining the parties involved in the transaction, and the services that each will promise to perform. If an agreement cannot be reached, there is no contract and the judge cannot find that there is a contract when there clearly is a lack thereof.

   b) Telebanking Contract

   Whether the telebanking contract contains the essential elements which make the contract sufficient is determined as follows:

   (i) Determination of the parties concerned

   A link must exist between Mr. X and bank Y. If this link is not established, then the parties are not defined. Consequently, Mr. X must be a customer of bank Y; and to obtain this status, he must have opened an account, and have deposited a minimum amount of funds in that bank.

   (ii) The essential obligations of the two parties

   The bank:

   (1) Has an obligation to communicate and process, within a reasonable time, the orders placed by its customer through the Internet or to a qualified person within the bank.

   (2) Has an obligation to take the necessary steps to secure as much of the data-processing network of the bank receiving the orders of the customer.

   (3) Has an obligation to use the most advanced techniques of encoding, and to update them regularly in order to communicate with the customer in a private, and confidential way.

   The customer:

   (1) Has an obligation to agree to be bound by the orders transmitted to his bank through the Internet.
(2) Has an obligation to be quick in transmitting the data-processing keys given to him by the bank in order to prevent their fraudulent use by an unauthorized third party to the detriment of the customer or the bank, which will occur if there is discovery of the coding algorithm.

2) Subjectively essential elements

Subjectively essential elements in a contract are secondary elements, but are elements which the parties have, from the start, considered as a condition of their agreement. Although subjectively essential elements are not a necessary element of the contract, one party, or both, can make them a condition of their contract. If they cannot agree, there is no assent and the judge cannot make a finding that there was assent. In order to be part of the agreement between the parties, the contents of the contract must be sufficiently defined, or at least, sufficiently determinable. The debtor must be able to identify the commitment that he is undertaking. As for determinability, it can rise from objective criteria (e.g. the stock exchange price on a given date) or the choice of a third party, or a party to the contract, insofar as the method does not constitute an excessive restraint on the freedom of the debtor (cf. Article 27 Civil Code [CC])61. It goes without saying that the parties can never predict, and regulate, all the elements of their contract. Should a dispute occur, the terms of the contract will be reviewed to attempt to resolve the dispute, and it will be up to the judge whether to supplement the contract. The absence, of subjectively essential provisions in telebanking contracts is explained by the procedure of request for offers, which does not give room for negotiation of any other possible additional provisions desired by one of the parties. However, it is theoretically possible to consider a situation where there is an individualized telebanking contract for each customer allowing the customer to remove or add the clauses. This would make it possible for the contract to have the subjectively essential clauses desired by the bank’s customer. However, this possibility is not easy in practice, because it would considerably burden the bank with additional work, and costs in order to offer this option. This conflicts with the prime function of telebanking, which is to reduce the bank’s costs and the customer’s costs. Moreover, this practice would also make it necessary to create a specialized legal department equipped with many lawyers who are able to analyze, and address the possible disputes that could arise under each contract.

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3. Form

The form of the offer should comply with the format provided for by Swiss Law (Article 11 through 16 of the Obligation Code [CO]). Swiss Law confirms the principle of the freedom of the parties to choose the form of the contract. This means that, except when contrary legal provisions exist, the parties are free to select the form that they wish to give to their contract.

However, Article 16 CO provides that when parties have agreed to use a specific contract form, which is not required by law, the parties will only be bound after the specific contract form is created. If a written form is required, without a more precise indication, the parties must observe any provisions relating to written contracts, when the law so requires.

Moreover, according to Article 13 of the CO, the telebanking contract, which is required by law to be in written form, must be signed by all parties upon whom it imposes obligations. If the law does not provide otherwise, a letter or a telegram is equivalent to a written contract, provided that the letter or telegram contains the signature of the parties to the contract.

Lastly, according to Article 14 CO, the signature must be handwritten by the parties to the contract. A signature that proceeds from some mechanical means will be considered sufficient only in cases where it is allowed by usage, such as when it entails signing written value papers in great numbers. We think for the moment, there is no usage in banking matters obliging to use the written form. However, the procedures required within the framework of the telebanking contract confirm the principle of the requirement that the contract be in the written form. In fact, the bank sends to its customer a pre-formulated contract containing general provisions to be signed and returned to the bank.

It is interesting to note that although a "request for offer" is considered not to have any legal consequences, as long as it is not quoted, it considerably restricts the freedom of the contracting party's choice as to the form of the contract.

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65. Id.
E. Acceptance

1. Definitions and Concepts

Acceptance is an affirmative response to an offer or an act by which the recipient of the offer expresses the will to create a contract in accordance with the offer. The acceptor, in our case, the customer of the bank, has the will to declare and sign the contract. In order to be valid, the acceptance must be addressed to the offeror (or to its representative), i.e. at the bank, under the terms, or the requirement, of the reciprocity of the declarations of the will to create a contract. Because the acceptance is an act subject to approval, it is not required to state the essential points of the contract, since it corresponds exactly to the offer that will contain such points.66

2. Contents

The acceptance must have the same contents as the offer. If not, the acceptance will not be an acceptance, but a new offer, provided that the acceptance contains the essential elements of a new contract.67 This situation is, however, not very probable in a telebanking contract. Indeed, it is the bank that wrote the offer, and the customer cannot modify the offer. The customer must agree "in block" to all the terms of the contract and does not have the ability to negotiate them. This means that the customer, through acceptance, is restricted to agreeing to the offer made to him by the bank. Consequently, the telebanking contract is created as soon as the acceptance is forwarded (Article 10 al. I CO).68

In a telebanking contract, the bank sometimes receives an offer from a potential customer. If the bank is interested in contracting with the potential customer, it must return a copy of the contract signed by the authorized individuals, along with the data-processing keys that will make it possible for the customer to use the bank's telebanking services. There can be a time lapse between the mailing of the contract by the offeror, and the reception of the data-processing keys. Crédit Suisse and UBS take between two and three weeks to complete the process.

However, United States banks like E-trade, Schwab, or Datek offer a free service without having accepted the contract, as a whole. For example, at these banks the customer must print the "request for offer"
and then the bank will instantly give to him the data-processing keys, through the Internet. This will make it possible to access the site immediately, and profit from its free services (stock exchange price online, information of Reuters, etc.). At this point, the bank has not yet formally accepted the contract, it must still receive the contract, review it and sign it, then return it to the customer. Prior to formal acceptance of the contract, the bank provides free services to the customer.

However, if a Swiss bank, governed by Swiss law, decided to do the same, the fact that the bank offered services without having received the offer of its customer, is not enough to perfect the telebanking contract. At this point, the customer has not yet given any funds to the bank, which is an essential element of the contract. Consequently, the contract would be perfect only when the bank has received funds from the customer, and accepted the customer's offer by sending a signed document to the customer.

This is why, in practice, the banks communicate to the customer their banking coordinates, as well as his new account number, only so the customer can deposit funds only after they have received an offer, and accepted it. From that point, there is only one element lacking to create a valid contract: the surrender of the customer's funds to the bank.

3. Form

We have seen that Swiss Law confirms the principle of freedom to choose the contractual form. Consequently, unless a special form is imposed or reserved, acceptance can be given in any form (see Article 11 of the CO).

Since a telebanking contract is a contract of adhesion, which requires it to be in writing, the offer and acceptance must also be made in writing.

IV. QUALIFICATION OF THE CONTRACT

A. Is the Telebanking Contract a Production Contract?

1. Essential Elements of the Production Contract

According to Article 363 CO, a production contract is a contract by which one of the parties (the Contractor) pledges to carry out work, for a price that the other party (the Contracting authority) promises to pay him.


Thus, the contract necessarily supposes:

- That a party pledges to pay a remuneration; if the contract is made on a purely free basis, we depart from the purview of the production contract; and
- that the other party will pledge to produce and deliver work; this is the characteristic of the service.\(^7\)

Indeed, according to a ruling of the federal Swiss court on February 16, 1938, the contract by which a person hires an architect to work out projects, and plans for remuneration, without entrusting him with another later activity is, in general, a production contract. When work is provided free, it can be a question of a mandate only. The main aspect of a production contract is that the contractor promises work, that is the result of an activity; however, to the characteristics of the mandate, allows the assignee to only commit himself to manage a business, or render services: a result which is not guaranteed. The mandate relates to the contractual relations, presupposing a great reciprocal confidence between parties throughout its duration; so much, that one party cannot impose on the other an undesired continuation of the contract. On the contrary, the production contract, which cannot be canceled at any time by the contractor, though it can be by the Contracting Authority, in general, takes into account the legitimate interest that the contractors have with respect to their commitments for the long term execution of a work.

2. Possible Applications to the Telebanking Contract

One could think that the telebanking contract is a production contract. Indeed, if the transmission of the data is free today, it may perhaps change tomorrow. Moreover, one could expect that the bank guarantees the execution of the orders, which are transmitted to it, and consequently, it pledges a result. Lastly, one could think that another principal function of the bank would be to guarantee security at the time of the communication of information through the Internet. However we will see in the following paragraph why we consider that improbable.

3. Exclusion of the Production contract

\(a. \textit{Absence of the Obligation of Price}\)

The telebanking contract does not meet the first essential condition of the production contract. It is, indeed, not possible to have a production contract which is free. The telebanking contract being per definition free,

does not meet the requirements for a production contract and, this is not likely to change in the future.

Indeed, the bank encourages its customers to use telebanking. This service enables it to save money. Especially, because the bank does not need to pay employees to act as an intermediary between the customer and the orderer. However, this service would be less enticing to the customer if the service became a paid service.

Moreover, historically the first experiments of telebanking in Switzerland were a failure because this service, called Videotex, was paid. On the other hand the, Minitel in France which also promotes telebanking, and the Internet today, succeeded in gaining the enthusiasm of the public by the simple fact that the Videotex terminals were given to the public. A marketing strategy, which incorporated free distribution of minitel, led to the success of this type of service in France.

Consequently, this essential condition of a production contract is not met today, and does not appear that it will be in the future. Because this condition is necessary, it is enough to disallow the finding of a production contract. However, in order to buttress the argument for the improbable case where telebanking would become a paid service in the future, we will analyze the second condition, obligation of results.

b. Absence of the Obligation of Results

First, the telebanking contract merely regulates the transmission of the customer's commands to the bank, and fails to regulate the execution of the commands controlled by specific contracts, such as the allocation for credit transfer or the factorage contract on Stock Exchange orders. Moreover since these are mandated contracts, they do not involve the obligation of results.

Secondly, the bank cannot, for technical reasons, guarantee total security at the time of the data-processing communication with its customer through the Internet. All kinds of problems can occur, such as: deformation leading to false information on the network; a breakdown linked, for example, to the Year 2000 "bug"; or another type of virus.

This is why banks usually deny any responsibility for the possibility of poor functioning of their data-processing network at the time of execution of the telebanking contract. This article will determine whether this total exemption is contrary to Article 20 CO,72 and whether too much liability is being shifted to the customer, who is responsible for any

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problems that occur, through no fault of the customer. The banks do not want to take the risk of incurring the obligation to make its electronic communications with it’s customer safer. As a result, there is no obligation in the telebanking contract. This also disqualifies the contract as a production contract.

B. The Mandate Contract

1. Sources

a. Code of Obligations

The mandate contract is governed by Art. 394-418v CO.\(^{73}\)

b. General Conditions

Moreover, the legal rules applicable to the mandate apply primarily to the enacting of instruments, and the parties may take exception to it. For example, they can do this by adopting general conditions. This is a common practice, especially in the banking sector.\(^{74}\)

c. Banking Customs

Lastly, insofar as the law refers thereto, the practices and customs are also an indirect source of law. These references are comparatively numerous in mandate law.\(^{75}\)

Customs are an integral part of the contract because the parties either refer to it expressly or tacitly, or simply by taking part in an activity which is dominated by such customs. Customs make it possible to interpret, and supplement the contract entered into with the bank. In practice, this forms a part of the normal banking operations. Thus, one must admit that there is a procedure for handling the payments of a customer, who opens an account in a bank. Similarly, there also exists a practice that forces the bank, within the framework of a contract of deposit of titles, to undertake routine administrative acts.\(^{76}\) Thus, by signing a telebanking contract, the bank, and the customer tacitly allow the integration of these customs in the contract.

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\(^{75}\) Id. at 480.

\(^{76}\) DANIEL GUGGENHEIM, LES CONTRACTS DE LA PRATIQUE BANCAIRE SUISSE [SWISS BANKING CONTRACTS] (2d ed. 1993).
2. Definition

The mandate is a contract where a person agrees to render services for the interest of another in accordance with their will insofar as the conditions of another contract are not carried out.  

According to the Swiss definition, the mandate is an obligations-generating contract that is subject to cases where the mandate refers to only one specified service and is a contract similar to a duration contract. In theory, the mandate contract is formed, subject to payment. Therefore, it becomes a bilateral contract because two services are offered in an exchange-type relationship. Because of the mandate's origin, it is viewed as a "bare contract." Therefore, it is an imperfect bilateral contract, because the assignee alone assumes the principal obligation; and, the employer is bound only to secondary duties.

3. Characteristic Elements

Its definition reveals that, within the framework of the telebanking contract, the mandate contract is comprised of three characteristic elements. The bank has the duty to:

* Take all necessary steps in order to communicate, within a reasonable time, the orders transmitted by its customer, through the Internet, to the computer, or to the person in the bank who is qualified to handle them;

* Take all necessary steps to provide the highest security to the Bank's data-processing network, which receives the customer's commands; and

* Use the most advanced techniques of encoding, and update them frequently in order to communicate with the customer in a private, and confidential manner.

These three elements highlight the obligations of the bank, which is a feature of the mandate contract, and an essential element of the production contract.

a. Transmission of Orders to the Executant within a Reasonable Time

Another essential characteristic of the telebanking contract concerns the orders transmitted to the bank. It is crucial that the operation requested


by the customer, whether it be a sale or purchase order for quoted stock or a simple payment, be received correctly, and that it be carried out within an acceptable time frame by either the computer\(^9\), or the person responsible for carrying out.

\textit{b. Security of the Bank's Data-Processing Network}

The bank must do everything possible to guarantee its customer a maximum-security data-processing network through continuous investment in systems with state-of-the-art technology. However, it would be unrealistic to require a guarantee of absolute security simply because such a degree of security does not exist. Research advances at exponential speeds, making it always possible to open new horizons in "foolproof systems."

\textit{c. Security of the Encoded Communication between the Bank and its Customer}

The bank must permanently update the encoding technique that is used to communicate with its customer in order to try to provide the most confidential communication possible. However, total confidentiality is impossible to guarantee. The laws limiting encoding that have been adopted in a growing number of countries, could prevent the bank from following technological developments as closely as may be desired. If a law prohibiting the encoding of data higher than a certain figure were adopted in Switzerland,\(^8\) the banks would be bound by this higher legal standard; and could only adapt their encoding upon the whims of legislative developments, which are lagging in relation to technological developments.

4. Form

There is no special provision regulating the form of the mandate contract. Consequently, the mandate contract is not subject to any special form,\(^1\) even when the mandate requires the completion of a legal document subjected to a particular form. A mandate contract is subjected to the

79. Orders transmitted by the customer linked to NASDAQ, the United States stock market shall be entered into his bank's computer system and then transmitted automatically to the stock exchange computer system via the bank's computer system, thereby eliminating the human execution.

80. This type of law exists in France, New Zealand, Singapore, the United States and other countries.

scheme analyzed above relating to freedom of form. The telebanking contract is thus, subjected to the written form.

5. End of the Contract
   
a. In General

In ordinary cases, the contract ends when the assignee has rendered all the required services. The execution of the contract is, therefore, the extinction of the contract. The parties can provide for separate extinction clauses in their contract; they can subject it to the expiration of a time period, or to a term, or condition. In Articles 404 and 405, the Obligations Code [CO] outlines some extraordinary clauses, the most significant being a termination without reasons.82

   b. Termination without Reasons

Under the marginal note "Revocation and repudiation," Article 404 al I CO provides that the mandate may be repudiated or revoked at any time.83 This text remains one of the most discussed in contract law, and recently, a new reading of it was proposed. The original reading was drawn from the origin of the rule, and comparison with foreign law. This unconditional right of cancellation draws its prime significance from the fact that each party has the capacity to terminate the contract. That means that the debtor may not be forced to render the service by resorting to the rules of forcible distraint. This principle is dictated by the nature of the obligation, which implies a personal activity.84 Consequently, the bank and customer can revoke the mandate at any time.

   c. Problem of Compensation

Under the terms of Article 404 al. II CO, "the party which revokes or repudiates the contract at an inappropriate time, must compensate the other for the damage that it causes him."85 The idea is that, in certain circumstances, the party who terminates the contract should compensate the other party to correct for the termination's effects. This compensation depends on the condition that the cancellation interferes with at an inopportune moment. The formula is too restrictive because it utilizes only

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the time factor. The federal Court admits that, in situations where the
cancellation causes the other party particular disadvantages, the condition
must be carried out as soon as the cancellation without a valid reason is
given. Consequently, the following two conditions must be met:

(1) Termination causes a damage because of the time when it
intervenes, and because of the measures taken by the other party. For
the assignee, it is a question of measures taken and expenses incurred
to execute a given mandate. For the employer, it is a question of
new, and unexpected expenditures that he must incur to look for a
new assignee.86

(2) The party terminating the contract did not give the other any valid
reason for doing so. In other words, if there is a just reason for
cancellation, repair or compensation is excluded.87

When these conditions are met, the party which terminates the
contract must repair the damage caused by the inappropriate cancellation,
and not by the termination as such. The federal Court concluded that the
question must be more broad than one of repairing unnecessarily incurred
expenditures and expenses. On the other hand, it is out of the question to
claim an allowance for loss of profit. However, in practice, parties
frequently decide, contractually and in advance, to fix the amount of the
compensation due. This is acceptable, but the amount selected must be
commensurate with the damage which can be repaired. Otherwise, the
provision places an excessive restriction on the right to terminate.

d. Other Extraordinary Causes

The contract can end for other extraordinary causes. A contract for
personal services, for example, may become extinct through one of these
events:

- the death of one of the parties, is a situation which should be
  likened to the dissolution of a legal entity. When the mandate must be
  executed after the death of the assignee, this poses a particular
  problem: whether it would be necessary as an extension of Article
  245 II of the CO to respect the forms of the provisions on account of
death;88

86. See generally PIERRE TERCIER, 4149-4157 LES CONTRACTS SPÉCIAUX [SPECIFIC
87. Id.
88. 478 LE DROIT DES OBLIGATIONS, supra note 69, at 90. See also Code of Obligations,
incapacity, as of the moment when the party loses the exercise of its civil rights; and

bankruptcy of a party, even if the procedure is later suspended.

It will be recalled that each party may, in addition, terminate the contract if he has a just reason—in particular, if his partner committed a fault which destroys the relationship of confidence. The precision is hardly worth anything in this field because the right of termination provided for in Article 404 CO applies only to the conditional obligation to compensate the party.

e. Liquidation of the Contract

At the moment when a clause of extinction intervenes, the contractual relationship ends. The parties are released from any obligation and can no longer claim any rights. The law reserves two cases that produce a kind of temporary extension of the contract. First, by virtue of Article 405 al. II CO, "If the extinction of the mandate jeopardizes the interests of the employer, the assignee, his heirs or his representatives are bound to continue management until the employee, his heirs or his representative are able to supply it themselves." When an extraordinary clause of extinction (other than termination) intervenes, the contract ends automatically. Such a situation could be prejudicial to the employer because the rules of good faith obligate the assignee or his rightful claimants to take precautionary measures independent of any contractual relation. This is business management (Article 419 CO) imposed by the law, and entirely subject to the rules of the mandate. Second, under the terms of Article 406 CO, "the employer or his rightful claimant shall be bound as though the mandate still existed, to the operations which the assignee performed before being informed of the extinction of the mandate."

Because termination takes effect in the future, the parties are bound by all the obligations resulting from the contract. The assignee must account for, and restore what he received (Article 400 of the CO). The employer must pay, in accordance with the contract, the fees he owes for

90. Code of Obligations, RS 220 art. 405(2)(2).
the operations which were carried out insofar as the mandate is not free. Within the framework of the telebanking contract, the bank could not rightfully liquidate the contract knowing that the contract's extinction would imperil the interests of the customer or his heirs.

For example, take the case of a transfer order transmitted by a customer to his bank via telebanking. The customer dies shortly thereafter. The bank will not be able to refuse to make the transfer to the executant, because the customer is deceased. More importantly, since such a situation has little chance of occurring. The transmission of the orders to the executant, directed by the bank's computer, is generally done very quickly.

V. TELEBANKING-RELATED SERVICES

The telebanking contract deals exclusively with the exchange of instructions between the customer, and his bank. During their implementation, such instructions shall be governed by the usual contracts, such as those in the giro banking and in the commission business. The number of services proposed by the bank should be expected to increase markedly in the future. Indeed, we do not see why the bank would refuse to further profit by eliminating middlemen: for example, in the areas of credit (loan agreement), and consulting (factorage contract). If during the transmission of instructions, the bank or the customer breaches the contract, the provisions of the mandate related to telebanking shall apply. However, if the trader erroneously carries out the order in which he receives the applicable provisions, the special contract rubric applies to any analysis of bank, and customer responsibility. We will, however, briefly analyze the two types of contracts involved, along with the telebanking procedures that are conducted after transactions have been transmitted to the bank.

A. The Giro Banking Contract

1. Definition

When a customer opens an account with a bank, and deposits money on this account, he may wish to make only one deposit. He may also like the bank to service payments. In that case, the customer will open a current account. This establishes a tacit contract in which the bank will handle the customer's payments through commercial documents instead of

cash. This is the giro-banking contract, to be distinguished from the current account itself.

2. Legal Nature

Thus, the concluded contract thus concluded should be referred to as a long duration general mandate. The bank must accept, and carry out the customer's instructions. The interventions of the customer, called payment order or transfer order allowance in the banking practice, are not a new contract. They are merely instructions the customer gives the bank to carry out a giro banking contract. In other words, the customer's instructions are classified under the giro banking contract framework.

When the customer makes out a payment order, he is asking his bank to pay a certain sum of money to a third party. The third party can be either a customer of this bank, or a customer of another bank. The recipient of the payment order will be able to receive this amount in his own name. The legal situation will be somewhat different depending on whether the recipient is a customer of the same bank, or of another bank.

B. Factorage Contract

1. Definition

When the customer asks his bank to buy or sell stock certificates, the bank deducts a factorage charge. The charge may be fixed,95 or it may be proportional to the amount of the transaction.96

2. Legal Nature

The factorage contract, on the sale side, is the contract where a person undertakes in his name, but on behalf of another, to sell or purchase movable or bills, with entitlement to a fee.97 This definition reveals that such a contract has the following three characteristics:

The service promised by the commission assignee shall consist of the sale, purchase, and possibly the exchange of certain goods. The sale shall relate to movable goods or bills. Where other goods are involved, the ordinary rules of the mandate shall be applied. The commission assignee shall make this purchase or this sale in his own name, and

95. Businesses with fixed charges include Youtrade from UBS, e-trade, and Tradepac.
96. UBS charges a fee of 0.6% for transactions less than 250,000 Fr.
not in that of the principal. He is thus an indirect representative.\textsuperscript{98}

VI. OBLIGATIONS OF THE PARTIES

A. Obligations of the Assignee

The obligations of the assignee (the bank) with respect to the principal (the customer) within the framework of the telebanking contract are of three main types:

(1) To provide the customer the widest possible access to the bank’s protected data-processing network by guaranteeing the highest possible confidentiality of communication (thanks to the permanent update of the encoding technique used).

(2) To transmit the customer’s orders, within a reasonable time, to the bank staff qualified to carry them out.

(3) To inform the customer as quickly as possible of any disturbance of service: stoppage, slow down in activity, interruption, modification of tariffs, or addition of new services.

To use the general terminology of the mandate contract business, these three principal obligations are distributed as follows:

1. Obligation to Render Service

   a. Principles

   According to Article 396 I of the CO, the scope of the mandate shall, unless otherwise expressly fixed by the convention, be determined by the nature of the business to which it relates.\textsuperscript{99}

   b. Obligations arising from a Convention

   The scope of the contract is initially determined by the convention, reserved by Article 396 I of the CO. Thus, the substance of the contract is crucial. In this context, the full import of the assignee’s obligation to follow his principal’s instructions stands out.\textsuperscript{100} This is the case with the current telebanking contracts concluded by the intermediary of a convention. The bank is obligated to render the services stipulated in the convention it has concluded with the customer. However, none of the four

\textsuperscript{98} Id.


\textsuperscript{100} PIERRE TERCIER, 3972 LES CONTRACTS SPÉCIAUX 487 (1995).
documents governing the telebanking contract concluded with UBS makes mention of the bank's obligations. UBS contents itself with stating in the main document, titled Declaration of Affiliation with UBS 24hr-Banking, that "the customer thus has access to UBS Phone banking, and telebanking via Videotex or the Internet, depending on the technical device chosen, and the network used." The same applies to the telebanking contract of the Post Office entitled "Yellow Net."

On the other hand, Crédit Suisse "DirectNet" claims that "Anyone who has legitimized himself can access, and use its services" and "whoever has earned legitimacy according to figure 1.1 is considered by the bank authorized to use the Direct Net/Telebanking services. Within the limits of the services, and the mechanism opted for in the user's application, the bank can enable the customer to consult the deposit accounts indicated in the application via Direct Net / or Telebanking. On the other hand, the bank can allow the customer to prepare or accept orders and communications . . . ." Crédit Suisse undertakes:

- authorization of general access to its telebanking services to whoever has been legitimized;
- allowing consultation of the relevant deposit accounts; and
- accepting the orders and the communications transmitted by its customer.

These are the three services that the bank undertook to render pursuant to the convention signed with its customer. Consequently, if the bank fails to specify all its obligations under the convention, such obligations will be determined by the nature of the business.

c. Obligations Arising from the Nature of the Business

In the absence of a convention, the scope of the mandate shall be fixed, in accordance with Article 396 I of the CO, by the nature of the business. This analysis is governed by the parties' objectives, in particular the result expected by the principal. The question must be examined on a case by case basis. If need be, reference could be made to the practices and Customs of the bank to which the assignee's activity is

attached. If it goes beyond the contents of the mandate, the assignee shall not be entitled to fees, and unless the business management conditions are met (Article 419ss of the CO); he may even have to repair the resulting damage.\textsuperscript{104}

Since the banks crafted none (UBS, Yellow Net) or only some (Crédit Suisse) obligations that fall within the framework of conditions governing the telebanking contract, the nature of the business will determine the contract terms. The bank is obliged to render the following services:

- To give to customer such access to the bank’s data-processing network as will allow him to make banking operations. This service will be opened to the customer as soon as he receives the data-processing keys;
- To transmit the customer’s orders to the bank staff qualified to treat them; and
- To ensure maximum security in any communication between the bank and the customer.

2. Obligation of Diligence

   a. In General

Under the terms of Article 398 al. II CO, the assignee is responsible for proper, and faithful execution of the mandate.\textsuperscript{105} This is the general principle which comprises the obligation of diligence. The rule indicates the extent of diligence needed. The mandate shall define the contents of the contract, and set objectives. The obligation of diligence determines how the assignee will carry it out. The assignee must act as any diligent person would under the same situation, i.e., in an objective manner. This by no means, excludes his adaptation to specific cases. This standard of diligence governs the question of whether the assignee has failed to meet his obligation pursuant to Article 398 I of the CO.\textsuperscript{106} This standard is often fixed in a set of ethical or general rules called a code of practice. The rules correspond to the general applied standards in the profession. However, the judge may draw inspiration from them without being limited

\textsuperscript{104} PIERRE TERCIER, 3983 LES CONTRACTS SPECIAUX [SPECIAL CONTRACTS] 487 (1995); see also Code of Obligations, RS 220 art. 419 (discussing a manager’s rights and obligations).


to them.\textsuperscript{107} We did not find guidelines issued by a serious banking association such as the Swiss Association of Bankers. However, banks should examine this matter in the near future, given the growing upsurge in telebanking. Guidelines should judge the level of the requirements, take account of all circumstances (in particular the mandate), reflect adjustments for available time, and reflect the importance of the business, and the qualification of the parties.

A telebanking contract is first a banking mandate, that involves significant, and risky services. The time available for the execution is very short since the bank must promptly transmit the customer's orders for them to be properly carried out. This is particularly true for Stock Exchange orders. Lastly, the assignee (banks) must be particularly qualified to handle the customer's order in an appropriate, and secure manner. We can deduce from this, that the degree of diligence required from the assignee is particularly high.

\textit{b. Role of Instructions}

The law appears to subject the assignee to the unilateral instructions of the principal. Indeed, according to Article 397 al. I CO, the assignee that received precise instructions cannot, in theory, deviate from them.\textsuperscript{108} There are two types of instructions:

\textbf{(I) Instructions}

Instructions are only demonstrations of will, subject to reception. The principal indicates to the assignee, how to perform the services promised in the contract. According to Article 397 al. I CO, the instructions are in theory compelling; thus, the assignee cannot deviate from them except for the following:\textsuperscript{109}

(i) Urgent measures

If it is necessary for the assignee to act in order not to jeopardize the interests of the principal, shall he have the right to do so even without instruction? For this, refer to Article 397 al. I CO.\textsuperscript{110} The assignee may have the right to do so if the situation was not anticipated by the parties, if circumstances do not allow the assignee to request further instructions from

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\textsuperscript{107} PIERRE TERCIER, 4020 LES CONTRACTS SPÉCIAUX [SPECIFIC CONTRACTS LAW] 491 (1995).


\textsuperscript{109} See generally id.

\textsuperscript{110} See generally Code of Obligations, RS 220 art. 404 (governing termination).
the principal, and if the course of action chosen by the assignee corresponds to the hypothetical will of the principal.

(ii) Unreasonable instructions

If the assignee feels that the instructions given to him are unreasonable, he shall be bound to draw attention thereto. This is part of the duty of diligence, also found in the production contract. If the Master persists, the assignee may divest himself from his responsibility, and even terminate the mandate (see Article 404 of the CO).

(iii) Illicit or socially improper instructions

It goes without saying that the assignee should not follow instructions which would violate the rights of others, or infringe on moralities.111 His compliance with such instructions is no defense for any civil or criminal liabilities he might incur.

(iv) Instructions contrary to the contract

If the mutual agreement defines the contract framework with precision, the assignee shall have the right not to carry out the different instructions that the principal may subsequently give him. This actually places a restriction on the scope of instructions.

(2) Agreements on the execution

In all the other areas, the "instructions" that the principal may give are only instructions for an offer made to the assignee for the execution of the mandate. The latter shall be bound only if he has accepted these terms. It is sufficient in itself that the parties agree on the general framework of the mandate. It will be incumbent on the assignee to carry it out according to terms, and conditions that he deems appropriate.

3. Obligation of Fidelity

a. In General

By virtue of Article 398 al. II CO, "the assignee shall be answerable to the principal for...the faithful execution of the mandate."112 This complements the obligation of diligence. It compels the assignee to act in all the circumstances in the supposed interest of the principal. The assignee must do everything that can be reasonably required of him to


uphold the mandate, and abstain from all action that could in some way be detrimental to it.\textsuperscript{113}

\textbf{b. Some Applications}

This obligation has many applications, which can also be deduced from the general obligation of diligence. Three of them follow:

(1) \textit{Obligation to Inform}

The assignee shall regularly inform the employer of the progress of the contract, and notify him of any significant incidents, particularly when those are likely to affect the instructions given. For example, when UBS decides to modify its general conditions, it has the duty to notify its customers of the change (see also Article 17 of the G.C.).\textsuperscript{114} When it introduces new credit or other services, it is obliged to give customers this new information.

(2) \textit{Obligation to Advise}

The assignee shall be bound to regularly advise the principal on the choice of the measures to be taken in the principal’s interest. The assignee must dissuade the principal when the principal intends to give or maintain instructions that could be prejudicial to the principal. For example, under the telebanking contract, the bank is bound to advise its customer to regularly modify his password for security reasons, and not make it accessible to others.

(3) \textit{The Settlement of Conflicts}

As soon as the assignee indicates that the exercise of his mandate raises a conflict of interests whose outcome could be prejudicial to the mandate, he must refuse the mandate if he has not already accepted it, and later on notify the principal or even terminate the contract.\textsuperscript{115} That could be the case if the bank had a deficient software authorizing overdraft, and/or failing to establish a link between the orders made via telebanking, and those via a more traditional means like the telephone or the fax (it is in particular the case of the Crédit Suisse).

\textsuperscript{113} PIERRE TERCIER, 4034 \textsc{Les Contracts Spéciaux [Special Contracts]} 493 (1995); PIERRE TERCIER, 4037 \textsc{Les Contracts Spéciaux [Special Contracts]} 493 (1995).


\textsuperscript{115} PIERRE TERCIER, 4042 \textsc{Les Contracts Spéciaux} 494 (1995).
If the customer makes several orders without having enough money in his account, and the bank's computer system fails to stop them, the bank may believe the customer is misusing the telebanking service. The bank must resolve this conflict of interest by serving a warning or terminating the contract.

4. The Duty of Discretion

Discretion's role varies, depending on the purpose of the contract. In relation to his employer, the assignee has a special duty of discretion which is not expressly stated by the law. It arises instead from the general regime of the contract. This duty is based on the protection of the employer's personality. By discharging his obligation, the assignee may and must have knowledge of intimate or secret facts. On the other hand, the assignee must do everything to avoid disclosure of such facts through him or through third parties. The scope of this duty is very broad (Article 418(d) al. I of the CO). It relates not only to all that the employer entrusts to the assignee, but also to what the assignee learns, stumbles on, or guesses during the exercise of the mandate. It obliges the assignee not only to disclose nothing, but also to guarantee that third parties cannot, without authorization, have knowledge of the information in his keeping. This duty goes beyond the execution of the mandate. During a telebanking operation, the bank and the customer exchange data protected by bank secrecy resulting from Article Forty-Seven of the Federal Law on Banks and Savings Banks (LB): Stock Exchange orders, transfer, consultation of the account, etc. However, this secrecy is not absolutely protected in the case of telebanking, for the following two main reasons:

a. Technical Problems Linked to the Internet in General

For technical reasons related to the Internet in general, the bank cannot guarantee that somebody "is not eavesdropping" on the "computer conversation" which it is carrying on with its customer. However, banks seem nevertheless to guarantee a restriction in this "eavesdropping." They assert that "the spy" may know from where the data is coming from and where it is heading, but that he will not be able to know what is said at the time of the "electronic conversation." even if the customer connects


117. Historically, the Internet was designed to stand against the destruction of communication in the event of a nuclear war. Consequently, to call from point A (Geneva) to point B (Zurich) one need not necessary remain in Switzerland: all the possible connections between A and B will be used maybe via the United States, Australia, France, or any other country which ensures such a connection.
himself in Switzerland to the computer network of a Swiss bank. The conditions applicable to Crédit Suisse’s Direct Net state in particular in their Article 6.2 that:

[T]he customer also acknowledges that data are transported over an open network (e.g. the Internet) which is accessible to third parties. Data are thus transmitted regularly unchecked across international borders. This also applies to data transfers where both the sender and recipient are located in Switzerland.

Although individual data packages are transmitted in encrypted form, the sender and recipient are not encrypted and thus can be read by third parties. It is therefore possible for a third party to conclude that a banking relationship exists.\textsuperscript{118}

The bank can therefore never totally guarantee that nobody will access its data-processing server, and listen to what is going on. However, the Internet has not changed many things: foreign States, or unauthorized third parties can already listen for a long time (without great difficulty) to the telephone conversations (faxes included) between a bank, and its customer.

\textit{b. Encoding}

Because encoding techniques are becoming increasingly advanced, States are afraid of not being able to listen to all that goes on, particularly within criminal organizations which can communicate without being susceptible to interception. This is why states tend to restrict the complexity of encoding keys.\textsuperscript{119} For example, in 1999, it was considered a crime in the United States and Canada to export a key higher than 128 bits. However, the legislation has been amended since. In France, this limit was fixed at fifty-six bytes.\textsuperscript{120} In Switzerland, there is no maximum limit, but given the current trend; it is probable that such a law will be on the

\textsuperscript{118} \textit{Crédit Suisse Application, supra} note 43, at art. 62.

\textsuperscript{119} The higher the capacity of the key, the more the coding process becomes complex and the harder will be to interpret the coded communication.

Swiss banks currently use keys of 128 bits, which are considered foolproof. However, should the law suddenly fix the maximum limit, banks will not be able to constantly update their security and will instead always have to conform to the maximum key allowed by the law.

The law on encoding would thus curtail the quality of bank secrecy. Today, a foreigner with a bank account in Switzerland may not necessarily use telebanking from his country if the law of his country forbids him from using the encoding keys of Swiss banks. Consequently, the UBS put the following information on the Internet page, making it possible to download the telebanking contract: “The products and services proposed on this page are not accessible to people residing in the United States, Canada, New Zealand, Australia, Japan and Singapore.”

5. Other Obligations

a. The Duty to Submit Reports

Under the terms of Article 400 I of the CO, “the assignee shall, at the request of the employer be bound to submit to him at any time a report of his management.” This report is an aspect of the obligation of fidelity. The employer must be able to learn, at any time, how his business is progressing.

b. Obligation to Inform

The assignee must in good time provide any information requested in relation to the mandate; this information must be truthful and complete. The bank fulfills this obligation by informing its customer, on its protected server, of the situation and the status of the bank’s operations.

c. Obligation to Present Accounts

When the mandate involves the management of financial values, the assignee must at any time be able to give the employer a detailed

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121. As of August 2001, no such law had been adopted in Switzerland. The reason for that might be that the Swiss banks do not want to be limited in their research for up-to-date and better encryption products.

122. However, they update permanently the level of encryption to maintain it at the “foolproof” level.

123. During stock exchange operations, the bank quickly posts on its server the status of orders transmitted by the customer: seconds after the placing of the order, it is labeled as ‘taken care of’ meaning the bank has received it and is processing it. Minutes afterwards, it is labeled as ‘pending’, meaning it is in the financial market system and will be carried out as soon as the period elapses or the market permits. A few hours or at most one day after being executed, it is labeled ‘allotted’. Then two days later, the bank labels it as ‘billed’.
breakdown of the account with supporting documents. The customer can at any time download a global view of his transactions, the balance of his accounts, and a breakdown of the last operations carried out.

However, that banks do not claim responsibility for the accuracy of information that they transmit to their customers via the Internet network. In our opinion, this exemption is a highly criticizable opinion, and we will dwell on this point in the chapter devoted to responsibility.

d. The Duty to Refund

By virtue of Article 400 al. I CO, the assignee is, at the request of the employer, bound to refund to the employer everything that he received, for the purpose of this management, in whatever capacity required.\textsuperscript{124} The obligation, which is imperative, exists throughout the contract; but it takes full significance at the end. The duty to refund is also a consequence of the general obligation of fidelity. To execute the mandate, the assignee must receive a number of documents. Moreover, his role often consists of producing or retrieving documents in order to collect money on behalf of third parties. Consequently, he has the obligation to return the documents. The idea is that he should not enrich himself by executing the mandate, apart from receiving the fees that have been agreed-upon. The obligation targets not only property, but all that assignee may have acquired or received. The only case where the assignee has the right to refuse to satisfy this obligation, is that of the right of lien of 9 DC 895 lien.\textsuperscript{125} The assignee may refuse to satisfy this obligation in guarantee of his ordinary fee debts.\textsuperscript{126}

(i) Restitution during the mandate

Since the current trend is to personalize the presentation of information on the Internet site for each customer, it will be soon possible for each customer to choose the presentation that he wishes. The customer could send to his bank a diagram on CD-ROM or software via the Internet, explaining how he wishes his various accounts to be presented on the site. He could also ask for the restitution of this CD-ROM.

(ii) Restitution at the end of the mandate

At the end of the mandate, the customer can require the destruction of the bank’s data-processing keys. Indeed, if the bank preserves these

\textsuperscript{124} See Code of Obligations, RS 220 art. 400.

\textsuperscript{125} PIERRE TERCIER, 4045-4058 \textit{LES CONTRACTS SPÉCIAUX \{SPECIFIC CONTRACTS LAW\}} 494 (1995).

\textsuperscript{126} Id.
keys, such preservation could be detrimental to the customer in the future; for it represents information sensitive to the customer. Because today the password is increasingly being used to carry out all types of operation,\textsuperscript{127} customers will often tend to use the same password or the same type of password (names of flowers, dinosaurs, celebrities, etc.).

The bank's possession of this information can give it the means to enter the private life of the customer, and spy on him without his knowledge. This is particularly prohibited by Swiss Federal data protection law.\textsuperscript{128} The bank should give the customer a document attesting the destruction of personal information. This is of special concern because the bank requires the assignee, in the event of termination, to turn in the data-processing keys (Article Nine of the UBS General Conditions). If the Bank demands the return of such information from their customers, the information is important.

\textbf{B. Obligations of the Employer}

1. In General

Within the framework of a mandate contract concluded free of charge, the employer is bound only to the services necessary to keep the assignee from sustaining any loss. This is the subject of Article 402 CO.\textsuperscript{129} Because the employer's services do not exist in an exchange relationship with the service rendered, this is a bilateral imperfect contract.\textsuperscript{130}

2. The Refunding of the Expenditures

Under the terms of Article 402 al. I CO, "the employer must refund to the assignee, all sums and accrued interests, on advances, and expenses that he incurred for the regular execution of the mandate...."\textsuperscript{131} As far as the mandate is concerned, this provision is meant to prevent the assignee from suffering losses through a reduction of his credit. The telebanking

\textsuperscript{127} For example, the personal identification Number (PIN) to withdraw money from the bancomat, used one's VISA card or the alarm or inter-phone codes to enter one's office or house, the password to consult one's e-mail, buy a book on the internet via www.amazon.com or to auction property on www.ebay.com.


\textsuperscript{130} PIERRE TERCIER, 4095 LES CONTRACTS SPÉCIAUX [SPECIFIC CONTRACTS LAW] 500 (1995).

\textsuperscript{131} Code of Obligations, RS 220 art. 402(III)(1).
contract leads to a lot of money being saved at the bank. The bank no longer needs to pay managers at exorbitant rates to receive the commands of the customer, and transmit those commands to the qualified people of the bank for processing. In telebanking, the customer indeed transmits his commands to the data-processing server, which automatically transmits the orders. Accepting orders placed via telebanking is a cost-saving operation for the bank. The bank not only receives the orders free of charge, but it deducts less factorage under the telebanking contract. This is why the bank does not ask its customers to refund the expenditures. However, although the bank does not exclude its right to expenditures in its telebanking contract, it can call for their refund if the opportunity arises.

3. Compensation for Damage

Under the terms of Article 402 II CO, the employer "must also compensate the assignee for the damage caused by the execution of the mandate, if he proves that this damage occurred through no fault of his."

The provision also tends to guarantee that the assignee does not suffer any loss on account of the execution of the mandate. This rule is applied subject to the following three conditions:

a. Damage

The assignee needs to have suffered damage, an involuntary reduction of his property. The concept is distinguishable from deeds that an assignee must perform in order to discharge his mandate, whatever the origin.

b. In the Execution of the Mandate

This damage must have been suffered not only at the time of the mandate, but in the very execution of the contract. It would, of course, be otherwise if the fault came from the assignee himself.

c. Fault

The employer repairs the damage only if he is liable for a personal fault. This fault may also be presumed. According to case law, a presumed fault analysis would not apply to a free mandate because the employer will have to pay damages even if he committed no fault. In this case, analysis follows the same mode as that of Article 402 II of the CO, relating to the management of businesses. For example, if the

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132. Id. at art. 402(II)(2).
telebanking software is not powerful, and allows the customer to transmit several orders which seriously overdraw his account, this could create a damage at the bank. The customer will have to repair this damage unless he had good faith during the transmission of his orders, and no time to check the balance in the account.

4. Payment of Fees

By virtue of the law, the mandate is free. Therefore, in principle, the employer is not bound to pay to the assignee the fees corresponding to the services rendered. This was carried over from the time when service was rendered "free of charge," which in itself did not exclude the payment of a bonus on an "honorary" basis. Article 394 al. III CO offers two exceptions to this principle, and the exceptions have become the rule:

a. Under the Terms of a Convention

By virtue of the principle of contractual freedom (Article 19 I of the CO), the parties can agree that the assignee's services will be specially remunerated. This agreement can be express or tacit. It may be contemporaneous with, or after the contract's signing. The assignee must establish the existence of such an agreement. The telebanking contracts analyzed are free, and consequently, their general provisions remain, for the moment, silent on remuneration.

b. By Virtue of Usage

Independent of any special agreement on the matter, the employer shall owe a remuneration when such is the norm. This is admittedly the case, except under particular circumstances, when a person renders service on a purely professional basis: as a lawyer, doctor, chartered accountant, etc. It goes without saying, even in this case, that the parties can also agree that the assignee can agree to render certain services without being paid. However, according to this scheme, the important thing is the extent to which the services rendered by the assignee can objectively be useful to the employer. Actually, the rule can be understood only as an application of the principle outlined in Article 82 CO: the assignee is entitled to remuneration only if, and only insofar as, he carried out the agreed


services.¹³⁶ His remuneration is indeed based on the convention. The convention provides, except where particular rules apply, that it is the services and not their result which pay for the debt. This criterion can nevertheless be taken into account to measure conformity of the services.

The telebanking contract is, for the moment, free. Moreover, lower commissions on the operations carried out via telebanking have provided incentive to customers to use the service. However, when all the customers use this medium of communication, the bank will have the right to require fees of the customer without mentioning those fees under the general contract conditions.

VII. RESPONSIBILITY OF THE BANK ASSIGNEE

A. In General

1. Principles

An assignee's violation of his obligations can lead to civil sanctions. Sanctions vary according to the nature of the duty concerned. First, the employer can refuse to pay all or part of the remuneration. Further, he can demand restitution of the transmitted accounts or goods. He also has the right to require the destruction of information relating to him that is stored in the bank's database (LPD). Lastly, if the contract so provides, the assignee can be held to pay a conventional penalty. Moreover, this is the most typical sanction—the employer can sue for damages. According to Article 398 al.1 CO, "the responsibility for the assignee is subject, generally, to the same rules as those of the worker in labor relations."¹³⁷ The rule refers to Article 321 E of the CO, which is itself based on the general mode of Articles 97/101 CO.¹³⁸

Consequently, the customer of the telebanking service will be able to do one of the following: 1) Sue the bank for damages; 2) Demand payment in the amount of the conventional penalty, possibly an amount fixed in the contract; 3) Refuse to pay the cost of the services if this falls due one day; 4) Demand restitution of the funds deposited in his account;¹³⁹

¹³⁹ If the latter are invested for three months by the bank and the customer is forbidden from withdrawing them during this period, since he will be guaranteed higher returns only if he were able to retrieve them at any time, the bank may be forced to hand them back to him before the date.
or 5) Demand restitution of the documents or information related to him as well as the destruction of these in the bank’s database. The contracts analyzed, however, mention neither conventional penalty nor service cost.

The bank may also be subjected to other sanctions. The customer may file criminal charges, particularly if there is a breach of trust, a violation of bank secrecy, or a data-processing infringement. A customer may also file an administrative violation charge if the bank violated the legal obligations enabling it to carry on its activity and does not respect the guidelines of the Federal Banks Commission (FCB). Since this study examines only the legal aspects of the obligations of the telebanking contract, this analysis concentrates on actions for damages. This is the most effective measure taken to repair the damage caused to the employer. One can, however, affirm that in the future, the industry should expect an increase in the other types of sanctions, given the substantial increase noted in data-processing criminality these last years.

2. Individual Liability

Under the terms of Article 321 E I of the CO, “the assignee is liable for the damage that he causes to the employer, either intentionally, or by negligence.” The provision, in spite of its formulation, is a repeat of the general mode of Article 97 or 41 of the CO. Liability is subject to the following four conditions.

a. Prejudice

The employer must prove that he suffered a damage, for example, an involuntary reduction in his property. Under the terms of Article 99 al. III CO, the law also targets the moral wrong, if the prejudice is sufficiently

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140. See Swiss Penal Code, RS 311.0 art. 318 (breach of trust); id at art. 143 (data interception); id at art. 143bis (data processing system access); id at art. 144bis (data modification or erasure); id at art. 147 (fraudulent use of computer); see also Loi fédérale sur les banques et les caisses d’épargne [Federal Law on Banks and Savings Banks], Recueil systématique du droit fédéral [Systematic Collection of the Federal Right] [RS] 952.0 art. 47, available at http://www.admin.ch/ch/f/rs/952_0/a47 [hereinafter Federal Law on Banks, RS 952].


serious. Such damages may include a reduction of the amount available on the account, if such a reduction is due to improper use or non-increase. This situation may arise from the bank's failure to transmit the customer's orders to the person most qualified to handle them.

b. Violation of the Contract

The employer must establish that the assignee violated one of his obligations. This obligation may be a principal obligation, or an additional obligation. In the case in point, banks are obligated to prevent an abusive use of the customer's account, promptly transmit to the bank's executant all orders transmitted in time by the customer, and guarantee the reliability of this transmission.

c. Causal Relationship

The employer must establish that there is an adequate causal relationship between the violation of the contract, and the prejudice he claims. After ordinary principles are applied, according to the ordinary course of things and the general experiments of life, the violation of the contract must have led to the prejudice. Because the customer uses a data-processing medium, and generally does not need to deal with intermediaries to transmit his orders to the executant of the bank, analysis of the bank's data processing system will be the key to establishing the causal link.

d. Fault

The responsibility to the assignee is breached only if there is negligence or an intentional fault. Thus, it can be a question of any fault, even of a light fault. This fault is presumed under Article 97 of the CO. When these conditions are met, the assignee must repair the damage in accordance with the general rules governing action for liability (Article 42 CO applicable under the terms of Article 99 al. III CO). This Article


145. Except where for technical reasons the system is defective and the order is place via the telebanking hotline i.e., by phone and thus to a human being.


highlights, in particular, the role which Article 99 II CO can play with regard to free mandates. 148

3. Third Party Liabilities

The law does not specially treat the assignee's responsibilities towards the third parties he calls upon in the fulfillment of his contract, except from the limited angle of substitution. It is consequently necessary to distinguish between the general principle and the special rule. The substitution rubric is valid only if the assignee has the right to call upon third parties. Otherwise he would be committing a breach involving his personal responsibility. The law expressly provides for the acts of substitutes, for which the assignee is answerable as if they were his, but the rubric is also valid if the third parties are mere auxiliaries. The principle is that the assignee is answerable for the acts of his auxiliaries, in accordance with Article 101 CO, going back to the general rules. 149

In the specific case of authorized substitution, the assignee is no longer answerable for the acts of the third parties to whom the execution of the mandate has been entrusted. According to Article 399 II CO, he is answerable only if he personally committed an offense in the choice and instruction of the third party substitute. 150

Such a situation would be possible if UBS undertook an outsourcing operation (vertical disintegration) with a third party. UBS would delegate the management of its information processing system or the execution of the commands transmitted by its customer. This, however, remains unlikely because of bank secrecy, and the security problems that such a substitution could invite.

a. Regulation

The exercise of action for damages is governed by the usual rules, especially insofar as that action involves regulation. Such an action must be filed within ten years. 151


b. Exclusive or Restrictive Liability Conventions

The assignee frequently tries, especially by resorting to the general conditions, to limit or exclude his responsibility. The law does not specifically address this matter in the provisions related to the mandate contract. Thus the general rules apply. Given the peculiarity of the mandate, it is advisable to briefly reiterate them.

1) Unquestionable illegality of the exclusion of responsibility for serious offense

Under the terms of Article 100 al. I CO, the assignee cannot validly exclude his responsibility for serious fault. This rule is not subject to exception, and will be interpreted against the party that drafted the general conditions. Moreover, under the terms of Article 101 III CO, the assignee cannot validly exclude his responsibility for serious fault in relation to the activity of his auxiliaries. Thus, the bank clerks who committed the offense as part of the execution of the telebanking contract, engage the responsibility of the bank.

2) Potential illegality of the exclusion of responsibility for a light offense

Insofar as the exercise of an assignee's activity is governed by a concession granted by the authority, Article 100 al. II CO enables even the judge to consider null the clause which would release the assignee from a light offense. This provision is particularly important for doctors, lawyers and bankers. A judge would be capable of nullifying a clause of the general conditions of a telebanking contract. This would exclude the bank from responsibility in the event of a light offense.

3) Unquestionable illegality of a limitation of responsibility which is contrary to manners or affects the rights of the employer

The validity of these clauses remains subject to the general conditions concerning the purpose of the contract. Since it is contrary to good manners, a limitation of responsibility affecting activities which have a direct relationship with the employer’s physical integrity or individual rights would be null.

B. Analysis of Clauses of Exclusion of Responsibility in Swiss Telebanking Contracts Currently in Force

1. Current Supply

The telebanking currently accessible to Swiss consumers can be divided into the following two main types:

a. Traditional Telebanking

Banks offer a range of expanding services via Internet, such as stock exchange transactions, transfers, and consultation of the account. Union des Banques Suisses and Crédit Suisse via its DirectNet service offer this type of telebanking.

b. Specialized Telebanking

At present, only two types of services are offered: Stock Exchange transactions, and bank transfers. Banks or financial institutions offer only stock exchange transactions via Internet. However, the American example, and the current trends spell out a future increase in this figure particularly with the introduction of credit via the Internet.156

1) Stock exchange transactions

This mainly involves Tradepac157 (Union des Banques Suisses), Youtrade158 (Crédit Suisse) & Swissnetbanking159 (MFC Merchant Bank LTD.). The customers of these sites can only buy and sell titles. They do not in particular have access to the advice of the bank's financial analysts. This differs from transactions carried out via traditional telebanking.

2) Bank transfers

Only one major institution offers this service: Yellownet160 (offered by the Swiss Post Office).

2. Comparison of Cases of Exclusion of Responsibility

We decided to compare provisions of telebanking contracts' general conditions of the three leading Swiss companies in order to determine whether the cases of exclusion of responsibility are identical and legal.

156. www.loan.com in the United States is particularly experiencing a boom.
158. Youtrade is online at http://www.youtrade.ch.
159. Swissnetbanking is online at http://www.swissnetbanking.com.
160. Postal Suisse's Yellownet is online at http://www.yellownet.ch.
The companies studied are the Union des Banques Suisses, 161 Crédit Suisse, 162 and the Post Office.

At the Union des Banques Suisses (UBS), three key documents govern the telebanking contract: the general provisions of the bank, 163 the framework conditions related to the use of the data-processing keys, 164 and special conditions related to telebanking. 165 Crédit Suisse (CS) uses two documents to regulate the contract: general conditions, 166 and conditions applicable to DirectNet/Telebanking. 167 Postal Suisse (the Post Office) uses three documents titled respectively: conditions of participation in Yellownet, conditions of participation in the postal account, and Postfinance general conditions. 168

a. The five cases of exclusion of the responsibility of the bank or the Post Office provided for in the general conditions

The general conditions provide for the exclusion of the responsibility of the bank or the Post Office in the following five principal cases:

1) Damage related to an interruption or a slow-down of the service

a) Cases provided for by the banks and the Post Office

The customer can suffer a loss if he is unable to transmit his order to the bank because its network: is overloaded; has problems; is suspended

161. Our analysis is limited to the UBS general conditions of traditional telebanking service, since those of the specialized "tradepac" telebanking services are identical.

162. Our analysis is limited to the Crédit Suisse general conditions of traditional telebanking service, since those of the specialized "Youtrade" telebanking services are identical.

163. UBS Basic Conditions, supra note 114.

164. See generally UBS, e-banking, at http://www.ubs.com/e/ebanking.html (last visited November 29, 2001). Data-processing key framework document may be obtained from the author.


166. See generally Crédit Suisse, Welcome to Crédit Suisse Private Banking, at http://www.cspb.com/ (last visited November 29, 2001). [Parts of this World Wide Web site may be inaccessible from United States Internet connections. General conditions document may be obtained from the author. -Ed.]

167. Crédit Suisse Application, supra note 43.

168. See generally http://www.yellownet.ch [Parts of this World Wide Web site may be inaccessible due to site security. "Conditions of Participation in YellowNet," "Conditions of Participation in the Postal Account," and "Postfinance General Conditions" may be obtained from the author. -Ed.]
for maintenance; is jammed; has a technical deficiency or transmission errors; is stopped due to disturbance; and has broken down if the customer's telebanking service was interrupted for security reasons, if deficiency comes from the Internet access provider, if the transmitted command was not carried out, or was carried out late, or if the customer lodges a late complaint at his bank. In any of these cases, the banks and the Post Office free themselves from any responsibility. For example, if the customer sends a "market" purchase order via Internet to his bank at 14.00 and the order enters the stock exchange information processing system forty minutes later due to one of the reasons stated above, and in the meantime price increases substantially to 14.40, the customer will buy stock at a higher price than if the order had been registered in time. The bank excludes its responsibility if such a damage occurs.

b) Legality of the exclusion of responsibility in these cases

The damage resulting from an inherent technical problem in any data processing system, from a perfectly justified interruption (security), or from an usual and foreseeable reason (maintenance) must be borne by the customer. The customer accepts the risk that his order may not be carried out on time. However, this exclusion is not admissible when these problems recur very often, when the bank or the post office does not try to solve the problem as quickly as possible, or when the bank or the post office does not try to inform the customer in a reasonable time that his order has not been handled. Even in these cases, the bank excludes responsibility if the customer's Internet service provider fails in its own obligations to his customer. Indeed, in these cases, the bank or the post office would meet their general obligations if they did everything to ensure the prompt transmission of the customer's order to the executant of the bank.

In addition, if the software presenting the data to the customer displays false information, (erroneous balance in hand, distorted confirmation of execution, or assumption of responsibility of command), the customer will suffer a prejudice. For example, the customer could decide to buy shares for $100,000, basing his decision on the balance in

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169. Meaning without setting a price limit.
170. Electronic markets like NASDAQ, in the United States, have eliminated human intervention: the customer's order placed via internet is transmitted to the bank's computer system which then transmits it automatically to the stock exchange system, without passing through a person.
171. According to Merrill Lynch (Switzerland) the maximum time allowed to punch the order in the computer system is ten minutes in the case of the American stock exchange and NASDAQ in particular.
his account, when his actual account balance is only $70,000. There will be debit interests to pay, and if the price of the share falls substantially, the bank will require its customer to refund part of the $30,000 that the customer obtained by mistake.

These two damages can be due to a software programming error by the bank. They could also be due to a hacker’s modification of the bank’s program during the transmission between the bank’s Internet site, and the customer’s computer.

2) Damage related on the exactitude and entirety of information transmitted by the bank: Cases provided for by the banks and the Post Office

The customer that carries out a banking operation via telebanking, because he bases the transaction on erroneous information provided by his bank or the post office, will suffer significant damage for which the banks, and the post office disclaim any responsibility in advance.172 Suppose, a person consults his account only sporadically. According to the telebanking site, he has $100,000 in his account. The bank further states on it’s site that the current value of the Microsoft share is $100. The customer then places a purchase order limited to $100,000 for 1000 Microsoft shares in order to use all the money of his account. The order is launched and carried out, bringing the customer’s account down to $0 and depositing the 1000 Microsoft shares in his name. Now suppose that, because of a deficiency of the bank’s data-processing server, the information presented was false. The customer actually had only $80,000. The customer will then, as soon as the problem is solved, have a negative account of balance $20,000, and will consequently have to pay debit interests. Now suppose that the following day, Microsoft is declared a monopoly and the shares fall to $60. The total value of the shares of the customer will go to $60,000, and he will have to refund to the bank the $20,000 lent by the data processing error.

If the erroneous information displayed on the telebanking site is so obvious that it can be spotted by an average person placed in the same circumstances, and that the customer does not notice it, the responsibility for the damage caused could not be placed on the bank. However, if an average user placed in the circumstances would be hard pressed to identify erroneous information, no fault will be ascribed to the customer. Technical risks must be borne by the customer. However, one can hardly compare the delay or the non-fulfillment of an order involving a loss of

172. See, e.g., UBS Basic Conditions, supra note 114, at art. 4.; UBS Special Provisions, supra note 165, at § 1.3.
profit with the display of false personal (balance of the account), and sensitive (price of a share) information on which the customer bases a decision that could involve substantial losses of capital. In such cases, the bank should repurchase its customers’ shares and take the damage as it’s responsibility in order to guarantee the customer a certain security. How will the customer still dare to carry out transactions via telebanking if he has no guarantees of the minimum reliability of the information he receives from his bank by Internet? We are consequently in agreement with the clause of exclusion of responsibility stipulated by UBS, CS, and the Post Office. We regard the communication of such erroneous information as a light or even serious offense, depending on the cases, and we doubt its legality in the event of litigation.

3) Damage related to the software provided by the bank or the Post Office

a) Cases considered by the banks and the Post Office

The customer can suffer an injury if telebanking software provided by his bank, or the post office does not function. This occurs when the bank encodes the communication between the bank and the customer,173 when the bank presents to the customer the information transmitted across a faulty network,174 or when a problem occurs during a data transfer from the Internet site of the bank or the post office to the customer’s computer.175

Indeed, if the safety of computer communication between the bank’s Internet site, and the customer’s computer is endangered by defective software, bank secrecy will no longer be guaranteed. A third party could consequently intercept the communication, and note significant information (account number, name and addresses of customer, password, number of contract, balances in account, transmitted banking orders, etc.). The third party could use this information to the customer’s detriment.

b) Legality of the exclusion of responsibility in these cases

Before distributing software to their customers, the banks or post office must check the software diligently and do repeated tests. If these tests are rigorous, and are conducted a sufficient number of times, banks cannot be reproached if a problem occurs despite the testing. Some technical risk is indeed inherent in any information processing system, and

173. See, e.g., UBS Special Provisions, supra note 165, at § 1.1.
174. See, e.g., UBS Basic Conditions, supra note 114, at art. 4; Crédit Suisse Application, supra note 43, at art. 4.5.
175. See, e.g., UBS Special Provisions, supra note 165, at § 1.3; Crédit Suisse Application, supra note 43, at art. 4.5.
the customer must be conscious of it. The customer must accept that risk when he decides to sign a telebanking contract.

However, if the tests are neither strict nor sufficiently numerous, or if the bank or the post office notes the deficiency in the software, but fails to quickly inform the customer of the problem, the bank or Post Office must bear the resulting damage. They have violated their general obligations to give the customer the most powerful computer system and software possible.

Because the risks of data interception, and modification by a computer hacker are for the moment very low, with a likelihood of occurrence similar to that of a force majeure, one can accept the exclusion of the responsibility of the bank.

4) Damage related to the non-fulfillment of commitments to third parties

a) Cases considered by banks and the Post Office

Many customers commit to making a payment before a specified date. Institutional customers might commit to buy n number of shares within two hours from the time the stock exchange lists a company in which the institution has acquired a large number of shares. If these commitments are not carried out because of an unspecified problem, be it technical or related to data interception, the customer will be subject to sanction for non-fulfillment of his obligation with respect to the third party. This will lead to a loss to the customer, for which the bank excludes any responsibility in advance.176

b) Legality of the exclusion of responsibility in these cases

The bank cannot be held responsible for the violation of customers' commitments to third parties, because it is difficult to bring evidence. These transactions often rest on trust and verbal agreements. Indeed, the bank would be taking great risks if it had to pay considerable damages with frequency. Such a scenario could endanger the bank's financial health. The customer must bear these risks related to telebanking. However, in the event of glaring, and excessive error ascribable to the bank or the Post Office, the institution has violated its obligation of diligence. It could then be held to pay all or part of the damage caused to its customer.

5) Damage related to a misuse of the customer's account

a) Cases considered by the banks and the Post Office

176. See, e.g., Crédit Suisse Application, supra note 43, at art. 4.9.
Damage can result from an unauthorized third party using the customer's account in an improper way. For this, the banks and the Post Office disclaim any responsibility in advance, particularly if illegal interventions take place in the server of the bank, or of the customer. Further, the banks, and the Post Office disclaim responsibility if the misuse stems from a deficiency of the network operator or of Internet access provider or if a defect of legitimization or an undetected forgery enables a hacker to access the bank's server. The banks, and the Post Office bear no responsibility if the customer or one of his agents has lost the key; if there are unauthorized manipulations of the account, or if the password and/or the list of numbers to be crossed out were wrongly used during the transmission of the data between the bank and it's customer. Finally, the institutions disclaim responsibility if an abuse occurred during the blocking of the account, even if it took place within the usual time frame.

b) Legality of the exclusion of responsibility in these cases

Any person who knows the content of the data-processing keys given by the bank to his customer is capable of misusing the account, and causing significant damage. Moreover, if the customer or one of his agents does not have the mental capacity, he or she is likely to cause damage to the account through inexperience and carelessness.

If the customer made a mistake in writing his password and left his data-processing keys unprotected, no reproach can be made to the bank or the Post Office. Moreover, if a hacker illegally penetrates the bank's Internet telebanking site or that of the Post Office, or if the customer in spite of the best possible computer security arrangement made by the latter, the banks or the Post Office will not assume the risk. If the customer or one of his agents does not have mental capacity, he must inform the bank or the Post Office at the time the contract is signed, or at least make sure their incapacity is mentioned in an Official Journal.

177. See, e.g., UBS Basic Conditions, supra note 114, at art. 4; Crédit Suisse Application, supra note 43, at art. 4.5.
178. See, e.g., Crédit Suisse Application, supra note 43, at art. 4.1.
179. See, e.g., Crédit Suisse Application, supra note 43, at art. 4.2.
180. See, e.g., UBS Special Provisions, supra note 165, at § 1.3; Crédit Suisse Application, supra note 43, at art. 4.2.
181. See, e.g., UBS Basic Conditions, supra note 114, at art. 2.
182. See, e.g., UBS Special Provisions, supra note 165, at § 1.3.
183. Id.
184. UBS Article 3 D.C.
customer’s failure in this duty will rightly clear the bank or the Post Office of any responsibility if the account is misused.

However, if the bank did not take all necessary precautions to upgrade its network with the latest encoding or security, the bank would violate one of its principal obligations. Such a violation would be a serious or light offense, depending on the situation. The gravity of the offense should depend on whether negligence was partial (for example, if the customer left his data-processing keys lying about without taking precautions), or total (not of the fault of the customer).

b. Proportionality and Equity Principles which Water Down the Legality of Exclusions of Responsibility

The principles of proportionality, and equity must control a bank or a Post Office’s assertion that it is excluded from responsibility. It is true that technical risks or risks related to hackers cannot be attributed to the bank or the Post Office if the institutions take all possible steps to protect themselves. However, if the damage suffered by the customer is great; if the customer did not commit any offense; and if the bank has sufficient resources to make good the damage without falling into serious financial difficulties, the institution must bear partial damages in all cases. It would indeed be unjust to make a diligent customer sustain huge damages. This is particularly true in the sensitive field of telebanking, where damage could have very serious consequences for the customer (for example, a loss of 85% of a retired employee’s fortune - saved all his life - when the retiree has made no error). The bank could, without falling into major financial difficulties, assume this sporadically-occurring damage.

c. Principle of Unfavorable Interpretation against the Party Having Drafted the General Conditions

As we saw above, the general conditions should not be interpreted too literally. It is necessary to examine the sense and the purpose of each provision while basing the analysis on honest use. If, in spite of such an interpretation, the provision in dispute remains ambiguous, this ambiguity will be interpreted to the detriment of the drafting party (namely, the bank).

VIII. CONCLUSION

By following the trends of electronic trade, and the Internet’s presence in the world, it is certain that the rapid development of telebanking will continue for years to come. Trends are already appearing. Initially, only major banks or financial companies could afford the luxury
of offering services via Internet. However, small firms are emerging with specialties in only one telebanking service: sales and purchase of stocks. Small firms can now emerge as banks. Barely five years ago, this would have been impossible. Indeed, without a counter, without direct interlocutories to the customers (except in the event of big problem via the Hotline telephone system), and without offering only one type of service, these financial companies could never have been born. Nor could they have survived, from a legal and economic standpoint.

The federal banking commission hardly appreciates the so-called "Swiss banks" whose only links with the country are the name "Swiss bank" spread across the network, and the presence of a mailbox. For example, www.swissnetbanking.com, based at P.O. Box 509 in Geneva, and doing very aggressive advertising in financial newspapers, particularly the Herald Tribune, is especially striking. The existence of this company shows that Internet has made it possible to create virtual Swiss banks based 99% in the United States. One should therefore expect a reaction from Swiss legislators. They will not allow this financial fence to return to countries of origin which, even yesterday, cast a shadow on the money market. Moreover, these upstarts are likely to be removed thanks to the new law on money laundering which came into effect in April, 1998. The law applies to any bank or financial intermediary, including companies offering telebanking services. In addition, the prospects for this new service are frightening vis-a-vis employment. If financial intermediaries are no longer necessary for the bank to maximize its profit, what will become of the 120,000 people employed in this vital economic sector of Switzerland? Will computer specialists replace them all? One should expect social reactions to the further development of telebanking.

However, the product seems to be worth the price. The amounts deposited in Swiss banks continue to grow more than 5% annually, and today they total 3 trillion Swiss Francs or 1.8 trillion US$. Telebanking is likely to increase this figure.

In addition, the growing number of telebank users will inevitably increase the potential conflicts between the bank, and its customer, particularly with regard to exclusion of responsibility of the latter. One can thus expect a re-balancing of the forces at play. At present, the general conditions favor the banks, which do not want to guarantee any risks. While hackers doggedly endeavor to pull down bank computer security systems, and foreign financial companies try to take advantage of the Swiss banking usage, by owning a Swiss postal address, Swiss banks,

their customers, and the courts will readily attest that the exclusion of responsibility of banks is abusive and illegal. These will be architects and creators of the first case law on the telebanking contract which, although hardly born, already has a bright future ahead of it.
THE ROAD TO RECOGNITION AND APPLICATION OF THE FUNDAMENTAL CONSTITUTIONAL RIGHT TO MARRY OF SEXUAL MINORITIES IN THE UNITED STATES, THE NETHERLANDS, AND HUNGARY: A COMPARATIVE LEGAL STUDY

Marilyn Sanchez-Osorio

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I. INTRODUCTION

The scope of this work is to shed some light on the vigorously debated and delicate subject of same-sex marriages, as well as to review how some countries have reached the point of recognition and application of the legal rights that homosexual individuals have within this global society. Starting with a general overview of the homosexual struggle to gain social rights and acceptance in particular societies within the Western Hemisphere, this article will focus on the specific domestic laws of the United States of America, the Netherlands, and Hungary that deal with the issue of same-sex marriage. In selecting these particular countries this article will show a traditionally open-minded society (the Netherlands); a society that purports to be modern, open-minded, and progressive as the world leaders (the United States) but, instead, it is one that is still moderate and conservative; and finally, a society that is just coming out of years of

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repression and closure to the rest of the world and its advances (Hungary). Additionally, this article will show how each country's societies and institutions have dealt, and deal today, with the subject of same-sex marriage. After analyzing specific laws and cases from these countries, this article will compare and contrast how each treat the subject in a similar or different fashion. This article will explore, based on the latest case rulings and legislations passed in these countries, how the future is being shaped and what the trend is in this area of legal concern for sexual minorities. This is a comparative legal study and analysis among the selected countries and their treatment of the issue of same-sex marriage based in their particular cultures, societies, religious influences and history. To conclude, this article will speculate as to how much international law can be used to ameliorate the legal situation of gays, lesbians, and bisexuals who have decided to live together in a same-sex union.

II. GENERAL HISTORY OF SEXUAL MINORITIES' STRUGGLE

"Sexual minorities include all individuals who have traditionally been distinguished by societies because of their sexual orientation, inclination, behavior, or nonconformity with gender roles or identity."\(^1\) Homosexuality appears in virtually all social contexts—within different community settings, socioeconomic levels, and ethnic and religious groups. In ancient Greece, homosexual relations were acceptable and, in some cases, expected activity in certain segments of society.\(^2\) It can be assumed that the ancient gay prototypes of antiquity were not a minority, were not stigmatized, were not perceived as different or deviant, and above all were not defined by their sexual orientations or attractions.\(^3\) The attitude towards homosexuality changed in the Western world largely by the prevailing Judeo-Christian moral codes, which treat homosexuality as immoral and sinful.\(^4\) An alliance of the Roman Empire and the equally imperial Church of Rome established the two rules on homosexuality that have marginalized same-sex love for many centuries. Both sexual activity and a legal marriage required people of opposite sexes.\(^5\)

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4. ENCARTA ENCYCLOPEDIA, supra note 2.
Although the criminal rule of same-sex activity was essentially abolished in great parts of Europe by Napoleon's civil codifications, it was later brought back by other empires (British, German, Austrian). The marriage rule has taken much longer to disappear, or be abolished, from Europe or other areas of Western civilization.\(^6\)

The first half of the twentieth century marked a period of great hostility and overwhelming negative feelings towards homosexuality.\(^7\) In the United States, homosexual activity, even among consenting adults, was made a criminal offense in most of the country by the passing of the so-called "sodomy" statutes.\(^8\) Homosexuals were subject to stereotypes and prejudice. Gay men were viewed as effeminate, and lesbians were portrayed as mannish, both obsessed with sex, with little self-control or morality.\(^9\) In the 1930s and during World War II, homosexuals were targets of persecution in Nazi Germany.\(^10\) Only recently have these prejudices against homosexuals in Western societies begun to change. As the result of much scientific discussion and study, in 1973 the American Psychiatric Association eliminated homosexuality from its list of mental disorders and, in 1980, it dropped it from its Diagnostic and Statistical Manual.\(^11\)

The institution of marriage has been altered fundamentally in Western societies because of social changes brought about by the Reformation, the Industrial Revolution, and a growing ideology of individualism.\(^12\) Because the family unit provides the framework for most human social activity, it is the foundation on which social organization is based. In most cultures, marriage is closely tied to economics, religion, and law.\(^13\)

### III. SAME-SEX MARRIAGE RIGHTS

The question seems a simple one: when does the law recognize that same-sex partners have the right to marry each other? The answer does not seem so obvious to a great majority of the Western societies. However, in Europe and in other areas of the world, particularly, in specific countries like the United States of America, the Netherlands, and

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8. Id.
9. Id.
13. Id.
even in Hungary, modern civilization is finally beginning to legally recognize the right that same-sex partners have to marry each other.

A. The United States of America

On December 20, 1999, the Supreme Court of Vermont reversed the trial court’s judgment in Baker v. State and retained jurisdiction pending legislative action because Defendant State was constitutionally required to extend to same-sex couples the common benefits and protections that flow from marriage under Vermont law. Chief Justice Jeffrey L. Amestoy based his decision on the Common Benefits Clause of the Vermont Constitution (Chapter I, Article 7), which says that government is for the common benefit of the community rather than for the advantage of individuals: ‘‘[G]overnment is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community ...’’

In the Constitutional claim section of his opinion, C.J. Amestoy emphasizes the differences between the Common Benefits Clause of the Vermont Constitution and that of its counterpart, the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. The Chief Justice points out that Vermont’s constitutional commitment to equal rights was the product of the successful effort to create an independent republic, in 1777, preceding the adoption of the Fourteenth Amendment by nearly a century. In his clarification of the reasons why this court based its decision on Vermont’s Common Benefits Clause, Justice Amestoy further explains that while the federal amendment may supplement the protections afforded by the Common Benefits Clause, it does not supplant it as the first and primary safeguard of the rights and liberties of all Vermonters and the Court is free to provide more generous protection to rights under the Vermont Constitution than afforded by the federal charter.

18. Id.
The historical origins of the Vermont Constitution thus reveal that the framers, although enlightened for their day, were not principally concerned with civil rights for African-Americans and other minorities, but with equal access to public benefits and protections for the community as a whole. The concept of equality at the core of the Common Benefits Clause was not the eradication of racial or class distinctions, but rather the elimination of artificial governmental preferment and advantages.\(^{19}\)

C. J. Amestoy reasoned that denial of the Plaintiff’s request for a marriage license was found in the legislative intent of the marriage statute that denied the homosexual couples in question the right to such license.\(^{20}\) “The legislative understanding is also reflected in the enabling statute governing the issuance of marriage licenses, which provides, in part, that the license ‘shall be issued by the clerk of the town where either the bride or groom resides.’ ‘Bride and groom’ are gender-specific terms.”\(^{21}\) Therefore, Chief Justice J. L. Amestoy told Vermont’s legislature in this opinion to either provide for licenses or set up some sort of domestic partner system where all or most of the same rights and obligations provided by law to married partners will be extended to same-sex couples.

In what has been called a “historical and ground breaking” event, on March 16, 2000, the Vermont House approved legislation that would create the closest thing to gay marriage that America has ever seen.\(^{22}\) In a vote of 79-69, a bill giving same-sex couples the benefits of marriage through “civil unions” was passed.\(^{23}\) Representative William Lippert, the only openly gay member of the House, gave a speech where he points out the many decades of mistreatment, discrimination, and prejudice that has existed against gay men and lesbians.\(^{24}\) Gay couples who form civil unions would be entitled to about three-hundred state benefits of privileges available to married couples: filing of joint tax returns, inheritance, property transfers, medical decisions, and insurance are among the most important areas.\(^{25}\) On April 26, 2000, Howard Dean, the Governor of Vermont, signed a “first-in-the-nation” same-sex “civil unions” bill into

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19. Id. at 33.
23. Id.
25. Sneyd, supra note 22 at 2A.
The law will allow gay couples to form civil unions beginning July 1. While other states will most likely not recognize Vermont's civil unions, through their "Defense of Marriage Acts," this is an enormous positive step in the fight for same-sex marriage rights in the United States.

On December 9, 1999, the Supreme Court of Hawaii decided *Baehr v. Miike*, ending an eight-year fight to make this island archipelago the first United States state to legalize same-sex marriage. The trial court had entered a judgment in favor of the plaintiffs, ruling that the sex-based classification in Haw. Rev. Stat. § 572-1 (1950) was unconstitutional by virtue of being in violation of the equal protection clause of Hawaii's Constitution Article I, section 5. The Department of Health was therefore enjoined from denying an application for a marriage license because applicants were of the same sex. However, the state legislature amended the state constitution, investing in the legislature the power to reserve marriage to opposite sex couples. On appeal, the court held that the marriage amendment validated § 572-1 by "taking the statute out of the ambit of the equal protection clause of the Hawaii Constitution, at least insofar as the statute, both on its face and as applied, purported to limit access to the marital status to opposite sex couples." The Court ordered that the judgment of the circuit court in favor of the plaintiffs be reversed and that the case be remanded for entry of judgment in favor of Miike and against the plaintiffs. The marriage amendment rendered the plaintiffs' complaint moot.

The importance of the *Baker* decision is that its consequences will not be limited to the State of Vermont. States in the United States must determine whether they will extend the Full Faith and Credit provision of the United States Constitution to any other state that does adopt legislation granting marriage licenses to same-sex couples. This may apply as well to any state that adopts a domestic partner system where homosexual couples enjoy the same benefits and rights that heterosexual married couples enjoy. Article IV, § 1 of the United States Constitution provides:


27. *Id.*


30. *Id.* at 1.

31. *Id.*

32. *Id.*

33. *Id.*

34. Wilets & Woods, *supra* note 1, at 213.
"Full Faith and Credit shall be given in each State to the Public Acts, Records, and Judicial Proceedings of every other State..." Public Acts is the most relevant of the above-mentioned elements of the Full Faith and Credit Clause of the Constitution to cover marriage, however

some legal commentators have suggested that it is 'comity' (legal principle whereby courts of one state or jurisdiction will give effect to laws or judicial decisions of another state or jurisdiction as a matter of deference and mutual respect) rather than 'full faith and credit' that is the relevant legal principle to apply to the question of a state's recognition of a same-sex marriage performed in another state.35

Even when this provision means that marriages in one state must be recognized in another, some states may claim a public policy exception to the provision.36 A major bar to the challenge under the "Full Faith and Credit" clause has been the passage of the Defense of Marriage Act. This federal law exempts those states that have enacted statutes that call for a refusal to recognize the legality of another state's same-sex marriage.37

As of February, 2000, "of the 541 pieces of state legislation dealing with issues concerning gay, lesbian, bisexual, and transgendered people and their loved ones, 309 were 'favorable' and 232 were 'unfavorable'."38

Bills allowing same-sex marriage failed in Massachusetts and Rhode Island while in Oregon, an anti-marriage initiative was kept off the ballot.39 Only Louisiana passed a bill prohibiting the recognition or validity of any marriage between persons of the same sex lawfully entered into in another jurisdiction.40

B. The Netherlands

Under Chapter 1, (Fundamental Rights), article 1 (Equality), of the Kingdom of the Netherlands's Constitution, there is a clause that reads:

35. Interview with James D. Wilets, Assistant Professor of Law, Nova Southeastern University in Fort Lauderdale, Florida. (Apr. 28, 2000) (on file with author).
36. Wilets & Woods, supra note 1, at 213.
39. Id. at 4.
"Discrimination on the grounds of religion, political opinion, race, sex, or on any other grounds whatsoever shall not be permitted."41

Same-sex, as well as opposite sex, unmarried couples and their children in the Netherlands, have had available to them a “Registered Partnership” legislation since January 1, 1998.42 The bill was introduced in the Dutch Parliament through bill number 2376, in June 1994, and it grants almost all legal consequences of marriage to unmarried couples that do not wish to marry, but who live together.43 It does not grant the actual marital status nor any form of parental rights and duties to the couple.

On April 16, 1996, the Lower Chamber of the Dutch Parliament, through Parliamentary Paper 1995/96, nr. 22700/18, proposed and adopted the following:

The Chamber, having heard the debate,

noting that often in our society two people of different sexes and of the same sex want to enter into a lasting and committed relationship;

noting furthermore that according to the Civil Code the concluding of a civil marriage is permitted to two people of different sexes;

being of the opinion that in line with the General Equal Treatment Act there is no objective justification for the marriage prohibition for same-sex couples;

resolves, that legal marriage prohibition for two people of the same sex be lifted."44

With the inception of a new coalition government in the Netherlands, on August 3, 1998, its members agreed to further the interests of homosexual couples by introducing a bill to open civil marriages and adoptions to persons of the same sex.45

41. NETH CONST. art. 1.
43. Id. at 3.
44. Id.
45. Id. at 4.
On June 25, 1999, by an amendment to Book 1 of the Civil Code—Parliamentary Papers: Kamerstukken II 1998/99, 26672, nrs. 1-3, the Dutch Cabinet approved the introduction of bills to open up marriage and adoption to same-sex partners. Normally, it would take both chambers of Parliament at least until the end of the year 2000 to debate and approve these bills. Therefore, the first same-sex marriages and adoptions would not take place before 2001. The Marriage Bill will not do away with registered partnerships and these two will co-exist for at least the next five years. In addition, registered partners will get the opportunity to convert their partnerships into full marriages.

On April 1, 2001, four laws came into effect in the Netherlands by means of the Royal Decree, Staatsblad, nr. 145. One of these laws is the law of December 13, 2000 (Staatsblad 2001, nr. 11), dealing with various matters including the further equality between marriage and partnership registration. Some parts of this law took effect before April 2001. Then, there is the law of December 21, 2000 (Staatsblad 2001, nr. 9), which deals with the opening up of marriage for same-sex partners. The third law that took full effect was the law of December 21, 2000 (Staatsblad 2001, nr. 10), dealing with adoption by same-sex partners. The fourth law that took effect was the law of March 8, 2001 (Staatsblad 2001, nr. 128), which adjusted various other laws to the opening up of marriage and adoption. Until a bill, now in Parliament, that provides for automatic parental custody for children born in same-sex marriages for lesbians or heterosexual registered partnerships becomes law, the differences between registered partnership and marriage, and between same-sex marriage and different-sex marriage, will be insignificant. With the exception of the differences imposed by biology and foreign laws, which are beyond the reach and sovereignty of the Netherlands’ lawmakers, same-sex and different-sex foreign partners hold now the same position with respect to marriage, partnership registration, and immigration. At midnight, on April 01, 2001, four same-sex Dutch couples took their legally recognized wedding vows after years of struggle for equality.

The Netherlands, thus, becomes the first country in the Western world to adopt a marriage law that grants same-sex couples all the rights, including the license, which heterosexual couples have in marriage.

46. Waaldijk, supra note 6, at 17.
47. Id. at 1.
48. Id.
49. Id.
50. Waaldijk, supra note 42.
51. Id.
C. Hungary

The Republic of Hungary decriminalized homosexuality in 1961, when it was still under the Soviet Union’s Communist regime. The age of consent for homosexual practices was 20 years until 1978, when it was changed by Section 199 of Hungary’s Penal Code to 18 years, subject to 3 years of imprisonment for a violation.

“The Hungarian Constitutional Court ruled on March 8, 1995, that it is unconstitutional for Hungarian law to recognize heterosexual common law marriages but not lesbian or gay ones.” Since Hungary recognizes marital unions under the common law marriage doctrine, the Hungarian court found no legal grounds on which to sustain such disparate treatment and sent the law on common law marriages, called Ptk 578/G, back to the legislature, ordering it to take action on the matter by March 1996. Nevertheless, the Court also ruled that civil marriages were still off-limits to homosexual couples by stating that the “Constitution protected the institution of civil marriage as a union between a man and a woman.”

On May 21, 1996, by passing Act XLII of 1996, an amendment to Act IV of the 1959 Civil Code of the Republic of Hungary, Parliament revised their “cohabitation” law to read: Section 1: “During their cohabitation, common law spouses shall acquire common property in proportion to their participation in the acquisition.” Section 2: “Common law spouses are two persons living together without marriage in common household, in emotional and economic community.”

It is also important to note that the Hungarian Constitution contains a provision, under Article 70A (No Discrimination), whereby “The Republic of Hungary shall respect the human rights and civil rights of all persons in the country without discrimination on the basis of race, color, gender . . . political or other opinion, or on any other grounds whatsoever.” Based on this Constitutional right not to discriminate on “any grounds whatsoever” and its finding that law Ptk 578/G was arbitrary and contrary

53. Id.
54. Wilets & Woods, supra note 1, at 231.
55. ILGA, supra note 52.
56. Wilets & Woods, supra note 1, at 231.
57. ILGA, supra note 52.
58. PTK/G (1996) (Hun.)
59. A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA [CONSTITUTION] art. 70A.
60. Id.
to human dignity, the Hungarian Constitutional Court had the legal tools necessary to demand Parliament to amend the law on cohabitation and, thus, extend to homosexual couples the same rights that heterosexual couples enjoyed. Today, in Hungary, same-sex couples living together can claim all the marital rights of traditional common-law marriages, except the right to adopt children.

IV. SIMILARITIES AND DIFFERENCES OF LEGAL TREATMENT AMONG SELECTED COUNTRIES

The United States, the Netherlands, and Hungary treat the issue of same-sex marriage in similar and different ways. Among the similarities, what stands out is: i) how recent it is that these countries have taken seriously the passage of laws to legalize same-sex unions, ii) the process by which these countries have had to first, recognize that there is discrimination in the area of sexual orientation; then, progressively, decriminalize homosexual activity, and then move to allow homosexuals their civil rights, including the final acceptance of same-sex marriage, whether based on common law marriage principles (Hungary), civil unions (USA- State of Vermont), or an actual marriage license (Netherlands). Another similarity is how internal conservative movements have continuously tried to obstruct legislation granting gays any type of right, much less the right to marry.

These countries, however, have dealt with this issue also in different ways. The Dutch Parliament, has proven time and again how the intense social conscience that prevails in the Netherlands on the subject of minority rights, non-discriminatory legislation in the area of sexual orientation, equal rights for same-sex partners, and general human rights laws, will find fertile ground in a legal system that works to fully reflect the society it represents and not only the personal and conservative views of a few of its members. The Dutch groundbreaking approach to real legislative representation has made the Netherlands a pioneer in granting same-sex couples a myriad of legal rights, whereas in countries like the United States, the legal system (including the legislative and judiciary branches of government) and those who represent it, have yet to reach this point in spite of being the country that created the civil rights movement.

The United States’ legislative system, starting from Congress, going to each state’s legislatures, and ending up at the court level, has proven that, although the awareness is there, the United States still has a long road to go before it fully reflects in its legislation its social reality in the area of

61. The International Lesbian and Gay Association, supra note 52.
human and civil rights for gays, lesbians, bisexuals and transgendered individuals. So far, the only positive legislation passed in the United States that provides similar rights of heterosexual married couples to same-sex partners, has been the Vermont civil unions law. In a country with almost three hundred million inhabitants and as the world economic leader, the United States has a terrible record as far as the creation and implementation of domestic anti-discrimination laws that protect the rights of sexual minorities or homosexuals.

The power that some extremely conservative religious groups assert over many members of Congress, through their lobbying and political action groups, is partly responsible for the striking down of legislation that would have given homosexuals the right to enter into full legal marriages, at least from the time that the State of Hawaii made its first claims on the subject. Other reasons are simply based on pure personal ignorance and fear of the unknown from people in power who, most likely, have never even met a homosexual couple in their lives. Respected judges in high courts of the United States have written opinions where they base most of the “logic” behind the denial of rights to a homosexual person, i.e. the right of privacy to engage in sexual conduct with a member of one’s same sex, upon the judge’s own values and standards of morality. As long as the problem is not attacked from its roots, education, and included as part of the regular general courses that children take in school, (i.e. subjects on tolerance of those different from us, civil rights and duties, and human rights) homosexuals, like any other minority in the United States, will continue to suffer the legal consequences of the blindness and deafness of the people that are supposed to represent their rights.

The good news is that a country like Hungary, with a much more controversial past than that of the United States, both socially and historically, is starting to take some serious steps in the direction of legislative awareness on the subject of sexual orientation issues and anti-


63. Justice White, who wrote the majority opinion in Bowers v. Hardwick, explained: [t]he law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed . . . [R]espondent insists that the majority sentiment about the morality of homosexuality should be declared inadequate. We do not agree . . . [n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other, has been demonstrated by either the Court of Appeals or by respondent [Hardwick]. Moreover, any claim that precedent cases presented to support Hardwick’s position stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally isolated from state proscription is unsupportable.

discriminatory legislation. Even if Hungary's only reason to accept homosexual couples living together is to offer an image of social and civil rights consciousness in order to eventually enter the European Union, this creates the legislative awareness needed as basis to move forward into an eventual full incorporation of same-sex marriage legislation.

V. REASONS BEHIND LEGAL TREATMENT OF ISSUE

History, religion, culture, economics and society all play an important role in understanding the reasons why the United States, the Netherlands, and Hungary treat the issue of same-sex marriage in a variety of ways and why each behaves legally in a particular way.

The advent of industrial capitalism led the way for the breakdown of old family structures in the Western world. Individuals started making their own livings and breaking away from the interdependent family unit. Urban societies became the center for people who wanted to find others like themselves. In the West, the evolution of liberal and democratic societies provided legal recourses for homosexuals to acquire, defend, and expand personal rights that were not available in rural societies or within the "traditional" heterosexual family structures. In addition, in the United States and Western Europe, education and economic possibilities were opening up for women, which translated into less pressure to marry and have children. With the addition of social mobility, the twentieth century marked the first time in Western history that the lesbian was able to emerge as a distinct social identity.

In the United States, the late nineteenth century marked a period of major change in the lives of many women. Romantic friendships flourished in a society were women were still not perceived as sexual beings. Then came the age of Freud, where women began to be viewed as "sexual," birth control became more accessible, and heterosexual sex did not have to end in babies. All of these factors threatened male dominance and women found themselves under pressure to abandon these romantic friendships and devote themselves to their marriages. The entry of the United States into World War II, in December 1941, helped

64. See generally MILLER, supra note 3 (analyzing gay and lesbian history).
65. See generally id.
66. See generally id.
67. Id. at XXIV.
68. Id.
69. MILLER, supra note 3.
70. Id. at 63.
strengthen a weak gay and lesbian identity.71 Thousands of men and women were taken into sex-segregated environments and away from the structures that family, church, and their hometowns provided. It was the first time that the United States military asked recruits whether or not they were homosexuals.72

A very important event took place on the night of June 27, 1969 in New York City. The Police Department raided, as it customarily did, a gay bar known as “Stonewall Inn.”73 This raid led to a series of days of riots by gays against the police officer’s abuses and discriminations against that particular section of society. The homosexual revolution had started with thousands of gays taking the streets, weeks and months after the Stonewall raid, shouting “Gay Power” and “We Shall Overcome.”74

American society slowly evolved into a liberal one within its conservative democratic political ideology. This liberal society allowed homosexuals to have some legal recourse to acquire, defend, and expand personal rights.75 In the post-1960s period, something known as “identity politics” came into fashion where the birth of the “gay and lesbian community” became viewed as just another minority or constituent group.76 It is important to point out that “the whole idea of anti-discrimination legislation (covering first race, religion, and sex) is primarily an American invention, starting with the Civil Rights Act of 1964.”77 This means that the American legal system of the sixties was already setting the grounds for case and statutory laws that would support the plight of sexual minorities within American society, although it has been a long and frustrating struggle.

Religion and morality are often used as reasons why society should not recognize same-sex marriages. Nevertheless, in the United States, several Protestant denominations—notably the Unitarian Universalist Church and many Quaker congregations—recognize same-sex unions.78 In addition, arguably the United States Constitution’s First Amendment’s Freedom of Religion is violated any time a state prohibits same-sex marriages. The excuse most often alluded to has been that same-sex

71. MILLER, supra note 3, at 231.
72. Id.
73. WILLIAM B. RUBENSTEIN, CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 63 (1997).
74. MILLER, supra note 3, at 368.
75. Id. at xxv.
76. Id.
77. Waaldijk, supra note 6, at 11.
78. RUBENSTEIN, supra note 73, at 749-50.
marriages do not lead to procreation, and this is a fundamental purpose of marriage. Nevertheless, no state actually requires heterosexual couples to procreate as a condition precedent to receiving a marriage license. Since sex cannot occur outside of wedlock and the fundamental purpose of marriage is to procreate, why are contraceptives not outlawed?

Economics can also play an important role in determining why a state may want to pursue the recognition of same-sex rights legislation. In a very perceptive analysis, a California law professor indicated in 1995 that it would bring economic benefits to any state to be the first to recognize same-sex laws: increased tourism and its revenue being the main economic incentive. She also indicated that the states most likely to be the ones to legalize same-sex marriage in the United States were Hawaii, New Mexico, or Vermont. She was right.

The Netherlands has a reputation for being one of the most open-minded and liberal countries within the European Union and the world. With laws that allow the public use of certain soft drugs, e.g., marijuana, the legalization of prostitution, the recent passage of a law permitting euthanasia, and for being the first country in Europe to have full legal homosexual marriages, their reputation is well deserved. The reasons for this tolerant atmosphere and uncommon open mentality are mixed. The Dutch inhabitants are mainly descendants from Franks, Frisians, and Saxons of Germanic and Nordic origins.

As Figure One indicates, Roman Catholics constitute about thirty-five percent of the population. Twenty-four percent are Protestants, mostly belonging to the Dutch Reformed Church, and about forty-one percent of the people do not belong to a religious body. This translates to sixty-five percent of the population of the Netherlands who do not hold any of the strict Judeo-Christian views on homosexuality.

79. Id.
80. Id.
82. Id.
84. Id.
The Netherlands has no official religion, however the Reformed Church has had a close association with the Dutch state since the founding of the Republic.\footnote{Id.} Finally, starting from the sixteenth century, when the Netherlands was the foremost commercial and maritime power of Europe, until today, the Dutch people have enjoyed a high level of basic education and high literacy rates.\footnote{Id.}

Hungary, where about ninety percent of its people are Magyars, descendants of the Finno-Ugric and Turkish tribes who mingled with Slavic tribes in the ninth century, possesses a great variety of ethnic minorities.\footnote{Encarta Encyclopedia, supra note 83.} Gypsies, Germans, Slovaks, Croats, Serbs, and Romanians are among the largest. It is predominantly a Roman Catholic country with a large Protestant minority, in spite of the fact that, during the Communist period, the government dissolved all religions.\footnote{Id.} Approximately ninety-nine percent of the adult population is literate and education is mandatory for children between the ages of six to sixteen.\footnote{Id.} Before the Communists took power in 1948, Hungary’s economy was primarily agricultural.\footnote{Id.} The new Communist government drastically changed it. It emphasized unrealistic industrialization goals for many years until new economic
reforms brought prosperity.91 The change from Communism to a free-market economy (1990) has taken its toll on the Eastern European economies and its people, bringing high inflation and low wages.92 Along with this economic breakdown comes social problems like a high incidence of alcoholism.93 There are also claims of discrimination and persecution that several Hungarian minorities have suffered. In spite of all this, Hungary is known for its constitutional guarantees of civil liberties and human rights. The main reason behind this type of legislation quickly passing in these former Communist countries of East Europe is that countries wished to meet the human rights criteria that were set for membership in the Council of Europe.94 Ultimately, Hungary wants to become a member of the European Union.

VI. FUTURE TREND—ROLE OF INTERNATIONAL LAW

With the legal leadership and precedent already set by the Netherlands; the legal and social consciousness that are now very present in the United States, after such states like Hawaii, which paved the way, and later the state of Vermont, which took the first real step towards equality for same-sex American couples; and, finally, with the acceptance of homosexual couple’s rights in a country like Hungary, the rest of the Western world is likely follow these examples. With the increasing trend toward globalization, all societies will eventually start incorporating into their legal systems legislation that will recognize same-sex marriages, partnerships, and the rights and responsibilities that come along with that.

Until World War II, customary international law95 stated or implied that each country could do as it pleased with its people within its borders, based on the doctrine of sovereignty.96 After the Holocaust, the International Human Rights Movement became part of international law

91. See JEFFREY A. FRIEDEN & DAVID A. LAKE, INTERNATIONAL POLITICAL ECONOMY 475 (1995) (discussing former Soviet states; the observations are equally applicable to Hungary).
92. Id. at 478.
93. ENCARTA ENCYCLOPEDIA supra note 32.
94. Waaldijk, supra note 6, at 8.
95. International custom is evidence of a general practice accepted as law, with no requirement of universal acceptance. See art. 38 of the statute. See also The Paquete Habana; The Lola, 175 U.S. 677 (1900).
96. The doctrine of sovereignty—the claim to be the ultimate political authority, subject to no higher power regarding the making and enforcing of political decisions—developed as part of the transformation of the modern medieval system in Europe in the modern state system, a process that culminated in the treaty of Westphalia in 1648. It is the basis of the international society. Ian McLean, The Concise Oxford Dictionary of Politics, 464 (Oxford University Press) (1996).
and the United Nations Charter. The Universal Declaration of Human Rights, G.A. Res. 217A, U.N. Doc. A/810 (1948), is the main Human Rights document binding all member states of the United Nations to uphold its provisions within their territories. Article 1 states that “all human beings are born free and equal in dignity and rights.” Article 2 sets out the non-discrimination provisions regarding the rights and benefits provided by the Declaration: “everyone is entitled to all the rights and freedoms set forth in this Declaration, without discrimination of any kind, such as race, sex, language, religion, political or other opinion, national origin or other status.” Article 7 brings into play the importance of equal protection guarantees: “All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”

When the European Union was founded, it was not perceived that there was a fundamental rights aspect to the primarily economic objectives of the Community. The original member states had established the separate structure of the Council of Europe and the European Convention on the Protection of Fundamental Rights and Freedoms (1950), and the European Court of Human Rights guaranteed the protection of human rights. Initially, fundamental human rights gained recognition through the judgments of the European Court of Justice, basing its decisions primarily on general principles of law. However, recent growing concerns within the European Union that measures taken to improve and implement internal markets could not be achieved without first addressing disparities in the protection against any form of discrimination. In May 1995, the European Parliament adopted a resolution whereby the Intergovernmental Conference of 1996 would adopt a treaty that provided more rights for EU citizens and improved protection of the fundamental rights of all EU residents. This led to the adoption of the Treaty of Amsterdam at the European Council Meeting on June 1997.

The importance of this treaty, for purposes of how international law can assist the rights that same-sex partners may have in marriage, is that it marks the first time that any international treaty introduces a clause based

97. Anthony Chase, Professor of Law, Lecture on Public International Law, Nova Southeastern University, Fort Lauderdale, Florida (Feb. 25, 2000) (on file with author).
99. Id.
100. Id.
101. Id.
102. Id. at 11.
on discrimination. For example, Article 13 makes specific mention of sexual orientation.\textsuperscript{103} A significant aspect of this Article is that it recognizes that discrimination on the grounds of sexual orientation exists, and implies that such types of discriminations calls for action on the part of the European Union members. Up to now, most legislation that has been passed that protects against discrimination, whether in Europe or in the United States, makes reference to sex, religion, race, ethnicity and nationality, but no specific mention of sexual orientation was ever made.\textsuperscript{104}

In the United States, treaties are considered the "supreme law of the land."\textsuperscript{105} Nevertheless, some treaties, \textit{e.g.}, those non-self-executing, require domestic legislation to make a treaty enforceable.\textsuperscript{106} The reality is that sovereignty and the consent of states defines international law. In other words, countries may sign treaties that protect human rights but they, ultimately, are the ones who must enforce them within their territories. Although there are established means of enforcement for violations to international treaties (such as economic sanctions), only in the last decade of the 1900s, a movement started towards using military sanctions (NATO air bombing of Belgrade) against countries in gross violations of human rights (\textit{e.g.}, genocide).

The importance of these events is that awareness that human rights, including the rights of same-sex partners, must occupy a more significant place in world politics and international law is already present.

\textbf{VII. CONCLUSION}

The Western world is seeing homosexual communities becoming more visible. Large numbers of homosexuals are openly declaring their identities and demanding their rights to equal and respectful treatment. What must be realized is that the homosexual community occupies a \textit{de facto} place in society and their rights must be recognized \textit{de jure} just as all other members of society rightfully do. In the last century, same-sex marriage went from being some unthinkable proposition to a reality. As

\begin{itemize}
\item \textsuperscript{103} \textit{Id.} at 16.
\item \textsuperscript{104} \textit{Gay Employee Can't Sue Under Title VII For Sex Harassment, Law. WEEKLY USA,} Apr. 16, 2001, at 5. (Referring to a recent Ninth Circuit Court of Appeals decision rejecting the claims of a plaintiff who sued based on sexual harassment under Title VII. This Court determined that Title VII protects against discrimination based only on the basis of race, color, religion, sex or national origin. \textit{Rene v. MGM Grand Hotel, Inc.}, Docket No. 98-16924 (9th Cir. 2001).
\item \textsuperscript{105} \textit{U.S. CONST.} art. VI, § 2.
\item \textsuperscript{106} International custom is evidence of a general practice accepted as law, with no requirement of universal acceptance. \textit{See} art. 38 of the statute. \textit{See also} \textit{The Paquete Habana; The Lola}, 175 U.S. 677 (1900).
\end{itemize}
long as societies around the world provide all legal consequences of civil marriage to same-sex couples, whether they choose the Netherlands’s full marriage recognition or registered partnerships, or Vermont’s bill allowing for same-sex civil unions, or Hungary’s common law recognition of legal cohabitation, eventually there will be no political or moral arguments to support that same-sex unions are not as legal and real as any other “marriage.” It remains to be seen what legal implications will the Netherlands’ passing of same-sex full marriage law will have within the European Union. Should the European Court of Justice decide to ignore same-sex marriages validly contracted in the Netherlands and restrict the meaning of the word “spouse” to its traditional heterosexual notion, that would translate to an invasion on the part of the Court to the Netherlands’ domain in the area of family law, over which individual member states still have preemption.

Despite changing attitudes toward same-sex relationships, homosexual conduct remains a criminal offense in some jurisdictions of the United States and many other countries around the world. To effect a global change in attitude towards homosexual issues, precedent suggests that countries and their societies need to pass through stages. First, there must be a conscious acceptance that homosexuals exist and have the same rights to equal protection of the laws as any other member of society. Second, countries need the realization that these sexual minorities are targets of continuous discrimination in practically all areas of life: employment, marriage, healthcare, housing, adoption, and even education. Third, countries need the progressive passage of anti-discrimination laws that include sexual orientation as part of the statutory language; fourth, the eradication of the idea that homosexual activity is criminal, immoral, or deviant. Finally, same-sex partnership legislation that lead to full legal marriages. As history has shown, it may be a difficult road. However, it is not an impossible goal.
On July 8, 1996, the World Court, the International Court of Justice at the Hague, banned the bomb. 1

This was in answer to a question certified by the United Nations General Assembly, "Is the threat or use of nuclear weapons in any circumstance permitted under international law?" 2 The answer was no,
nuclear warfare is not permitted. The World Court has jurisdiction\(^3\) to give such answers, and even though the Court has no more battalions than the Pope or the Archbishop of Canterbury,\(^4\) still it is the closest thing we have to a final authority in international law, so the answer must have some importance. It is astonishing how little reaction and comment this ruling has generated.\(^5\)

In 1998, about two years after the ruling, India and Pakistan blasted their way into the nuclear club. A massive diplomatic response is now trying to persuade them to leave peacefully.\(^6\) But the United States and the Russian Federation each have many times the deliverable warheads of all the other nuclear powers combined,\(^7\) and present plans will allow those two arsenals to continue at omnicidal and ecocidal levels into the indefinite future. India and Pakistan can excuse themselves as small contributors to the nuclear threat, negligible when compared to the United States and Russia.

Long before the Indian and Pakistani bombs, the two great nuclear arsenals were being questioned by recovering Cold Warriors with impeccable military credentials—retired CIA chief Admiral Stansfield Turner,\(^8\) for instance, and retired SAC commander General George Lee

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4. Responding to criticism from the Catholic Church, Joseph Stalin replied, "The Pope! How many divisions does he have?" WINSTON CHURCHILL, THE GATHERING STORM 135 (1948) [emphasis in original].


Butler. Their old colleagues from the deep bunkers of the Iron Mountain era were finding it necessary to circle wagons and defend MAD, overkill, and the rest of the nuclear status quo. The World Court's ruling shows that law has a role to play in this debate. Some of the discipline necessary to call the world back from its long flirtation with extinction may come from legal reasoning, and may even come from one of the law's most disparaged departments, international law.

Therefore, let us examine the World Court's ruling. The lack of reaction and comment about the ruling may be largely the Court's own fault. The ruling consists of a formal dispositif, which seems to say there may be exceptions to the bomb's illegality; a rambling and diffuse "Advisory Opinion" by the whole Court, which offers little usable analysis of the issues; and fourteen separate opinions, one from each judge, no two concurring with one another. Most of the discussion is hopelessly abstract. As a political rallying point the ruling is unpromising. Clashing viewpoints and differing legal traditions from around the world, which could make the World Court an intellectual clearinghouse for the best hopes of humankind, came together, and a decision was reached to condemn the bomb. But the aspirations of Nuremberg were drowned by the confusions of Babel.

I. THE COURT HOLDS NUCLEAR WEAPONS SUBJECT TO LAW

Let us start with the World Court's formal dispositif. It has two sections. In section 1, the Court, by a vote of thirteen to one, accepted jurisdiction and agreed to issue an advisory opinion. In section 2, the Court held:


10. Several are quoted in Hendrickson, supra note 8.


12. Id. at 227-65.

13. All fourteen can be found in Nuclear Weapons, supra note 1, at 268-593. Nine of them are also published in 35 I.L.M. 809, 832-938. The other five can be found in 35 I.L.M. 1343, 1343-58.
A. Unanimously, there is in neither customary nor conventional international law any specific authorization of the threat or use of nuclear weapons;

B. By eleven votes to three, there is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such;

C. Unanimously, a threat or use of force by means of nuclear weapons that is contrary to Article 2, paragraph 4, of the United Nations Charter and that fails to meet all the requirements of Article 51, is unlawful;

D. Unanimously, a threat or use of nuclear weapons should also be compatible with the requirements of the international law applicable in armed conflict, particularly those of the principles and rules of international humanitarian law, as well as with specific obligations under treaties and other undertakings which expressly deal with nuclear weapons;

E. By seven votes to seven, by the President's casting vote, it follows from the above-mentioned requirements that the threat or use of nuclear weapons would generally be contrary to the rules of international law applicable in armed conflict, and in particular the principles and rules of humanitarian law;

However, in view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self-defense, in which the very survival of a State would be at stake.

F. Unanimously, there exists an obligation to pursue in good faith and bring to a conclusion negotiations leading to nuclear disarmament in all its aspects under strict and effective international control.14
Paragraph (2)A says there is no specific authorization for nuclear weapons. This states the obvious, but it is far from trivial. If the nuclear powers' reservations of their rights had been as successful as they claim, surely there would be some specific authorization somewhere. This paragraph makes clear that Hiroshima and Nagasaki are not precedents amounting to such a specific authorization.

Paragraph (2)B says there is no "comprehensive and universal prohibition of the threat or use of nuclear weapons as such." Language so loaded with qualification cries out for explanation. It is heavy with what logicians call negatives pregnant. Two of the three judges who voted against this paragraph—the three were Christopher G. Weeramantry of Sri Lanka, Mohamed Shahabuddeen of Guyana, and Abdul G. Koroma of Sierra Leone—cited the 1925 Geneva Gas Protocol as such a prohibition. The Court did not go along with this, so we must accept that the bold proposition that the bomb is illegal as a poisonous gas did not survive the Court's strict constructionism. One of the three judges, however, pointed to the negatives pregnant and claimed that the Court did not really deny the possibility of some nuclear prohibition: "The specificity conveyed by the words 'as such' enables me to recognize that '[t]here is in neither customary nor conventional international law any comprehensive and universal prohibition of the threat or use of nuclear weapons as such.'" Nevertheless, he voted against the paragraph, he said, because "the words 'as such' do not outweigh a general suggestion that there is no prohibition at all of the use of nuclear weapons." Both the nuclearists and the anti-nuclearists on the Court indulged in much of this kind of hair-splitting.

In any event, it was a "comprehensive and universal"—strong words—"as such" prohibition that paragraph (2)B rejected eleven to three. This rejection is trivial and meaningless as applied to customary law, which is not written down and therefore cannot prohibit anything "as such" (that is, by name, explicitly), and it is only a statement of regrettable but undeniable fact as applied to treaty law as it now stands, because the all-important Nuclear Non-Proliferation Treaty (below) prohibits possession, not use, or it prohibits use only by implication. There is less to paragraph (2)B than meets the eye.

15. See Nuclear Weapons, supra note 1, at 429, 433 (Opinion of Weeramantry); id. at 429, 508-12 (referencing the 1925 Geneva Gas Protocol); id. at 556, 580 (Opinion of Koroma) (citing Article 23(a) of the Hague Convention of 1899 and 1907 as well as the Geneva Gas protocol of 1925). The third objecting judge cited the 1925 Geneva Gas Protocol in support of a general principle against weapons that cause unnecessary suffering. Nuclear Weapons, supra note 1, at 375, 403 (Opinion of Shahabuddeen).


17. Id.
The unanimous holdings of the next two paragraphs, (2)C and (2)D, take away in practice more than paragraph (2)B allowed in theory. In these next paragraphs, the Court finds nuclear weapons firmly under the moderating hand of international law. The Opinion of the Court notes the general acceptance by the nuclear States that any use of nuclear weapons is "indeed restricted by the principles and rules of international law, more particularly humanitarian law . . . ." 18 "A weapon that is already unlawful per se, whether by treaty or custom, does not become lawful by reason of its being used for a legitimate purpose under the Charter," 19 i.e., self-defense, and even self-defense is subject to the rules of necessity and proportionality. 20 Any use of nuclear weapons must take account not only of the effects of the immediate use but also of the retaliatory use it is likely to engender. 21 It follows that any conceivable use of nuclear weapons would be illegal. All the negatives pregnant in paragraph (2)B are indeed gravid with significance. There are customary prohibitions against nuclear weapons, even if they are not, to the Continental legalist, entirely "comprehensive" and "universal" and against nuclear weapons "as such."

II. THE COURT CONDEMNS NUCLEAR WEAPONS "GENERALLY"

If the dispositif stopped there, anti-nuclearism would be far ahead. But there is the exasperating puzzle of paragraph (2)E.

A majority of the Court felt there must be some limit on its condemnation of nuclear weapons, or at least on the expression of it. Paragraph 95 of the Opinion says:

In view of the unique characteristics of nuclear weapons, to which the Court has referred above, the use of such weapons in fact seems scarcely reconcilable with respect for such requirements [the principles and rules of law applicable in armed conflict]. Nevertheless, the Court considers that it does not have sufficient elements to enable

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18. See Nuclear Weapons, supra note 1, at 239, 260, which quotes the submissions of several nuclear States: "Restrictions set by the rules applicable to armed conflicts in respect of means and methods of warfare definitely also extend to nuclear weapons." (Russian Federation, CR 95/29, p. 52); "So far as the customary law of war is concerned, the United Kingdom has always accepted that the use of nuclear weapons is subject to the general principles of the jus in bello." (United Kingdom, CR 95/34, p. 45); and 'The United States has long shared the view that the law of armed conflict governs the use of nuclear weapons—just as it governs the use of conventional weapons.' (United States of America, CR 95/34, p. 85)." Id. at 227, 260.
19. Id. at 227, 245 ¶ 39.
20. Id. at 227, 245 ¶¶ 41-44.
21. Id. at 227, 245 ¶ 43.
it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules of law applicable in armed conflict in any circumstance.\textsuperscript{22}

Most jurists, moralists, and logicians would accept this as a hand-wringing confession of the inevitable limits of human wisdom and language. But when the same thought appears in paragraph (2)E of the dispositif, it has become linked to “an extreme circumstance of self-defence, in which the very survival of a State would be at stake.”\textsuperscript{23} Would this mean that the Japanese could have legally used the bomb against America, had they had it in 1945?\textsuperscript{24} Or that Hitler could have put nuclear warheads in his V-2s?\textsuperscript{24} This would be an alarming concession, but the Court does not say nuclear weapons would be legal in such cases. The Court refuses to rule one way or the other.

The Court has been keeping the discussion on the level of abstract rules and principles, and avoiding concrete situations, real or hypothetical. Some of the judges seem to have in mind an all-out nuclear exchange, while others may be speculating about limited battlefield uses of tactical warheads under special and well-controlled circumstances, while still others struggle for a formula that would cover all conceivable scenarios with the phrase “nuclear weapons” in them. This may be inevitable in an advisory opinion, which does not give a court the pragmatic benefit of a factual situation. But here at the eleventh hour, one hypothetical—and a hypothetical hypothetical at that—is sneaked in and given prominent place. We could use more discussion of hypotheticals, or we could do without this one.

The individual opinions put all this in a better light. Four\textsuperscript{25} of the seven\textsuperscript{27} judges who voted for paragraph (2)E said explicitly that they

\begin{itemize}
\item \textsuperscript{22} Id. at 227, 262-63.
\item \textsuperscript{23} Nuclear Weapons, supra note 1, at 227, 266.
\item \textsuperscript{24} Both id. at 556, 561 (Opinion of Koroma) and id. at 375, 419 n. 33 (Opinion of Shahabuddeen) point out that this idea of an unlimited right to defend the State was rejected at Nuremberg.
\item \textsuperscript{25} Robert Musil, of Physicians for Social Responsibility, has suggested (orally, in a class) that the great powers might have taken a more negative attitude toward nuclear weapons and might have avoided the nuclear arms race entirely if they had first encountered the atomic bomb as an Axis weapon used against London or San Francisco.
\item \textsuperscript{26} Nuclear Weapons, supra note 1, at 556-82 (Opinion of Koroma); id. at 330-74 (Opinion of Oda); id. at 375, 376 (Opinion of Shahabuddeen: “My difficulty is with the second part [of (2)E]”); id. at 429, 433 (Opinion of Weeramantry: “My considered opinion is that the use or threat of use of nuclear weapons is illegal in any circumstances whatsoever” [emphasis in original]).
\end{itemize}
objected only to the limits on the condemnation of nuclear weapons, and
that they thought the condemnation should have been absolute. Only one
of the dissenting seven, Judge Schwebel, candidly argued for the legality
of the bomb. (This leaves two who were ambiguous or unclear,
Guillaume and Higgins.) Of the seven who voted for the paragraph,
not one of them expressly said he would have voted against it had it been
stronger and had the condemnation been without limits. No matter how
the limitations got in there, we have both a clear statement that most uses
of the bomb would be illegal and a possible majority of judges believing
that any use would always be illegal.

III. THE NON-PROLIFERATION TREATY BANS POSSESSION

Whatever the cautionary negatives in the first several paragraphs of
the dispositif, the tone changes in the final paragraph, (2)F. The Court
lays down the law and spells out a clear and unequivocal obligation for
future action: The nuclear signatories of the Non-Proliferation Treaty
must give up their nuclear weapons. The negotiations leading to that treaty
resulted in a bargain between the nuclear States and the non-nuclear States,
with the nuclear States agreeing to Article VI: "Each of the Parties to the
Treaty undertakes to pursue negotiations in good faith on effective
measures relating to cessation of the nuclear arms race at an early date and
to nuclear disarmament, and on a treaty on general and complete
disarmament under strict and effective international control."
The last paragraph of the dispositif, (2)F, holds the signatory nuclear States to this agreement. It unanimously decrees that these nuclear powers are obliged to negotiate complete nuclear disarmament. Paragraph 99 of the Opinion of the Court amplifies this:

The legal import of that obligation goes beyond that of a mere obligation of conduct; the obligation involved here is an obligation to achieve a precise result—nuclear disarmament in all its aspects—by adopting a particular course of conduct, namely, the pursuit of negotiations on the matter in good faith.34

The Court went on to support this voluntarily incurred treaty obligation, this promise made by each nuclear power to all the other States signing the Non-Proliferation Treaty, by citing General Assembly resolutions from the very first onward,35 and the statements of the 1995 NPT review conference.36 Thus, the Court squarely rejected the notion that the post-Cold War world order might include the United States and the Russian Federation bristling with thousands of nuclear weapons each.

IV. NATIONS OUTSIDE THE NON-PROLIFERATION TREATY

When the Court discusses possession, it takes the course of least resistance and most certainty by leaving unwritten law behind and focusing on the Non-Proliferation Treaty. Little did anyone know how dramatically attention would shift two years later to nations outside the Treaty, when two of them, India and Pakistan, would write in subterranean fire the questions the Court neglected to answer: Is it lawful under international law, outside of the Non-Proliferation Treaty, for a nation to arm itself with a nuclear weapon? Is it lawful even if the nation in question has a traditional enemy that is sure to respond by similarly arming itself? Is it lawful to start or join a nuclear arms race?

34. Id. at 227, 263-64.
The arguments against the lawfulness of any nation, even one outside the Treaty, acquiring a nuclear weapon are many. Acquiring a nuclear weapon, especially when one's adversaries are likely to acquire it too, is a threat to international peace and security. So the UN Security Council said through its president in 1992: “The proliferation of all weapons of mass destruction constitutes a threat to international peace and security...” If use of nuclear weapons is a crime against humanity, then preparation for use must be at least an inchoate illegality. And when a treaty commands as much acceptance as has the Non-Proliferation Treaty, it may be declaratory of the *jus cogens*, the general principles binding on all. Perhaps a nation gains nothing by holding back its signature. We can assume that all these arguments are being made to India and Pakistan—and to Israel as well, one hopes. But the World Court did not explicitly address the question of nations outside the Nuclear Non-Proliferation Treaty.

V. THE JUDGES' SEPARATE OPINIONS

The fourteen separate opinions, one from each member of the Court, suggest by their very bulk that the *dispositif* and its limitations may not have been the optimum set of compromises. It is too much to expect that fourteen judges using different languages and grounded in differing legal traditions might sharpen issues as effectively as, for instance, the nine members of the United States Supreme Court sometimes do. But we cannot help but wish that their output might have been both shorter and clearer.
A. The Anti-Nuclearists

Three of the separate opinions, long as they are, make good reading for the anti-nuclearist: Christopher G. Weeramantry of Sri Lanka covered 126 pages (about 50,000 words) with arguments against the bomb;\(^4\) Mohamed Shahabuddeen of Guyana fifty-three pages (about 20,000 words);\(^2\) and Abdul G. Koroma of Sierra Leone, twenty-six pages (about 10,000 words).\(^3\)

Koroma was one of the judges mentioned above who voted against paragraph (2)C because they believed that the gas protocols and other conventions do ban nuclear weapons "as such." He voted against paragraph (2)E because he read the Nuremberg tribunal as saying a State’s right to ensure its own survival is not unlimited,\(^4\) and the ICJ’s own Nicaragua case likewise.\(^5\) He found the fifty-year tradition of non-use amply backed by an opinio juris against the bomb, making it binding law.\(^6\) In one of the few references\(^7\) to Hiroshima and Nagasaki by any member of the Court, Koroma said: "It should not be forgotten that the Second World War had witnessed the use of the atomic weapon in Hiroshima and Nagasaki, resulting in the deaths of thousands of human beings. The Second World War therefore came to be regarded as the period epitomizing gross violations of human rights."\(^8\)

Koroma dismissed the distinction between treaty law, admittedly binding, and humanitarian customary law, which the United States and

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42. *Id.* at 375-428 (Opinion of Shahabuddeen).
43. *Id.* at 556-82 (Opinion of Koroma).
44. *Id.* at 556, 561 (Opinion of Koroma) (citing THE INTERNATIONAL MILITARY TRIBUNAL SITTING AT NUREMBERG GERMANY, THE TRIAL OF GERMAN MAJOR WAR CRIMINALS, vol. 1 at 208.
46. *Id.* at 556, 578-79 (Opinion of Koroma).
47. Shahabuddeen quoted a Red Cross reaction to Hiroshima and Nagasaki and cited to the Tokyo District Court ruling condemning those urbicides: Shimodo v. The State, 8 JAPANESE ANN. OF INT’L L. 212, 235 (1964). Nuclear Weapons, *supra* note 1, at 375, 383, 397 (Opinion of Shahabuddeen). Weeramantry argued those bombings did not show that modern nuclear war would be survivable because, for one thing, they did not involve the modern risk of escalation. *Id.* at 429, 473-75 (Opinion of Weeramantry). Other references to the Japanese cities were perfunctory or dealt only with the destruction and injury done there. For a summary of the statements of the mayors of Hiroshima and Nagasaki, see *id.* at 556, 567-69 (Opinion of Koroma).
others had urged the Court to leave to political consideration.49 He cited several authorities rejecting such a double standard and holding that the humanitarian side of customary law is part of the jus cogens binding on all.50

Weeramantry and Shahabuddeen were as anti-nuclear as Koroma, and wrote at greater length. The idea that nuclear weapons are essentially a gas and are prohibited by the anti-gas protocols51 was rejected by the majority of the Court, but many of their other points remain arguable law.

B. The Candid Nuclearist

The only unabashed apologist for the bomb was the American, Judge Harold Schwebel, Vice President of the Court. Schwebel served for many years in the office of the Legal Advisor in the United States State Department. His opinion begins, “More than any case in the history of the Court, this proceeding presents a titanic tension between State practice and legal principle.”52 He claims that for a half-century, the threat to use nuclear weapons has been clear and constant from the major States, States “that together represent the bulk of the world’s military and economic and financial and technological power and a very large proportion of its population.”53 But we know the vast majority of States do not possess nuclear weapons, and those that possess them seldom or never make threats, even implicitly, and have not used a nuclear weapon since 1945. This more accurate view of State practice would take some of the titanic out of Judge Schwebel’s tension between practice and principle.

Schwebel takes similar liberties by enlisting the treaty regimes of the last half-century on the pro-nuclear side of his tension. All the limited nuclear bans, such as the Non-Proliferation Treaty, legitimize that which they do not ban, he argues.54 He carries this to the extreme of reading the assurances of non-use the nuclear powers gave to the non-aligned, non-nuclear signatories of the Non-Proliferation Treaty as implying the threat to use nuclear weapons elsewhere.55 As for the anti-nuclear General

50. Id. at 556, 572-74 (Opinion of Koroma).
51. Id. at 429, 433 (Opinion of Weeramantry). See supra note 15.
52. Id. at 311 (Opinion of Schwebel).
53. Nuclear Weapons, supra note 1, at 311, 312 (Opinion of Schwebel).
54. Id at 311, 315-17. (Opinion of Schwebel). Many nations have said explicitly when supporting these limited bans that they do not mean to validate bombs outside of the ban.
55. Nuclear Weapons, supra note 1, at 311, 315-17 (Opinion of Schwebel).
Assembly resolutions, Schwebel requires that such resolutions be "adopted unanimously (or virtually so, qualitatively as well as quantitatively) or by consensus . . ." before they become evidence of the world's opinio juris. Thus he claims that the resolutions passed by mere majorities serve only to show that the law is the opposite of what they say.

Schwebel accepts the concessions of the nuclear powers that any nuclear use is subject to the humanitarian principles of law. Those principles are what make up the anti-nuclear side of his tension. He agrees there is a problem in the deterrence theory of the nuclear States: It rests on a professed willingness to incinerate millions of civilians with no conceivable proportionality to any legitimate military objective, and such behavior is against generally accepted principles of humanitarian law. Faced with this contradiction, Schwebel comes close to concurring with the Court's anti-nuclear ruling: "The use of nuclear weapons is, for the reasons examined above, exceptionally difficult to reconcile with the rules of international law applicable in armed conflict, particularly the principles and rules of international humanitarian law."

Further to his credit, Schwebel puts forth a hypothetical. What if a rogue submarine were destroying cities and killing and threatening to kill millions? Ordinary depth charges are powerless against it. Would it be illegal to hit it with a nuclear depth charge, a clean nuclear explosion that would save the threatened cities with no collateral damage, fallout, or risk of escalation?

We asked for hypotheticals, so it is only fair that we give our enthusiastic endorsement to this virtuous nuclear explosion. It sounds as wholesome as a nuclear bomb vaporizing a giant meteor headed toward the earth, and about as likely. In the post-nuclear world, there will be no submarines capable of killing millions, and the greater safety lies in seeing that such incapacity comes about as soon as possible. A legal rule should

56. Id. at 311, 319.
57. Id. at 311.
58. Id. at 311, 321.
60. Likewise for nuclear terrorism, where nuclear weapons in the hands of national authorities would be of little value anyhow. Whatever the virtue or necessity of some residual nuclear capability remaining with some authority, we are so far from that level of disarmament that it is dishonest to talk about it. The present issue when we talk about law and rules is this: Can the general rule against nuclear weapons per se be destroyed by improbable thought-experiments or does the general ban, with its authorization to keep nuclear weapons away from terrorists and rogue nations, stand as a general ban, whatever the limitations and defeasibility of all verbal rules?
condemn a source of danger, not condone it in the hope that it might possibly in some extraordinary case serve as a homeopathic antidote to itself. Schwebel's interest in this hypothetical reflects the same view as the United States' filing with the Court: the view that the Court should not attempt to synthesize a verbal rule unless a treaty has led the way and supplied the rule, and that any rule as verbalized must be indefeasible by any conceivable set of circumstances. There is some authority for this kind of judicial restraint in the healthy maxim **nulla poena sine lege** (no punishment without a law), but as far as major crimes against humanity are concerned, it was conclusively rejected at Nuremberg.

The underlying problem with Schwebel's approach is his allocation of burdens of legal persuasion. If he encounters a divided view on any nuclear issue, it is nuclearism that prevails, and restraint must bear the risk of non-persuasion. He rests this on the adage that that which is not prohibited is allowed—a sound principle, but one that does not apply to mass destruction. With mass destruction, that which is not specifically and affirmatively justified, and brought within some extraordinary license, is illicit—because mass destruction is generally illicit. Schwebel's approach is well-illustrated by some speculations about the 1991 Gulf War that take up the final pages of his opinion. Tariq Aziz, the Iraqi Foreign Minister, has claimed that Iraq had been ready to use chemical and biological warfare but was deterred by the veiled nuclear threats of United States Secretary of State James Baker. Schwebel offers this as an instance of the bomb having a healthy effect. His logic here is the eternal logic of bellicism: The bomb gets credit for deterring everything the Iraqis did not do, however speculative their ability to do it, but need accept no embarrassment for what they actually did do, in defiance of the same deterrent.

But putting aside this fundamentally misplaced presumption of regularity, Schwebel's opinion presents issues at the crux of this case:

1) How are the opinions of nations to be weighed? Do the great powers outweigh the rest of the world in determining legal consensus? Or are all foreign offices created equal? Or does the truth lie between these extremes?

2) To what extent should any official or any commentator, including the International Court of Justice, limit its discussion of international

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law to written treaties, and dismiss the opinion of humanity because it is diffuse and ill-defined?

3) Do the unwritten principles of humanitarian law ever ban a particular weapon, or must those principles always address only the results accomplished?

The first question will disappear if and when the United States and the other nuclear powers cease opposing the rest of the world on the legality of nuclear arms. The Court's ruling answers the second question for the International Court of Justice at the Hague: The unwritten law of humanitarian restraint is as real there as it was at Nuremberg a half-century ago.6 The third question remains as the last-ditch defense of nuclearism: Maybe we can't use our nuclear weapons and maybe we are obliged to get rid of them, but just don't say that they are illegal per se. The nuclearists' world may end not with a bang but a quibble.

We can be grateful to Schwebel for his clarity and candor. He voted against paragraph (2)E because he saw no general illegality in the use of nuclear weapons, and a clear majority of the Court voted down that theory.

VI. THE LAW AS IT NOW STANDS

Our review of the World Court's work has perhaps smacked of ingratitude. The International Court of Justice is the closest we have to a final authority in international law (even if it is not one, because nations reserve the right to ignore its opinions). When such an authority condemns the bomb, it seems ungrateful to complain of obscurity or lack of clarity. The World Court accomplished much. Because of its efforts we can now declare large areas of law settled. Let us try to outline the law as it now stands. First, some obvious distinctions:

1) Categories of nuclear acts: research, development, acquisition, stockpiling, deployment, threatening to use, and the actual use of nuclear weapons.

2) Categories of use: peaceful explosions, testing, and the possible combat uses, all of which have been hypothetical since 1945: tactical use in controllable situations, limited escalations, counterforce escalations, countervalue escalations, urbicide, genocide, omnicide, ecocide, etc.

3) Sources of law: customs joined with an opinio juris, including the basic humanitarian laws of war; treaty regimes, also confusingly called conventional law; and fully implemented rules acknowledged

63. Nuclear Weapons, supra note 1, at 265.
by States and conveyed to their officials by laws, orders, and regulations.

4) Criteria of legality: rules that forbid a given weapon *per se*, and rules that forbid certain weapons because of the unlikelihood that they can be used legally; rules that forbid a weapon by name, and rules that denounce it by description.

With all of this factual and conceptual variety, and with the general lack of institutional settlement in international law, there is much we cannot say with authority. But if we focus on the use of nuclear weapons, we find three points that are now generally accepted by nuclear and non-nuclear States alike:

1) Any military use of nuclear weapons is subject to the unwritten principles of humanitarian law, the law referred to in the Martens clause.  

2) These principles ban the targeting of civilians.

3) They require economy and proportionality even when the targets are military.

4) While the nuclear powers accept these points, they seem to have trouble with what obviously follows: that any nuclear exchange would be against international law as well as violating every other standard of human conduct. So would any nuclear bombing of any city. Only the most unlikely hypothetical use—against Schwebel’s rogue submarine, for instance—could avoid collateral consequences of escalation and fallout enough to escape a ringing condemnation by “the requirements of the public conscience.” Even the smallest of “tactical” nuclear artillery would bring down on the nation or group using it the odium of humankind for crossing the nuclear threshold.

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64. *Id.* at 227, 266. The Martens clause says that, unless otherwise provided, “populations and belligerents remain under the protection and empire of the principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience.” *See, e.g.,* Hague Convention II of 1899, Convention with Respect to the Laws and Customs of War on Land, 32 Stat. 1803, 1805. *See also 3 ENCYCLOPEDIA OF PUB. INT’L L.: MARTENS’ CLAUSE 326-27 (1997).* A more recent form of the Martens clause is quoted at Nuclear Weapons, *supra* note 1, at 227, 257.


66. *Id.* at 227, 245 (Opinion of the Court).

67. *Id.* at 227, 266.

68. *Id.*

69. *Id.* at 227, 245 (Opinion of the Court).
Thus the half-century of non-use is not a legal irrelevancy. It has given rise to law as clear as any written on paper and signed at conference tables, and breaking it would cost any nation or group dearly. Counselors who try to define this law out of existence will regret their words, should anyone ever be foolish enough to act upon their advice.

VII. WHITHER NOW?

Apart from all the considerations discussed above, humanitarian law as well as treaty law should have something to say about the sheer mass of the two largest nuclear arsenals, even after their post-Cold War reductions, because no conceivable military or political threat can justify the risks of omnicide and ecocide involved. There are several distinct principles at work here: Any acquisition of a nuclear bomb is destabilizing and a threat and should be denounced as illegally aggressive under the Charter, in addition to its illegality under the Non-Proliferation Treaty. But quite separate from this, and antecedent to even the simplest attempts at forming international law, when a nuclear arsenal reaches the size that it becomes a threat to the life of the planet itself as well as a threat to the peace, it must acquire yet another dimension of illegality. None of this is covered in the Court’s opinion.

The Russian Federation and NATO have switched places since the days of John Foster Dulles, but still the weaker side sees its nuclear weapons as a cheap substitute for the prohibitively expensive buildup it would need to reach a balance of conventional forces. This was American doctrine under Truman and Eisenhower, when faced with the massive Red Army sprawled over half of Europe, and it is the doctrine of the Russians now, faced with NATO expanding into former Soviet satellites. It would dramatically enhance the American margin of power if the nuclear weapons were out of the order of battle.

On most of the above legal questions, the United States professes doctrines different from the rest of the world. That is the chief source of legal obscurity. Judge Schwebel and others find benefit in this obscurity. This is the crux of this matter: Which is safer, a world professing the illegality of nuclear weapons and seeking to suppress them by that illegality, or a world professing their legitimacy and hoping to hold them in check by their own dangerous effects, such as nuclear diplomacy and

71. Bernard Baruch to John Foster Dulles, Oct. 5, 1948: “The only thing that stands in the way of the over-running of Europe today is the atom bomb. When once we outlaw that, there is nothing to stop the Russian advance.” UNITED STATES DEPARTMENT OF STATE, FOREIGN RELATIONS OF THE UNITED STATES 1948 448, 450 (Vol. 1, Part I, 1975).
nuclear terror? Because the issue is not capable of experimental resolution, the answer must turn on presumptions and judgment. When it comes to the omnicidal arsenals now in place, and to the proposed retention of enough of those arsenals for multiple genocides, the world must vote down Judge Schwebel, his former colleagues in the Department of State, and those of like mind in the Russian Federation.

Somewhere, sometime, there may have been a State that refrained from an evil act because its legal advisors could not say nuclear retribution against it would be illegal. It seems unlikely. But we know for sure that States such as India and Pakistan rely on the legal arguments of the nuclear States when they claim the right to become nuclear. So we must seize the chance the World Court has given us to rectify the legal confusion left over from the 1940s and 1950s, and declare to, and for, all the planet that the United States accepts the rule that no one may lawfully use a nuclear weapon. Then we must give the Russian Federation the assurances it needs so that all the nuclear powers may carry out the promise of Article VI and rid the world of their nuclear weapons. If we let the present window of relative opportunity pass, and if the Russian Federation is left with its thousands of warheads—unstable, but cocked and ready to go—we will deserve the curses of our descendants, if we have any.
PRESSURE FROM ABROAD AGAINST USE OF CAPITAL PUNISHMENT IN THE UNITED STATES

John Quigley

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I. INTRODUCTION

Foreign pressure on the United States on the capital punishment issue continues to build. Fewer States around the world are employing capital punishment. This progression leaves the United States more and more isolated as one of only a handful of States that execute as criminal punishment. The isolation is particularly strong on the issue of the execution of juvenile offenders. While some States have stricken capital punishment from their statute books, others have simply ceased using capital punishment in practice. They have taken the approach of a de facto moratorium.

In many States of the world, capital punishment, whether imposed on adults or on juveniles, is regarded as a throwback to a former era and is condemned out of the same considerations that have resulted in universal condemnation of the use of torture. In Europe, capital punishment is outlawed by treaty as a human rights violation. In Latin America, capital punishment is used by only a few small States. These are the two regions of the world with the closest ties to the United States.

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II. POLITICAL PRESSURE

In addition to isolating the United States by their own practice, other States have taken affirmative steps to curb the use of capital punishment by the United States. Within the past year, capital punishment in the United States has become a major political issue in the United States-Europe relationship. When the European Union and United States met for a summit meeting in 2000, capital punishment in the United States was viewed by commentators as a major issue impeding the development of a closer transatlantic relationship. European leaders frequently raise the capital punishment issue with United States officials.

On April 13, 2000, the European Parliament formally requested of President Clinton that he institute a moratorium on federal executions in the United States. On July 12, 2000, the European Union made a similar request of President Clinton. The European Union added a call to President Clinton to exercise his power of clemency with respect to Juan Garza, who was scheduled to be executed for a federal crime, and who would have been the first person executed under recently adopted federal legislation providing the death penalty for a wide variety of offenses.

These démarches are, as international relations go, extraordinary developments. States do not readily make a public request to another State on a matter of the domestic policy of the other State. States value too highly their own sovereignty to criticize other States over domestic policy. To do so sets a precedent and may lead to a request by the United States in the future on some issue of domestic policy in Europe. The fact that the European Parliament and the European Union took this step indicates strong sentiment in Europe that the United States, by using capital punishment, acts beyond the limits of what is acceptable.

International human rights mechanisms have also been invoked with respect to use of capital punishment in the United States. The United Nations Human Rights Commission undertook a study of the application of the death penalty in the United States, sending a special rapporteur to visit the United States and to analyze the manner in which capital punishment is used.\(^1\) The report found racial bias in the use of capital punishment in the United States.\(^3\) It also concluded that the use of capital punishment is arbitrary in that standards do not seem to be followed with respect to the question of who is subjected to capital punishment.\(^3\)

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2. \textit{Id.}
3. \textit{Id.}
III. EXTRADITION IN CAPITAL CASES

Many States, both European and others, refuse to extradite persons requested by the United States, if capital punishment awaits them in the United States. Many foreign States have insisted on the insertion, in bilateral extradition treaties with the United States, of a clause that allows the requested State to decline to surrender a person being charged capitally. In the context of requests by the United States for the surrender of suspects, many foreign States have insisted on this clause and have refused to extradite unless the United States first agreed that capital punishment would not be sought for the suspect.

In one case in Europe, the United States sought the surrender by the United Kingdom of a man wanted on a capital charge in Virginia. A United States-United Kingdom treaty contained a clause on capital punishment, but the United Kingdom, after some hesitation, did not insist that United States authorities commit to foregoing a capital charge against the man. The man took the matter to the European Court of Human Rights, which ruled that if the United Kingdom were to extradite, it would itself be in violation of a provision in the European human rights treaty that precludes inhuman and degrading treatment.

The United Kingdom complied with the ruling of the European Court of Human Rights. It informed the United States that it would surrender the man only if the United States undertook that he would not be executed. The United States was forced to make such a commitment, and only then was the man surrendered. After being surrendered, he was convicted of non-capital murder in Virginia.

Pressure has also been exerted on the United States by the committee that monitors compliance with the International Covenant on Civil and Political Rights. In one case, the issue was manner of execution. Canada was about to extradite to the United States a man sought on a capital charge in California. In a complaint against Canada to the monitoring committee, the man argued that the gas chamber as then used in California inflicted unnecessary suffering, and therefore if Canada surrendered the man, Canada would violate a provision in the International Covenant on Civil and Political Rights that forbids inhuman and degrading treatment or punishment.

5. Id. at 444.
6. Id. at 439.
The monitoring committee agreed with this argument and ruled that Canada would be in violation of the International Covenant were it to surrender the man for a trial on a capital charge in California. Canada surrendered the man without conditions. However, after he was surrendered, United States courts came to the same conclusion as the monitoring committee about the California gas chamber, ruling that its use caused unnecessary suffering and therefore violated United States constitutional protections.

IV. FOREIGN CONSULS IN UNITED STATES COURTS

Consuls of foreign States who are accredited in the United States have become increasingly active in recent years in seeking to ensure that capital punishment not be imposed on their own nationals. It is estimated that approximately seventy foreign nationals are currently under a sentence of death in the United States and are awaiting execution. In a recent case in Illinois, a Polish national was convicted of capital murder and sentenced to die. The Polish Consul in Chicago intervened in the case at the appellate stage, thereby becoming a third party to the litigation. The consul's challenge to the death sentence was based on the failure of Chicago police to inform the individual at the time of arrest that he had a right to approach the Polish Consul for assistance. The governments of both Germany and Mexico filed briefs as amicus curiae in support of Poland's Consul.

The United States, along with some one hundred sixty other States, is party to a multilateral treaty, the Vienna Convention on Consular Relations, which stipulates that detaining authorities must inform a foreigner, upon detention, of the right to contact the home State consulate for assistance in preparation of a defense. Police in the United States rarely comply with this obligation, and as a result most of the seventy or so foreigners presently under death sentences in the United States were not informed of their right of consular access.

The Chicago case went to the Supreme Court of Illinois, which upheld the death sentence by a four to three vote, on the ground that the defendant had not raised in a timely manner the issue of the failure of police to

11. Id. at 423.
12. Id. at 425.
13. Id. at 426.
inform him of his right to approach the Polish Consul. The three dissenting judges would have voided the death sentence for the police's failure. One of the four judges in the majority stated that he considered it more appropriate that the individual serve a jail term in Poland, rather than be executed in Illinois.

Foreign governments now routinely file briefs as *amicus curiae* in cases in which foreign nationals are subjected to a capital charge. While such briefs more often than not do not convince the court to reverse a death sentence, the cumulative effect may be considerable. On occasion, courts respond. One recent murder case in Ohio, albeit a non-capital case, involved a young Mexican man who had recently arrived in Ohio to do agricultural work. In the middle of the night, someone broke into the apartment where he and several other young Mexicans were living, with the apparent intent to steal. One of the young Mexicans apparently chased the intruder out of the house and shot and killed him. One of the young Mexicans was arrested and was interrogated through an interpreter at a local police station. He was tried and convicted and sentenced to life in prison.

On appeal of the conviction, the Mexican government filed a brief as *amicus curiae* on behalf of the young man. In preparing that brief, the Mexican government discovered a fact that had to that point not been apparent to lawyers on either side, namely, that the interpreter who helped the police interrogate the young man barely spoke Spanish, and that, in particular, the manner in which she rendered the Miranda warnings bore little relation to the warnings the United States Supreme Court requires be conveyed to a suspect. As a result, the Ohio Court of Appeals reversed the murder conviction.

Incidents like this case can have an impact at the local level that can raise protections for foreign nationals against false convictions, including capital convictions. Following the reversal by the Ohio Court of Appeals, procedures in the particular county were changed to increase the chances that a non-English-speaking suspect would be properly informed of the

16. *Id.* at 429-32.
17. *Id.* at 428.
19. *Id.* at 1066.
20. *Id.*
21. *Id.*
22. *Id.*
Miranda rights and would be interrogated through a competent translator. Procedures were also changed to ensure that foreigners arrested as criminal suspects be informed of their right to contact the consul of their home country.

In their efforts to stop executions, foreign consuls have found an ally in non-governmental organizations with an international focus. Both Amnesty International and the American Branch of the International Law Association have filed amicus curiae briefs in such cases, urging strict compliance with the Vienna Convention on Consular Relations.

V. INTERNATIONAL LITIGATION

In two instances, a foreign State has taken the United States to the International Court of Justice over the imposition of capital punishment on one of its nationals. Paraguay filed such a case in 1998, and Germany did so in 1999. Germany's case is pending before the Court, having proceeded through the state of oral argument. Germany's ground for alleging illegality is that the two German nationals, who were charged with capital murder in Arizona, were not informed at the time of arrest of their right to contact a German Consul. A multilateral treaty to which Germany and the United States are parties requires that such information be given. A protocol to the treaty provides that in the event of non-compliance, the State whose national was the suspect may sue in the International Court of Justice. Under procedures of the International Court of Justice, which are agreed by treaty, decisions of the Court are binding on the parties.

Thus, Germany seeks a Court ruling that would be binding on the United States in this case. Germany is asking the Court to rule that if the obligation to provide the necessary information to a suspect is not fulfilled, a court may not convict the person, and if it does the conviction must be reversed. In the instant case, the two German nationals have already been executed by the state of Arizona. Germany seeks a ruling by the Court that would preclude the United States from executing in the future a foreign national who has not been informed of the right to contact a consul.24

Pressure has also been brought to bear on the United States by a 1999 advisory opinion issued by the Inter-American Court of Human Rights. The opinion dealt with the obligation to inform foreign nationals detained as criminal suspects of their right to contact their consulate, in particular in the context of capital cases. The Court ruled that a conviction secured after a failure to comply with this obligation may not stand. The Court

also ruled that where such a flawed conviction leads to a death sentence, the right to life, an internationally secured human right, is violated. The Court said consular assistance is an element of due process because it allows a foreign national to present a proper defense.\(^2\) The Court said the imposition of a death sentence without compliance with the obligation to inform of the right of consular access constitutes arbitrary deprivation of life, in violation of the International Covenant on Civil and Political Rights, and of the American Convention on Human Rights.\(^2\)

VI. FEDERALISM AS AN OBSTACLE

A factor that limits the effectiveness of international pressure on the United States on the capital punishment issue is the nature of the United States' system of government as a federal system. The pressure is felt largely by the federal government, because it carries out foreign relations. Capital punishment, however, is carried out primarily by the constituent states.

The pressure complicates life for the federal government, as it is forced to respond to criticism, and as it is responsible for extradition. The pressure is felt much less by the states, where the executive branch (state governors) and the legislative branch largely view international pressure as irrelevant. Some pressure, to be sure, has been exerted on state institutions by foreign actors, in particular in making representations to state governors about particular pending executions. In many instances, foreign non-governmental organizations and individual foreign officials have approached a governor to ask for a reprieve, even in cases in which the condemned person was a United States national. Nonetheless, because state governors do not have to deal with foreign governments on a regular basis, they can ignore the representations without any significant political cost.

The federal government has exerted some pressure on states in response to pressure being exerted from abroad on the federal government. To date, however, the federal government has tread quite cautiously in this realm. It has not taken action to compel states to comply with international obligations. The instance in which the federal government has gone the farthest is extradition. Here it has, on more than a few occasions, made a commitment to a foreign government that a person sought by a state within

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26. Id. at ¶ 137.
the United States on a capital charge would not be subjected to capital punishment. It has then informed the authorities of the state that it is able to secure the surrender of the individual only on condition that capital punishment not be imposed. To date, state prosecuting officials have complied with this condition and have foregone pursuing a death penalty.

Federalism, to be sure, may not be an insuperable obstacle to the federal government in securing a change in policy by the states on an important social issue. One need only recall school desegregation in the 1950s, where the federal government pursued a policy of reform despite strong opposition from many states.

VII. THE IMPACT OF INTERNATIONAL PRESSURE

International pressure operates in a fashion that oftentimes seems exceedingly weak. When the United Nations Human Rights Commission, as noted above, criticized the United States on its use of capital punishment, federal authorities immediately rejected the report. They had, in fact, declined to cooperate with the United Nations rapporteur while he was in the United States conducting his study.\(^2\) Despite such reactions, one cannot dismiss such pressure. It is difficult to predict the long-term effect of pressure. Measures of pressure that seem inconsequential can work with others to produce results. On the one hand, the United States is more resistant to international pressure than most States, as a result of its economic independence and strength. Weaker States are more subject to pressure, because they depend for economic aid on other States that may invoke human rights criteria as a condition to extending aid.

One example among many is the concern shown by Ethiopia in trials that have been in process there for a number of years against members of the prior government for atrocities those persons are alleged to have committed while in office. On the one hand, Ethiopia was under pressure from the donor community to try these persons. At the same time, it was under pressure from the donor community to try them applying standards of due process. Donor States established aid projects to assist in the conduct of both the prosecution and defense in these cases, to ensure observance of due process. Because Ethiopia is dependent on aid for economic progress, it was keen to accept this assistance in order to maintain good standing with the donor community.

A State like the United States is obviously in quite a different position. Far from being subject to pressure like that which can be placed on Ethiopia, the United States often seems to enjoy a kind of informal

immunity on human rights matters. As a State that gives aid instead of receiving it, it is unlikely to be pressured by States that receive aid from it, and most States of the world do. The only States with sufficient economic independence to put pressure on the United States are the European States. It is those States, for example, and those alone, that have filed formal objections to the extensive reservations that the United States entered when it ratified the International Covenant on Civil and Political Rights. In particular, several of them filed objections to the United States reservation to the provision of the Covenant that prohibits the execution of persons who were juveniles at the time of committing the offense for which they were convicted. Only a very few States of the world allow the execution of such persons, so presumably most States of the world viewed the United States' reservation in a negative light. However, it was only several States in Europe that went to the length of filing a formal reservation.

At the extreme, international pressure takes the form of developing an international-legal norm, which could be a treaty outlawing capital punishment, or the emergence of a norm of customary international law against its use. In either event, however, the United States could opt out. It is not required to ratify any draft treaty on capital punishment. And even if all States except the United States come to the view that capital punishment is precluded by international custom, the United States could insist that it does not accept this customary norm. States that object to the formation of a customary norm are not bound by it, even if it is a customary norm as to all other States.

Finally, even if the United States did become bound by a treaty or customary norm against capital punishment, judicial redress would probably not be available, either for an individual facing execution, or for a foreign State.

The rulings by the European Court of Human Rights in the Soering case, and by the monitoring committee of the International Covenant on Civil and Political Rights in the Ng case, represent a unique form of pressure, in that the States found to be under an obligation were not the United States but the States where suspects sought by the United States were found. Thus, the United States' insistence on seeking the death penalty created international complications for the United Kingdom and for Canada. Each of them was haled in as a defendant State before an international human rights body and was required to explain its conduct. In these instances, use of capital punishment by the United States caused substantial inconvenience and significant allocation of resources by the United Kingdom and Canada in connection with the proceedings that were taken against them.
What one might call the "nuisance effect" of international pressure is one way it often operates. All States prefer smooth relations with others. For the United States, when it schedules a summit with the European Union to discuss economic and political issues, it is a significant distraction if the United States is bombarded with questions about death sentences in Texas or Florida. The "nuisance effect" is heightened when the inconvenience is caused as well to one's allies, as occurs, as noted above, when the United States seeks extradition on a capital charge.

Other States would prefer not to have to be concerned about United States' use of capital punishment when they get an extradition request from the United States. The inconvenience is particularly significant for Canada, because it shares a border with the United States and not infrequently finds itself hosting persons who have fled United States justice. Canada, on the one hand, has taken a firm stand against capital punishment, and many Canadian officials would probably prefer not to be in the position of facilitating death sentences in the United States by surrendering fugitives. On the other hand, because of its very proximity to the United States, Canada is concerned lest it become a haven for large numbers of fugitives. The use of capital punishment in the United States creates a dilemma for Canada, one in which it would prefer not to find itself.

It is difficult to calculate the cumulative effect on the United States of the pressure being exerted upon it on the capital punishment issue. On this, or other issues, pressure can be exerted over a long period without substantial effect. On the other hand, incidents may occur or situations may develop that will highlight the issue, and suddenly the cumulative effect of the pressure can produce dramatic results.

Foreign States have shown considerable consistency in pressuring the United States. This is in one sense surprising, because the United States holds a position of economic predominance that frequently immunizes it from pressure on human rights matters. The strength of sentiment against capital punishment has been sufficiently strong that foreign States have continued the pressure. Popular sentiment has at times played a role. In particular, in situations in which a national of a foreign State is scheduled for execution in the United States, marches have been held to the United States embassy in the relevant State. Such expressions of popular feeling put pressure on the government of such a State to pressure the United States, even where doing so may jeopardize economic or other kinds of relations the State has with the United States.

The example mentioned above of school desegregation may hold some precedential value. A factor in the decision by the federal authorities to desegregate the schools was pressure from abroad. Enmeshed in the Cold
War, the United States was hard-pressed to “sell” its way of life to third world countries in competition with the Soviet Union, so long as segregation remained the law of the land. The United States Department of Justice filed an *amicus curiae* brief in *Brown v. Board of Education*,

urging the United States Supreme Court to desegregate the schools. The Department wrote, “the United States is trying to prove to the people of the world, of any nationality, race and color, that a free democracy is the most civilized and most secure form of government yet devised by man.” The pressure of Soviet criticism of the United States over racial segregation was reflected in the quoted language from the United States brief.29

To be sure, the Cold War has ended, and as a result the United States may be less responsive to criticism over capital punishment than it was to criticism over segregation. Nonetheless, the pressure being exerted on the United States over capital punishment does not appear likely to dissipate. This pressure imposes a definite diplomatic cost on the United States. Foreign pressure is, of course, not the sole factor operating on the question of the continued use of capital punishment in the United States. Domestic factors remain key. Nonetheless, the foreign pressure has become a significant element in the capital punishment picture in the United States.

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JUDICIAL ACTIVISM IN THE ICJ CHARTER INTERPRETATION

Lara M. Pair

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I. INTRODUCTION

Judicial activism has a wide variety of definitions, while its true content remains unclear. This paper will engage in the exercise of fashioning criteria with which to measure the decisions of the International Court of Justice (hereinafter ICJ) for the extent of their judicial activism. Once these criteria have been determined, I will methodologically analyze the decisions and come to an objective conclusion about the work of the ICJ.

This article will show that the ICJ rules in a judicially active fashion. To this end, it will first introduce the concept of national judicial activism and adjust it according to the needs of an international tribunal like the
ICJ. It will discuss the character of the United Nations Charter, subsuming it to both the treaty and the constitutional model, to show the different implications of these theoretical distinctions. These distinctions can alter the objective criteria used to evaluate the ICJ for judicial activism. Thus, the character of the United Nations Charter plays an important role in deciding how to fashion the standard of judicial activism for our purpose. The analysis will show that neither model alone is sufficient to describe the United Nations Charter. This article will then proceed to synthesize both models into a new thesis, resulting in new criteria for assessing the ICJ. It will then use these adapted norms for judicial activism to judge the work of the “World Court.”

The article will also compare the status of the ICJ to the status of national courts and the ways of these systems to remedy wrongful decisions. This comparison will help to better assess the consequences of judicial activism within the United Nations system and the possible impact of legitimacy concerns that derive from judicial activism. To assess whether the ICJ is in fact judicially active, compared to the objective criteria introduced, this article will divide the practice of the ICJ into procedural activism and substantive activism.

The assessment of procedural activism in the ICJ requires the critical reflection of domestic procedural concepts, such as the political question doctrine and the advisory opinion doctrine. This article will introduce the domestic doctrines of “advisory opinion” and “political question”. These doctrines are creations governed by judicial restraint and the reaction of the judges to a doctrine of restraint will show whether they are procedurally judicially active. Considerable adjustment of these concepts for application in the ICJ is needed, and only after amending the doctrines, this paper will transfer and apply them to the international plane. Turning to the substantive United Nations Charter interpretation, this article will primarily suggest different possible outcomes and reasons for activism discovered in the ICJ. Lastly, it will consider the legitimacy of the ICJ in light of the judicial activism displayed, as well as in light of the lack of review of other United Nations organs’ actions. The analysis will conclude with some remarks referring to the necessary deference that should be afforded to the ICJ when fulfilling its task and plead for more consistency in the judges’ attitudes toward their task.

The ICJ is the principal judicial organ of the United Nations system, and as such, its judges decide many disputes concerning the proper interpretation of the United Nations Charter text. The ICJ has an important role to play in international law and politics, because its

1. U.N. CHARTER art. 92.
decisions are the last word on matters of international law worldwide. Not all decisions I have read met my approval, and I am certain everyone who has ever read a few cases, disagrees on which ones meet their approval and for what reasons. This paper is intended to give a bird's-eye view and some insight on consistency and activism in fifty years of United Nations Charter interpretation.

II. WHAT DOES JUDICIAL ACTIVISM MEAN?

Anglo-American legal systems commonly use the term "judicial activism," and the early United States Supreme Court became particularly well known for its judicial activism. Civil Law jurisdictions do not often use the term, because Civil Law judges view their roles very differently from Common Law judges. Even Anglo-American jurisdictions use the term in a variety of definitions. Due to these differences (and other problems discussed below) the term shall be laid out anew in the context in this paper, to develop a better understanding of its meaning in international tribunals such as the International Court of Justice.

A. What is Judicial Activism?

Judicial activism exists in numerous definitions, originating from various scholars such as Posner, Harwood and Lewis. These and other scholars have applied the concept domestically. In order to apply it internationally, the reader must be informed about the domestic application first. This will assist the reader in appreciating both the differences between national and international application and the impact of the practice of ICJ judges.


3. A Civil Law judge will not consider [a] decision he makes to create law, merely to interpret existing law. Civil Law countries aspire to a complete law, which needs no additional rules made by judges. Although this may be true only in theory, inner convictions of judges as civil servants influence their thinking in practice. Thus, the idea of a judge effectively engaged in lawmaking is unthinkable and with it the idea of judicial activism. See Konrad Zweigert & Hein Kotz, INTRODUCTION TO COMPARATIVE LAW (Tony Weir, trans., 2d. ed. 1987).


Judicial activism in the United States or any national jurisdiction is separate and distinct from any meaning the term could have internationally. Judicial activism can be identified by measuring either the behavior of judges against objective criteria, or the results achieved against other possible results. Most definitions use behaviors as a focal point. However, no single definition has achieved universal acceptance and therefore, interpretations of what constitutes judicial activism vary. The most useful interpretations for our purposes employ objective criteria to identify the concept of judicial activism. Judges decide in a judicially active fashion if they (a) refuse to take an attitude of deference for legislative or executive power or judgment, (b) relax requirements of justiciability, (c) break precedent or (d) loosely construe constitutions, statutes or binding precedent. Some of the criticisms of judicial activism include non-democratic lawmaking, decision-making based on personal morals or preferences, and rewriting law under the guise of interpretation. Black also adds progressiveness to the definition. The above-mentioned criteria establish a working definition to be used throughout this paper that will suffice for our purposes.

Judicial activism can be identified not only by behavioral patterns but also by the results it can produce. The most common feature of a judicially active outcome is avoidance of an unjust result. For example, through creative reasoning, a judge can avoid letting strict application of the law lead to an unjust result. Results so achieved are mostly tailored to the case at hand rather than to the overarching system which is usually taken into account by legislators.

7. Compare supra notes 4, 5 and 6.
8. HARWOOD, supra note 5, at 2.
9. I consider criticism nothing but a negative definition of the concept in this context.
10. HARWOOD, supra note 5, at 3.
12. This working definition will suffice for the moment, because the domestic definition of judicial activism is but a starting point for this analysis.
13. HARWOOD, supra note 5, at 3.
B. Domestic Implications of Judicial Activism

The parties involved in the proceeding are primarily impacted by implications of judicial activism, and even beyond the parties concerned in a particular dispute, the overall structure of the legal system is affected by judicially active decisions. Therefore, judicial activism can lead to questions relating to legitimacy. When judges act in an activist fashion, two common paths can be taken to avoid the result achieved. The first possibility to affect an unwanted result is judicial. The second is legislative. The likelihood of access to these ways differs depending on the court involved.

The judicial possibility is through the appeals process. In lower courts, appeals to the next higher courts are possible, and will likely lead to a different result, should the judge have been too active in construing the law. In higher-level courts, such as Appellate Courts or even State Supreme Courts the possibility for appeal is much reduced, because higher courts have discretion to grant or deny certiorari. For example, the grant of certiorari in the U.S. Supreme Court is not guaranteed and thus the possibility of appeal may end at this point. Appeals from the United States Supreme Courts are naturally excluded once a judgment is rendered.

14. It is impossible to address judicial activism in every country, so I choose the U.S. as an example the reader will be most familiar with. In the U.S. domestic context, judicial activism is a very disputed subject and therefore I must stress that concerning domestic judicial activism, I am entirely neutral and do not intend to pass judgments or conclusions. Like Cannon, “I accept judicial activism [in the domestic arena] as a fact of life.” Bradley C. Cannon, Defending the dimensions of judicial activism, 66 JUDICATURE, 236, 246 (1983).

15. The individual party is affected, because they believed the state of the law to be one thing, when the judge decides it is another.

16. Different judges can make different decisions, therefore, the system is affected through lack of clarity and inconsistency of the law.

17. In the domestic context, the question of legitimacy does not seem as pressing to me because judges are elected publicly, or appointed by an elected member of the executive. Further, statutes and the Constitution offer a far better anchorage in domestic law then they offer in international law. The issue of legitimacy in the ICJ is discussed in another paragraph separately.

18. By way of example, the House of Lords can decide either to take a case, or refuse to take it. ROBIN C.A. WHITE, THE ENGLISH LEGAL SYSTEM IN ACTION: THE ADMINISTRATION OF JUSTICE 219, 221 (3d ed. 1999).


20. This is true provided there is no separate constitutional Court in the country as exists in Italy, Germany, and South Africa.
jurisdiction cannot be "corrected" through appeal.21

The legislative way to correct decisions of overly active judges is to lobby lawmakers to overturn precedent or interpretation by way of a new statute. Even the highest courts of any given jurisdiction are susceptible to legislative action.22 If a legislature does not like a decision of a Supreme Court, then it will pass a statute or regulation changing the effects of the decision.23 Legislative override is possible in both state and federal legislatures.24 The legislative path is not open at all stages; because it is quite unlikely that Congress would act on an interpretation of a lower court, whether the judgment is subject to appeal or not.25 An example of Legislature in the United States overriding the Supreme Court is Missouri v. Holland.26 In some cases, even ordinary congressional action cannot override the Supreme Court, whether activist or not.27 An American example is Marbury v. Madison,28 in which the Supreme Court declared to have exclusive right to interpret the Constitution and derived this right from the Constitution. No legislative act short of an amendment of the Constitution could overturn this decision.

Chances of action, either through appeal or legislative act, decrease with the proficiency of the judges' using "interpretive techniques."29 Neither of the two mechanisms is thus fully failsafe. The implication of judicial activism is therefore far from minimal for both the interplay of laws in any country and the dispute of the parties involved.

21. In the United States Supreme Court, many such decisions have been rendered from Marbury v. Madison, 5 U.S. 137 (1803), to Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382 (1920).

22. Ironically, the highest courts seem to be the most likely target for this kind of ramification.

23. An example of legislative override is the Miranda warnings. The U.S. Supreme Court stated they were not constitutionally mandated, so Congress enacted the protection of Miranda warnings through statute. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966).

24. Although legislative override is specifically tailored to the U.S., the general idea is true in every democratic society.

25. It would be ineffective for the legislature to act on every magistrate court's unpopular judgment. They will most likely say there is a possibility for appeal.

26. The History of Missouri v. Holland, 252 U.S. 416, 40 S.Ct. 382 (1920), was as follows: Congress passed a statute concerning migratory birds. The Supreme Court ruled the statute unconstitutional. The legislature then turned around, made a treaty with Canada, and reenacted the statute as treaty. The Supreme Court then approved the piece of legislation.

27. I am referring to regular legislative action, short of amending of the Constitution.


29. This is so because the better the judge conceals the actual reason for the result, or the better he or she can employ unrelated precedent, the less likely the judge will be discovered and overturned.
Having the potential to change the law through interpreting it in any given case reflects much power, the abuse of which leads to the issue of legitimacy of judicial activism, particularly where a decision is non-reviewable. In a way the judge can make law, but should judges make law? In the tripod structure of democratic society, the role of the judiciary involves interpretation and not creation of law. In the United States, state court judges are elected, so that their beliefs and morals will likely reflect the belief and morals of the community whose disputes are affected by potential activism. When non-elected federal justices can make law, judicial activism seems to be contrary to the foundation of democratic society. We will get back to the point of legitimacy later in the discussion and will not focus on it in the context of domestic law. Just one word spoken true and wise to this subject: sometimes we do not want the majority to be able to control it all!

C. Judicial Activism Internationally

After having laid a foundation for the following discussion, the transition of the concept of judicial activism to the international plane must be made. This shift exceeds mere copying of concepts, because it involves establishing a new working definition of judicial activism adapted to the international context. Both working conditions and impact of decisions vary internationally from their domestic equivalents. The transfer made in this article is only applicable to the International Court of Justice, which is the focus of this work. This discussion is also limited in substantive considerations to the United Nations Charter interpretation.

To make a successful conversion from the domestic to the international sphere, the United Nations Charter must be considered more closely with respect to its function and purpose, because theoretical classification impacts the criteria forming our new working definition. Some have considered the United Nations Charter to be an instrument similar to a constitution while others see the United Nations Charter as

30. Judges are elected not only because of competence, but also because of personality. If the judge does not reflect the community’s beliefs by ruling in a certain fashion, then he/she will not be reelected.

31. See LEWIS, supra note 6, at ch. 3, for a good discussion. In most countries, judges are not elected, so that their law making can be compared to the U.S. federal judges. The same is true for judges of international tribunals.

32. I refrain from further comments on the subject in the realm of domestic courts, because it exceeds the scope of this paper and is only included to clarify the later points concerning the ICJ.

simply a treaty. Even the ICJ displays some lack of uniformity on this question in its decisions.

1. The Constitutional and Treaty Model

In this subsection, I will discuss the arguments for and against the schools of thought that consider the United Nations Charter either constitution or treaty respectively.

The constitutional model seems appealing, but has its shortcomings. Similar to many domestic constitutions, the United Nations Charter forms the basic underpinning for the organization of the United Nations. It purports to give a purpose, allocate powers, and create different organs. National constitutions usually establish branches of government, comparable to the principal organs of the United Nations, allocate powers to the organs/branches, establish a judiciary, and grant certain rights and freedoms. Many international organizations follow a comparable model with more or less similarity. The analogy of corporate charters would be more appropriate because they too have an executive body and shareholders as constituents of their power. The shareholders could also be equated with the members of the General Assembly. It is useful to consider these structural similarities more closely.


35. The Charter has been called a treaty in the Certain Expenses, Id., and a constitution in the Conditions of Admission of a state to membership in the United Nations, 1948 I.C.J. 57, 70 (May 28) [hereinafter Conditions of Admission]; to mention only two different cases. Many authors refer to constitutionalism with respect to the UN and the ICJ. See generally EDWARD MCWHINNEY & PAUL MARTIN, THE INTERNATIONAL COURT OF JUSTICE AND THE WESTERN TRADITION OF INTERNATIONAL LAW (1987).

36. U.N. CHARTER art. 1.

37. Each organ has a set of powers allocated in the Charter. The Security Council, e.g., has powers allocated in UN Charter arts. 24-26; the Economic and Social Council in U.N. Charter arts. 62-66, and so on.

38. The principal organs are enumerated in U.N. CHARTER art. 7 para. 1.

39. See e.g., Treaty of Amsterdam amending the Treaty on the European Union, the Treaties establishing the European Communities and certain related acts, 1997 O.J. (C 340) 1 [hereinafter Treaty of Amsterdam].

a. Structure of the Organization

The United Nations Charter creates four main bodies,41 which have their own allocated powers: the Security Council42, the General Assembly,43 the Secretariat,44 and the ICJ45, which, if compared to national democratic models, reveals some striking similarities to domestic constitutions. The General Assembly is a body comprising all members talking about the world and the state of affairs, very similar to legislatures. The point where the analogy to legislatures fails is that the General Assembly does not create hard law in the form of statutes; it has no legislative power in the domestic sense.46 It does, however, have the power to make statutes and rules for the bodies within its control.47 The Security Council could be said to be the executive branch of the United Nations, since substantive power comes from the Council in the form of binding resolutions.48 The Secretary General could be viewed as the head of state, representing the organization and capable of ceremonial acts.49 Unlike the American head of state, the President, the Secretary General is without true power.50 The ICJ could be viewed as the judiciary branch, the final arbiter of legitimacy.51

b. Character of the United Nations Charter

The character of the United Nations Charter may point toward a constitutional model as well. It directs powers and functions, declares a purpose, and has every possibility to provide authority for a wide variety

41. U.N. CHARTER art. 7, para. 1, establishes the main organs. Although it also creates the Trusteeship Council and the Economic and Social Council, they have little impact on this analysis.
42. Id. at ch. V is devoted to the Security Council, describing powers and duties.
43. Id. at ch. IV, describing General Assembly powers and duties.
44. Id. at ch. XV, describing Secretariat powers and duties.
45. Id. at ch. XIV, describing ICJ powers and duties.
46. This statement should be read as excluding housekeeping functions, such as the budget power.
48. The Security Council has the power to compel members. U.N. CHARTER art. 25.
49. U.N. CHARTER art. 97 makes the Secretary General the head of the Secretariat.
50. The concept of a virtually powerless Head of State is not unknown. In the Federal Republic of Germany, the president has limited power. GRUNDGESETZ [GG] [Constitution] arts. 54-61 (F.R.G.). Similarly, the Queen of England, is still head of state. Like the Secretary General, the power of these persons in office are symbolic in nature.
of "laws," due to certain ambiguities. These resemblances to domestic constitutions are bound to be present in many treaties that purport to form organizations, and they are essential to some international contracts. The ICJ has declared that the United Nations is a special kind of organization and that its character is different from any other organization due to its purpose and fundamentality, so that this uniqueness should elevate the United Nations Charter to the constitutional level.

The ambiguity of the United Nations Charter in certain areas could also be comparable to domestic constitutions, because constitutions are meant to survive changes in society. Against this point stands the argument that the world leaders would have never agreed to make a constitution, and that ambiguities result from a lack of consensus rather than foresight. It could be argued that they made a treaty to establish an organization of fundamental reach, but not a world constitution.

The limitless duration of the United Nations Charter gives it the character distinct from treaties. However, this seems rather a tribute to the effort behind succeeding to form an organization so many countries could agree on. The United Nations Charter is important, like a constitution is, but that is why it cannot be interpreted as a constitution. Its failing would be catastrophic. When would we be able to write a new constitution and get over 150 countries to agree to it? Although I find the idea intriguing in order to stress the value and gravity of the United Nations Charter by calling it a constitution, it cannot be a true constitution.

c. Pro-Treaty Arguments

Scholars have recognized the difficulty of the constitutional model and

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52. An example of the ambiguity that creates problems is exhibited in the UNAT case in 1954; See Effects of Awards, supra note 47.


54. See Certain Expenses, supra note 34.

55. The U.S. Constitution, now over 200 years old, is a good example of a constitution surviving over a long period of time.


58. It is hard to imagine fifty countries agreeing on such a fundamental document now. It could be worse if this process had to be repeated time after time, whenever the "contract" came to an end.

have thus focused on the treaty model. The main points in favor of this view derive from the shortcomings of the constitutional model and from the mere fact that the United Nations Charter fits the definition of a treaty. A treaty is an instrument between subjects of international law, mostly states, purporting to deal with the objects of international law.60 The United Nations Charter is concluded between the oldest subjects of international law and deals with objects of international law, namely international peace and security. There is no judicial review as in domestic constitutions;61 there are no democratic justifications, no world elections for representation in the United Nations; there is no lawmaking in the domestic sense. Countries came together, bargained and formed a contract for the formation of an organization to achieve one purpose: international peace and security.62 There was no delegation of power from the people or, for that matter, from countries to give to a new government.63 However, contracts are not usually open-ended and do not have the power to bind third parties.64 The United Nations, through its United Nations Charter, has in effect the power to bind and put pressure on third parties.65

d. Implications of the Models

The impacts both theories will have on the standards to be imposed are broad indeed. If the United Nations Charter is a mere contract, a treaty, it ought to be interpreted according to the Vienna Convention on the Law of Treaties.66 The Vienna Convention requires a more textualist approach and refers to the use of intent and purpose for interpretation only if the text leads to an absurd result. Under the treaty-based approach, no consideration would need to be given to gaps, functioning, and vitality of the United Nations system. No double-checking of purpose and intent as against other organs would be appropriate. If the United Nations Charter

61. For a scholar arguing that there is no judicial review, see Herdegen, supra note 51.
62. U.N. CHARTER arts. 1, 2.
63. Constitutions are usually associated with the creation of a government.
64. This excludes third party beneficiaries.
65. Reparations for Injures Received suffered in the Service of the United Nations, 1949 I.C.J. 174 (Apr. 11) [hereinafter Reparations]. (Israel had not been a member of the UN at the time, yet was bound through this opinion. In addition, sanctions can also put pressure on non-member states).
66. Although the Vienna Convention does not technically apply because it is younger than the UN Charter, the principles of interpretation are still valid.
is to be interpreted like a constitution, then a more functionalist approach is necessary.

A constitution has to function, because it builds the foundation of the rule of law, unlike a mere treaty. Intent or purpose might be the only bases of interpretation. If a mere contract is silent on a point, legal norms already in existence will be applied to the contract. In the constitutional context, that is not possible. If the United Nations Charter were a constitution, it would mean that similar standards apply as in the interpretation of domestic constitutions and similar standards as in constitutional law would be appropriate. It would also mean that the interpretations given by the ICJ must adhere to a higher standard, results reached would always have to be weighed against the spirit of the United Nations Charter, short of hyper-textualism and political decisions. The ICJ would have to be able to review the actions of the other organs of the United Nations to their conformity with the United Nations Charter and imply that the ICJ could annul the acts of other organs as ultra vires. In short, the constitutional model would require both more freedom for the judges to aid the organization in functioning and more deference to other organs with respect to the same goal. The treaty model would require more restraint of interpretive freedom and less deference to the other organs, because the ICJ would be limited by the pure text.

e. New Model: Consensual Constitution

The United Nations Charter is no constitution; however, the treaty model has its shortcomings as well. It is certainly a mixture between the two models. A consensus constitution is a contract forming the basis of an organization, one that exceeds the original consensus but remains limited by its original form. This model gives greater leeway for interpretation, without allowing the filling of blatant gaps in the law. The United Nations Charter does not stand alone and customary international law as well as jus cogens norms can be utilized when gaps are apparent to help bridge them. This implies, that the objective criteria one has to use for evaluating the decision of the ICJ for activism have to be sensitive to both textual and teleological possibilities. The "consensual constitution" model affords deference to the other organs of the United Nations and interpretive freedom to the ICJ to make the organization work, while it restrains deference and interpretive freedom at the same time, through the knowledge that the text and overall

67. See Sloan, supra note 53.
scheme are paramount and may not be compromised for the sake of convenience or function. 64

2. Legal Systems

The "consensus constitution" model alone is not adequate to provide a standard for ICJ judge. Knowing what kind of instrument is to be interpreted, the status of the court within the system needs to be discussed to find the appropriate level of scrutiny. Besides the institutional differences between national and international system, there are variances in the specific legal structure between courts that influence the transition of the judicial activism doctrine. 69

In the United Nations' court system, a structure comparable to that of the domestic plane is lacking. In domestic courts, various steps of appeal are possible, whereas the in United Nations system the ICJ is sole tribunal. 70 Although there are other international tribunals, such as the European Court of Justice (ECJ) or the World Trade Organization boards, these tribunals are unconnected with each other and do not form a coherent system comparable to domestic judiciaries. 71 Tribunals that are more closely connected to the United Nations structure, such as the UNAT, 72 the ICTY, 73 or the ITR, 74 however, do not fall under one coherent structure. 75

68. See McWhinney, supra note 35, at 143, 144. He accepts the law-making role of the ICJ more readily, and considers the ICJ even less drastic than the U.S. Supreme Court. He states that the ICJ only does as is necessary for the maintenance of the organization.

69. This will be explained in this section more closely.

70. Unlike the U.S. Constitution, the Charter does not provide for the creation of additional courts. U.S. CONST. art. 3; U.N. CHARTER art. 92.

71. Unlike a domestic judiciary, there are different statutes making these courts, and all follow different rules of procedure.


75. The ICJ served for a brief period as appellate body to the UNAT in special circumstances, but got tired of the task. Under consensus circumstances, the ICJ serves as appellate board for ICA decisions if countries agree. These circumstances are, however, extraordinary and not relevant for this discussion. Although they are connected to the UN, they have independent jurisdiction and their decisions are not subject to appeal in the ICJ. The exception is the UNAT, where appeal is possible. One could argue that state courts are separate from the federal system as well, and that the lower federal courts had not been established expressly by the Constitution either. These arguments must fail. The UNAT is established by the General Assembly and has its own statute and not the same subject matter or personal jurisdiction that the ICJ has. The ICTY and ITR were established by the Security Council and have their own statutes and jurisdiction different from the ICJ.
Thus, the ICJ is the sole judicial organ deciding matters arising between states or the organs of the United Nations in the United Nations system. No appeal, i.e., no judicial correction, is possible. This fact gives the ICJ the status of a Supreme Court or a Constitutional Court for the purpose of measuring the impact of activism.

The impact of the unique role as interpreter of the United Nations Charter in case of conflict is intensified because the possibility of legislative action to remedy a wrongful decision is virtually lacking the context of United Nations Charter interpretation. The only possibility of overriding an interpretation is United Nations Charter amendment. The United Nations cannot overrule an interpretation of the ICJ by mere statute. First, there is no power to make a statute. Second, as the basic instrument of the organization, the United Nations Charter has somewhat the status of a constitution as discussed supra. A United Nations Charter amendment has occurred only thrice since its entry into force, and it is very unlikely to occur again. This gives the ICJ much more influence than even the Supreme Courts or Constitutional courts of nations possess. In turn, this power consequently requires both more regard to the overall scheme of the United Nations when making decisions in order to let it serve its function, and more judicial restraint than a domestic court would have to exercise to avoid being too judicially active. A wrong decision cannot be remedied as easily, if at all. The following section will identify the criteria applied to the ICJ for judicial activism with regard to the differences in the systems.

3. Objective Criteria for ICJ

Oriented on the prior domestic working definition of judicial activism, this section identifies a new working definition for the concept to evaluate the ICJ.

Some of the domestic criteria for judicial activism do not neatly fit in the international setting. Non-democratic lawmaking is one of the

76. There have been only 3 sets of amendments, not adding any paragraphs, merely changing the Charter; the latest came into force in June 1968. They are quite similar to the U.S. constitutional amendments but even more difficult in practice. In practice, the ICJ cannot compel action in accordance with its decisions. It would have to rely on the Security Council and thus an interpretation might be ignored, specifically as requested in advisory opinions. See Herdegen, supra note 51.

77. There is no provision in the UN Charter that gives power to legislate. Compare U.N. CHARTER.

78. This is true at least in theory, but in practice, the ICJ is not always obeyed. See Certain Expenses, supra note 34. France and Russia still refused to pay their dues.
examples: there is no democratic process involved in international law.79
One could substitute "non-democratic" for "progressive." If there is no
law on the subject or sufficiently close to it, such as custom or treaty, the
ICJ cannot give an opinion without progressing international law. This
progress would create law without direct participation of the subjects of
international law and could be compared with non-democratic lawmaking
domestically, matching one of Black's points of reference.80

Breaking of precedent is an aspect I will fully strike as an objective
criterion, because precedent is an Anglo-American concept. In
international law, there is no formal precedent, although in practice, prior
decisions can be of importance and are often quoted by the ICJ judges.81
This criterion should be abandoned for another reason: there are simply
not enough cases in comparison to domestic law to create a gapless net of
precedent. In addition, because the ICJ is the only court, it can only break
its own precedent,82 an act which domestically is not considered overly
activist.

The criterion of relaxation of justiciability requirements ought to be
modified, but it remains in substance, because the ICJ does not have
extensive justiciability criteria. Issues like political questions,83 mootness,
and ripeness have different implications.84 The ICJ has not frequently
applied the mootness doctrine,85 and ripeness issues can easily be avoided
by phrasing a question for advisory opinion or request for (preliminary)
measures. The concept of justiciability is better-served in the international
arena under the heading of deference to political decisions.

Lack of deference to decisions of other United Nations organs is a
definite criterion for activism. How much deference is required and how
little mandated by the structure of the United Nations Charter as
"consensual constitution" is another question. The rough concept is that

79. See generally ANTHONY D'AMATO, INTERNATIONAL LAW COURSEBOOK, TO
ACCOMPANY INTERNATIONAL LAW ANTHOLOGY, ch. 8 (1994).
80. See BLACK ET AL., supra note 11.
81. See, e.g., Certain Expenses of the UN, supra note 34, at 156, (citing with approval
Conditions of Admission of a State to Membership in the United Nations Article 4 of the
Charter, 1947 I.C.J. 61). For more information on precedent in the ICJ, see generally
82. One more precedent-possibility exists: the prior Permanent Court of International
Justice. But for the purpose of this statement, the courts ought to be considered one for successor
reasons. Id.
83. This will be discussed infra.
84. I will not go into detail concerning the differences and ask the reader to bear with me
in accepting that there are differences.
85. The only case I can think of was Nuclear Test (N.Z. v. Fr.) 1974 I.C.J. 457 (1974).
the court needs to afford deference to other organs of the United Nations, unless there is an apparent United Nations Charter violation or a violation of object and purpose of the United Nations Charter. Deference need only be afforded in areas where the particular organ has absolute jurisdiction to decide; in particular I am referring to examples like the Article 39 determinations of the Security Council86 or the budget approval power of the General Assembly.87 Review of actions taken should be limited to the criteria laid out in the United Nations Charter for the specific action and the general purpose of the United Nations Charter. Deference should be broad enough to exclude only what specifically violates either the text or the intent and purpose of the United Nations Charter as they are stated in Articles One and Two. Where concurrent jurisdiction is given to two or more United Nations organs, the ICJ should be mindful of who is posing a request and whether that party would be injured in case of infringement of powers.88

Loose construction of the United Nations Charter remains as a criterion. We now add another aspect, tailored to the ICJ: loose construction of questions put before the court in advisory opinions as well as rephrasing the questions beyond the necessary to retain jurisdiction. This criterion is very important indeed, because it can give the court a power to address issues almost sua sponte. This power has not been conferred on the court by any treaty, and no other court has such power either domestically89 or internationally.90 In addition, its use might create a discrepancy between practice and decision.91

86. See U.N. CHARTER art. 39.
87. U.N. CHARTER art. 17, para. 1.
88. In addition, I think it would not be a bad idea to steal some of the concepts of domestic variable scrutiny for a variety of different scenarios, depending on how important the action taken by another organ are.
89. This is to be read to exclude issues of justiciability, which can and in some instances have to be raised by the court. I am here referring to substantive issues. I am not referring to dictum either, because it does not have the same effect nationally or internationally.
90. With the exception of the International Criminal Court [hereinafter ICC], which has an almost sua sponte aspect. The prosecutor of the ICC can initiate proceedings. Since he is a part of the ICC, one could say there is some sua sponte possibility.
91. As an example, I am speaking about the voting procedure in the Security Council: Although the court approved of the practice despite the words of the Charter, Legal Consequences of the continued presence of South Africa in Namibia notwithstanding Security Council Resolution 1971 I.C.J. 16 (June 21) [hereinafter Namibia]; had the court raised this question and answered it negatively when the other organs did not believe it to be a problem, there could have been a world of trouble. Compare Marcella David, Passport to Justice, Internationalization of the Political Question Doctrine for Application in the World Court, 40 HARV. INT’L L.J. 81, 121 (1999).
Decision-making based on personal morals or preferences and rewriting law under the guise of interpretation is the ultimate criterion for judicial activism. This includes focusing on results in avoidance of an unjust result—for example, through creative reasoning rather than strict application of the law. Also included is narrowing the question to exclude aspects that the requesting organ anticipated to be answered. This factor must hence be altered for the international setting. Advisory opinions, for example, require the court to make a statement for the overall structure of the United Nations, so that creative reasoning becomes necessary in the face of a lack of narrow grounds. In the case of contentious proceedings, the matter changes, because narrow grounds are available for limiting the decision and should be utilized. This leads to a two-fold approach. Stricter scrutiny for review is required for contentious proceedings than for advisory opinions. For the ICJ, this ties into the remarks about deference. Personal preference not to review certain actions of the Security Council not only qualifies as judicial activism, but also raises a question of legitimacy, because personal preferences change with the set of judges on the court.

In summary, the new working definition includes: a) progressing of international law as defined above; b) lack of deference; c) loose or overly narrow construction of queries; and d) decision-making based on personal preferences with focus on a result rather than in light of the United Nations Charter as consensual constitution.

III. INTERPRETATIONS OF THE UNITED NATIONS CHARTER IN THE ICJ

The above-mentioned forms of judicial activism are used in this section to evaluate the ICJ decisions. It will be proposed that ICJ jurisprudence in reference to activism cannot be subdivided into phases; however, I will subdivide the analysis in two categories: procedural issues and substantive United Nations Charter interpretation.

A. Procedure Evidencing Activism

In every legal system, courts exercise some form of restraint when asserting their power to adjudicate, and the ICJ is not an exception. Doctrines like ripeness or mootness have been applied in the ICJ as in


many courts across the globe. This section will discuss the Political Question doctrine more closely.

The ICJ does not recognize the Political Question doctrine in the domestic sense, because use of the Political Question rhetoric is incompatible with the mission of the ICJ. Although the court can only consider legal questions before it, in the international arena hardly any question does not involve political decision-making. In the domestic area, the Political Question doctrine describes behavior of self-restraint exercised by the courts when decisions of political branches are involved and when these branches are expressly granted absolute discretion over the area the decision affects. This doctrine of self-restraint could be adapted to the United Nations system. The ICJ could review other organs' actions for the apparent compliance with the United Nations Charter when requested, yet refrain from criticizing once there is no apparent violation; or, in the alternative, when the organ that is subject to the inquiry had absolute discretion in the matter. The ICJ would lose importance and most likely many cases if the Political Question doctrine were fully applied, because international law is made by political decisions and the court made clear that those could be used to evaluate new political decisions made prior in time. Although the ICJ never rejected the doctrine as such, much impact has been taken from it, and the court has reduced the substance of the Political Question doctrine to insignificance. Hence it is fair to say the ICJ has rejected the doctrine.

94. The mootness question was asserted in Nuclear Tests (N.Z. v. Fr.), 1974 I.C.J. 457 (Dec. 20). There a unilateral declaration of France not to conduct more tests was considered sufficient to render the dispute moot.
95. The division is the same as the above-mentioned behavior and result separation. The procedural analysis equals the behavior part of the definition; the substantive analysis, the result part.
96. See David, supra note 91, at 145.
97. Statute of the International Court of Justice art. 65 [hereinafter ICJ statute].
98. This issue is explained further in the text.
100. See David, supra note 91, at 132.
101. The Security Council is the only organ deciding whether a threat to the peace exists. This decision would not be reviewable; actions taken under the powers of Chapter VII however would be reviewable, to see if they violate the charter or the object and purpose of it (e.g., SC ordering genocide). Cf. id. at 133 (believing considerable adaptation is needed).
102. See Conditions of Admission, supra note 35, at para 24 saying it is a political question.
103. Already in Conditions of Admission, the court stated:
Rejecting the Political Question doctrine is not judicially active in the ICJ, although it would be in any other domestic court. Measured against our definition of judicial activism, the rejection of the doctrine makes sense. As stated above, every decision that ICJ can make would only hold new political decisions against other commitments entered into through prior political decisions. These commitments take the form of legal rules despite their political character. *Pacta servanda sunt* has always been a recognized principle. In order to answer questions of political nature, the ICJ has often interpreted the questions given to it, to transform them into issues that can be legally analyzed. In doing so, the ICJ exercises discretion and judgment. Unlike domestic legal instruments, such as the United States Constitution, the United Nations Charter is more concerned with function of its organs than with substance, so that an allocation of powers that grants discretion exclusively to one organ hardly exists.

The *Certain Expenses* case makes clear that the responsibility for international peace and security is not only in the Security Council’s hands alone but also in the General Assembly’s hands. This example makes

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When a question is referred to the Court, the latter therefore must decide whether its dominant element is legal, and whether it should accordingly deal with it, or whether the political element is dominant and, in that case, it must declare that it has no jurisdiction. In the questions, which it is called upon, to consider, the Court must, however, take into account all aspects of the matter, including the political aspect when it is closely bound up with the legal aspect. It would be a manifest mistake to seek to limit the Court to consideration of questions solely from their legal aspect; to the exclusion of other aspects; it would be inconsistent with the realities of international life. It follows from the foregoing that the constitutional Charter cannot be interpreted according to a strictly legal criterion; another and broader criterion must be employed and room left, if need be, for political considerations.

Conditions of Admission, *supra* note 35, at 70.

104. *Id.*

105. Assuming they do not overstep their boundaries.

106. Since international law is made by states that decide as political entities every decision and every act has political implications, regardless of discretion. Every country has full authority over their affairs, so that with a full political question doctrine no legal review would be possible.


108. The articles entitled functions and powers only number 17 of 111 articles. *Compare U.N. CHARTER.*

109. There are instances, but in general, the main functions are allocated between two organs, e.g. Maintenance of international peace and security. *See McWHINNEY & MARTIN, supra* note 35, at 143 (agreeing that the organs have little exclusive power).

110. *See Certain Expenses, supra* note 34.
clear that little true separation of powers exists. Without a clear separation of power, a basic underpinning of the Political Question doctrine is missing in many cases before the court. No one organ can claim absolute discretion necessary in one sector to claim a right to be free from scrutiny. The Court cannot refuse to decide a case because one organ is vested with absolute discretion, so that review would be outside justiciable limits. Also, in terms of advisory opinions discussed below, the Court cannot, without compelling reasons, refuse to answer a question. A certain level of flexibility is required for the ICJ because, unlike the United States government, the Security Council may not intervene in any contentious proceedings. The following paragraph will determine whether the ICJ was judicially active when accepting political questions.

1. Transforming Inquiries Into Legal Issues

According to the ICJ statute, the Court can only answer questions of a legal nature. One example of the court transforming an inquiry is the first on the Court’s docket: the Conditions of Admission case in 1948.

In that case, the General Assembly requested an advisory opinion concerning additional criteria to the admission of new members process of the United Nations Charter. The question was political in nature: Can sovereign states be bound to consent to admission without the bargaining process usually involved in state action? Holding the question justiciable, the judges stated that there was more than political will involved in affairs of the United Nations Charter and that states would be bound to the rules they had agreed to without much leeway.

The ICJ initially made clear that it did not intend to pass judgment on the internal decisions that prompted a vote for or against membership.

111. There are some rare exceptions, like the presence of the article 39 situations by the Security Council, but a review of the actions taken under article 39 situations are still possible against purpose and intent of the Charter.

112. See Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 226, para. 14 (July 8) [hereinafter Nuclear Weapons].

113. Compare David, supra note 91.

114. ICJ Statute art. 65.

115. See Conditions of Admission, supra note 35.

116. What I am trying to get at is that states usually do not do favors for another state without gaining an advantage, or worsening their collective position. The states could not accept that the Charter would be able to take precedence over the political will of the states that created it.

117. See Conditions of Admission, supra note 35, at 60. That issue would have been political to decide.
While the substance of the interpretation stated the obvious,118 the second interpretation cut precisely into the heart of the inquiry. Considering the circumstances, the General Assembly wanted to know what, if any, kind of condition can the members require for an affirmative vote while still fulfilling their obligations under the United Nations Charter.119 The Court cleverly limited the question by expressing the opinion: "The Court is not called upon either to define the meaning and scope of the conditions on which admission is made dependent, or to specify the elements which may serve in a concrete case to verify the existence of the requisite conditions."120

While the General Assembly wanted to know what kind of conditions can be imposed other than those purely internal to the state decision making process, the ICJ only wanted to answer that internal processes were of no importance. In doing so, the Court refused to declare openly that it was unwilling to pass judgment on internal decision-making processes, but declared rather that the question was not asked.121 This limitation served only one function, namely to disguise that the Court was not willing to answer the second part of the question. The Court reduced the question of the General Assembly from one of entitlement to add conditions into a question of the mere interpretation text of Article Four of the United Nations Charter.122 This interpretation transformed the question into a purely legal analysis of a textual provision rather than into a problem of interplay of politics.

Measuring this decision on the working definition of judicial activism, the judges neither acted progressively nor lacked deference. Nevertheless, they construed the question posed loosely. In doing so, the judges did not act in a judicially active fashion, because the construction was not overly loose. The judges remained neutral. Holding parties to what they have

118. It is impossible for the organization to control the reasons why a member passes its vote. If it did, it would infringe on the principle of sovereignty. Each country can do with its vote whatever it chooses. And is precisely not subject to legal standards.

119. The question was phrased as follows:
In particular, can such a Member, while it recognizes the conditions set forth in that provision to be fulfilled by the State concerned, subject its affirmative vote to the additional condition that other States be admitted to membership in the United Nations together with that State?

Conditions of Admission, supra note 35, at 58.

120. Id.

121. In fact it was not asked, but the way the court limited the scope of its decision at the outset makes it seem like they thought it was. If it had been asked, the limitation would not have been necessary, but rather a declaration that these matters are not legal.

122. U.N. CHARTER art. 4.
promised to do is a universal principle, the application of which did not overstep any boundaries or advance the general understanding; therefore progressiveness cannot be implied here. A lack of deference is not evidenced, because there was no body to afford deference to. The General Assembly was requesting advice because it was split over the question, and individual members' actions do not require the Court to extend the privilege of deference. No act requiring deference occurred, regardless of the loose construction. The Court did not overstep its bounds.

The Nicaragua case in 1984 was politically very charged and provided for another opportunity to test for the Political Question doctrine: Is a country answerable before a court if it engages in military activity that it considers vital to its interest? Each political leader is bound to act as is best for his/her country in order to maintain approval in that country. Is survival of the state as entity in international law not the ultimate issue of sovereignty, a sovereignty that the United Nations had accepted? The ICJ held: No. The Court rephrased this highly emotional question into a question of fact that was to be held against the word of the United Nations Charter. States could not engage in aggressive behavior unless in self-defense, a question of fact before a clear rule. The obligation not to act in violation of another State's sovereignty and its exceptions was an obligation that the United States entered into and could be held to abide by.

This opinion was not judicially active in the issues we are presently discussing. The Court did not progress the law on the subject of the Political Question doctrine with this case, going beyond narrow boundaries already drawn. It would not make sense to have international law condemn aggression without the ICJ's ability to find that a country commits this

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123. The political spiel of the members does not need to concern the deference considerations as to the organization as a whole.
124. See Nicaragua, supra note 107.
125. This is true for democratic regimes. In totalitarian regimes, the goal is to stay in power of something, and thus the state interest becomes the personal interest.
126. I am hopelessly exaggerating the U.S. position and I am aware of it, but it is necessary to illustrate the point.
127. This answer changed slightly in the face on the Threat of nuclear weapons opinion in 1996, see Nuclear Weapons, supra note 112 (when the justices refused to answer a similar point for lack of law on the subject).
129. Again I am hopelessly simplifying, because the court had a huge amount of difficulty defining the actual law, but to that later. The court determined there was law and that each act could be held against it.
130. See Nicaragua, supra note 107.
aggression. In order to hold a State to the promise not to commit aggression, the question had to be within the Court’s justiciability standards.

Very closely intertwined with the concept of Political Question and the transformation of questions is the issue of advisory opinions.

2. Transforming Non-Political Advisory Opinions

This subsection presents a related and yet different aspect of the issue of transforming inquiries of political nature into legal ones. We have determined that the Court has to engage in some rephrasing and limiting, in order to be able to answer the questions at all. This subsection is concerned not with the political implications of the questions, but with the tendency of the ICJ to rephrase questions to suit the judges’ answers, a phenomenon limited to advisory opinions.

An advisory opinion is an opinion that judges are requested to render on an abstract legal question. Usually, no factual background and no actual controversy are involved. The concept is in place to help the other branches of government to interpret existing law in an area, either in order to tailor new laws and regulations to the existing ones, or to end an interpretive dispute before it rises to the level of an actual controversy before the courts. Some countries are familiar with the concept of advisory opinions. The ICJ often follows the practice of interpreting the questions posed to it so drastically that the actual question is altered to an extent the asking body did not intend. The next section will lay out the practice in domestic courts and then draw parallels to the ICJ practice.

3. Domestic Advisory Opinions

Most courts do not recognize a doctrine of advisory opinion, yet some countries and some states in the United States permit their Supreme Courts to render advisory opinions. To take an example of one of the United States’ states, the Rhode Island Supreme Court shall render advisory

131. Some of these countries are India, and South Africa. Internationally, the ECJ recognizes a similar doctrine.

132. It could be the Supreme Court or the Constitutional Court depending on the system. Some of the national courts include the Canadian Supreme Court, and the English and the Indian Supreme Courts; See DRAHMA PRATAP, ADVISORY JURISDICTION IN THE INTERNATIONAL COURT, 263 (1972) as well as the South African Constitutional Court, CONSTITUTION OF THE REPUBLIC OF S. AFR., Act 108 of 1996 S 167 (6). Islamic law incorporates the concept of advisory opinions as well.

133. I am using the example of Rhode Island, because it is similar to many others in respect of the statutory or constitutional underpinnings of the doctrine. For analysis of states allowing
opinions upon written request by either of the coordinate branches but not jointly.134 Where allowed, advisory opinions are limited in scope. States vary in their limitations; the range extends from, “any question of law” to “important questions of law” or “solemn occasions.”135 Courts differ in their opinion as to the bindingness of advisory opinions.136 In general, domestic judges tend to reject and disagree with the doctrine.137

State court judges have put additional limits on the issuance of advisory opinions not found in the original grant of power to render the opinion, such as prohibiting requests dealing with private interests.138 Even in states where issuance of an advisory opinion is mandatory, the Supreme Courts have imposed limits, such as the relatedness to the constitution.139 Some more common general restrictions are the refusal to entertain an advisory opinion if litigation is pending in a matter directly or indirectly related to the advisory opinion.140

Judges often rephrase questions posed to them in order to either fit the restrictions or fit their standards. An example of the common trait of rephrasing the question is tellingly in a multilateral court: the ECJ commonly rephrases questions submitted to it by the national courts to fit the interpretive standard imposed on the Court.141 National courts follow the same practice if they feel that a question does not fit the requirement, but nevertheless believe the query ought to be answered.142


134. Id. at 215.
135. Id. at 216.
136. Id.
137. Id. at 231, 232.
139. See e.g., Opinion to the Governor, 96 R.I. 358, 191 A.2d 611 (1963).
140. See Topf, supra note 133, at 236.
141. I am referring here specifically to the Case 26/62, Van Gend en Loos v. Nederlandse, 1963, 1 C.M.L.R. 105 (1997) [hereinafter Van Gend], where the court rephrased the question in this manner. The ECJ can take questions referred to it by national courts, if these questions only deal with an abstract matter of law. The Treaty of Amsterdam amending the Treaty on the European Union, Nov. 10, 1997 OJ C 340 art. 234 (1997), makes these referrals of interpretive questions possible and sometimes mandatory. They can be considered an advisory opinion as well, because they do not decide a case as such, but help the courts in interpreting a provision that is necessary to decide the case. In the area of treaties, the ECJ can give a purely advisory opinion as well, but Van Gent, Id. does not arise out of such a pure advisory opinion.
142. See generally Topf, supra note 133.
4. Practice of the ICJ

The ICJ also has certain requirements attached to its advisory jurisdiction set out in Article 65 of the Statute of the Court. The proper organ has to request an opinion and the question must be a legal one. There is no restriction such as "important," but "any" legal question should be answered. The judges believe they are vested with discretion, but they have hardly declined any requests. This section discusses the practice of the ICJ with regard to phrasing of the question by the requesting organ. Advisory opinions pose a query to the Court that the Court is supposed to answer. One aspect of this is the fitting of a question into legal terms; the second aspect is interpreting the legal question to mean one thing rather than the other.

A case thirty-two years after the Conditions of Admission case, when the Political Question doctrine was well settled, illustrates the difference. Although the ICJ used to attempt to separate context and query, it now required context. In the WHO v. Egypt case, an advisory opinion was requested, but instead of ignoring the actual circumstance to answer an abstract question in a legal fashion, the Court stated: "if a question put in the hypothetical way in which it is posed in the request is to receive a pertinent and effectual reply, the Court must first ascertain the meaning and full implications of the question in the light of the actual framework of fact and law."

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143. ICJ Statute art. 65.
144. Id. at para. 1. See also Legality of the Threat or Use of Nuclear Weapons, 1996 I.C.J. 66 (July 1996).
145. U.N. CHARTER art. 96 para. 1.
147. Although the court considers itself to have discretion whether to answer an inquiry, U.N. CHARTER, supra note 145, it has only refused to do so in two cases. There has been no refusal, based on the discretionary power of the Court, to act upon a request for advisory opinion in the history of the present Court; in the case concerning the Legality of the Use by a State of Nuclear Weapons in Armed Conflict, the refusal to give the World Health Organization the advisory opinion requested by it was justified by the Court's lack of jurisdiction in that case. See supra note 111, at para. 14.
148. The fitting of the question into legal terms is not limited to advisory cases, but I will rely in this second on advisory opinions as a matter of example. This issue has been amply addressed above.
149. See Conditions of Admission, supra note 35.
150. See Interpretation of an Agreement of 25 March 1951 between WHO and Egypt, 180 I.C.J. 73 (Dec. 20) [hereinafter WHO and Egypt].
151. Id. at 76.
The Court still contended that the inquiry was a legal one, although admitting that it had political implications. The ICJ declined to take motives leading to the request into consideration. It re-articulated a question regardless of its already abstract character. The original inquiry was this:

Are the negotiation and notice provisions of Section 37 of the Agreement of 25 March 1951 between the World Health Organization and Egypt applicable in the event that either party to the Agreement wishes to have the Regional Office transferred from the territory of Egypt?

2. If so, what would be the legal responsibilities of both the World Health Organization and Egypt, with regard to the Regional Office in Alexandria, during the two-year period between notice and termination of the Agreement?

This inquiry would have required nothing but an interpretation of a treaty between the World Health Organization (WHO) and Egypt. Nevertheless, the World Court transformed the inquiry into: "What are the legal principles and rules applicable to the question under what conditions and in accordance with what modalities a transfer of the Regional Office from Egypt may be effect?"

In changing the question, the Court effectively addressed the issue of whether international organizations have to comply with their agreements; therefore the ICJ ruled judicially actively. Measured against the working definition, the ICJ clearly construed the request given in a fashion designed to raise issues unnecessary to fully answer to the original request. Both the almost sua sponte raising of an issue and the lack of limitation to the necessary for a satisfying answer make the case a landmark decision.

In the Competence of the General Assembly case of 1950, the Court was faced with the question of whether the General Assembly could sua sponte accept members without a positive or negative recommendation of the Security Council. The inquiry was directed at the issue of how to interpret a vetoed resolution for acceptance or denial of acceptance—in

152. Id.
153. Id. at para. 33.
154. Id. at para. 1.
155. See WHO and Egypt, supra note 149, at para. 35.
157. Id. at 5
short, whether a vetoed decision was a decision at all for the purposes of acceptance.

The ICJ instead interpreted the question as follows: "The Court is, therefore, called upon to determine solely whether the General Assembly can make a decision to admit a State when the Security Council has transmitted no recommendation to it."\textsuperscript{158}

The court here used "no recommendation" rather than what had been described by General Assembly\textsuperscript{159} as "negative recommendation."\textsuperscript{160} This rephrase predetermined the outcome, because when "vetoed recommendation" became "no recommendation" at all, only textualism was needed.

This interpretation of the question here was not true\textsuperscript{161} to the query; nevertheless, it was not judicially active. Although the ICJ changed the issue and avoided interpreting the true question of the General Assembly, the judges gave the United Nations a sufficient answer, by refusing to analyze whether a vetoed recommendation was sufficient, and rather assuming that this was the case. Since this assumption fits within the natural interpretation, the Court was not judicially active in this case.

In the \textit{Certain Expenses} case, the Court decided whether cost incurred during peacekeeping operations were expenses of the organization that had to be paid by all its members.\textsuperscript{162} The World Court again stressed that it could only answer legal questions.\textsuperscript{163} It concluded that all it was asked to decide was the interpretation of the specific United Nations Charter provision, namely Article 17.\textsuperscript{164} In the interpretation of this article however, the Court extended the inquiry further.\textsuperscript{165} Claiming that nothing but the query itself was relevant for a discussion under the advisory opinion, the ICJ formally dismissed the French amendment to the inquiry that had been rejected by the General Assembly.\textsuperscript{166} The ICJ still reserved

\textsuperscript{158. Id. at 7.}
\textsuperscript{159. Id. at 9.}
\textsuperscript{160. Id. at 7.}
\textsuperscript{161. See General Assembly, supra note 156 at 21 (Judge Azevedo, dissenting, contends, that the court left out an important part of the inquiry, namely the question whether a vetoed recommendation would count as a negative recommendation).}
\textsuperscript{162. See Certain Expenses, supra note 34.}
\textsuperscript{163. Id. at 155.}
\textsuperscript{164. Id.}
\textsuperscript{165. Id. at 199 (Judge Fitzmaurice concurring, agrees that the court went into more detail than required, see also Id. at 235, Judge Basedevant, dissenting).}
\textsuperscript{166. Id. at 155.}
the right to comment on the particular amendment, namely the question of the appropriateness of incurring the cost.\textsuperscript{167}

The judges of the 1962 Court in fact remained with the original problem; however, in the decision, it inserted language justifying the actions of the General Assembly by giving it the Court's seal of appropriateness.\textsuperscript{168} The ICJ could have stopped at page 162 of its opinion. Everything after page 162 refers to the problem of appropriateness, which the General Assembly specifically ruled out of the inquiry.\textsuperscript{169} The Court specifically addressed that the General Assembly has an independent power over international peace and security, and thereby declared the peacekeeping operations legitimate.\textsuperscript{170} The judges even went as far as to make the inference explicit.\textsuperscript{171} Judge Spiropoulos made clear that he viewed the Court as exceeding the boundaries in his declaration following the opinion.\textsuperscript{172}

The Court in this case clearly overstepped the limits to judicial activism, because of the result achieved and the fashion in which it was achieved. As measured against our working definition, the Court clearly lacked deference to the inquiry posed to it and took it upon itself to solve a question that the General Assembly had explicitly taken out of the equation for the ICJ to discuss. There was no ambiguity as to the General Assembly's wishes.\textsuperscript{173}

While the inquiry was evidently a legal one, the ICJ changed the inquiry to add dictum. With this dictum the Court entered into \textit{sua sponte} considerations that are not within the scope of advisory opinions. The World Court was faced with a question of interpretation technically not in dispute; the task of an advisory opinion is to engage into an analysis that answers the question narrowly so as to avoid possible conflict with a standing practice.\textsuperscript{174} Here, the Court engaged in an analysis the requesting

\textsuperscript{167} See Certain Expenses, \textit{supra} note 34 at 156-57.

\textsuperscript{168} What I am referring to here is the language: "It is a consistent practice of the General Assembly to include in the annual budget resolution, a provision for expenses relating to the maintenance of peace and security." \textit{Id.} at 160.

\textsuperscript{169} \textit{Id.} after page 162 (the court turns to limitation on the budgetary power, which is discussed in far more detail and in a direction not necessary for the immediate question at hand).

\textsuperscript{170} See General Assembly, \textit{supra} note 156, at 163.

\textsuperscript{171} \textit{Id.} at 176-77.

\textsuperscript{172} Judge Spiropoulos, \textit{supra} note 160, at 180-81 (Judge Spender also agrees on this point, \textit{concurring}, at 182-83).

\textsuperscript{173} Since, as mentioned before, the General Assembly voted against the expansion of the very question.

\textsuperscript{174} The same comments apply as mentioned before, regarding the possible difference between practice and theory.
organ wanted to avoid, causing a lack of deference, which alone renders the opinion judicially active.\textsuperscript{175}

The inquiry posed to the court in the \textit{Namibia Case}\textsuperscript{176} was rather simple: "What are the legal consequences for States of the continued presence of South Africa in Namibia, notwithstanding Security Council resolution 276 (1970)?"\textsuperscript{177}

The broadness of the question allowed and forced the Court to go into many details and into considerations beyond the immediately necessary.\textsuperscript{178} Surprisingly, the Court refused to take advantage of the full scope of the inquiry. The actual outcome of the question is hardly as interesting as some of the statements going along with the opinion. The Court could have reviewed the legality of the resolutions made by the General Assembly and the Security Council, as it had done previously in the \textit{Certain Expenses}\textsuperscript{179} case with less authority to do so.\textsuperscript{180} Instead the Court states,

\begin{quote}
Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned. The question of the validity or conformity with the Charter of General Assembly resolution 2145 (XXI) or of related Security Council resolutions does not form the subject of the request for advisory opinion.\textsuperscript{181}
\end{quote}

In the \textit{Namibia}\textsuperscript{182} decision we find one of the rare instances in which the Court under-uses the power conferred upon it. The question to be answered here is whether this action amounts to judicial activism as

\begin{quote}
\textsuperscript{175} I feel the need to express that I do agree with the outcome of the case, and I am relieved that the court decided as it did. Nevertheless, the task of this paper is to analyze the jurisprudence of the court, and assess the attitude the court takes to its task. The evaluation of their performance will be discussed later.

\textsuperscript{176} See Namibia, \textit{supra} note 91

\textsuperscript{177} \textit{Id.} at 27, para. 42.

\textsuperscript{178} The question whether this particular resolution of the Security Council was justified, and what consequences would arise, are only examples.

\textsuperscript{179} See \textit{Certain Expenses}, \textit{supra} note 34.

\textsuperscript{180} Again, this touches on the issue of deference and the obligation to review to maintain legitimacy in the UN.

\textsuperscript{181} See \textit{Certain Expenses}, \textit{supra} note 34, at para. 89. It would have been possible to review the power to make this decision and the foundations of the decision of the other organs of the UN, to assess whether South Africa's presence was indeed valid and the resolution without effect. Although the court goes into some of these issues, not all are addressed. The selectivity with which the court here operates is striking.

\textsuperscript{182} See Namibia, \textit{supra} note 91.
\end{quote}
defined in this paper. From the decision that was handed down, the Court stayed well within the boundaries of the inquiry, the Court also afforded deference to the other organs of the United Nations and did not seem to interpret in a lax fashion.

Nevertheless, not engaging in some kind of review concerning the substance of the other organs' actions appears to be another form of activism, namely decision based on personal preference. The refusal to go into some of South Africa's concerns regarding voting patterns in the Security Council might not have altered the query so to render the opinion activist in the procedural sense, but changed the result. By refusing review of other organs' actions, the Court was only concerned with the case, not the overall scheme of the United Nations Charter. In the future, this action might have consequences harmful to the United Nations system.


This paper will now turn to address decisions of the ICJ relating to the substantive analysis of the United Nations Charter interpretation. In the Conditions of Admission case, the Court was faced with the interpretation of a narrow article of the United Nations Charter. The ICJ engaged in a by-the-book textual analysis: what the meaning of the words were, whether they were exclusive or by way of example. The court was here guided by plain meaning of the text. The court stated: "To warrant an interpretation other than that which ensues from the natural meaning of the words, a decisive reason would be required which has not been established."

The ICJ engaged in an analysis of the results of an opposite decision in order to justify a result already reached and concluded that a different decision would violate the spirit of Article Four of the United Nations Charter. Here, the Court was certainly not willing to compromise the text of the United Nations Charter for political necessities of the member States. It interpreted the United Nations Charter true to the text and did not engage in loose interpretation. Thus, from a substantive point of view, the Court did not rule in a judicially active fashion.

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183. The court effectively decided that there could not be a review of UN organ action, a striking view, which could well be further discussed in a different paper.
184. See Conditions to Admission, supra note 35, at 57.
185. Id. at 62.
186. Id. at 63.
187. Id.
In the early phase of interpretation of the United Nations Charter and a time when legal positivism was a preferred form of interpretation, the Court would have been unlikely to decide otherwise. The Court had not yet established enough strength to rule on the basis of purpose and intent alone, not only because of its own weakness and inexperience, but also because of the credibility of the organization and its purpose. The organization had been formed to create a body that supervised the rule of international law in the form of peace and security; how could its principal organ rule on any other basis than the written rule of law? The text of Article Four is quite clear, so that it would have asked too much of the Court to decide otherwise. The conclusion here must therefore be that the court did not rule judicially actively.

In the Competence of the General Assembly case, the Court proceeded in the same pattern, not only because the query was made only two years later, but also because the same Article Four was involved and the surrounding reasons had not dramatically changed.

In the Effects of Awards of the UNAT case in 1954, the Court was faced with a request for advisory opinion that was in part too far remote from an actual provision of the United Nations Charter for the World Court to operate on a purely textual basis. The opinion can be separated into two parts. The Court held that the findings of the UNAT were binding upon the organization and that the General Assembly had the right to establish the UNAT. In the first part of the decision, the ICJ analyzed the language of the statute of the tribunal and found it to be a judicial body. Then the Court proceeded to infer all characteristics of a judicial body, so the tribunal could fulfill its purpose.

When the court proceeded to consider whether the General Assembly had the power to create a tribunal rendering decisions binding on the Organization, the analysis was further removed from any text. Article 101 provided the basis from which to infer the power of the General Assembly.

188. See R. Moles, Definition and Rule in Legal Theory: A Reassessment of H.L.A. Hart and the Positivist Tradition (1987); See also Edward McWhinney, Judge Manfred Lachs and Judicial Law Making, 17 (1995); See also McWhinney, supra note 35, at 35 (commenting on the positivist tradition).

189. See General Assembly, supra note 156.

190. See Effects of Awards, supra note 47.

191. Id.

192. Id.

193. Id. at 53. The court found that a judicial organ was established and that the nature of a judicial organ includes binding decisions and independence. It therefore refused to let the General Assembly have the right to review without alternation of the statute.
to create the tribunal, however, the article is hardly detailed. The Court had to infer intent and purpose to even be able to rule on the question whether the General Assembly had the power to create the UNAT. Without a strong background of a rather clear United Nations Charter provision, the ICJ was left with intent and purpose of the provisions and, frankly speaking, common sense. Although this decision was only four years after the Competence of the General Assembly case, it seems the Court was more comfortable with departing from the actual text. There appear to be several reasons for this departure: first, there was hardly any applicable text; second, it made logical sense; third, principles common to many legal systems in the world suggested this result; fourth, the departure only briefly touched upon the subject of the inquiry; and fifth, the ICJ cannot refuse a proper request for an advisory opinion.

The court did not overstep the bounds to activism in the result. The argument that articles 101(1) and 101(3) were a basis to infer that the General Assembly had authority to even create the tribunal is hardly convincing. The Court attempted to conceal the lack of text (and thus of law) by pointing to remotely applicable portions of the United Nations Charter. The judges did not directly admit to the United States constitutional language, that the creation of the UNAT was a "necessary and proper" use of powers, to fulfill the task given to the General Assembly, but did not fall very short of the statement. Measured against the working definition, I cannot find activism regardless of the apparent lack of text. The Court showed deference to the General Assembly, by conceding that there was a need and the possibility to create the tribunal.

The standard of deference applied seems most appropriate in this instance, first because the General Assembly agreed and second it seemed logical to proceed in this fashion. There was no danger threatening basic principles of the United Nations, because the creation of the UNAT did not violate any express term of the United Nations Charter and rather fostered the principles therein. Holding the General Assembly to the statute of the tribunal, as they had created it, was based on textualism. In interpreting the statute of the tribunal narrowly based on text and function, the ICJ did

194. U.N. CHARTER art. 100.
195. The language of the text of the Charter in the relevant provisions is as follows: "the Security Council under regulations established by the General Assembly shall appoint the staff." U.N. CHARTER art. 101, para. 1. See also U.N. CHARTER art. 101, para. 3 ("the paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency.")
196. See General Assembly, supra note 156.
197. U.N. CHARTER art. 100, paras. 1, 3.
neither interpret the statute in a loose fashion, so as to bring them into the definition of activism nor progressed international law. The decision was very narrow in scope and did not affect international law in general, so as to progress it.

Another example of this approach is the Certain Expenses case.\textsuperscript{198} Although this case has been discussed in an earlier section under the heading of procedural activism, the value of this case for the section on substance will become evident. The Court employed analysis of the text of the United Nations Charter, discussing the issue whether an expense had to be administrative or other, to introduce the issue of maintenance of peace and security into the discussion.\textsuperscript{199} In deciding the case, the ICJ introduced the distinction between enforcement and non-enforcement action.\textsuperscript{200} Since the United Nations Charter seems to give the General Assembly and the Security Council concurrent jurisdiction over the matter of international peace and security,\textsuperscript{201} the World Court had to find a way to make sense of the United Nations Charter and transform it into a workable form. By making the distinction, the ICJ introduced a new concept into the United Nations Charter.\textsuperscript{202} The dividing line between the Security Council's competence and the General Assembly's competence is ICJ made. The use of purpose and intent as interpretive guidelines becomes more evident in this case, compared to the cases of the earlier decisions.

Through its procedural activism, the Court increased the difficulty for itself and ruled in a judicially active fashion. The Court did not allow deference to the creators of the United Nations Charter, trusting that concurrent jurisdiction was feasible without a line drawn, so as to give room for practice. The ICJ progressed the law of the United Nations Charter by introducing a new concept creating the modern peacekeeping missions, which were not originally in the United Nations Charter. For these reasons, the Court was judicially active in the substance of this case. Recalling the deadlock in the Security Council, the ICJ was, more likely then not, concerned with the possibility of the United Nations being able to fulfill its purpose and thus generated this result. However, it should not have gotten politically involved. The Court was not forced to decide on an

\begin{itemize}
\item \textsuperscript{198} See Certain Expenses, supra note 34.
\item \textsuperscript{199} Id. at 160.
\item \textsuperscript{200} Id. at 163.
\item \textsuperscript{201} U.N. CHARTER art. 24, para. 1; art. 11, para. 1.
\item \textsuperscript{202} See Certain Expenses supra note 34, at 197 (Judge Spender, in a separate opinion, expresses his discontent with the approach of the majority, and warns the court not to engage into political considerations rather than legal ones).
\end{itemize}
infringement of powers, and no substantive violation of principles of the United Nations Charter was evident as to invite review.

In the Reparation for Injuries case,\textsuperscript{203} the ICJ conferred upon the organization international legal personality. Loosely tying this privilege to the text of Article 100 of the United Nations Charter,\textsuperscript{204} the ICJ implied that an opposite decision would violate the text of this Article, nevertheless plainly stating:

The Charter does not expressly confer upon the Organization the capacity to include, in its claim for reparation, damage caused to the victim or to persons entitled through him. The Court must therefore begin by enquiring whether the provisions of the Charter concerning the functions of the Organization, and the part played by its agents in the performance of those functions.\textsuperscript{205}

The Court here had no choice but to use a positivist approach, because of the simple lack of text. Does this make the decision activist by definition? Not by itself. The Court here exhibited great deference to the makers of the United Nations Charter as well as to the personnel involved. What was implied did in fact progress the law, but not to an extent that was surprising or unforeseeable.\textsuperscript{206} The judges pointed to the uniqueness of the United Nations Charter and of its function, thereby limiting the possible extent of the decision. Nothing in the United Nations Charter made its legal personality express; giving the organization international personality was a novelty in international law.\textsuperscript{207} Our prior discussion concerning the character of the United Nations Charter is of help here to evaluate the ICJ decision.

As adequate for a "consensual constitution," the judges were under the obligation to bridge gaps in international law. This case marks a paramount measure for the difference between creating law and bridging the gaps. The former is improper, while the latter is proper. Whether this decision is activist or not, this case illustrates the closest possible scenario between proper bridging and improper creation.\textsuperscript{208} Giving the United

\begin{itemize}
\item \textsuperscript{203} See Reparations, supra note 65.
\item \textsuperscript{204} U.N. CHARTER, art. 100.
\item \textsuperscript{205} See Reparations, supra note 65, at 182.
\item \textsuperscript{206} Id. at 190 (Judge Alvarez, concurring in the result, is even of the opinion that the court has the legitimate power to progress the law in the face of new situations).
\item \textsuperscript{207} Up to this point only states had had international legal personality.
\item \textsuperscript{208} I must be clear that I refuse to express my opinion, whether this case is activist or not, in an absolute fashion. It is a close call and reasonable people can differ.
\end{itemize}
Nations legal personality was necessary for the functioning of the organization. But does the end justify the means? Although the judges attempted to limit their ruling by stating that the United Nations has special status, politicians are unlikely to have considered the theoretical implications of what they intended to create. If they had known that it would take actual legal personality, and what leap this would entail for international law, to create the United Nations, they might have denied this status to their creation. No international institution had had legal personality before, so that the leap the ICJ took crosses the line to activism.209

In the Namibia case,210 the Court again interpreted the United Nations Charter in a purposivist fashion. Over South Africa’s objection, the ICJ condoned the voting procedures of in the Security Council, although they violated the actual text of the United Nations Charter.211 The Court did not want to allow South Africa to invoke an issue it felt that only the permanent members of the Security Council had standing to raise. By refusing to let South Africa raise the issue, the Court again overstepped its limits. The considerations that probably went into the decision were more focused on a just result, namely that South Africa leave Namibia, than law. This result orientation fits neatly in the definition of judicial activism. A consideration outside the law was to regain the trust of Third World Countries, after the devastating South West Africa decision series.212

The court ruled in an activist fashion by construing the text of the United Nations Charter so loosely and letting practice alter the United Nations Charter’s express terms. The ICJ could have declined to decide the issue raised by South Africa based on standing or through interpretation of the question, rather than to decide the issue.

In the Threat of Nuclear Weapons case,213 The ICJ decided the question posed, but refused to decide an issue imbedded in it, namely the question whether self-defense would trump the prohibition against use of

209. See Reparations, supra note 65, at 197-98 (Judge Hackworth dissenting, agrees, that there was nothing suggesting this kind of power for an international organization). Cf. id. at 205 (Judge Pasha, dissenting).

210. See Namibia, supra note 91.

211. Id. In this case, the ICJ decided that an abstention was equally valid as a vote form a permanent member of the Security Council. The text of the Charter however requires an affirmative vote: “Decisions of the security Council on all other matters shall be made by an affirmative vote of nine members including the concurring votes of the permanent members.” U.N. CHARTER art. 27, para 3.

212. The court had been immediately criticized for its decisions and, in the aftermath, the court changed its views. See McWhinney, supra note 188, at 14.

213. See Certain Expenses, supra note 34.
force. The ICJ alleged the reason of insufficiency of the law in order to avoid deciding the issue.

The World Court did not overreach beyond normal judicial limits in this case. By admitting to a lacuna the Court did not stretch the limits of the question in abuse of discretion, nor did it display a lack of deference. This was the first time in the history of the Court that the judges decided to take a query, but returned a decision that did not give a full answer, because of a lacuna. In the overall structure, it could not harm the United Nations to admit to certain gaps in the law. No one organ needed deference in this regard because they were likely not to be involved in such issues. The question had been: “Is the threat or use of nuclear weapons in any circumstance permitted under international law?” The Court did its best not to alter the question and refrained from trying to legislate.

After the aforementioned examples of ICJ jurisprudence that established some cases of judicial activism, this paper will consider whether the Court legitimately exercises this activism, thereby excusing the activism exhibited.

C. Legitimacy of the ICJ

The ICJ is the principal judicial body of the United Nations. As the principal judicial organ, its task is to interpret the United Nations Charter and to resolve disputes between the organs of the United Nations and its member States. The ICJ has on several occasions exceeded the task given to it by the United Nations Charter, by ignoring a question, by adding to it, or by interpreting the United Nations Charter loosely. Where does the ICJ obtain its legitimacy, if it is judicially active?

Like many federal judges, ICJ judges are not elected by common ballot among the people in their community. They are nominated by the Permanent Court of Arbitration and then elected by the General Assembly and the Security Council. The judges represent the major legal systems and cultures of the world. This representation is not formal and the

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215. Id.

216. See Nuclear Weapons, supra note 112.


218. ICJ Statute art. 4, para. 1.

judges do not serve as agents of their countries, but are neutral. Since they are not representatives, do they have the legitimacy to make law? In international law, countries make law by either treaty or custom. If the judges do not represent the will of the countries, they cannot make law with democratic legitimacy. There has been some writing on democratic legitimacy on the international law community, without a conclusive result. International law is not based on democratic legitimacy and does not need to be. International law is a separate legal system, as explained many times in this paper, and therefore, the rules of what constitutes legitimacy are different from the domestic context and legitimacy must be derived from a different source. The basic legitimacy of the ICJ derives from the instrument creating it, but if the scope of the power conferred is exceeded by judicial activism, there is little that can offer legitimacy. Of course it is difficult for any judge to proclaim the law without coloring the words and adding to the flavor, but this coloring may not exceed the scope of bridging gaps in the law.

If judges in the World Court continue to actively make law, their legitimacy will be lost. Judicial activism in the ICJ can take not only the form of active creation of law, but also of (passive) refusal to act in fulfillment of their judicial function in accordance with the United Nations Charter. When the World Court refuses, for example, to pass judgment on or review certain actions of other United Nations organs, it cannot fulfill its functions fully, namely to protect the object and purpose of the United Nations Charter. If judges do not fulfill their functions, they loose legitimacy and put the credibility of the United Nations and the ICJ at risk.

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220. ICJ Statute art. 2.
221. See Certain Expenses, supra note 34.
222. I will not go into detail as to the democratic legitimacy of international law in general, first because it will exceed this paper’s scope, and second because it has been hotly debated among scholars.
223. Talim Elias argues that the General Assembly took cognizance of the rule making powers of the ICJ, and that this action, taken in resolution 3232 (XXIX) of 12 November 1974, is sufficient. He also argues that the court cannot declare a non liquet. See TALIM ELIAS, INTERNATIONAL COURT OF JUSTICE AND SOME CONTEMPORARY PROBLEMS, 216-17 (1983). I cannot agree fully with this argument for several reasons. First, the General Assembly cannot by resolution itself make hard law, so it cannot authorize the ICJ to do so. Second, the resolution itself is not as unambiguous as portrayed.
224. They may not since the Nuclear Weapons case showed the newly coming reluctance and preference to admit to a lacuna.
226. It is, in my view, hypocritical to let the 880-pound Gorilla do whatever it pleases. There is a limit. Articles 1 and 2 of the Charter and the ICJ should be there to watch over this
I do not mean to imply that Article 39 determinations are reviewable, but rather only measures blatantly against the text of the United Nations Charter. Since the World Court has, on numerous occasions, refused to review the other organs' actions for their compatibility with principles of the United Nations, this paper has not even reached the question on how much review should be in place. First, there must be review in the first place. The ICJ has virtually rejected the Political Question doctrine and has no excuse to reject a review of other organ's actions. In the Namibia case the judges refused review, in the Certain Expenses case they undertook review. There are more examples on both sides; some review engaged in for right or wrong reason and in the proper or improper way, some review refused for the right or wrong reasons, in a proper or improper way. Lack of consistency in deciding will not help to establish legitimacy and credibility.

IV. CONCLUSION

Procedurally, the Court used to be more active than it is now. Concerning substantive activism, the actions of the Court can be tied to the existence of text to guide the interpretation. When there is clear text, the Court usually does not ignore the plain meaning. When no clear text is involved, the Court has proven to be quite active in creating law.

In the early stages of the ICJ, the justices were trained mostly in Europe or were themselves European. This resulted in a strong tendency toward legal positivism. The judges wanted to separate particular issues totally from their social context. Unfortunately over time, the judges were not able to separate the issues form their social context and fell victim to the apparent need to create law. When clear text is involved, the judges

228. Compare Namibia, supra note 91.
229. I think I have made clear how much review I would apply in through the standard of deference I have suggested as measure for judicial activism.
230. Cf. BODIE, supra note 92. Bodie subdivides the courts activism in two phases, before and after 1966. I disagree, due to the reasons shown in this paper. Concerning the substance before 1966, the ICJ stripped the inquiry to its textual essentials. Id. at 64. In the period after 1966, the ICJ turned to more evaluative reasons and became more conscious of the charter's background, purpose, and intention. Id. at 62.
231. Id. at 61.
used to rule for the plain meaning, and when no clear text was available, purpose and intent of the United Nations Charter ruled the decision. In later cases, with a new set of judges, the World Court took great liberty with which issues were decided and which chosen to be left at rest, once any inquiry or conflict had been presented to them. This liberty falls within the working definition of judicial activism. Although not every case warrants this label, the analysis above shows that the Court in procedural liberty throughout the years of jurisprudence displays a great deal of activism that is not part of a grand scheme.

Another factor in this assessment, however, has to be the need for activism. It has been said that every judicial body makes law and that indeed, lawmaking is an essential function of the adjudicative role. The role of the judges is to state the law, and in doing so, judges necessarily add color or flavor to the rule, thereby adding and making new law. Judges necessarily advance the law minimally by their interpretation and their application. It is also clear that the position of the ICJ as only arbiter increases pressure on the judges to reach the right result, while they are still trapped with a strong need for restraint because their decisions cannot be remedied like domestic decisions. Nevertheless, the ICJ often went beyond the "flavoring" of the law by deciding issues not in question or avoiding them. The unique role of the Court, as it has been described supra, makes its decisions uniquely important and restraint on its side is desirable. Although the judges found the right measure at times, the lack of consistency, traceable to different panels at different times with different morals and cultural backgrounds, shows that judicial activism in the ICJ is less a creed and more a creature of personal preference.

Although the intent of the judges to progress the law and heal the international machinery is commendable, where it occurred, medicine applied the wrong way can still harm the patient. Consistency is necessary for the ICJ. Doctrines of ripeness and mootness have their place in international and domestic law, so that the decision of questions not within the inquiry should, more often than not, not be an issue. Similar to the ripeness doctrine, an issue not on the agenda should not be decided in a sterile setting, removed from a problem situation. It could result, and at times has resulted, in a fundamental decision with the ability to cause more


234. See Reparations, supra note 65, at 190 (Judge Alvarez, concurring in the result, states that he cannot even see the line that separates law making from development of law).
harm than use. The World Court has said in the Asylum case\textsuperscript{235} it ought to consider the question asked and ignore those not asked. This is also known as the non-ultra petita rule.\textsuperscript{236} The judges should stick to this rule. If the ICJ were less active procedurally, it would be less hard-pressed in some substantive decisions.

The ICJ has a unique task in the international plane, which calls for consideration of the judges' positions as to the basics of the structure of the United Nations, the position of the Court in the organization, and their own roles. Once these factors are clearer in the minds of the judges, the activism exhibited by ICJ may be directed into a more controlled and consistent manner that does justice to the important role played in international law. If consistency is reached beyond one set of judges or one set of circumstances, the ICJ will receive more leeway for being judicially active. Unfortunately, over the fifty-year period the Court has been in place, the personal attitudes of the judges varied so strongly that no coherent trend can be identified, and the Court at times resembles an ad hoc panel rather than a standing Court with fifty years of decisions to guide it.

Judicial activism is certainly not "evil" for international law, nevertheless, everything can be overdone. The judges in the World Court can be compared with Supreme Court justices in the United States. To a degree judicial activism is inherent in their function as the court of last resort. The judges have to be active. In international law, the ideal would be comparable to domestic law: legislators come together and create law where there is a need for it. Unfortunately, international law is always behind its time.\textsuperscript{237} If we do not want more non-decisions of the ICJ as in the Threat of Nuclear Weapons case,\textsuperscript{238} then we have to live with an active Court from time to time.

The United Nations Charter must be interpreted first on its face, and the result so achieved must be weighed against the object and purpose of the United Nations Charter. The object and purpose must then be construed broadly to exclude only those results, which would offend its purpose blatantly in order to afford sufficient deference to the other organs of the United Nations. Nevertheless, consistency in this review is necessary to afford legitimacy to both the court and to the United Nations.

\footnotesize

\begin{itemize}
  \item 235. See Asylum (Colom. v. Peru), 150 I.C.J. 266, 402 (Nov. 20). Although this was a contentious case, the rephrasing of questions remains, and the doctrine administered by the court should also stay consistent.
  \item 236. See BODIE, supra note 92, at 65.
  \item 238. See Nuclear Weapons, supra note 112.
\end{itemize}
If that takes some activism from time to time, the author is willing to accept that. But not everyone shares this view, as some say: "[A] proactive court is as dangerous as a proactive council."\textsuperscript{239} One cannot help but feel a swell of pity for the ICJ judges, stuck with the need for deference \textit{and} review—stuck with a whipsaw.

\textsuperscript{239} See David, \textit{supra} note 91, at 149.
ECONOMY CLASS SYNDROME:
A FIRST CLASS LIABILITY

Bill Cotterall*

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I. INTRODUCTION

Economy Class Syndrome is a condition coined from the cramped seating conditions passengers often experience while riding in coach or economy class on commercial air carriers. Although the condition

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received its name from the economy seating on air carriers, it is by no means limited to economy class air travel.\(^2\)

It is the intention of this article to establish a legal basis by which air carriers will be determined liable to their passengers who develop deep vein thrombosis and, as a result, suffer damages from Economy Class Syndrome. This article will evaluate the individual elements of the Warsaw Convention as they relate to international air carrier liability and the established judicial standards for the elements. After establishing the elements of the tort, it will analyze the factors of Economy Class Syndrome, in conjunction with the elements of the tort, to establish that the air carriers are liable to their passengers for the damages they suffer from the conditions that lead to Economy Class Syndrome. Although the development of Economy Class Syndrome does not qualify as an “accident” under the Warsaw Convention, Article 17, the air carrier is nevertheless liable for damages under Article 25, due to its “willful misconduct” in recklessly and knowingly creating the conditions that result in Economy Class Syndrome.

A. Overview

The purpose of this article is to determine an air carrier’s liability for Economy Class Syndrome and to evaluate the damages that occur from it. This article begins with an overview of Deep Vein Thrombosis, the underlying medical condition of Economy Class Syndrome, and the particular conditions that cause it. This is followed by a brief section discussing some of the current events that have raised the public’s awareness of Economy Class Syndrome, combined with a background of Deep Vein Thrombosis. The third section covers the Warsaw Convention and how this Treaty affects air carrier liability. This article does not go into explicit detail on the history of the Warsaw Convention or the subsequent amendments made to it in later treaties. These issues have been thoroughly discussed in prior works of other individuals and therefore are not analyzed here.\(^3\) The fourth section discusses the elements of torts in commercial air carrier liability as established by the Warsaw Convention. The fifth section discusses the issue of “willful misconduct,”

2. *Id.* (stating the condition is known to result from long periods of inactivity that slows the blood flow, an example of which is the prolonged immobility due to surgery or a limb set in a cast).

and the consequences of knowingly acting with disregard for the passenger's safety, followed by air carrier defenses to such claims. The article concludes by incorporating the tort elements established by the Warsaw Convention, the conditions of Economy Class Syndrome, and the exception created in Article 25, which moves the air carriers limited liability to an unlimited liability.

B. Deep Vein Thrombosis

The medical term for Economy Class Syndrome is Deep Vein Thrombosis (hereinafter DVT). DVT is a pulmonary condition, in which there is a formation of blood clots in the lower extremities of the body after an individual has been immobilized for long periods of time with the legs in a lowered position. This condition may result in a pulmonary embolism, a potentially fatal condition which occurs when a developed blood clot moves through the blood stream and suddenly becomes lodged in the lung arteries, blocking the blood flow to the lung tissue. The symptoms of Economy Class Syndrome may vary from person to person. Some of the more commonly reported symptoms include panic attacks, shortness of breath, sharp chest pains (often thought to be a heart attack), dizziness, and coughing blood. If the pulmonary condition is not immediately treated, it can be fatal. There are approximately 600,000 cases of pulmonary embolisms annually, ten percent of which result in death.

C. Public Awareness

Due to the increased media coverage in the late 1990s, the traveling public has become increasingly aware of effects of these blood clots and the development of Economy Class Syndrome. Much of this awareness has come after the sudden death of a twenty-eight year-old woman, who suddenly collapsed after departing her twenty-hour flight from Sydney, Australia to London's Heathrow Airport. The traveling public’s concern of the condition was further sparked after the realization that Economy

5. See id.
6. Id.
7. Id.
8. Id.
Class Syndrome can affect individuals who are otherwise healthy.\textsuperscript{10} This became a reality when three Olympic athletes who were traveling to the 2000 Summer Games in Australia developed DVT, and subsequently suffered from Economy Class Syndrome after their flight to Australia.\textsuperscript{11} Due to the extensive flight distances, often in excess of fifteen hours, the majority of Economy Class Syndrome claims are from flights emanating to or from the far-east countries such as Australia, Japan, and New Zealand.\textsuperscript{12}

As a result of the public's concern and the recent global recognition of Economy Class Syndrome,\textsuperscript{13} the commercial air carrier industry has begun to address the issue of passenger related Economy Class Syndrome claims.\textsuperscript{14} Several of the major commercial air carriers are now informing passengers of the possibilities of Economy Class Syndrome and educating them on how to reduce their risk of developing DVT blood clots during long flights.\textsuperscript{15} These preemptive measures include advising passengers to get up and walk to the restroom during a flight and having flight crews demonstrate stretching exercises that will increase the passengers' blood flow to their legs. In addition, several commercial air carriers have started including warnings on their tickets and advising passengers of the possibility of developing DVT during prolonged flights.\textsuperscript{16}

\section*{II. BACKGROUND}

The medical condition DVT was first described in the 1940s during World War II, when physicians began noticing an increase in pulmonary embolisms among people who spent extended periods of time crouched in air-raid shelters during the London "Blitz."\textsuperscript{17} In the post-World War II

\textsuperscript{10} \textit{Squash Star Saved By Her Fitness}, \textit{Evening News} (Scotland), Feb. 13, 2001, available at WL 6108780 (suffering from economy class syndrome, doctors tell a squash player that if she wasn't a professional athlete she wouldn't be alive at all).


\textsuperscript{13} Both the increased awareness of the medical condition and the public's perception of DVT.

\textsuperscript{14} \textit{See Airlines to Attend Summit on Economy Class Syndrome}, \textit{AP Newswire}, Feb. 4, 2001 (stating that a summit addressing recent deaths attributed to economy class syndrome will be attended by airline executives from Qantas, Virgin, Air New Zealand and British Airways, and also by aviation regulators, doctors and pilot unions).

\textsuperscript{15} Salazar, \textit{supra} note 9.

\textsuperscript{16} Id.

\textsuperscript{17} Interview by Tom Brokaw with Stanley Mohler, Ph.D., Wright State's Aerospace Medicine Chair, Wright State University School of Medicine, in Dayton, Ohio, (Oct. 23, 2000) at http://www.med.wright.edu/whatsnew/spotlight.html.
years, DVT has been almost unheard-of by the general and traveling public. One of the reasons DVT has remained a relatively obscure condition among travelers is that doctors who treat the passengers often misdiagnose the condition due to the symptom’s resemblance to other, more common, medical conditions.\textsuperscript{14}

Although Economy Class Syndrome can affect otherwise healthy individuals, there are several well-known risk factors that may increase an individual’s chance of developing DVT. Individuals have an increased chance of developing blood clots and suffering from Economy Class Syndrome if they “have a history of blood clots, cancer, prolonged bed rest following orthopedic surgery, recent treatment involving general anesthesia, estrogen therapy, obesity, and cigarette smoking.”\textsuperscript{19} These factors, combined with the prolonged travel in a stationary position, contribute to a traveler’s possibilities of suffering from Economy Class Syndrome.

III. AIR CARRIER LIABILITY—THE WARSAW CONVENTION

The Warsaw Convention\textsuperscript{20} is the governing rule of law that protects air carrier passengers traveling on international routes.\textsuperscript{21} Since the inception of the Warsaw Convention, international aviation has undergone great expansion. International flights have become a common event and travelers who are seeking to embark on this form of transportation often have numerous carriers to choose from, many of which are not based within the United States. Due to this industry expansion, the Warsaw Convention has undergone numerous changes to keep it current.\textsuperscript{22} It is well established that when the courts interpret a treaty, they are to give the language of the treaty the same meaning as the contracting parties do to the treaty.\textsuperscript{23}

To briefly mention jurisdiction under the Warsaw Convention, the Warsaw Treaty as adopted by Congress clearly states that under the Treaty, “resort to local law is precluded only where the incident is covered

\begin{itemize}
  \item \textsuperscript{18} Id.
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} Convention for the Unification of Certain Rules Relating to International Carriage by Air, Oct. 2, 1929 [hereinafter Warsaw Convention].
  \item \textsuperscript{21} See \textit{El Al Israeli Airlines v. Tsui Yaun Tseng}, 525 U.S. 155, 167 (1999) (explaining that a ratified treaty is not only the law of the land, but also an agreement among sovereign powers).
  \item \textsuperscript{22} \textsc{Diederiks-Verschoor}, supra note 3, at 57.
  \item \textsuperscript{23} \textit{El Al Israeli Airlines}, 525 U.S. at 167.
\end{itemize}
by Article 17."24 This means local law is precluded where there has been a passenger accident, either on the plane or in the course of embarking or disembarking, which led to death, wounding, or other bodily injury.25 In addition, the Warsaw Treaty precludes passengers from bringing actions under local laws when they cannot establish air carrier liability under the treaty.26 The courts have held that the Warsaw Convention is the exclusive basis of recovery for injuries that fall under the Convention, meaning the Warsaw Convention preempts all claims based on state law.27 However, "[t]he Warsaw Convention does not preempt local law in cases arising out of [an air carrier's] willful misconduct."28 The court in the following passage, as it relates to air carrier liability, described the scope of the Warsaw Convention:

The Warsaw Convention establishes that the treaty applies to all international transportation of persons, baggage, or goods performed by aircraft for hire, Ch. I, Art. 1(1); describes three areas of air carrier liability, Ch. III, Arts. 17 (bodily injuries suffered as a result of an 'accident...on board the aircraft or in the course of any of the operations of embarking or disembarking'), 18 (baggage or goods destruction, loss, or damage), and 19 (damage caused by delay); and instruct that cases covered by article 17 can only be brought subject to the conditions and limits set out in the Convention.29

The specific language of the Warsaw Convention that allows for commercial air carrier liability is this:

The carrier shall be liable for damages sustained in the event of death or wounding of a passenger or any other bodily injury suffered by a passenger, if the accident which caused the damage so sustained took place on board the

24. Id. at 155 (precluding passengers from bringing actions under local law when they cannot establish air carrier liability under the treaty).
27. In re Air Disaster at Lockerbie Scotland, 928 F.2d 1267 (2d Cir. 1991).
28. See El Al Israeli Airlines, 525 U.S. at 178 (stating in Article 25 that a carrier shall not be entitled to avail itself of the provisions of the Convention if its misconduct is willful).
29. Id. at 155.
aircraft or in the course of any of the operations of embarking or disembarking the aircraft. 30

Article 25 of the Warsaw Convention removes the air carrier from the protections of limited liability provided by the Convention when the conduct of the air carrier is “willful misconduct” by stating:

In the carriage of passengers and baggage, the limits of liability specified in Article 22 shall not apply if it is proved that the damage resulted from an act or omission of the carrier, his servant or agents, done with intent to cause damage or recklessly and with knowledge that damage would probably result; provided that, in the case of a such act or omission of a servant or agent, it is also proved that he was acting within the scope of his employment. 31

Although the drafters of the Warsaw Convention were interested in protecting the passengers by creating consistent and uniform guidelines for air carrier liability, they were also interested in providing the air carrier with limited liability. 32 The drafters therefore created a “fault based” liability with a “reverse burden of proof” which is placed on the air carrier. 33 The drafters included several clauses that relieve the air carrier of liability. The first clause states the air carrier is not liable for a passenger injury if it has “taken all necessary measures to avoid the damage.” 34 Secondly, an air carrier is not liable if it was impossible for it to take such measures. 35 The third scenario that removes the air carrier’s liability is when the passenger’s negligence was a contributing factor in causing the injuries. 36 However, in what can be rationalized as a “good faith” provision, the drafters included a powerful provision that punishes air carriers who deliberately or recklessly place passengers at risk. 37

The Warsaw Convention also places restrictions on the monetary damages passengers can claim. 38 The courts have followed these

32. DIEDERIKS-VERSCHOOR, supra note 3, at 57.
33. See id. at 68 (explaining that the burden of proof lies on the carrier shoulders in exchange for the passengers losing the benefit of unlimited liability of the carrier).
34. Warsaw Convention, Oct. 12, 1929, art. 20, 49 Stat. 3019.
35. DIEDERIKS-VERSCHOOR, supra note 3, at 69.
restrictions by holding that punitive damages are not permitted under the terms of the Warsaw Convention; rather, only compensatory damages are recoverable.\textsuperscript{39}

Although the air carriers have limited liability, the liability standard is that of strict liability that cannot be contracted away.\textsuperscript{40} The Warsaw Convention voids "any [contract] provision tending to relieve the carrier of liability or to fix a lower limit than that which is laid down in the Convention."\textsuperscript{41} To further protect the passenger from "willful misconduct" by the air carrier, the Warsaw Convention voids the limited liability enjoyed by the air carrier if it is determined by the court that the damages are caused by the air carrier's "willful misconduct."\textsuperscript{42}

\textbf{A. Elements of Liability}

The Warsaw Convention has established specific elements that must be met for a tortious claim to be successful.\textsuperscript{43} These elements are: 1) an unexpected or unusual event, termed by the courts as an accident; 2) which results in death or bodily injury; 3) while either on board, embarking, or disembarking the aircraft.\textsuperscript{44}

\textbf{1. Accident}

An "accident," as defined by Article 17 of the Warsaw Convention, is an "unexpected or unusual event or happening that is external to the passenger."\textsuperscript{45} Courts have held that this definition should "be flexibly applied after assessment of all the circumstances surrounding a passenger's injuries."\textsuperscript{46} Courts have further held that air carriers may be held strictly liable for injuries to passengers that are proximately caused by risks inherent in air travel.\textsuperscript{47} The courts have held that it is not a prerequisite for

\begin{itemize}
\item \textsuperscript{39} \textit{See In re Disaster at Lockerbie Scotland}, 928 F.2d 1267 (holding that the language in the context it was written, the law of contracting parties, subsequent interpretations, and the historical translation argue that the language establishes liability for compensatory damages only, and it would be inconsistent with the purpose of the Warsaw Convention to permit the recovery of punitive damages).
\item \textsuperscript{40} Warsaw Convention, Oct. 12, 1929, at art. 23, 49 Stat. 3020.
\item \textsuperscript{41} \textit{Id}.
\item \textsuperscript{42} Warsaw Convention, Oct. 12, 1929, art. 25, 49 Stat. 3020.
\item \textsuperscript{44} \textit{Id}.
\item \textsuperscript{45} \textit{Air France v. Saks}, 470 U.S. 392, 405 (1985).
\item \textsuperscript{46} \textit{Id}.
\item \textsuperscript{47} \textit{See id}. (finding airline was liable for damages sustained to a passenger's broken eardrum because the pressurization of an aircraft cabin falls within the normal operations of an aircraft).
\end{itemize}
liability that a claimant demonstrates a malfunction or abnormality in the operation of the aircraft. 48

An "accident," as defined by the courts, is not limited to the initial injury suffered by the passenger. An accident may be an event that occurs after the initial injury, such as the failure of the air carrier’s agents to render medical assistance after the initial injury or medical condition has occurred. 49 Therefore, an air carrier may be held strictly liable for medical conditions that are caused by the air carrier’s actions or lack thereof.

The courts have consistently held that an "accident" requires that a passenger’s injury must be caused by an "unexpected or "sudden" event other than the normal operations of the aircraft. 50 In the case of Economy Class Syndrome, the development of the embolism while seated onboard the aircraft does not constitute an "unexpected" or "sudden" event. Rather all passengers are aware of the approximate time, length, and seating conditions of their flight prior to boarding the aircraft. The court differentiates between the two causes by categorizing them as either "accidents" or "occurrences," the latter of which does not qualify as an unexpected or sudden event as intended by the Warsaw Convention. 51 However, even if the courts do not recognize the development of a medical condition during the normal operations of the aircraft, they have recognized that the failure to provide assistance may establish a claim where the air carrier’s agents fail to provide reasonable care to its passengers suffering from a medical condition. 52

2. Bodily Injury

When determining what constitutes bodily injury, a determination must be made between "physical injury" and "mental injury." The courts have provided us guidance in separating physical from mental injury by stating:

The claim must [be] predicate upon some objectively identifiable injury to the body. In addition, there must be some causal connection between the bodily injury and the 'accident.' In our view, this connection can be established

49. See Seguritan, 86 A.2d at 658 (holding that the accident was not the passenger’s heart attack, rather it was the alleged aggravation of decedent’s condition by the negligent failure of defendant’s employees to render her medical assistance).
51. Id. at 406.
whether the bodily injury was caused by physical impact, by the physical circumstances of the confinement or by psychic trauma. If the accident caused severe fright, which in turn manifested itself in some objective 'bodily injury,' then we would conclude that the [Warsaw] Convention's requirement of the causal connection is satisfied.\footnote{Rosman v. Trans World Airlines, Inc., 34 N.Y.2d 385, 399 (N.Y. 1974).}

Therefore, there may be a causal link between mental and physical injuries of the accident. If a causal link establishes that the physical injury resulted from the mental injuries, the plaintiff may be allowed to recover for the physical suffering caused by the accident.\footnote{Id.} However, mental injuries are not recoverable, only damages that resulted from the physical injury may be recovered.\footnote{Id. at 400.} The court relies on the ordinary meanings of the words in Article 17 to support the plaintiff's claims for a physical (bodily) injury.\footnote{See id. (explaining that the terms, in their ordinary meaning, will not support plaintiffs' claim that psychic trauma alone, or even the psychic trauma which caused the bodily injury, is compensable under the Warsaw Convention).}

Economy Class Syndrome, by definition, is a physical condition where there is the development of blood clots within a passenger's extremities.\footnote{Pulmonary Embolism—What You Know May Save Your Life, supra note 4.} The development of these blood clots may result in physical conditions such as chest pains, pain in the calf or leg, swelling of the leg or limb, shortness of breath, protracted surface veins and even death.\footnote{Andrew Demaria, Deep Vein Thrombosis Explained, (Feb. 2001), at http://www.cnn.com/2001/WORLD/asiapcf/01/24/dvt.medical/index.html (sudden death can occur a week to ten days after the thrombosis is formed as a result of the pulmonary embolism).} By following the court's distinction between the physical and mental injuries, death is not necessary to constitute damage as long as there is some form of physical injury to the passenger. If there is no physical injury to the passenger, rather only a physical discomfort that does not escalate to an injury, such as chest pains, there is no recoverable damage as defined by the court. Although a mental condition may occur from a passenger's temporary physical discomfort, unless that mental condition is the contributing cause of a physical injury, there is no recoverable damages.\footnote{A man who honestly believes he is suffering from a heart attack, and possibly death, may very well suffer some form of mental injury as a result of that belief.} A passenger would only be able to recover from the physical injury caused
by Economy Class Syndrome, whether that physical injury is a primary result of the Economy Class Syndrome physical injury, or a secondary injury where the mental injury resulted in a subsequent physical injury to the passenger. This would also include cases in which the temporary discomfort condition escalated into a physical injury.

3. Onboard, Embarking, Disembarking the Aircraft

Air carriers are only liable to passengers who are within specific areas that are under the carriers’ control. These areas are onboard the aircraft, embarking the aircraft, or disembarking the aircraft.60 One of the problems a plaintiff faces in establishing a valid Economy Class Syndrome claim is establishing the actual location in which the condition developed. The effects of the blood clots often are not discovered until after the passenger has left the airport, sometimes days after.61

In order for the blood clots to develop, the passenger must be in a stationary position for an extended period of time.62 It would be highly unusual for a passenger to develop DVT while embarking an aircraft unless there was an extended timeframe (fifteen plus hours) of stationary condition prior to this action. It can be held that, under the doctrine of res ipsa loquitur, the Economy Class Syndrome facts speak for itself in that the only reasonable incubator for the development of these blood clots is in the extended seated position onboard the aircraft.

B. Reckless Disregard—Article 25

Air carriers have followed their drive for increased profit margins at the expense of passenger safety. Many air carriers have reduced seat pitch to “shoehorn” more passengers onto their aircrafts.63 An example of this is that in the 1980s, all USAir 727-200 aircraft were equipped with 145 seats.64 The same model aircraft in 1994 was equipped with 163 seats.65 During the same period, United Airlines increased its DC-10-30’s capacity by adding five rows of seats. This increased the number of seats on the

60. Air France, 470 U.S. at 394.
61. Demaria, supra note 58.
65. Id.
aircraft from 232 to almost 300.\textsuperscript{66} When TWA removed four of the seats from a 141-seat MD-80 to accommodate their passengers' legroom, it resulted in an $87,603 annual loss in revenue for that aircraft.\textsuperscript{7} Multiply this by hundreds of aircrafts in a carrier's fleet, and it is easy to see how cost plays a major factor in passenger safety.

Air carriers have drastically shortened the legroom of passengers. What is referred to as the "pitch," the spacing between the front of one seat and the back of the seat preceding it, has decreased during the late 1980s from thirty-four (34) inches to just thirty-one (31) inches.\textsuperscript{67} Coach seats, which had a typical pitch of twenty-two (22) inches in 1993, decreased to approximately nineteen (19) inches in 1994.\textsuperscript{68} This constitutes the airline's willful disregard for the passenger's safety in the name of greater load factors for the aircraft.

\section*{C. Trier of Facts}

In a claim made by a passenger, the complaint must be construed in the light most favorable to the plaintiff and construed as true.\textsuperscript{70} A complaint should not be dismissed "unless it appears beyond a reasonable doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to the requested relief."\textsuperscript{71} In the event of personal injury to a passenger where there is contradictory evidence, it is for the trier of fact to determine if an accident has occurred.\textsuperscript{72} In determining if an accident occurred or if there was a willful and disregard for passenger safety, there are defenses available to the air carrier that will hold them not liable for damages.

\section*{D. Air Carrier Defenses}

1. Preexisting Conditions

The courts have held that the definition of an "accident" under the Warsaw Convention is to be construed flexibly and a passenger only needs to prove "that some link in the [causal] chain was an unusual or

\begin{itemize}
\item \textsuperscript{67} Id.
\item \textsuperscript{68} McCarthy, \textit{supra} note 64.
\item \textsuperscript{69} Id.
\item \textsuperscript{70} Fischer, 623 F. Supp. at 1065.
\item \textsuperscript{71} Id.
\item \textsuperscript{72} Air France, 470 U.S. at 405.
\end{itemize}
unexpected event external to the passenger." The courts have further held that injuries that are a result of a preexisting condition do not constitute an accident as defined by the Warsaw Convention, even if there was a causal link provided by the negligent actions of the air carrier staff.

2. Preventive Measures to Avoid Accident

The Warsaw Convention provides a clause to protect air carriers who take the preventive steps to protect their passengers’ well-being. An air carrier is not liable for injury to its passengers if “he and his employees have taken all necessary measures to avoid the damage, or if it was impossible for him, or them, to take such measures.” It is up to the discretion of the trial judge to determine what actions actually constitute “necessary measures.”

E. Statute of Limitations

There is a two-year statute of limitations for claims arising under the Warsaw Convention. This limitation is established in Article 29 of the convention which states:

(1) The right to damages shall be extinguished if an action is not brought within 2 years, reckoned from the date of arrival at the destination, or from the date on which the aircraft ought to have arrived, or from the date on which the transportation stopped. (2) The method of calculating the period of limitation shall be determined by the law of the court to which the case is submitted.

The courts have held that the two-year time limitation is a “condition precedent” which bars the party’s right to bring a claim if the “action precedent” which bars the party’s right to bring a claim if the action is not

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73. *Id.* at 392.
74. *Fischer*, 623 F. Supp. at 1065 (finding failure to treat passenger suffering from a heart attack was not an “accident” for which liability could be imposed under the Warsaw Convention).
75. DIEDERIKS-VERSCHOOR, supra note 3, at 69.
76. *Id*.
77. *Id*.
78. *Seguritan*, 86 A.D.2d at 658 (finding a complaint served more than two years after plane arrived at destination was barred by the statute of limitations).
79. *Id* at 659 (citing Warsaw Convention, art. 29).
commenced within two years.80 The statute of limitations begins to run upon the arrival at the destination or on the date that the aircraft was scheduled to arrive, or on the date that the transportation actually stopped.81 The laws of the court in which the action is filed determine which method is used to calculate the timeframe.82

IV. CONCLUSION

The Warsaw Convention requires that a passenger’s claim of injury meet three conditions: 1) accident, and 2) bodily injury, while 3) onboard, embarking, or disembarking the aircraft. Economy Class Syndrome, while occurring onboard the aircraft and resulting in physical injury, does not qualify as an “accident” under the Warsaw Convention. Rather than the passenger’s physical injury occurring as a result of an unexpected event, the blood clots develop during what is considered the “normal” practice of remaining seated during the flight. The physical injury is not a result of a sudden or unusual event as required by the courts, and therefore Economy Class Syndrome does not meet the elements of a tort as defined by the Warsaw Convention.

It is not the contention of this article to redefine the courts’ definition of an “accident.” Rather it is this article’s contention that the air carriers, through their long-time practices of decreasing seat pitch and failing to warn passengers of the foreseeable development of DVT blood clots, results in what can be termed only as a reckless disregard for the passengers’ safety. The result is the removal of the air carrier from the protection of the Warsaw Convention as stated in Article 25 of the Convention. Removing the limited liability status of the air carrier who fails to take reasonable measures to prevent Economy Class Syndrome will hold the air carriers liable for damages suffered by their passengers.

81. Id. at 698-99.
82. Id. at 699.
THE HELMS-BURTON ACT: THE FINAL PIECE TO BRING DOWN THE TYRANT’S REGIME

Franchesco Soto∗

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In 1960, President Dwight D. Eisenhower began what has become one of the longest standing economic embargoes this country has ever had against another country.1 In 1964, President John F. Kennedy continued what president Eisenhower started, and strengthened economic sanctions against the Cuban government.2 The sanctions passed by President Kennedy prohibited almost all direct commerce between the United States and Cuba.3 In February 1996, a Cuban MiG-29 fighter jet shot down two unarmed United States civilian planes in international airspace, killing all four individuals on board.4 In response to this unprovoked attack by the Cuban government, President William Jefferson Clinton signed into law the Cuban Liberty and Democratic Solidarity (LIBERTAD) Act of 1996

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2. Id.

3. See id.

(Helms-Burton) on March 12, 1996. This piece of legislation is the focus of this article, and is the focus of great debate in the international community. Since its inception the Helms-Burton Act has created a surplus of commentaries, law reviews, and symposia concerning certain titles of the Act, in particular Titles III and IV. The stage is now set for President George W. Bush to inflict the final blow on the Cuban regime, and sign into law Title III of the Helms-Burton Act, which many legal scholars believe would end Castro's tyranny. This article suggests that suspending Title III from the Helms-Burton Act renders the Act as nothing more than political gesturing, and simply a mere extension of the 1959 Trade Embargo currently in place. Indeed, if the current administration wants to see an end to the Castro regime, it must be proactive in its approach towards Castro, and not succumb to the political pressures being applied by their trading partners.

Part I of this article analyzes the four provisions of the Helms-Burton Act, closely scrutinizing Title III, which allows United States nationals to file lawsuits against any foreign investors who traffic in illegally confiscated property within Cuba. Part II of this article examines whether the Helms-Burton Act is in line with international law in light of harsh criticism and non-support from the international community. Finally, part III of this article examines whether United States courts have jurisdiction based upon the "effects" doctrine which grants countries the right to exercise jurisdiction with respect to activity outside of the state, but have or intend to have a substantial effect within the state's territory. This article concludes that the Helms-Burton Act is a legal, effective, but unutilized tool to strengthen the Cuban embargo, bring an end to Castro's hegemonic regime, and be the final piece of a forty-year-old puzzle giving every Cuban-American a country free from tyranny.


8. "Traffic as used in Title III, and except as provided in subparagraph (B), is someone who sells, transfers, distributes, dispenses, brokers, manages, or otherwise disposes of confiscated property, or purchases, leases, receives, possesses, obtains control of, manages, uses, or otherwise acquires or holds an interest in confiscated property." 22 U.S.C.A. § 6023(13) (2001).

I. HELMS-BURTON ACT OF 1996 ANALYZED

The Helms-Burton Act's explicit purpose is to assist the Cuban people in regaining their freedom and prosperity, as well as in joining the community of democratic countries that are flourishing in the Western Hemisphere, to strengthen international sanctions against the Castro government, and to provide for the continued national security of the United States in the face of continuing threats from the Castro government of terrorism, theft, and political manipulation of the desire of Cubans to escape that results in mass migration to the United States. The Act further seeks to encourage the holding of free and fair democratic elections in Cuba conducted under the supervision of internationally recognized observers, to establish a policy framework for United States support to the Cuban people in response to the formation of a transition government or a democratically elected government in Cuba. Finally, the Act aims to protect United States nationals against confiscatory takings and the wrongful trafficking in property confiscated by the Castro regime.

Title I, "Strengthening International Sanctions Against the Castro Government" calls upon the President of the United States to advocate and instruct the permanent representatives to the United Nations to seek, within the Security Council, a mandatory international embargo against the Cuban Government. Further, Title I combines incentives and consequences to achieve a democratic government in Cuba. Section 101, entitled "Statement of Policy," makes it clear to the international community, and in particular to the Castro government, any threat of national security posed by the operation of any nuclear facility will culminate in a backlash of consequences against the Castro government.

11. Id. § 6022(2) (1996).
12. Id. § 6022(3) (1996).
13. Id. § 6022(4) (1996).
16. Id. § 6031 (1996).
17. Id. § 6031(2) (1996).
18. French, supra note 1, at 8.
19. Helms-Burton Act, supra note 5, at § 6031 (1996). The President should do all in his power to make it clear to the Cuban Government that (a) the completion and operation of any nuclear power facility, or (b) any further political manipulation of the desire of Cubans to escape that results in mass migration to the United States, will be considered an act of aggression which will be met with an appropriate response in order to maintain the security of the national borders of the United States and the health and safety of the American people. It is beyond the scope of
In essence, the goal of Title I is to apply economic pressure to the Castro government by restricting imports from Cuba into the United States. Further, Title I does not allow any American people or companies to invest, supply loans, credits, or any other form of economic help for the Castro government.  

Title II of Helms-Burton Act, “Assistance to a Free and Independent Cuba,” calls upon the United States to provide assistance to a transitional government in Cuba. This Section formally states that the United States will form solidarity with the Cuban people, to provide appropriate forms of assistance to a transition government in Cuba, and to facilitate the rapid movement from such a transition government to a democratically elected government in Cuba, that results from an expression of the self determination of the Cuban people. The provisions of this Section will take effect upon a determination by the President of the United States that a transition to democracy is taking place in Cuba. Among aid the United States will provide to Cuba, once a democratically elected government is in place, shall be items such as food, medicine, medical supplies, and equipment to meet emergency needs to protect the basic human rights of the Cuban people.

Keeping the provisions of Title I and Title II in mind, we turn now to the 1959 Trade Embargo, and compare the provisions of that Embargo with the Helms-Burton Act. The 1959 Trade Embargo calls upon the United States to prohibit all direct commerce between the United States and Cuba; block all assets in the United States belonging either to Cuba or to Cuban nationals, including freezing bank accounts; rescind Cuba’s “most favored nation” status; and ban aid to any country which provides assistance to Cuba. In comparing Title I and II with the 1959 Trade Embargo, there does not seem to be a great deal of distinction between the two. Quite frankly, the first two titles of the Helms-Burton Act are simply an extension of the 1959 Trade Embargo, because the objectives of both are to isolate Castro’s government and prevent countries from supporting this article to explore the consequences which will occur if Cuba maintains and operates a nuclear power plant within its country.

20. French, supra note 1, at 8.
22. Id. § 6061(5) (1996).
23. Helms Burton Act, supra note 5, § 6062 (a)(1) (1996). “The President shall develop a plan for providing economic assistance to Cuba at such time as the President determines that a transition government or a democratically elected government in Cuba as determined under section 203(c) is in power.” Id.
25. See French, supra note 1, at 2-3.
the communist regime. It is not until reading the provisions of Title III and Title IV that a clear distinction is marked between the two statutes.

Title III has received the harshest criticism from the international community. Title III of the Act, entitled "Protection of Property Rights of United States Nationals" states that

any person that traffics in confiscated property for which liability is incurred under paragraph (1) shall, if a United States national owns a claim with respect to that property which was certified by the Foreign Claims Settlement Commission under Title V of the International Claims Settlement Act of 1949, be liable for damages computed in accordance with subparagraph (C).27

In essence, this title protects United States property that has been wrongfully confiscated by the Cuban government and resold in an effort to stir economic re-growth for the Castro regime. However, the re-growth comes at the expense of the rightful owners who are United States nationals, or have become United States nationals as a consequence of fleeing the communist country. It is this title that gives the Helms-Burton Act not only distinction from the 1959 Trade Embargo, but clearly places a strain on the Castro government by making any and all individuals or corporations trafficking confiscated property in Cuba, subject to a lawsuit by the rightful owners of that property.

This article is not opposition to Section 306, granting the President power to suspend the effective date of Title III for a period of six months, provided that the President states in writing that the suspension is necessary to the national interests of the United States and will expedite a transition to democracy in Cuba.28 This article, however, is in opposition to the manner in which Section 306 has been used to appease countries engaging in the very acts that Helms-Burton opposes. This presidential power has been used consecutively since the signing of the Helms-Burton Act,29 first by President William Jefferson Clinton and more recently by President George W. Bush.30 President Bush stated that he hopes by

28. Id. § 6085(b)(2) (1996).
30. Id.
suspension of Title III it will encourage a movement toward democracy on the island. 31 However, President Bush fails to state what events or steps the Castro government has taken that would support such a statement.

Since Fidel Castro seized power in Cuba in 1959 he has trampled on the fundamental rights of the Cuban people, and through his personal despotism, has confiscated the property of millions of his own citizens, thousands of United States nationals; and thousands more Cubans who claimed asylum in the United States as refugees because of persecution and later became naturalized citizens of the United States. 32

The Castro government has not given any indication it is willing to change its form of government, 33 and has openly referred to democratic pluralism as "pluralistic garbage." 34 President Clinton and President Bush have consequently suspended more than 6511 lawsuits that have been filed under Title III of the Helms-Burton Act. 35 There is no question the President has the authority, pursuant to Section 306, to suspend the right to bring a lawsuit under the title. However, there has been strong criticism against both President Clinton and now against President Bush by the Cuban American leaders and supporters. 36 By suspending Title III the Helms-Burton Act, we are left with a mere extension of the 1959 Trade Embargo, the rest of the Act becomes superfluous.

Finally, Title IV of the Act, "Exclusion of Certain Aliens," gives the Secretary of State the power to deny a visa, and the Attorney General the power to exclude from the United States, any alien who has confiscated property of United States nationals or who traffic in such property. 37 Opposition to Title IV is also based on the notion that denial of visas to executives of corporations, as well as denying visas to their families, is an over extension of United States law, because the denial is solely based on the executives trafficking in property outside of the United States. 38 Further, countries such as Canada and Mexico argue that Title IV is a

31. Id.
33. Id. § 6021(3) (1996).
34. Id. § 6021(16) (1996).
35. See Troia, supra note 9, at 605.
violation of the North American Free Trade Agreement (NAFTA) to which the United States is a party.39 Both Canada and Mexico have been very vocal about their opposition to the Helms-Burton Act, and argue that the Act violates Chapter Eleven of NAFTA which requires that each NAFTA signatory treat investors of other NAFTA signatories with the "most favored nation" principle.40

In light of these harsh criticisms by the international community, it is essential to understand that Congress did not zealously draft this controversial piece of legislation without first finding sufficient reason to do so. Consequently, it is essential now to look at some of the findings that led to the drafting of the Helms-Burton Act of 1996. Congress makes the following finding:

(3) The Castro regime has made it abundantly clear that it will not engage in any substantive political reforms that would lead to democracy, a market economy, or an economic recovery. (4) The repression of the Cuban people, including a ban on free and fair democratic elections, and continuing violations of fundamental human rights, have isolated the Cuban regime as the only completely non-democratic government in the Western Hemisphere. (5) As long as free elections are not held in Cuba, the economic condition of the country and the welfare of the Cuban people will not improve in any significant way. (6) The totalitarian nature of the Castro regime has deprived the Cuban people of any peaceful means to improve their condition and has led thousands of Cuban citizens to risk or lose their lives in dangerous attempts to escape from Cuba to freedom.41


40. See Troia supra note 9, at 607 n. 26. The "most favored nation" is a term that requires "each party shall accord to another party treatment no less favorable than that it accords, in like circumstances to any other Part of a non-party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." NAFTA, supra note 39, at 639.

41. Helms-Burton Act, supra note 5, § 6021 (1996). There are several other findings Congress made prior to the drafting of this Act which further solidify the foundation upon which the Helms-Burton Act is not only justified, but necessary. Among those omitted from the body of the text are (1) The economy of Cuba has experienced a decline of at least 60 percent in the last 5 years as a result of (A) the end of its subsidization by the former Soviet Union of between 5 billion and 6 billion dollars annually, (B) 36 years of communist tyranny and economic mismanagement by the Castro government; (C) the extreme decline in trade between Cuba and
These and several other findings are the basis upon which the Helms-Burton Act is not only justified, but required.

In spite of such findings, opponents of the Helms-Burton Act are still overly critical of both Title III and Title IV. In Section 301 of Title III of the Helms-Burton Act, Congress has found “it is in the interest of the Cuban people that the Cuban Government respect equally the property right of Cuban nationals and nationals of other countries.” Congress further finds that

individuals enjoy a fundamental right to own property which is enshrined in the United States Constitution. (2)

The wrongful confiscation or taking of property belonging to the United States nationals by the Cuban Government, and subsequent exploitation of this property at the expense of the rightful owner, undermines the comity of nations, the free flow of commerce, and economic development. (4)

The Cuban Government has unlawfully confiscated property that rightfully belongs to United States nationals, and has turned around and offered that property to foreign investors in an effort to stimulate economic growth within the country. (4) The Helms-Burton Act merely affords those individuals who have been deprived of their property the right to redress their loss in the just courts of law. Yet, because of politics and economics, countries continue to oppose the Helms-Burton Act, and have sufficiently manipulated our leaders to suspend Title III.

II. HELMS-BURTON ACT IS IN LINE WITH INTERNATIONAL LAW

Chief trading partners with the United States have vehemently opposed the Helms-Burton Act, and argue that Helms-Burton does not fall in line with international law. (7) Consequently, many countries have adopted several “antidotes” to counter the effects of the Helms-Burton Act in an effort to make it clear to the international community that acts by the

the countries of the former Soviet bloc; and (D) the stated policy of the Russian Government and the countries of the former Soviet bloc to conduct economic relations with Cuba on strictly commercial terms.


43. See Perez-Lopez & Travieso-Diaz, supra note 6, at 102.


45. Id. § 6081(2) (1996).

46. Id. § 6081(5) (1996).

47. See generally Shamberger, supra note 7.
United States government will not go unopposed. However, the Helms-Burton Act is in full compliance with international law, and the United States has the proper right to enact such laws that protecting the national security of the United States as this Act does.

Critics of the Helms-Burton Act argue that it violates provisions of the General Assembly on Tariffs and Trade (GATT). In particular, the very purpose of the GATT agreement is to encourage its contracting parties to “enter into reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade, and to the elimination of discriminatory treatment in international commerce.” On its face it would seem that Helms-Burton is in violation of the GATT agreement, however, within the GATT agreement itself, there is a provision providing an exception when the security interests of the country are at stake. The security exception to GATT which reads as follows:

Nothing in this agreement shall be construed (a) to require any contracting party to furnish any information the disclosure of which it considers contrary to its essential security interest; or (b) to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests.

The United States, and frankly the international world, has a strong national security interest in being free of the cronyism of the Castro government. It is part (b) of the GATT exception which the United States can use to justify whatever violation of international law may be claimed by the European Union under the GATT agreement. The national security interest that the United States would claim is a product of the atrocious act by the Cuban government of shooting down the two civilian United States planes in international airspace, which killed four people.

However, it is clear that opponents to the Helms-Burton Act do not share this view of national security interest. In fact, the European Union has been the chief advocate against the Helms-Burton Act, and has encouraged investors to blatantly ignore the Helms-Burton Act and invest

50. See Ratchik, supra note 26.
51. See Shamberger, supra note 7, at 528.
52. Id. at 508.
53. Id. at 537 n. 84.
54. See Implementation of the LIBERTAD Act, supra note 4.
in any properties in Cuba. In essence the European Union is telling its investors to outright ignore the interests of the United States, ignore the fact that Castro has taken properties that rightfully belong to United States nationals, and invest in those properties. Further, the European Union investors shall ignore the continual Human Rights violations that occur in Cuba; and justify their actions by passing resolutions posturing a political stance, which in actuality are nothing more than political jargon.

The European Union has been quite vocal in its opposition to the Helms-Burton Act because it would affect the pocket of many of its investing companies. However, it is not quite as vocal in its opposition to the continual human rights violations that occur within Cuba, "while the [European Union] called for a peaceful transition to a pluralistic democracy, respect for human rights, and fundamental freedoms in Cuba," it never indicated that trade and investment with Cuba would be conditioned upon advancements in these areas. The European Union, along with countries such as Canada and Mexico, are concerned with the Helms-Burton Act not because of the "unhealthy precedent" that it will set, but rather because it will affect them economically.

Opponents to the Helms-Burton Act argue that to permit Helms-Burton is a direct violation of the obligation the United States has under the NAFTA to treat all members with "most-favored-nation" status. In pertinent part, NAFTA states, "each Party shall accord to investors of another Party treatment no less favorable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." Further, Canada and Mexico argue that Helms-Burton violates Chapter Sixteen of NAFTA, explicitly requiring all parties to NAFTA accord temporary entry of business persons to the respective countries. Canadian and Mexican investors argue that Title III, which allows lawsuits to be brought against those investors who deal in confiscated property in Cuba, and Title IV, which denies entry to the United States for those investors and their family, frustrates the very purpose of Chapter Eleven and Chapter sixteen

55. Shamberger, supra note 7, at 509.
56. Id.
57. Id. at 509.
58. Id. at 508.
59. NAFTA, supra note 39, at 639.
60. Id.
61. Id.
of NAFTA. However, the United States has several arguments that would not only allow but justify the United States enacting Title III, and maintaining Title IV of Helms-Burton, without violating any provision of the NAFTA agreement.

The United States can rightfully claim, under Article 1110 of Chapter Eleven of the NAFTA agreement, one of the member countries can prohibit other country members from taking measures that directly or indirectly expropriate an investment of a NAFTA country. Clearly, the Canadian or Mexican investor who traffics in confiscated United States property is in direct violation of Article 1110, and it is therefore justified for the United States to take measures that would prohibit these investors from profiting from confiscated property. The very purpose of Article 1110 is to allow other member countries from being handcuffed in situations such as this. The Canadian or Mexican investor is willfully and knowingly trafficking in properties that were wrongfully confiscated by the Cuban government. The United States has no other recourse but to exercise its right under Article 1110.

Next, the United States can rightfully deny Chapter Eleven benefits to any of the member countries, if it finds that Canadian or Mexican investors maintain investments that are owned or controlled by investors of a non-NAFTA country with which the United States maintains no diplomatic relations, or against which it maintains economic sanctions. The government of Cuba is not a member of the NAFTA agreement, and the United States, which is denying benefits to the Canadian and Mexican investors, maintains economic sanctions against the Cuban government. It does not matter that the investment comes from Canada or Mexico, because the investment is administrated or run in Cuba, and therefore the rules and laws of the Cuban government control what occurs with the investment.

Finally, the United States can use Article 2102, which allows any one of the NAFTA member countries to take a contrary position to the agreement if it feels that national security interests are being threatened.

62. See Troia, supra note 9, at 606-07.
63. See NAFTA, supra note 39, at 641 (governing payment of compensation when an investment is appropriated).
64. See Troia, supra note 9, at 616.
65. See NAFTA supra note 39, at 642 (authorizing denial of chapter eleven benefits).
66. See Troia, supra note 9, at 616.
67. See Troia, supra note 9, at 616-17.
As described earlier in relation to the GATT agreement, the United States has a national security interest in protecting its citizens from ruthless attacks on the part of the Cuban government. The Cuban government can only thrive and continue if countries such as Canada and Mexico continue to openly invest in the country, providing the Cuban government with the hard currency necessary to maintain the government running. It is contrary to the national security of the United States to have a country, which is only ninety miles away and is hostile to the United States, continue to receive economic support by the very countries with which the United States is suppose to have strong trading ties. Therefore, it is in the interest of United States national security to implement legislation such as the Helms-Burton Act that will dismantle the Cuban regime which has shown time and again its dislike for the United States. Clearly the United States has ample justification for the implementation of Title III of the Helms-Burton Act and the maintenance of Title IV, without dealing with the issue of whether or not the GATT agreement or the NAFTA agreement are violated. The United States has an obligation first and foremost to the citizens of the United States, irrespective of whether the Mexican and Canadian investors are in agreement with the manner in which that obligation is carried out.

III. THE EFFECTS DOCTRINE PERMITS THE UNITED STATES TO IMPLEMENT EXTRATERRITORIAL LEGISLATION

It is argued that the Helms-Burton Act violates international law because it is an unjustified extraterritorial application of United States law against foreign countries. Opponents to Helms-Burton argue that it is an extraterritorial legislation because it seeks to require foreign countries and their nationals to comply with the United States embargo against Cuba, or

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68. See GATT, supra note 49.
69. See Troia, supra note 9, at 616.
70. See NAFTA, supra note 39 at 639.
71. Helms-Burton Act, supra note 5, § 6031 (1996). It is the sense of the Congress that (4) in view of the threat to the national security posed by the operation of any nuclear facility, and the Castro government's continuing blackmail to unleash another wave of Cuban refugees fleeing from Castro's oppression, most of whom find their way to the United States shores, further depleting limited humanitarian and other resources of the United States, the President should do all in his power to make it clear to the Cuban Government that (a) the completion and operation of any nuclear power facility or (b) any further political manipulation of the desire of Cubans to escape that results in mass migration to the United States, will be considered an act of aggression which will be met with an appropriate response in order to maintain the security of the national borders of the United States and the health and safety of the American people.
72. See Troia, supra note 9, at 637.
face the possibility of a lawsuit in a United States court." The United States recognizes in international law five basis for jurisdiction prescribed by international law. The five bases that the United States recognizes for jurisdiction are as follows:

1. Territoriality: Entails the notion that countries are free to regulate and exercise jurisdiction over conduct that, wholly or in substantial part, takes place within its territory.

2. Nationality: Permits a country to exercise jurisdiction over the status of persons, or interests in things, present within its territory.

3. Protective: Recognizes the right of a state to punish a limited class of offenses committed outside its territory by persons who are not its nationals—offenses directed against the security of the state or other offenses threatening the integrity of governmental functions that are generally recognized as crimes by developed legal systems.

4. Passive Personality: Asserts that a state may apply law—particularly criminal law—to an act committed outside its territory by a person not its national where the victim of the act was its national.

The fifth basis, the effects doctrine, is discussed within this article. The United States can rightfully claim that under the "effects doctrine" of the Restatement, legislation such as the Helms-Burton Act is in compliance with international law because the foreign investments in Cuba have a substantial effect within the United States. The effects doctrine reads in pertinent part:

[A] state has jurisdiction to prescribe law with respect to (1)(a) conduct that wholly, or in substantial part, takes place within its territory; (b) the status of persons, or interests in things, present within its territory; (c) conduct

73. Id. at 637.
74. Id. at 640.
75. See Troia, supra note 9, at 640-42 (citing RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW § 402(3)(d) (1986)).
outside its territory that has or is intended to have a substantial effect within its territory.\textsuperscript{76}

The effects doctrine has on prior occasions been used to address cases dealing in anti-trust, securities, and environmental protection. In such cases, United States courts have held that conduct between foreign companies on foreign soil could nevertheless subject them to United States jurisdiction if there are effects in the United States.\textsuperscript{77} Knowing that the effects doctrine is a vehicle by which the United States can get around violating international law, it is important to note that under Section 403 of the Restatement, a state may not exercise jurisdiction to prescribe law with respect to a person or activity having connections with another state when the exercise of such jurisdiction is unreasonable.\textsuperscript{78} Clearly the question then turns to what exactly the legislature means by reasonable. In Section 403(2) the legislature provides a non-exhaustive list which describes the several factors that must be considered when trying to determine if a particular piece of legislature is reasonable.\textsuperscript{79} The United States should

\begin{itemize}
    \item[(2)] Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:
    \begin{itemize}
        \item[(a)] The link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
        \item[(b)] The connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity, to be regulated, or between that state and those whom the regulation is designed to protect:
        \item[(c)] The character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.
        \item[(d)] The existence of justified expectations that might be protected or hurt by the regulation;
        \item[(e)] The importance of the regulation to the international political, legal, or economic system;
        \item[(f)] The extent to which the regulation is consistent with the traditions of the international system;
        \item[(g)] The extent to which another state may have an interest in regulating the activity;
    \end{itemize}
\end{itemize}

\textsuperscript{76} \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 402 (1987).

\textsuperscript{77} \textit{See} Shamberger, supra note 7; \textit{Timberlane Lumber Co. v. Bank of America Nat'l Trust & Sav. Ass'n}, 549 F. 2d 397 (9th Cir. 1976); \textit{United States v. Aluminum Co.}, 148 F. 2d at 444 (2d Cir. 1945).

\textsuperscript{78} \textit{RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW} § 403 (1987).

\textsuperscript{79} \textit{The Restatement (Third) states:}

\textsuperscript{(2)} Whether exercise of jurisdiction over a person or activity is unreasonable is determined by evaluating all relevant factors, including, where appropriate:

\begin{itemize}
    \item[(a)] The link of the activity to the territory of the regulating state, i.e., the extent to which the activity takes place within the territory, or has substantial, direct, and foreseeable effect upon or in the territory;
    \item[(b)] The connections, such as nationality, residence, or economic activity, between the regulating state and the person principally responsible for the activity, to be regulated, or between that state and those whom the regulation is designed to protect:
    \item[(c)] The character of the activity to be regulated, the importance of regulation to the regulating state, the extent to which other states regulate such activities, and the degree to which the desirability of such regulation is generally accepted.
    \item[(d)] The existence of justified expectations that might be protected or hurt by the regulation;
    \item[(e)] The importance of the regulation to the international political, legal, or economic system;
    \item[(f)] The extent to which the regulation is consistent with the traditions of the international system;
    \item[(g)] The extent to which another state may have an interest in regulating the activity;
\end{itemize}
argue that subsection (a) of Section 403(2) is a good example of why it is reasonable to implement Helms-Burton. Under subsection (a) the regulating state, i.e., the United States, has to demonstrate that there is a link between the activity and the territory wanting to regulate the activity.80

The United States is trying to regulate the activity of countries that are trafficking in illegally confiscated property. The justification for doing so is that there will be a substantial, direct, and foreseeable effect upon the United States if it continues to allow countries to traffic in United States properties illegally confiscated by the Cuban government.81 To continue to allow the Castro government to taint the titles of properties that rightfully belong to the United States nationals, would create an insurmountable problem for the United States down the line in the claims resolutions.82 "The clouds on titles created by these purported valid transfers to traffickers of other nationalities would, at the very least, delay and complicate the task of settling the valid property claims of United States nationals through the Foreign Claims Settlement Commission."83 This purported action by the Castro government would create a substantial effect on the United States, and would thus justify the provisions of Helms-Burton, in particular Title III. This is not to say that based on subsection (a), and it alone, would the United States reach the reasonable standard that was discussed earlier in Section 403 of the Restatement. It is clear that there is some form of a totality of the circumstances approach by the legislature to reach the reasonable standard.

We turn now to the question of whether or not the interests of other countries such as Canada, Mexico, or the European Union, outweigh the interests of the United States when addressing the issue of whether legislation which has extraterritorial effects are reasonable. We first can compare, and quickly dismiss, the notion that the interests of the Cuba outweigh those of the United States. The only interest Cuba has is in profiting from property that has been illegally confiscated from the United States.84 Such interests, compared with those of the United States, are not legitimate. The United States and its nationals have a compelling interest

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80. Id.
81. See Brice M. Clagett, Title III of the Helms Burton Act is Consistent with International Law, 90 AM. J. INT'L L. 434 (1996).
82. See Shamberger, supra note 7, at 522.
83. Id. at 523.
84. Id. at 522.
in getting back property that rightfully belongs to them.\textsuperscript{85} This interest substantially outweighs any kind of interest that the Cuban government might have in trying to continue its illegal trafficking of confiscated property.

The more interesting situation arises when comparing the interests of the United States with those of the European Union, Mexico, and Canada. There is a closer argument that the interests of the European Union, Mexico, and Canada outweigh those of the United States. However, there is no mistaking the fact that the United States has an interest in not allowing foreign nations to continue to profit at the expense of the United States.\textsuperscript{86} These foreign nations that are profiting from United States confiscated property are fully aware that the Castro government seized those properties without compensating the United States nationals for the property.\textsuperscript{87} These foreign nations argue that their interests lie in their ability to continue to conduct trade and business with Cuba free from the laws of the United States.\textsuperscript{88} Yet, what these nations do not seem to understand is first, that the Helms-Burton Act is not a complete ban upon countries that want to do business with the Cuban government. Rather it is a measure taken to protect the interests of United States nationals who have lost their ownership rights to property in Cuba, simply because of the desperado tactics of the Castro government.

These nations that argue that their rights to freely deal with the Cuban government are hindered by Helms-Burton are only partially correct, because Helms-Burton is called into effect when these foreign nations begin to traffic in property which was illegally confiscated from United States nationals.\textsuperscript{89} There is not one provision within the Helms-Burton Act which bans any and all trades with Cuba. It only bans those trades and dealings which implicate directly properties that were confiscated from United States nationals.\textsuperscript{90} To further illustrate the substantial interest the United States has in passing such legislation, the Foreign Claims Settlement Commission recently announced that the United States nationals possess claims to confiscated property that exceeds six billion dollars.\textsuperscript{91} Clearly that number will continue to rise as long as the Castro government is allowed to profit from those illegal activities.

\textsuperscript{85} See Clagett, supra note 81, at 436.
\textsuperscript{86} See Shamberger, supra note 7, at 524.
\textsuperscript{87} Id. at 524.
\textsuperscript{88} Id. at 523.
\textsuperscript{89} See generally Helms-Burton Act, supra note 5.
\textsuperscript{90} See generally id.
\textsuperscript{91} See Shamberger, supra note 7, at 522.
Lastly, it is a well recognized principle in international law that confiscations in violation of international law are ineffective in passing valid title to the property. Therefore, the countries do not have an obligation to recognize the passing of the title to the subsequent purchaser of title.⁹² Therefore, the United States can claim that its interests substantially outweigh those of these other competing countries, inasmuch as these competing companies do not have free and clear title to confiscated property. In the event these countries continue to traffic in those properties, they are assuming the risk of purchasing property that they know is confiscated illegally.⁹³

IV. CONCLUSION

The Helms-Burton Act, as it is in place right now, is a great piece of legislation which quite frankly is being misused, or rather unused. While Title III continues to be suspended by the President, the Helms-Burton Act is nothing more than political posturing by the current administration, and an extension of the 1959 Trade Embargo. It would be shameful to think that Congress drafted a piece of legislation which does nothing more than address an issue which has already been addressed. Indeed, it seems an improbability to think that Congress intended to make Helms-Burton a mere extension. Rather, it is clear from the language within the Helms-Burton Act itself that it was intended to be the final blow to the Cuban regime. Our leaders have an obligation to the citizens of this country. The obligations the country owes its people are promulgated by the United States Constitution, which states:

We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution of the United States of America.⁹⁴

The obligation to provide for the common defense, and establishment of Justice, is for the citizens of this country and not for the benefit of trading partners.

The Helms-Burton Act is the vehicle by which a final period can be placed on the Castro regime. However, it is up to our great leaders to step

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92. See id. at 525.
93. See Claget, supra note 81, at 437.
94. U.S. CONST. pmbl.
to the forefront and ensure that such a result will occur. This great nation was founded upon an ideology of non-compliance with tyranny and oppression. The Castro government has time and again proven that tyranny and oppression shall be the standards by which they shall be measured, and defiantly dare the United States government to act. The legislature has acted and now it is up to the President of the United States to put the final nail in the Castro government, and bring an end to the tyrant’s regime. Great leaders are measured by what great things they did in their time of ruling. President Truman during World War II saw an end to the Adolf Hitler rule. President George Bush saw the mighty fall of the Communist Soviet Union and an influx of democracy to that region. The fall of the Castro regime would have the same if not greater historical accolades, and it is now the time for the current administration to do everything within their power to bring the tyrant’s regime to an end.
I. INTRODUCTION

Ten years elapsed from the time the first case of Bovine Spongiform Encephalopathy (BSE), commonly referred to as "mad cow disease," was discovered in Great Britain, until researchers confirmed that BSE was...
responsible for many human deaths. In many regions of the world, especially the United Kingdom, rampant epidemics of the dreaded foot-and-mouth disease (FMD) threaten to devastate the worldwide multi-billion dollar agricultural industry. During the last five years, the public has been exposed to the media onslaught of written, verbal, and photographic images depicting flaming piles of animal corpses conveying the fear and mayhem caused by these contagious diseases that appear to pose serious health hazards. Independent governmental bodies have had mixed reactions to the current outbreaks that exist in or threaten to invade their respective countries.

Currently, there is no uniform method of procedure to contain and ultimately eradicate these animal diseases. The World Trade Organization (WTO), the International Office of Epizootics (OIE, or World Organization for Animal Health), and the Codex Alimentarius Commission (Codex) are several global entities working in conjunction to curb the threat of these diseases that are potential causes of international catastrophe to physical and economic health. Recent accusations by European Union countries of independent policymaking motivated by economic protectionism, rather than by scientific principle, have spurred debates about conformity of disease prevention and eradication standards and trade regulations.

This article will explore the nature of these viral epidemics and contemplate whether disease-free countries like the United States are sufficiently protected from, and prepared for, an outbreak of either or both of these viruses. Additionally, this article will provide an overview of how different countries around the world are coping with containment, eradication, and prevention of viral outbreaks. Finally, this article will address the issue of fairness and efficacy of international policies related to BSE and FMD.

2. After the first confirmed case of BSE in 1986, the British government assured the public that beef was safe to eat. This was based on the scientific perception that TSEs (Transmissible Spongiform Encephalopathies - the general term for the type of virus that includes BSE) were not transmissible between species. The BSE Inquiry, Vol. 1: Findings and Conclusions, Executive Summary of the Report of the Inquiry, S. Communication of the Risk Posed by BSE to Humans, at http://www.bse.org.uk/report/volumel/execsum6.htm (last visited Oct. 27, 2001).


Part One of this article will illustrate the characteristics of BSE and FMD. Part Two of this article will examine the United States’ strategies to protect its citizens and its agricultural industry against these two diseases. Part Three of this article will focus on the current status of the two diseases in selected regions of the world, and what policies specific countries have enacted. Part Four will address the sanitary standards for exporting countries contained in the SPS Agreement, the international treaty governed by the WTO. Part Five will contemplate the perspectives of disease-free countries and countries affected economically by the trade regulations and the importation policies and restrictions that have been imposed by importing countries.

II. DISEASE CHARACTERISTICS

A. BSE

BSE is a type of degenerative neurological diseases known as Transmissible Spongiform Encephalopathy (TSE). TSEs occurring in other animal species are known by names specific to the type of animal. It is not known exactly how TSEs are spread. However, it is now recognized that the once common practice of using ground bodily remains of TSE-carrying animals in feed given to ruminant animals, which are inherently herbivorous, has caused the recent BSE outbreak in Great Britain. In the commercial livestock industry, cattle and sheep are routinely fed high protein diets to facilitate rapid and enhanced growth. BSE incubation periods can run from several months to several years after ingestion of contaminated animal feed. What is known for certain is that TSEs always result in fatality of the affected organism.

BSE afflicted cattle exhibit symptoms of neurological and central nervous system damage, including changes in disposition, difficulty standing straight, and other signs of physical debilitation. A BSE infected animal’s brain will have sponge-like holes on its surface, a common

5. USDA/APHIS, BSE, supra note 1.
6. Id. The TSE found in sheep is known as “scrapie.” As of this writing, scrapie is not transmissible to humans. Id.
7. Id. The causative agent of TSEs has not been fully characterized, though they are suspected to be caused by a type of a virus or a protein. Id.
10. See USDA/APHIS, BSE, supra note 1.
11. Id.
12. Id.
characteristic of all TSEs. Currently, diagnosis of BSE can only be confirmed through a post-mortem examination of the animal’s brain.

There is no known treatment or cure for BSE. A BSE infected animal’s condition will systematically worsen until it dies naturally within two weeks to six months, or until it is slaughtered. Upon confirmation of BSE in an animal, the affected animal, along with the remainder of its herd, will be quickly destroyed and the carcasses incinerated in an effort to halt the spread and eradicate the disease. The milk and offspring of these animals are not known to carry BSE. BSE is only known to be contracted as a result of ingesting BSE contaminated meat.

The form of TSE that affects humans is called Creutzfeldt-Jakob Disease (CJD). Currently, there are no known cases of CJD in the United States. The first confirmed case of CJD in Great Britain was reported in 1986. Incidence of CJD is estimated to be one in one million people around the world. In the mid-1990s ten cases of CJD in humans were confirmed in Great Britain. Scientists discovered that this was a variant form of CJD (vCJD) that closely resembles BSE. Like all TSEs, vCJD is a fatal disease that attacks brain tissue. Scientists believe that vCJD was contracted by humans after ingesting or otherwise coming into contact with BSE contaminated animal products.

13. Id.
14. Currently, BSE is undetectable in live animals. Animals showing signs of neurological disorders are slaughtered and during necropsy, their brain tissue is examined for BSE. Additionally, immunohistochemistry and immunoblotting techniques are used to detect the partially-proteinase resistant form of the prion (PRPres) protein that would confirm a BSE diagnosis. The laboratory confirmation of BSE takes up to two weeks. USDA/APHIS, BSE, supra note 1.
17. CDC, BSE, and vCJD, supra note 15.
18. Id.
19. Id.
20. Id.
21. Id.
22. USDA/APHIS, BSE, supra note 1.
23. See CDC, BSE, and vCJD, supra note 15.
24. Id.
25. Id.
26. Id.
27. See CDC, BSE, and vCJD, supra note 15.
possible BSE contaminated beef go far beyond a simple hamburger. They include cosmetics, pharmaceuticals, vaccines, and gelatin. It is unknown which, if any, of these products were responsible for the BSE outbreak in the United Kingdom. This finding spurred the enactment of measures worldwide to control the spread and eradicate BSE.

No cases of either BSE or vCJD currently exist in the United States. In 1997, the United States banned the use of most animal remains in cattle feed, especially meat and bone meal (MBM), which is the suspected culprit of the origination of BSE. There is no vaccination or treatment currently available for any of the TSEs. The scientific inconclusiveness about the epidemiology (how the disease is contracted and transmitted) of the disease is cause for health and economic concern in any part of the world where cattle products are a substantial part of daily living.

**B. FMD**

FMD is a highly contagious viral infection that affects cloven-foot domestic livestock and wild animals. It is rarely contagious to humans. The primary concern humans have regarding a FMD outbreak is of an economic nature. Although FMD has a mortality rate of less than one

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29. Id.

30. Id.


32. Id.

33. The FDA banned the practice of adding the wastes and remains from slaughtered ruminant animals to animal feed meant for ruminants. This ban was based on evidence suggesting that consumption of BSE contaminated animal feed caused the BSE outbreak in the United Kingdom, SCHLOSSER, supra note 8, at 202. See also Office of Public Affairs, FDA Announces Test Results from Texas Feed Lot, FDA NEWS, Jan. 30, 2001.

34. CDC, BSE and vCJD, supra note 15.

35. Id.


37. Memorandum from James R. Little, Chair, National Food and Agriculture Council, to all employees of the USDA, On Guard Against Foot-and-Mouth Disease (June 12, 2001), available at www.aphis.usda.gov/oa/fmd/fmdmemo.html.

percent, it weakens and reduces the productivity of the afflicted livestock.\footnote{39} FMD is transmitted easily by animal-to-animal or human-to-animal contact.\footnote{40} There is thought to be a risk of airborne contamination risk because it can spread to nearby flocks without any physical contact.\footnote{41} For example, a human who has been in contact with a FMD infected animal may harbor the virus in his or her respiratory tract for twenty-four hours, and possibly transmit the disease to a FMD susceptible animal in another area.\footnote{42} Humans can also carry the disease on their clothing and shoes.\footnote{43} Animals easily contract the virus by breathing it in through their noses or ingesting it in their mouths.\footnote{44} The incubation period is one to five days.\footnote{45} Symptoms include fever and characteristic oozing sores, known as vesicles, on the feet, legs, teats, udder, and in and around the mouth.\footnote{46} An infected animal’s tongue grows a grayish-white coating with several blisters protruding from underneath.\footnote{47} As the disease runs its course, the protrusions erupt and the thick grayish-white coating layer eventually sloughs off by itself.\footnote{48} FMD damages the cardiac muscle and results in decreased fertility and milk production.\footnote{49}

Although the mortality rate for FMD is under one percent, this percentage rises in young and otherwise immune-compromised animals.\footnote{50} The cost of a FMD outbreak can ultimately amount to billions of dollars.\footnote{51}


\footnote{41} Id.

\footnote{42} Id.

\footnote{43} Id.

\footnote{44} Id.


\footnote{46} Id. at 20-21.

\footnote{47} Id.

\footnote{48} Id. at 21. At later stages, FMD infected animals may exhibit signs of aggression, lameness, excessive drooling, and nasal discharge. \textit{Id.}


\footnote{50} Id. at http://www.aphis.usda.gov/vs/ep/fad_training/VESVOL7/page70_7.htm (last visited Oct. 27, 2001).

\footnote{51} An FMD outbreak could have a devastating effect on the $93 billion United States animal agriculture industry. \textit{Foreign Animal Diseases Emergency Plan Urged by House Agriculture Committee Leaders}, \textit{FOOD CHEMICAL NEWS}, Nov. 24, 1997; See also Foot-and-
Vaccinations are available for FMD, but one vaccine cannot protect against all variant strains of the disease.\textsuperscript{52} Furthermore, a country is prohibited from claiming an official recognition of "disease-free" status if it has a current FMD vaccination program in effect.\textsuperscript{53} Countries implementing vaccination programs are designated as "FMD-free (with vaccination)."\textsuperscript{54} As such, the downgrade in status to "FMD-free (with vaccination)" creates a downward spiral in export prices for meat products, while meat prices rise for consumers within these countries.\textsuperscript{55} In endemic countries, meaning those where FMD is deemed generally under control, livestock export prices are generally fifty percent lower.\textsuperscript{56} Declaring a country free of FMD increases its livestock export prices by one hundred percent.\textsuperscript{57}

Many countries choose not to implement a vaccination program, but rather opt to eradicate FMD through the immediate slaughter of all susceptible animals within a proscribed zone of possible contamination and decontamination of the infected premises.\textsuperscript{58} This instant slaughter and burn method is quicker and, arguably, more efficient than employing a vaccination program; but it is the most costly method both economically and environmentally.\textsuperscript{59} In some countries, like the United Kingdom, the government compensates farmers for their slaughtered livestock.\textsuperscript{60} Ultimately, the whole country suffers financially from an outbreak.\textsuperscript{61} In Great Britain, for example, the cost of eradicating FMD is estimated to be

\begin{itemize}
\item Mouth War is Costing Taxpayers, THE SUN SENTINEL, July 14, 2001, at 17A [hereinafter FMD War] (Eradication of the FMD outbreak in the United Kingdom will cost U.S.$3 billion. This includes the cost of destroying and disposing of animals, disinfecting contaminated areas, and compensating farmers for their losses sustained).
\item 52. Farmers once coped with FMD outbreaks by wiping the tongues of FMD infected animals with rags and then used those rags to purposely spread the disease to the rest of the herd. This way, they would all be infected at the same time and build up immunity to FMD. However, this tactic did not always work because the cattle, while immune to one strain of FMD, would become stricken by other variant strains of the disease. APHIS, supra note 36, at http://www.aphis.usda.gov/vs/ep/fad_training/VESVOL7/page77_7.htm (last visited Oct. 27, 2001).
\item 53. Steven Lewis, South America Facing Shortage of Foot-and-Mouth Vaccines, 43 FOOD CHEMICAL NEWS, May 7, 2001, at 7.
\item 54. See, e.g., Binkley, et. al., supra note 3, at 17.
\item 55. Id.
\item 56. James F. Smith, From Frankenfood to Fruit Flies: Navigating the WTO/SPS, 6 U.C. DAVIS J. INT'L L. & POL'Y 1, 29 (2000).
\item 57. Id.
\item 58. Id.
\item 59. Id.
\item 60. See FMD War, supra note 51, at 17A.
\item 61. Id.
\end{itemize}
several billion dollars. In other countries, farmers can be financially devastated by an FMD outbreak if they are forced to have their animals slaughtered or carry the financial burden of vaccinating their herds, or the diminished productivity of their disease ridden livestock.

III. FMD AND BSE STATUS IN THE UNITED STATES

The United States currently employs measures to vigilantly guard against BSE and FMD. BSE poses less of a threat than FMD because there has never been a case in the United States, and because it is spread by ingestion of BSE contaminated meat. Feedlots where live cattle are held awaiting slaughter and slaughterhouses are constantly monitored for signs of cattle with neurological disorders, and brains of slaughtered cattle are routinely tested as a precaution. Since 1997, feed mills have been prohibited from using ruminant animal wastes as an ingredient in feed for ruminant animals.

Disease outbreaks can have far-reaching effects in the modern global economy besides affecting meat and milk prices. For example, the BSE/vCJD outbreak in Europe may lead to a reduction in the amount of surgical procedures performed in New York City, where at least twenty-five percent of the blood supply is imported from Europe. This is due to new Food and Drug Administration (FDA) guidelines restricting blood donations from people who may have been exposed to BSE.

The United States Department of Agriculture (USDA), in conjunction with the Centers for Disease Control, the National Institute of Health, and the Food and Drug Administration, bears the responsibility of safeguarding the United States from food-borne diseases. Recently, the USDA obtained a court order to confiscate and destroy several hundred sheep

62. Id.
63. Id.
64. See Foreign Animal Diseases Emergency Plan Urged by House Agriculture Committee Leaders, supra note 3.
65. See SCHLOSSER, supra note 8.
66. See CDC, BSE and vCJD, supra note 15.
67. See SCHLOSSER, supra note 8.
69. Id.
from neighboring Vermont farms.\textsuperscript{71} The sheep, imported from Belgium and the Netherlands in 1996, were suspected of being exposed to BSE contaminated feed before being imported into the United States.\textsuperscript{72} In 2000, some sheep in the Vermont flocks tested positive for a TSE, prompting the USDA to issue a "declaration of extraordinary emergency" to have the sheep removed.\textsuperscript{73} It may take years to determine, through laboratory tests, which form of TSE was found in the Vermont sheep.\textsuperscript{74} Although there are no documented cases of BSE infected sheep, serious concern arises from the fact that sheep can contract BSE from ingestion of a very small amount of BSE contaminated feed.\textsuperscript{75} Additional fears arose from the uncertainty of whether flocks of sheep were consistently monitored in Europe for TSEs.\textsuperscript{76} Consequently, humans are possibly in danger of exposure to vCJD from the Vermont sheep.\textsuperscript{77} Prior to 1998, when the USDA learned of the possible exposure to BSE contaminated feed, offspring and milk products from the Vermont sheep were sold for human consumption.\textsuperscript{78}

FMD threatens United States livestock because it is easily transmissible.\textsuperscript{79} Over fifty years have passed since the last FMD outbreak in the United States.\textsuperscript{80} Animals in the United States are particularly susceptible to an outbreak of FMD because they have no immunity.\textsuperscript{81} Currently, there is no vaccination program in effect due to the high cost involved and the questionable effectiveness of such a program.\textsuperscript{82} Because FMD is a highly contagious viral disease spread by physical contact, widespread fears abound of the threat of contamination from people carrying the disease and arriving in the United States from FMD affected countries.


\textsuperscript{72} \textit{Id.}

\textsuperscript{73} \textit{Id.}

\textsuperscript{74} \textit{See Solomon, supra note 70.}


\textsuperscript{76} \textit{Id.}

\textsuperscript{77} \textit{Id.}

\textsuperscript{78} \textit{See Solomon, supra note 70.}

\textsuperscript{79} \textit{See Smith, supra note 56.}

\textsuperscript{80} \textit{Id. at} 28-29.

\textsuperscript{81} \textit{Id. at} 29.

countries. An FMD outbreak may cost the United States taxpayers billions of dollars before it is under control and eradicated.

IV. FMD STATUS INTERNATIONALLY

Although FMD is widespread around the world, currently North America, Central America, Chile, Australia, New Zealand, and some European countries are considered FMD disease-free. South America, Africa, and parts of Asia have reported recent outbreaks of FMD. While reported outbreaks of FMD are on the decline in the United Kingdom, public disapproval of the slaughter and burn program has swayed the British government toward enactment of a regional vaccination program. The head of the European Union’s meat trade association officially recognized the financial devastation that would ensue in the event of an FMD outbreak in the mainland European countries. In 1998, the United States placed a ban on importation of all meat products from the European Union countries.

A. Japan

Similarly, in response to a recent outbreak of FMD, for the first time in ninety-two years Japan has recently banned all pork, mutton, and related meat imports from the European Union Countries. This follows a ban on

83. See, e.g., In re Cynthia Twum Boafo, P.Q. Docket No. 00-0014, 2001 WL 195269 (USDA) (A woman imported beef from Ghana, a FMD affected region. Regardless of lack of intent to spread disease, sanctions were issued as a deterrent to others who try to import meat); In re Conrad Payne, A.Q. Docket No. 98-000457, 1998 WL 872494 (USDA) (A man imported uncooked sausage from the Netherlands. In a USDA administrative appeal hearing regarding importation of raw meat. The Netherlands, at the time, was considered at the time to be free of FMD).

84. See Foreign Animal Diseases Emergency Plan Urged by House Agriculture Committee Leaders, supra note 3.


86. Id.


88. Binkley, et al., supra note 3, at 17.

89. Id.

90. Japan to Ban Pork, Mutton From EU Over Foot-and-Mouth, supra note 38.
all beef products two months earlier after the European outbreak of BSE. The European Commission called Japan's ban on meat from all the European Union countries "unnecessary and not proportionate." The ban on meat products from all the European Union countries will drive up meat prices in Japan.

B. Canada

Like the United States and Japan, Canada does not import meat products from Europe because even a small outbreak would cost the country an estimated $2 billion dollars. The last FMD outbreak occurred there in 1952, and it has been FMD-free since that time. Since Canada does not allow any meat products imported from Europe, its main concern is that someone will unknowingly bring the virus into the country on their shoes or in food or plants through their luggage. Canadian inspectors are increasing inspections of passengers and luggage on flights from Britain in order to keep FMD out of North America.

C. European Union

1. United Kingdom

Combined efforts between the European Union's Standing Veterinary Committee and the United Kingdom government authorities intended to contain and eliminate FMD have been fairly successful in reducing the frequency of outbreaks. The British government has extended the ban on the movement of all livestock within the country, while other European Union member-states also are taking unilateral steps. Following outbreaks earlier this year, France, the Netherlands, and Germany have slaughtered all animals with any connection to Great Britain. The French government prohibits vaccination programs in favor of eradication of

91. Id.
92. Id.
93. Id.
94. Binkley, et al., supra note 3, at 17.
95. Id.
96. Id.
97. Id.
98. Binkley, et al., supra note 3, at 17. (In the United Kingdom, the number of new cases have fallen from forty per day at the peak of the outbreak to less than ten per day.) See WTO News, supra note 4, at 1.
99. Id.
100. Id.
affected animals and has implemented a ban on importation. France has recently declared itself FMD disease-free.

2. Ireland

Ireland also has a FMD disease-free status after enacting aggressive measures throughout its territory. Police, military, and Department of Agriculture officials are banning together to effectuate extensive controls at ports, airports, and on vehicles at the border of United Kingdom/Northern Ireland. As in other countries, they require disinfection of vehicles at the border, ports, and airports. Movement of all FMD susceptible species is banned, except directly to slaughter or for welfare reasons. Vehicles must be cleaned and disinfected following transport of susceptible species. Personnel have been increased in slaughter plants for the purpose of detailed ante-mortem examination of sheep. Intensive public campaigns disseminate information to farmers, veterinarians, and the general public.

D. South America

1. Argentina

Various types of FMD viruses have been identified recently in South America. In South America, countries battling FMD outbreaks vaccinate animals as part of their eradication programs. Supplies of vaccinations are rapidly depleting in an effort to control the spread of the recent FMD outbreak. Delays in reporting FMD outbreaks in Argentina have been instrumental in spreading the disease across its borders. Secrecy in

102. Id.
103. Binkley, et al., supra note 3, at 17.
104. Id.
105. Id.
106. Id.
107. Id.
109. Id.
110. Clapp and Thornton, supra note 85.
111. OIE, IAC, supra note 101.
112. Lewis, supra note 53, at 19.
113. Steven Lewis, Argentina’s Secrecy on Foot-And-Mouth Proves Costly; Restrictions Imposed on Meat Exports, 43 FOOD CHEMICAL NEWS, Mar. 26, 2001, at 4.
reporting the true status of FMD outbreaks in Argentina will prove costly, not only because of the expenses involved and loss of exports, but in terms of the government's image.\footnote{114}

Argentina requires FMD vaccine to inoculate fifty million head of cattle against the disease.\footnote{115} In June, a total of eighty-six outbreaks affecting thousands of animals were confirmed, clinically and by laboratory tests, in cattle in various districts and departments in provinces of Argentina.\footnote{116} Control measures involve application of animal movement restrictions, in the areas around the outbreaks and in the surveillance zones.\footnote{117} These measures include a temporary ban on gatherings of animals for trade, whatever the destination and purpose.\footnote{118} Primary vaccination against FMD is being performed in accordance with the provisions of the Eradication Program, and is due to be completed in late June or early July, depending on the climatic conditions prevailing in the different parts of the country.\footnote{119}

2. Uruguay

Coping with a new FMD epidemic, Uruguay will have trouble meeting its demand for FMD vaccine.\footnote{120} Recognized as FMD free, the country had previously implemented a vaccination program along with movement restrictions, to eliminate the disease in 1994.\footnote{121}

Furthermore, in 1994, Uruguay passed a law banning the production of FMD vaccine, in an effort to improve its standing as a FMD disease-free nation.\footnote{122} Now, the country has one laboratory equipped to manufacture the vaccine, and it will not be able to produce the estimated 28 million doses needed for its vaccination program.\footnote{123} Beef exports have been put on hold until the disease is once again eradicated.\footnote{124}
3. Brazil

Bordering Uruguay, Brazil has been coping with its own FMD outbreaks. Although thousands of animals have been slaughtered to date, the Brazilian government, under pressure from cattle industry associations, has implemented a regional vaccination program along with other control measures, including a halt to vehicle or pedestrian movement across the Brazil/Uruguay border, where the most recent FMD outbreaks have occurred.

V. WTO SANITARY/PHYTOSANITARY AGREEMENT

The Sanitary/Phytosanitary (SPS) Agreement was drafted in 1994 to promote uniform sanitary and phytosanitary measures for WTO member countries. To achieve this goal, the SPS Agreement encourages WTO members, when creating or maintaining SPS measures, to rely upon the SPS standards established by three international organizations: the Codex Alimentarius Commission (Codex); the International Plant Protection Convention (IPPC); and the International Office of Epizootics (OIE). These organizations act as advisory boards to address issues concerning human, plant, and animal life and health, respectively.

Disputes may arise concerning standards proposed based on the specific trade agendas of member countries, as opposed to scientific evidence. Lengthy approval processes and the desire to retain professional integrity of the scientists who are delegates to these organizations, may prevent the creation of scientifically questionable standards. The SPS Agreement was designed to provide sanitary guidelines based on scientific principles, not to impose strict uniform standards on its member countries. Consequently, wide latitude is given

125. Id.
126. Id.
128. Id. at 28.
129. Id.
130. Id. at 51.
131. Id. at 52.
to the individual sanitary policies of member countries.\textsuperscript{133} The SPS Agreement’s purpose is to encourage international trade by limiting the use of sanitary measures as disguised barriers to trade.\textsuperscript{134} WTO member countries have the right to impose SPS measures as necessary “for the protection of human, animal or plant life or health.”\textsuperscript{135} Another goal is to minimize trade barriers by preventing countries from committing arbitrary or unjustifiable discrimination when imposing SPS policies on imported products.\textsuperscript{136}

VI. PROTECTIONISM OR PROTECTION?

The European Union has taken offense to the United States and Japanese bans on imports from all European Union countries as unreasonable measures, and accused the United States policy of being rooted in economic protectionism because the ban is not considered scientifically grounded.\textsuperscript{137} However, a European Union official has recognized that the current FMD outbreak in Great Britain is a result of a particularly potent strain of the virus believed to be brought over from India.\textsuperscript{138} As such, it is understandable that FMD-free countries would want to employ the most drastic measures necessary to prevent introduction of the virus. At issue are the adequacy of monitoring standards set by the OIE and import restrictions on meat that are not as stringent as in the United States.\textsuperscript{139}

The principle argument of the European Union is that it is unfair to ban imports from regions that are disease-free because they are European Union countries.\textsuperscript{140} The European Union feels that it is protectionism masked by unsound scientific principle.\textsuperscript{141} The United States may soon find itself on the opposite end of this type of dispute.\textsuperscript{142} The European Communities may ban imports of United States manufactured pharmaceuticals because of the use of gelatin capsule casings partially composed of materials such as bovine brains and spinal cords originating

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\textsuperscript{133} Id. at 877.

\textsuperscript{134} Id. at 875.

\textsuperscript{135} Id.

\textsuperscript{136} Id.

\textsuperscript{137} Stewart and Johanson, supra note 127, at 53; Binkley, supra note 3, at 17.

\textsuperscript{138} Id.

\textsuperscript{139} Stewart and Johanson, supra note 127, at 51-52.

\textsuperscript{140} Id. at 51.

\textsuperscript{141} Id.

\textsuperscript{142} Id.
from BSE infected countries. This ban could cost the United States billions of dollars in pharmaceutical sales overseas. The United States views this European Communities measure as violating the SPS Agreement based on "scientifically unsound" principles because the United States monitors for BSE in compliance with OIE standards.

VII. CONCLUSION

FMD and BSE seriously threaten human and animal health, food supplies, and agricultural economy around the world. Public awareness of the implications of an outbreak is important so that governments and regulatory agencies will be more accountable for their control of agricultural industries. Though global entities are striving for uniformity in sanitary practices and disease eradication measures, cultural differences may thwart efforts to maintain harmony in international trade.

Difficulty lies in distinguishing between international trade policies rooted in protectionism and those based on sound scientific principle. It is more important for a government body to make decisions for its constituents erring on the side of caution than it is for a particular foreign country to expect entitlement to sell its exports. Fears of losing export business because of FMD or BSE should provide economic incentive for countries to adhere to sanitary standard guidelines. Until BSE is eradicated and there is certainty that an FMD outbreak can be easily quashed without debilitating great numbers of livestock, there should be no reason to subject a country to international disputes involving a decision to ban imports from any other country or region.

143. Id.
144. Stewart and Johanson, supra note 127, at 51.
145. Id.
Case Concerning the Seabed Mining Facility

REPUBLIC OF EREBUS

Applicant

v.

KINGDOM OF MERAPI

Respondent

SPRING TERM 2001

MEMORIAL FOR THE APPLICANT

New England School of Law, United States of America

Team Members: Ann Cascanett, Curtis Carpenter, Raymond Tamayo, and Katya Novtochina
THE CASE CONCERNING
THE SEABED MINING FACILITY

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I. STATEMENT OF JURISDICTION

Pursuant to Article 40(1) of the Statute of the Court, the Republic of Erebus and the Kingdom of Merapi, by a special agreement dated 1 November 2000, have agreed to submit their present dispute concerning maritime boundary delimitation and the seabed mining facility to the jurisdiction of the International Court of Justice under Article 36(1) of the Statute of the Court.

II. QUESTIONS PRESENTED TO THE COURT

1. Whether the Treaty of Amity and Peace established the Erebian-Merapin boundary as being the middle of the Krakatoa River’s principal arm, irrespective of any subsequent movement in the location of said arm;

2. Whether the shift that has occurred in the location of the Krakatoa River’s principle arm is governed by the doctrine of accretion;
3. Whether the shift in the Krakatoa’s main arm has resulted in placing the Alma Shoals and the adjacent petroleum reserves within the Erebian exclusive economic zone;

4. Whether Merapi acted in violation of international law when it seized and subjected to forfeiture proceedings six Erebian-flagged vessels fishing in the Alma Shoals;

5. Whether Erebus acted consistent with international law when, in response to the Merapin seizures, it provided naval escorts to Erebian fishing vessels in the Alma Shoals;

6. Whether Merapi is required to return or compensate for the Erebian fishing vessels it seized in the Alma Shoals;

7. Whether the establishment of the Erebian deep seabed mining facility under the high seas was inconsistent with international law;

8. Whether Merapi is prevented by the doctrine of equitable estoppel from asserting that the Erebian seabed mining facility is not in compliance with international law;

9. Whether the Aqua Protectors’ attack on the Erebian seabed mining facility is imputable to the government of Merapi;

10. Whether Merapi’s involvement in the Aqua Protectors’ attack was justifiable as self-defense under Article 51 of the United Nations Charter;

11. Whether Merapi had authorization from the United Nations Security Council to attack the Erebian seabed mining facility;

12. Whether Merapi is required to compensate Erebus for the cost of repairing the seabed mining facility and lost profits while such repair is underway;

13. Whether Merapi is required to compensate Erebus for the loss of life inflicted by the Aqua Protectors’ attack; and

14. Whether Merapi must extradite the responsible members of the Aqua Protectors for prosecution in Erebus.

III. STATEMENT OF FACTS

This case arises out of the Kingdom of Merapi’s seizure of Erebian-flagged fishing vessels and its support for a deadly attack on the Erebian government’s seabed mining facility. (Compromis ¶¶7, 18; Clarifications ¶4).
The Kingdom of Merapi borders the Republic of Erebus to its south. (Comp. ¶2). In 1947, Erebus and Merapi entered into the Treaty of Amity and Peace, which established their common land border as the midpoint of the principal arm of the Krakatoa River. (Comp. ¶¶3, 4). The Krakatoa River follows an easterly path and forms a large uninhabited delta before reaching the Etna Sea. (Comp. ¶2; Clar. ¶2). The Treaty also marked the nations' maritime boundary as extending out to sea from the midpoint of the principle arm of the Krakatoa River. (Comp. ¶4).

At the time the Treaty was prepared, the principle arm lay between Pigeon Rock to the south and the Cape of Realto to the north. (Comp. ¶4). As a result, the Alma Shoals and its fish-stocks were placed within the contiguous waters of Merapi. (Comp. ¶2). Notwithstanding, vessels from Erebus and other nations fished the area without provoking a response from Merapi. (Clar. ¶3).

Over time, hurricane-induced erosion has shifted the principal arm of the Krakatoa southward, so as today Pigeon Rock lies to the north of the principal arm. (Comp. ¶5). The river's previous main arm has ceased to exist as a distinct topographical feature. (Comp. ¶5; Clar. ¶1). Drawing the maritime boundary from the midpoint of the river's new principal arm establishes the Alma Shoals as now being within the exclusive economic zone of Erebus. (Comp. ¶5).

In early 1999, an Erebian oil company discovered petroleum reserves approximately 50 nautical miles from shore and adjacent to the Alma Shoals. (Comp. ¶5; Clar. ¶3). In August 1999, Erebus clarified its position that the Treaty of Amity and Peace places the Alma Shoals and the petroleum reserves within Erebian waters. (Comp. ¶6). Shortly thereafter, the Prime Minister of Merapi issued a communiqué, which stated that any interpretation of the Treaty as giving Erebus claim to this territory would constitute an act of hostility. (Comp. ¶6). Additionally, the Prime Minister threatened the seizure of Erebian fishing vessels operating in the Shoals. (Comp. ¶6). Erebus did not alter its position in response, and vessels bearing its flag continued to fish the Shoals. (Comp. ¶7).

Several months after the communiqué, the Merapin navy seized six Erebian fishing vessels found in the Shoals. (Comp. ¶7). The crews of these ships were released unharmed; however, the ships themselves were confiscated for their alleged trespass. (Comp. ¶7). In response, Erebus offered to provide naval escorts to any Erebian vessel wishing to exercise its right to fish in the Alma Shoals. (Comp. ¶7). No further confrontations between Erebian and Merapin vessels have occurred in the Shoals region. (Comp. ¶7). However, Erebus continues to demand the release of the six captured vessels bearing its flag. (Comp. ¶21).

Erebus's northern neighbor is the powerful state of Fogo, whose
Distinguished Brief

territorial ambitions have created hostile relations, resulting in sporadic military confrontation. (Comp. ¶1). In response to Fogo's aggression, Erebus has been forced to embark upon a buildup of its defensive forces. (Comp. ¶9). Some of the weapon systems that Erebus is developing require the procurement of minerals such as manganese, cobalt, nickel, and copper. (Comp. ¶9). While Erebus has a modern, developed economy, it is almost totally dependent on imports for its mineral needs. (Comp. ¶1.) In response to this critical strategic weakness, Erebus spent a number of years studying deep seabed nodules as a potentially dependable and economically viable source of minerals. (Comp. ¶9.)

In April 2000, Erebus announced to the world its intention to begin mining manganese nodules in international waters approximately 300 nautical miles beyond Merapi's exclusive economic zone. (Comp. ¶9). Government owned and operated facility was being constructed 5,000 feet below the surface of the water with mining scheduled to begin by the end of September 2000. (Comp. ¶9; Clar. ¶4). This announcement was accompanied by the release of an exhaustive report conducted by the Chair of the Department of Environmental Science of the University of Erebus. (Comp. ¶10). This report, which was the result of computer modeling and site comparison research, vouched for the environmental safety of the project. (Comp. ¶10; Clar. ¶4).

On August 15, 2000, the President of the United Nations' Security Council released a statement regarding concerns over the Erebian seabed mining facility. (Comp. ¶12). The statement asked Erebus to postpone mining until it could prove to the Council that the operation would not harm the fish-stocks of the nearby Grand Basin. (Comp. ¶12; Corrections ¶2). In a prompt reply to the Security Council, Erebus noted that while it had announced its seabed mining plans some six months prior, Merapi had never protested these plans. (Comp. ¶13). While Erebus could appreciate the Council's concerns, Erebus declined to postpone the mining operation at such a late date. (Comp. ¶13). Erebus believed the operation to be fully tested and proven safe. (Comp. ¶13). Additionally, due to continued tense relations with Fogo, Erebus had an immediate need for minerals for self-defense purposes. (Comp. ¶13).

Merapi's first diplomatic correspondence regarding the seabed mining operation was an August 25, 2000 note to the Security Council, in which Merapi requested that the Council take actions to prevent Erebus from beginning its mining operation. (Comp. ¶14). While the Council stated its intention "to remain seized of the matter," it took no official action in response to Merapi's request. (Comp. ¶15).

On the morning of September 1, 2000, saboteurs bombed the Erebian seabed mining facility. (Comp. ¶16). The bombing of the facility
resulted in the death of six Erebian civilians who at the time of the blast were working on a temporary platform. (Comp. ¶16). Additionally, the explosion resulted in over U.S. $1 billion in damages to the physical plant that will take over a year to repair. (Comp. ¶16).

Later that same day, a Merapi-based organization calling itself the "Aqua Protectors" claimed responsibility for the attack, which it referred to as "Operation Sea Storm." (Comp. ¶¶11, 16). Within hours, Merapi delivered a diplomatic note to the Security Council in which it denied either planning or participating in the attack. (Comp. ¶17). However, the same day the Merapi Times reported that the government of Merapi had prior knowledge of the operation and had financially backed the attack with US $100,000. (Comp. ¶18; Corrections ¶3). This report was later confirmed during routine oversight hearings in the Merapin Legislature. (Comp. ¶18).

Erebus immediately demanded that Merapi pay for the damage and loss of life caused by this attack. (Comp. ¶19). Additionally, Erebus demanded that Merapi extradite the responsible members of the Aqua Protectors for prosecution in Erebus on charges of homicide and destruction of government property. (Comp. ¶19; Clar. ¶6). Some of the individuals responsible are Merapin citizens, while others are nationals of a third state to Merapi’s south. (Clar. ¶5.) To date, Merapi has neither extradited nor prosecuted any of these individuals. (Comp. ¶19; Clar. ¶6). They remain free from police custody, amidst the general population of Merapi. (Clar. ¶6).

On October 1, 2000, after a series of diplomatic talks, the parties agreed to submit their dispute to the International Court of Justice. (Comp. ¶22).

IV. SUMMARY OF PLEADINGS

A. The Erebian-Merapin border is the present location of the Krakatoa River’s principal arm. Erebus and Merapi are bound by the terms of the Treaty of Amity and Peace, the plain meaning of which establishes their boundary as the middle of the principal arm of the Krakatoa, irrespective of changes in the river’s location. Over time, hurricane-induced erosion has shifted the river’s principle arm southward. Since this movement was of a gradual nature, the doctrine of accretion dictates that the Erebian-Merapin boundary moved with the shift in the river. Consequently, the Alma Shoals, as well as the adjacent petroleum reserves, now lie within the Erebian exclusive economic zone, entitling Erebus to exploit and regulate the sea and seabed resources of that area.

B. Independent of the issue of the location of the Erebian-Merapin maritime boundary, Merapi’s seizure and submission to forfeiture
procedures of Erebian vessels fishing in the Alma Shoals was a violation of international law. Erebus was, thus, justified in sending its naval vessels into the Alma Shoals to protect other Erebian fishing vessels. International law requires that Merapi must either return the six unlawfully seized vessels bearing the Erebian flag, or pay Erebus reparations equal to their value.

C. The Erebian deep seabed mining operation was not in violation of international law. Erebus is a party to neither the 1982 Law of the Sea Convention nor the 1994 Agreement on Implementing Part XI of the 1982 Convention. The seabed mining provisions of the 1982 Convention and the 1994 Agreement do not constitute customary international law binding on non-parties. Thus, Erebus is not restricted by the seabed mining provisions in these agreements, and may mine the seabed consistent with the customary international law freedom of the high seas doctrine. Finally, the United Nations Security Council Presidential Statement did not create a binding obligation upon Erebus to forbear from commencing its seabed mining operation. In any event, the doctrine of estoppel bars any claim that Merapi may have had concerning the legality of the Erebian seabed mining facility, since it made no protest during the construction of the billion-dollar facility.

D. Merapi is liable for the destruction of the Erebian seabed mining facility and the killing of Erebian nationals. Under the principles of state responsibility, Merapi’s financial support to the Aqua Protectors, with prior knowledge of their planned attack against the Erebian facility, amounts to a use of force against the property and citizens of Erebus. Since Merapi had knowledge of the Aqua Protectors’ plan, Merapi was obligated to warn Erebus and to take other reasonable measures to prevent the Aqua Protectors’ attack. Merapi’s support of the Aqua Protectors was not justified as self-defense consistent with Article 51 of the United Nations Charter, because Article 51 does not authorize anticipatory self-defense, and even if it did, the potential for economic or environmental harm would not constitute an “armed attack” triggering such a right. In any event, Merapi’s actions were inconsistent with the requirements of “necessity” and “proportionality.” Merapi’s actions were unnecessary, both because the United Nations Security Council was actively engaged in the dispute and because Merapi failed to exhaust all available peaceful measures. Merapi’s actions were also disproportional, since the attack needlessly resulted in the death of civilians.
E. International law requires Merapi to compensate Erebus for the destruction of the mining facility and the killing of Erebian nationals, as well as to extradite the responsible parties to Erebus for prosecution. Merapi’s refusal to extradite cannot be justified by resort to the political offense exception as the Aqua Protectors do not qualify as “political offenders” under any of the internationally excepted tests for determining the exception’s applicability.

V. PLEADINGS

A. The Legitimate Boundary Between Erebus and Merapi is the Present Location of the Krakatoa River’s Principal Arm

1. Merapi and Erebus are bound by the terms of the Treaty of Amity and Peace, which explicitly establishes their land and maritime boundaries.

A treaty is a written agreement between states, governed by international law. All treaties are binding upon their contracting parties. In 1947, Erebus and Merapi entered into the Treaty of Amity and Peace [hereinafter “Treaty”], which established their common land and maritime boundaries. As parties to this treaty, Erebus and Merapi are bound by its terms.

a. The plain meaning of the Treaty establishes the border as the midpoint of the principal arm of the Krakatoa River, irrespective of the river’s location.

A treaty is to be understood according to the plain meaning of its terms, subject to the context in which they appear, with an eye towards the purpose of the instrument. Unless it leads to a reading that is ambiguous or patently unreasonable, the plain meaning is definitive.

The Treaty establishes the Erebian-Merapi land border as being

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3. Compromis ¶¶3, 4.


5. See Vienna Convention, supra note 1, at art. 32.
"the midpoint of the Krakatoa River." The Treaty is thus clear that the border is the river itself, and not an indelible line fixed by a surveyor's level and compass. The Treaty states that the maritime boundary extends from "the mouth of the Krakatoa River, taking as the mouth of the river its principal arm . . . " The Treaty, thus, again utilizes an impermanent, rather than a geographically fixed, marker. The Treaty goes on to identify the river's principal arm as "lying between Pigeon Rock to the South, and the Cape of Realto to the North." The context in which this phrase is employed compels the interpretation that it was meant as a contemporary identification of the principle arm, and not a condition precedent to using the principal arm to mark the boundary.

The Treaty's plain meaning clearly establishes that the Erebian-Merapin land and maritime boundaries are indeterminate in nature, subject to change with the course of the Krakatoa. There is nothing unreasonable about this interpretation, as despite their fundamental impermanence, states routinely use the course of rivers to mark their boundaries. Moreover, Merapi was aware that the Krakatoa had shifted course in the past, yet it did not insist on a clause, such as exists in the Israeli-Jordanian Peace Agreement, stating that the boundary would not move with the river, perhaps because the previous shift had been favorable to Merapi.

b. Evidence of the circumstances surrounding the Treaty's conclusion confirm that the reference to Pigeon Rock and the Cape of Realto was meant for contemporary identification purposes only.

Recourse to extrinsic evidence, such as preparatory work and evidence of the circumstances surrounding a treaty's conclusion, is allowed for the purpose of confirming a treaty's interpretation. The circumstances surrounding agreement on the Erebian-Merapin maritime boundary indicate that the parties were primarily interested in setting forth "an
objectively identifiable boundary." This extrinsic evidence, thus, confirms that the purpose of the phrase "said arm lying between Pigeon Rock to the South, and the Cape of Realto to the North," was to identify the principal arm's location at the time. This phrase is now obsolete, since the new principal arm is in itself an objectively identifiable boundary, as its location is uncontested, while the previous riverbed has ceased to exist as a distinct topographical feature.

2. Under the doctrine of accretion, the Erebian-Merapin border followed the gradual southerly shift of the Krakatoa's principal arm.

The shifting of riparian boundaries is governed by either the doctrine of accretion or avulsion, depending on the speed at which the change occurs. When the course of the river changes over time, accretion dictates that the boundary follows the altered course. When the river's path is suddenly altered, avulsion leaves the boundary in the middle of the now abandoned riverbed.

A typical avulsion was displayed in the case of Arkansas v. Tennessee, wherein the Mississippi River changed its course over a period of 30 hours so as to abandon 20 miles of the riverbed. Alternatively, accretion was illustrated by the case of Nebraska v. Iowa, wherein the Missouri River markedly changed course over a period of several years. In that case, Nebraska argued that, due to local soil conditions, large sections of riverbank often collapsed into the river, thus, the change was "not gradual and imperceptible, but sudden and visible," and consequently, inconsistent with accretion. The United States Supreme Court, however, found the doctrine of accretion to apply, because the change, though relatively rapid, was the product of an ongoing erosive process and not a swift and singular event.

Gradually, over a period of several years, hurricane-induced erosion shifted the Krakatoa's principal arm southward. Thus, according to the principle of accretion, the boundary moved with the shift in the river.

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13. Comp. ¶4.
14. Comp. ¶¶4, 5; Clar. ¶1.
17. See id.
19. 143 U.S. at 369-70 (1892).
20. Id. at 367-68.
21. See id. at 368-70.
22. Comp. ¶5.
3. The shifting of the Krakatoa River has placed the Alma Shoals and the adjacent petroleum reserves within the exclusive economic zone of Erebus.

All states are entitled to an exclusive economic zone [hereinafter "EEZ"] extending 200 nautical miles beyond their coastal baseline. First codified in the 1982 Law of the Sea Convention [hereinafter "UNCLOS"], the concept of the EEZ has ripened into customary international law. Within their EEZ, states have an exclusive right to non-living resources and a preferential right to living resources. It should be noted, the relative socio-economic conditions of the parties are irrelevant in the resolution of a maritime boundary dispute. Thus, any contention that Merapi's economic conditions should influence the Court's judgment must be rejected as "[s]uch considerations are totally unrelated to the underlying intention of the applicable rules of international law."

Drawing the maritime boundary from the midpoint of the Krakatoa River's new principal arm establishes that the newly discovered petroleum reserves and the Alma Shoals lie within the EEZ of Erebus. Erebus, thus, has the exclusive right to any petroleum found in the zone and a priority right to the zone's living resources.

27. See Maritime Delimitation in the Area Between Greenland and Jan Mayen (Den. v. Nor.), 1993 I.C.J. 38, 74 (June 14).
29. Comp. ¶¶4, 5.
30. See Restatement, supra note 25, at § 514, Reporter's Note 4. See also UNCLOS, supra note 24, at arts. 56, 61-62.
B. Merapi is Liable for Its Unjustified Seizure of Erebian Fishing Vessels in the Alma Shoals

1. Irrespective of the legal status of the Alma Shoals, Merapi's seizure and subjection to forfeiture proceedings of the Erebian fishing vessels is unlawful.

While under customary international law a coastal state has certain economic rights in its EEZ, in all other respects, the zone retains the attributes of the high seas. Under customary international law, a ship operating beyond territorial waters is functionally a floating island of the country whose flag it flies, and as such, no other state may exercise jurisdiction upon it without the flag state's consent. Under the UNCLOS, a party-state may enforce fishing regulations in its EEZ by boarding, inspecting, and arresting the vessel of another party-state believed to be out of compliance with such regulations. However, as a non-party to the UNCLOS, Erebus never consented to such a regime.

Moreover, there is no indication that the Erebian-flagged vessels were in violation of any regulatory regime. Prior to recent events, Merapi had not objected to Erebian vessels fishing in the Shoals, and the actual count with which the seized vessels were charged was simply "trespass."

Additionally, the UNCLOS provides that when a ship is lawfully seized, not only must the crew be promptly released, but also the vessel itself must be released upon the posting of a reasonable bond. Thus, even if the UNCLOS's search and seizure provisions are found to be applicable to the Erebian vessels, Merapi violated international law by subjecting the vessels to forfeiture proceedings without affording Erebus the option of posting a bond to secure their return.

31. See RESTATEMENT, supra note 25, § 514 cmt. b.


33. See UNCLOS, supra note 24, at art. 73.

34. Comp. ¶8.

35. Clar. ¶3.

36. Comp. ¶7.

2. Merapi’s unlawful seizure and forfeiture of Erebian-flagged ships provided Erebus the right to send naval vessels to protect Erebian ships fishing in the Shoals.

When a state’s rights have been denied or infringed under international law that state has the right to respond with appropriate defensive measures. Merapi’s seizure of the Erebian ships was an unlawful act; thus, Erebus clearly acted within its rights when it responded by providing naval escorts to Erebian vessels wishing to operate in the Alma Shoals. Moreover, the mere presence of naval vessels in the EEZ of another state is a violation of neither customary international law, nor the UNCLOS.

3. International law requires Merapi to return the six unlawfully seized fishing vessels or make reparations to Erebus on behalf of their owners.

Reparations must, to the extent possible, eliminate the consequences of the breach of duty and restore the injured state to the position it would have occupied if the breach had never occurred. The unlawful seizure of a ship at sea is a violation of the rights of the flag-state, not simply a violation of the rights of the ship’s owner and crew. Since the requirement to exhaust effective local remedies before bringing an action in an international tribunal applies only to cases in which the plaintiff-state is making a claim on behalf of a private citizen, it does not apply to the case at hand. Therefore, Merapi is obligated to redress the Erebian injury by either returning the unjustly seized vessels to their owners, or paying reparations equal to their value.
C. The Erebian Deep Seabed Mining Operation is not In Violation of International Law.

1. International law imposes no obligation upon Erebus to refrain from mining the deep seabed under international waters.
   a. As a non-party, neither Part XI of the UNCLOS nor the 1994 Agreement on Implementing Part XI bind Erebus.

   According to the Vienna Convention on the Law of Treaties, to which both Erebus and Merapi are parties, a treaty may obligate a non-party only if it "expressly accepts that obligation in writing." As a non-party, Erebus cannot be bound by the terms of either Part XI of the UNCLOS or the 1994 Agreement on Implementing Part XI [hereinafter "Agreement"], without its consent.

   b. The seabed mining provisions found in Part XI of the UNCLOS and the 1994 Agreement have not ripened into customary international law.

   The opinio juris and consistent practice of a substantial number of states evidence customary international law. International agreements may lead to the creation of customary law only when they are intended for general adherence and become widely accepted. The party claiming a customary international norm bears the burden of proving its existence.

   Though the UNCLOS was signed by a majority of states, several important industrialized nations, including the United States, refused to sign it due to the "hopelessly flawed" seabed mining provisions contained in Part XI. The Agreement made substantial changes to those provisions in an effort to appease the industrialized world. However, it apparently failed to appease the United States Senate, which has continued

44. Comp. ¶8.

45. See Vienna Convention, supra note 1, art. 35. See also MCNAIR, supra note 1, at 309.


47. See RESTATEMENT, supra note 25, at §102.


to block ratification. What the Agreement accomplished, though, was to fracture any international conformity that may have existed regarding acceptance of a seabed mining regime. Today, the UNCLOS has 158 signatories, while the Agreement, with its substantially altered provisions, has only 79.

Finally, the Secretary-General of the International Seabed Authority, in his most recent annual report, admitted that it was too soon to tell if the seabed mining regime would be successful as currently constructed. Accordingly, it cannot be said that either the UNCLOS deep seabed mining provisions or the Agreement have crystallized into customary international law binding on Erebus.

c. General Assembly Resolutions proclaiming the seabed to be the “common heritage of mankind” do not constitute customary international law.

A General Assembly Resolution, in and of itself, is not legally binding upon member states. While General Assembly Resolutions may function as a part of the larger customary law creating process, by themselves, they are merely recommendations.

In 1970, the United Nations General Assembly adopted the "Declaration of Principles Governing the Seabed," which proclaimed the deep seabed and its resources to be the "common heritage of mankind," and provided that the exploitation of these resources had to be carried out to the benefit of all mankind. While the vote was unanimous, a number of states made comments at the time of its adoption that the Declaration was intended to be aspirational rather than binding. Since a General Assembly Resolution is not binding in the absence of other evidence of conforming


53. See *II Multilateral Treaties Deposited with the Secretary-General: Status as at 31 December 1999*, ST/LEG/SER.E/18, 209, 242 (2000).


state practice, the Declaration of Principles Governing the Seabed does not constitute customary international law.  

**d. The United Nations Security Council Presidential Statement does not legally obligate Erebus to delay commencement of its seabed mining operation.**

Security Council Presidential Statements are informal documents, which should not be interpreted as creating legal obligations. Whereas Chapter VII Resolutions are formal statements of the will of the Council, and as such have the force of law, Presidential Statements are the product of informal consultations between the Council President and members, and not a decision by the body as a whole. These informal consultations are not Security Council “meetings;” in fact, they have no legal status as the Council’s procedural rules make no reference to them. Additionally, informal consultations, unlike formal Security Council meetings, do not afford “a party to a dispute under consideration,” such as Erebus, its right under Article 32 of the United Nations Charter to participate in Council debates. In light of these facts, the Presidential Statement dated August 15, 2000, should not be interpreted as having legally obligated Erebus to delay its seabed mining operation.

It should be noted that this Court has previously determined that it lacks the power of “judicial review,” and is thus, incapable of passing judgment upon the validity of a Security Council action. However, it is within this Court’s ability to interpret the purpose and meaning of a Security Council instrument.

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60. See id. at 540-41.


62. Cf. id. at 65, 547.


64. U.N. CHARTER art. 32.


2. The Erebian facility conforms to the customary international law doctrine of freedom of the high seas and the duty of states to protect the natural environment.

The freedom to use the high seas, the air space above them, and the seabed may only be limited or modified by a general consensus amongst states. Thus, in the absence of a universally recognized seabed mining regime, the doctrine of freedom of the high seas remains controlling. According to this doctrine, deep seabed mining is permitted as long as the state conducting such activity gives reasonable regard for the rights of others engaged in similar activities, and adequately complies with its customary law duty to protect the environment.

In April 2000, Erebus announced its intention to begin mining manganese nodules in international waters. No state or individual has suggested to Erebus that this project will interfere with their similar operation. Erebus complied with its duty to safeguard the environment by conducting an exhaustive environmental impact assessment, which has vouched for the project's safety. While others less familiar with the project have disputed its environmental soundness, it should be noted that when faced with similarly conflicting environmental studies in the past, this Court as declined to weigh their relative merit. Since Erebus has satisfied all requirements of freedom of the high seas doctrine, the seabed mining project is permitted by customary international law.

3. Merapi is estopped from asserting that the Erebian seabed mining facility is in violation of international law.

The principle of estoppel bars a state's claim when a state has maintained an inconsistent position in regard to a matter of fact or law. An

69. See Brown, supra note 50, 559-60.
70. See id.
72. Comp. ¶9.
73. Comp. ¶10; Clar. ¶4.
74. Comp. ¶10.
75. See Gabcikovo, 1997 I.C.J. at 41.
estoppel by acquiescence results when a plaintiff-state is provided ample opportunity to protest what it believes is an infringement of its rights, but remains silent, thus, leading the defendant-state to believe that its conduct is acceptable.77

Erebus announced to the world its intention to begin deep seabed mining 500 nautical miles off Merapi’s coast.78 Merapi did not protest Erebus’ s plan for several critical months during which Erebus, relying upon Merapi’s silent acceptance, poured vast economic resources into the project.79 Merapi is, thus, estopped from objecting to the Erebian seabed mining facility.

D. Merapi is Liable for the Destruction of the Erebian Seabed Mining Facility and the Killing of Erebian Nationals

1. Under the Principles of State Responsibility, Merapi is responsible for the Aqua Protectors’ attack, either by its acts or by its omissions.

a. Merapi’s act of providing financial support to the Aqua Protectors with prior knowledge of their planned attack against the Erebian facility amounts to a use of force against the property and citizens of Erebus.

Article 2(4) of the United Nations Charter prohibits the use of force in international relations.80 The term “use of force” is not limited to conventional military force, but also prohibits states from “organizing or encouraging the organization of irregular forces or armed bands... for incursion into the territory of another state.”81

Merapi’s financial support of the Aqua Protectors with knowledge of their objective was an act of “encouraging” their plan to attack the Erebian facility. Erebus’s seabed mining facility is jurisdictionally a part of Erebian territory, just as Erebian ship on the high seas would be.82 Thus, Merapi’s support for the operation conducted by the Aqua Protectors is a violation of the prohibition against the use of force.

78. Comp. ¶9.
79. Comp. ¶17.
80. See U.N. CHARTER art. 2, para. 4.
b. Since Merapi had knowledge that an attack on Erebus was being planned on Merapin territory, Merapi was obligated to warn Erebus and to take other reasonable measures to prevent the Aqua Protectors' attack.

Customary international law requires that states use "due diligence" to prevent their territory from being used for the purposes of attacks on other states with whom they are not at war. Since states exercise exclusive control over their territory, victim states are at a disadvantage when attempting to establish facts necessary to prove such a breach of duty. Under these circumstances, victim states are entitled to a relaxed burden of proof, and a more generous allowance for circumstantial evidence and inference.

In the Corfu Channel Case, two British ships struck mines in Albanian waters, sustaining serious damage and loss of life. This Court found, by way of circumstantial evidence, that Albania knew of the mines, and thus, breached international law by not warning others of the danger. This Court also found the duty to warn to be part of the obligation of all states not to allow knowingly their territory to be used for attacks on other states.

Merapi knew the Aqua Protectors where planning an attack on Erebus's seabed mining facility from their headquarters in Merapin territory, yet it neither acted to prevent the attack nor to warn Erebus of it. Thus, Merapi has incurred responsibility for the attack.

2. Merapi's support of the Aqua Protectors was not justified as an act of self-defense consistent with Article 51 of the United Nations Charter.


The plain meaning of Article 51 of the United Nations Charter prohibits a state from resorting to the use of force before it has been the subject of a military attack. Article 51 states: "Nothing in the present

83. See United States v. Arjona, 120 U.S. 479, 484 (1887). See also Fitzmaurice, supra note 46, at 21.
84. See Fitzmaurice, supra note 46, at 128.
85. See id.
86. See Corfu, 1949 I.C.J. at 10.
87. See id. at 18-23.
88. See id. at 22.
89. Comp. ¶18.
Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs . . . .” Merapi was never subjected to an armed attack.

While some publicists have argued that Article 51’s use of the phrase “inherent right of self-defense” preserved the right as it existed prior to the Charter, and thus, includes a right of anticipatory self-defense, others have pointed out that such a reading renders the words “if an armed attack occurs” inoperable. Publicist Philip Jessup believed that Article 51 did not codify a right to anticipatory self-defense: “Under the Charter, alarming military preparations by a neighboring state would justify a resort to the Security Council, but would not justify resort to anticipatory force . . . .”

Additionally, the case for anticipatory self-defense is weakened by the fact that consistently large numbers of states have condemned, censured, or disapproved of uses of force justified on the basis of anticipatory self-defense. The best historic analogy is the 1981 Israeli bombing of a partially constructed Iraqi nuclear reactor. Israel justified its attack as anticipatory self-defense, since it feared that Iraq would use the reactor to produce fissionable material for weapons to be used against it. However, the Security Council unanimously rejected this defense in a resolution, which stated that the attack was a “clear violation of the charter of the United Nations and the norms of international conduct.”

b. Even if anticipatory self-defense were legitimate under Article 51, the potential for economic harm does not constitute an “armed attack” triggering the right of self-defense.

Even if the United Nations Charter allowed anticipatory self-defense, Merapi’s contention that economic harm can be the equivalent of an armed attack is without merit. During the 1945 negotiations of the United Nations Charter in San Francisco, the drafters confirmed that

90. U.N. CHARTER art. 51 (emphasis added).
93. PHILIP C. JESSUP, A MODERN LAW OF NATIONS 166 (1968).
95. See id. at 191.
97. Comp. ¶14.
economic embargoes did not constitute an unlawful use of force, let alone armed attack.\(^8\) State practice has never recognized economic harm as justifying the use of force.

Merapi claims its economic dependence on the fish-stock within the Grand Basin means that a threat to that resource is the same as an armed attack on Merapi itself.\(^9\) Merapi's argument is similar to the economic justifications for the use of force used by France, Great Britain, and Israel during the 1956 Suez Canal crisis.\(^10\) All three nations justified their actions at least partly on the economic necessity of maintaining the flow of traffic through the canal.\(^10\) However, an overwhelming majority of nations rejected their rationalizations, as the General Assembly voted 64 to five to denounce their actions.\(^10\)

c. **International law does not allow a state to intervene in anticipation of environmental damage outside of its EEZ.**

The practice and *opinio juris* of states indicate that a right to environmental intervention on the high seas has not been internationally recognized. This was recently confirmed in the Canadian-Spanish dispute, which began when Canada amended its laws to authorize its officials to use force to board foreign vessels in international waters to prevent overfishing of stocks important to Canada's economy.\(^10\) In 1995, Canadian naval forces chased, fired upon and captured a Spanish fishing vessel suspected of violating Canadian law and regulations.\(^10\) Spain strenuously objected to Canada's unilateral extension of jurisdiction into international waters.\(^10\) As part of the settlement that ensued, Canada was required to repeal the statutes allowing for the seizure of foreign ships in international waters.\(^10\) Thus, Merapi's concern for the marine environment of the Grand Basin cannot justify a use of force against the Erebian facility.

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101. *See* id. at 272.


105. *See* id. ¶20.

106. *See* id.
d. In any event, Merapi's actions are inconsistent with the customary international law requirements of "necessity" and "proportionality."

Customary international law holds that the use of self-defense must be necessary and proportional.107 These requirements stem from the Caroline incident, as to which U.S. Secretary of State Daniel Webster wrote that self-defense must be limited to situations in which the "necessity of the self-defense is instant, overwhelming, and leaving no choice of means, and no moment for deliberation."108 Additionally, Webster wrote that a necessary action must also be proportionate in that it "must be limited by that necessity, and kept clearly within it."109

i. Merapi's actions cannot meet the requirement of necessity because Merapi did not first exhaust all possible peaceful measures available to it.

Before self-defense can be "necessary," a state must exhaust all of potential peaceful means of settling the dispute.110 Article 2(3) of the United Nations Charter requires states to "settle their international disputes by peaceful means...."111 Article 33(1) requires that attempts be made to resolve disputes by means, such as "negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement..." prior to the use of force.112 Merapi failed to exhaust this list of potential peaceful settlement means prior to launching its attack. Therefore, Merapi's actions were in violation of the requirement of "necessity."

ii. Merapi's actions cannot meet the requirement of necessity since the Security Council was actively engaged in the matter.

Self-defense under Article 51 is limited to the time prior to the Security Council's engagement in a dispute.113 Once the Security Council is involved in a dispute, it has sole authority to "determine the existence of any threat to the peace, breach of the peace, or act of aggression...."114 Mere days before the Aqua Protectors attacked the seabed mining facility, the Security Council stated its intent "to remain seized of the matter."115

108. BROWNLIE, supra note 91, at 42-43.
109. Id. at 261.
110. See U.N. CHARTER art. 2, para. 3; art. 33, para. 1.
111. Id. art. 2, para. 3.
112. Id. art. 33, para. 1
113. See id. art. 51.
114. Id. art. 39.
115. Comp. ¶15.
Thus, Merapi's actions were not "necessary" as the Security Council was actively engaged in the dispute.\textsuperscript{116}

iii. Merapi's actions cannot meet the requirement of proportionality since the attack needlessly resulted in the death of civilians.

A proportionate self-defensive use of force is one that is equal to its necessity, not one that is equal to the initial threat.\textsuperscript{117} Thus, no matter how great a threat Merapi may have believed the Erebian seabed mining facility posed to its security, proportionality required Merapi to use self-defensive measures that were only equal to what was required to eliminate that threat.\textsuperscript{118} Merapi and its agents, the Aqua Protectors, could have given warning (even just a few minutes) to ensure that the Erebian civilians could be evacuated from the temporary platforms before the detonation of the explosives.\textsuperscript{119} The loss of life that accompanied the Aqua Protectors' attack\textsuperscript{120} was unjustified; thus, the attack was disproportionate.

e. Merapi had no implied authorization from the Security Council to attack the Erebian seabed mining facility.

In every past case in which the Security Council authorized the use of force (Iraq,\textsuperscript{121} Bosnia,\textsuperscript{122} Somalia,\textsuperscript{123} Rwanda,\textsuperscript{124} Haiti\textsuperscript{125}), it employed the phrase "all necessary means," which does not appear in this Presidential Statement.\textsuperscript{126} In the absence of this talismanic phrase, authorization to use force should not be read into the actions of the Security Council. Resolutions and statements from the Security Council are often the subject of intense negotiations. Allowing tenuous assertions of authorization for

\textsuperscript{116} Comp. ¶12.
\textsuperscript{117} See ALEXANDROV, supra note 94, at 165.
\textsuperscript{118} See id.
\textsuperscript{119} Comp. ¶16.
\textsuperscript{120} See id.
\textsuperscript{126} Comp. ¶12.
the use of force to be read into these instruments effectively undoes their negotiations.\textsuperscript{127} For this reason, the Court should reject any assertion by Merapi that the Presidential Statement implicitly authorized their use of force.

\textbf{E. International Law Requires Merapi to Compensate Erebus for the Destruction of the Mining Facility and Killing of Erebian Nationals, as well as Surrender the Perpetrators of the Attack to Erebus for Prosecution}

1. International law requires Merapi to compensate for the unlawful destruction of Erebian property.

Reparations must be set at a level equal to the cost of repairing or replacing the destroyed property plus any lost profits, which the property may reasonably have been expected to produce.\textsuperscript{128} Merapi is thus required to compensate Erebus for the cost of repairing the seabed mining facility and the cost of purchasing manganese, cobalt, nickel, and copper on the open market for the period of time that will be required to repair the facility.

2. International law requires Merapi to compensate for the unlawful killing of Erebian citizens.

International law gives states the right to bring claims for the injuries suffered by their nationals.\textsuperscript{129} Though the state is asserting its own rights and not acting in a representative capacity, the damages are, nonetheless, measured by the injury suffered by the citizens or their estates.\textsuperscript{130} Six Erebian citizens were killed by Merapi’s attack on the seabed mining facility.\textsuperscript{131} Thus, Merapi is liable to Erebus for these citizens’ injuries, measured by the loss to their estates.

\textsuperscript{127} See Christine M. Chinkin, \textit{Kosovo: A "Good" or "Bad" War?}, 93 AM. J. INT’L L. 841, 842 (1999).

\textsuperscript{128} See \textit{Chorzow}, 1928 P.C.I.J. at 47-48.

\textsuperscript{129} See \textit{Fitzmaurice}, supra note 46, at 26.

\textsuperscript{130} See \textit{id}.

\textsuperscript{131} Comp. ¶16.
3. International law requires Merapi to surrender the members of the Aqua Protectors responsible for the attack on the seabed mining facility.

   a. *The customary international law principle of aut dedere aut judicare requires Merapi to extradite or prosecute the Aqua Protectors.*

   States have a duty under the customary international law principle of *aut dedere aut judicare* to either extradite persons accused of terrorism and other international crimes, or prosecute them under their own laws.\(^\text{132}\) This duty is rooted in the principles of state responsibility and starts from the assumption that when an international crime is committed, the injured state has a right to punish the perpetrators.\(^\text{133}\) As a fundamental duty to respect the sovereign rights of fellow states, the duty applies equally with regards to aliens and nationals.\(^\text{134}\)

   While the international crime of terrorism has no precise definition, terrorist activities have certain characteristics, which include the victimization of innocent third parties, and the targeting of non-military facilities.\(^\text{135}\) Given these characteristics, the Aqua Protectors are clearly terrorists, as their targeting of a non-military installation killed innocent civilians.

   Since the duty of *aut dedere aut judicare* is a part of so many multinational treaties dealing with international crimes such as terrorism,\(^\text{136}\) it may be deemed to have ripened into customary international law.\(^\text{137}\) Thus, Merapi has a duty to prosecute or extradite the Aqua Protectors even in the absence of a specific treaty obligation. In light of Merapi’s involvement in the


133. See Bassioumi, *supra* note 132, at 38-39.


137. See Bassioumi, *supra* note 132, at 47.
actions of the Aqua Protectors and its failure to arrest or bring criminal charges against them, extradition is required because Merapi cannot realistically be expected to prosecute this case diligently.

b. Merapi has displayed a lack of good faith in its invocation of the political offense exception to the duty to extradite.

Under the political offense exception, states may refuse the extradition of fugitives accused of crimes of a political nature. While the exception is applied according to the standards of the state from which extradition is requested, like all decisions affecting relations between States, its application is subject to a duty of good faith. Since a principal justification for the exception is to maintain neutrality in other states' political conflicts, good faith requires a nonpolitical branch, i.e. the judiciary, to determine the exception's applicability. Merapi's invocation of the exception exhibits a lack of good faith. Firstly, Merapi has refused to submit the issue to its court system for a nonpolitical determination. Secondly, the Aqua Protectors do not qualify as political offenders under any of the tests applied by the international community.

Under the political-incidence test employed by most common law countries, a crime is considered a political offense when the perpetrator is a member of an organization engaged in a political uprising and the crime is committed in furtherance of that uprising. Erebus has not witnessed a political uprising; thus, the actions of the Aqua Protectors cannot be deemed to further a political uprising.

Under the proportionality test employed by most civil law countries, the political element must predominate over the act's common crime aspects in order for it to be considered a political offense. However,
like the political-incidence test, the crime must be committed in the confines of the political uprising.446 Again, since Erebus has not been the subject of political unrest, the Aqua Protectors’ attack cannot constitute a political offense.

The French political objective test focuses on the nature of the injury, rather than on the intent of the perpetrator.447 Under this test it would be irrelevant whether the Aqua Protectors intended a political result, as the question would be whether the injury resulting was solely to the state.448 Under the political objective test, treason, espionage, and even the destruction of government property would qualify as political offenses, however, the killing of civilians, as occurred in the present case,449 would not.

VI. PRAYER FOR RELIEF

For the reasons stated above, the Republic of Erebus respectfully requests that this Honorable Court:

1. DECLARE that by virtue of the change in course of the principal arm of the Krakatoa River, the Alma Shoals lie within the EEZ of Erebus, and its citizens and vessels, therefore, have a right to fish there;

2. DECLARE that its proposed deep seabed mining operations are consistent with international law;

3. DECLARE that Merapi violated international law through its involvement in the terrorist attack against the Erebian seabed mining facility, and by its seizure and detention of the six Erebian vessels;

4. ORDER Merapi to pay Erebus U.S. $1.2 billion in compensation for the damage to the facility, the loss of human life, and the loss of future seabed mining revenue; and

5. ORDER Merapi to surrender the members of the Aqua Protectors responsible for the attack on the seabed mining facility to Erebus for prosecution, as well as to release the Erebian fishing vessels.

146. See Garcia-Mora, supra note 141, at 1249-53.
147. See id. at 1249-50.
148. See id.
149. Comp. ¶16.
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Case Concerning the Seabed Mining Facility

REPUBLIC OF EREBUS

Applicant

v.

KINGDOM OF MERAPI

Respondent

SPRING TERM 2001

MEMORIAL FOR THE RESPONDENT

University of Vienna, Austria

Team Members: Clemens Bruckmann, Solveig Kaspar
Martin Reichard, and Maria-Theresia Roehsler
THE CASE CONCERNING
THE SEABED MINING FACILITY

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I. STATEMENT OF JURISDICTION

Merapi and Erebus have agreed to submit the Case Concerning The Seabed Mining Facility to the ICJ pursuant to Art.36(1) of the Statute of the ICJ. The jurisdiction of the Court has not been qualified or contested. There is no dispute as to the jurisdiction of the Court.
II. QUESTIONS PRESENTED TO THE COURT

Merapi asks the Court:

1. Whether the Alma Shoals still lie in Merapin waters, despite the change in the course of the Krakatoa river;

2. Whether Merapins still have the right to fish the Alma Shoals even if the boundary has moved;

3. Whether Merapi is required to release the six Erebian fishing vessels;

4. Whether Erebus has to pay compensation for the losses Merapi has sustained as a result of Erebus' occupation of the Alma Shoals;

5. Whether the proposed Erebian seabed mining operation is in violation of international law;

6. Whether Erebus should be enjoined from starting up the seabed mining operation;

7. Whether Erebus is required to upgrade or relocate the seabed mining facility;

8. Whether Merapi acted in violation of international law regarding the destruction of the seabed mining facility

9. Whether Merapi is required to surrender the members of the Aqua Protectors to Erebus.

III. STATEMENT OF THE FACTS

Merapi is a small developing State whose fishing industry provides its main source of subsistence. By contrast Erebus is a large economically developed State with a minor fishing sector. Both are parties to the Vienna Convention on the Law of Treaties and the four 1958 Geneva Conventions on the Law of the Sea. Only Merapi is party to the 1982 United Nations Convention on the Law of the Sea. The land and maritime boundaries between Merapi and Erebus are delimited by the 1947 Treaty of Amity and Peace which specifies that the maritime boundary should follow the mouth of the principal arm of the Krakatoa River, “said arm lying between Pigeon Rock to the South, and the Cape of Realto to the North.” According to the preparatory works the river was chosen to provide a boundary that would satisfy both parties. This solution was agreed to after difficult negotiations, over opposed territorial claims and Merapi’s burial sites. From 1996 to 1999 the river’s principal arm has made a substantial
southward shift, resulting from three violent hurricanes, so that the Alma Shoals presently lie to its north. Erebus now holds that this has placed the rich fishing grounds of the Alma Shoals, lying immediately off the Merapin coast, in its waters. Merapi has fished the Alma Shoals for decades and without interruption, contributing 10% to its GDP. After Merapi had warned Erebus against fishing in the Alma Shoals, six Erebian vessels subsequently found fishing there were seized. Proceedings are still pending before Merapin courts. Erebus responded with an armed occupation driving Merapin vessels from the area, causing losses in fishing of U.S.$ 1 billion.

In the midst of the escalating fishing dispute, Erebus announced that seabed mining would start near the Grand Basin in September 2000 for its own purposes, although the hard metals sought are also available on the world market. Merapin fishermen have had exclusive use of the resource-rich Grand Basin, lying 220nm off the coast of Merapi, for at least half a century, amounting to 40% of Merapi's GDP. Erebus' announcement, although accompanied by a report which however was limited to computer simulations of seabed mining data, was met with harsh criticism by prominent scientists around the world who indicated that the operation would severely endanger the marine environment in a 300nm radius, including most fish stocks in the Grand Basin. The President of the International Sea-Bed Authority also opposed the operation. Several States brought the issue to the attention of the U.N. Security Council which determined, by Presidential Statement, that the boundary dispute and the potential environmental catastrophe constitute a threat to international peace and security within the meaning of Chapter VII of the Charter and demanded the delay of the operation until proof was given that it would not threaten marine life. Erebus refused to comply with this demand. Merapi stated that the pollution would be equivalent to an armed attack, resulting in human death and starvation on a massive scale. The Security Council has been unable to reach any further decision. The Aqua Protectors, environmentalists partially funded by Merapi, carried out an operation to disable the seabed mining facility a few days before the proposed commencement of mining, unfortunately resulting in six casualties and property damage. The operation was brought to Merapi's attention.

Merapi refused to extradite the members of the Aqua Protectors due to the absence of an extradition treaty between the two countries and the policy of Merapi not to extradite its own nationals or political offenders.
IV. SUMMARY OF THE PLEADINGS

A. The Alma Shoals still lie in Merapi’s EEZ despite the shift in the Krakatoa river, since the boundary has remained in place pursuant to interpretation of the Treaty of Amity and Peace. Further, according to customary international law a boundary delimited by a river does not change when the river makes a sudden and violent shift. Even if the boundary has moved Merapi still has the right to exclude Erebus from fishing because of Merapi’s historic rights and due to its dependence on fishing.

B. The proposed Erebian seabed mining operation is in breach of the 1958 Convention on the High Seas since it excludes other legitimate uses. Erebus furthermore contravenes customary international environmental law by polluting areas beyond national jurisdiction, and not consulting other States. It violates the principle of the common heritage of mankind by not sharing the seabed resources with other States. The continuance of the operation contravenes the Security Council’s Presidential Statement, a binding decision under Chapter VII.

C. Merapi did not violate international law regarding the destruction of the seabed mining facility because the private action of the Aqua Protectors cannot be attributed to Merapi. Even if it is attributable, the action is justified as carrying out the Presidential Statement. Even if no authorization by the Security Council existed, it was justified by a state of necessity.

D. Merapi is not required to surrender the environmentalists since no extradition treaty exists between the two States. No duty to extradite exists under customary international law for offences not constituting international crimes. Furthermore, Merapi does not have to extradite persons for predominantly political offences, or its nationals. In place of extraditing, Merapi may still prosecute the Aqua Protectors.

E. Merapi is not required to release the six fishing vessels since the Erebian ship owners have not exhausted local remedies. Furthermore, under customary international law Merapi was allowed to seize and detain vessels fishing in its EEZ, and Erebus may not claim their release, not being party to the UNCLOS and not having posted any bond.

F. Merapi requests the Court to indicate provisional measures to avoid irreparable harm from the pollution of the Grand Basin, which would render any decision of the Court ineffective.
G. Under customary international law Erebus is obliged to upgrade or relocate the mining facility in order to prevent, or at least reduce, pollution of the Grand Basin and to respect Merapi's historic fishing rights. Further, it has to respect Merapi's human right to development.

H. Erebus must compensate Merapi for U.S.$1 billion in fishing losses resulting from the unlawful occupation of the Alma Shoals. Exhaustion of local remedies is not required because the losses to Merapi's nationals are incidental to the direct injury caused to Merapi in its quality as a State. Furthermore, the grave infringement in itself on Merapi's sovereign rights renders Erebus responsible.

I. Even if Erebus is not responsible, it has to reimburse the revenue from fishing, as it is unjustly enriched.

V. PLEADINGS

A. Merapi Requests The Court To Declare That, Notwithstanding The Change In Course Of The Principal Arm Of The Krakatoa River, It Has The Right Under International Law To Exclude Vessels And Persons Of Erebian Nationality From Fishing The Alma Shoals

1. The boundary between Merapi and Erebus has not moved and the Alma Shoals remain in Merapi's exclusive economic zone.

Under customary international law a coastal state enjoys sovereign rights to exploit all natural resources of the sea and exclude other States in a 200nm zone from its coast. This regime of an Exclusive Economic Zone [hereinafter EEZ] is codified in Part V of the 1982 United Nations Convention on the Law of the Sea [hereinafter UNCLOS]. In order to ascertain Merapi's EEZ towards Erebus, the 1947 Treaty of Amity and

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Peace [hereinafter TAP] determining the land and maritime boundaries, has to be interpreted.

2. The boundary between Merapi and Erebus has not moved according to the TAP.

Although both States are parties to the Vienna Convention on the Law of Treaties [hereinafter VCLT] its non-retroactivity renders the VCLT inapplicable to the 1947 TAP. However, since Arts. 31 and 32 VCLT are customary international law, the terms of a treaty have to be interpreted in good faith according to their ordinary or especially intended meaning, in the light of the treaty’s object and purpose, at the time of conclusion. In case of ambiguity, recourse may be had to supplementary means including the preparatory work and circumstances of the treaty’s conclusion.

The ordinary meaning of a term may be displaced by a special, unusual meaning. The parties gave a special meaning to the term “principal arm” by defining it as “lying between Pigeon Rock to the South and the Cape of Realto to the North.” With regard to this geographical meaning intended by the parties, the terms of the TAP do not allow the line of delimitation to lie south of Pigeon Rock.

In order to determine the object and purpose of a treaty the intentions of the parties have to be taken into account. Object and purpose of a


7. VCLT, supra note 3, at arts. 31, 34; Thirlway, supra note 5, at 27; Western Sahara, 1975 I.C.J. 12, 52 (Oct. 16).

boundary treaty is stability and finality of borders,9 otherwise instability could continue indefinitely, and "finality would never be reached."10 A boundary established by a treaty may not even be unilaterally altered by invoking a fundamental change of circumstances.11 The parties to the TAP wanted a stable and final border, protecting the achieved balance of interests between the two opposing territorial claims. Therefore, the boundary remains at the old river course.

Even if the Court decides that the meaning of the terms is ambiguous, the travaux préparatoires and the circumstances of the TAP as supplementary means of interpretation still confirm that the boundary did not change. Heritage sites as a special local circumstance are of relevance for determining State boundaries.12 Ancient Merapin burial sites are lying between the Cape of Realto and Pigeon Rock. In 1947 Merapi already agreed to losing the northern half of its burial sites. The travaux préparatoires show that the drafters of the TAP agreed on a satisfactory solution forming the basis of the Treaty. Having the boundary at the present river course would deprive Merapi of all the remaining burial sites and would not have satisfied it in 1947, nor today. Therefore the preparatory work and the circumstances at the time of the conclusion of the TAP confirm that the boundary has not changed.

Moreover, according to the principle of restrictive interpretation, restrictions on the sovereignty of States are not to be presumed.13 Interpreting the TAP so as to move the boundary would lead to a loss of territory for Merapi. The ensuing loss of territorial sovereignty cannot therefore be presumed.

For all these reasons, correct interpretation of the TAP leads to the result that the boundary has not changed.

11. VCLT, supra note 3, at art. 62, 2(a); Schwelb, Fundamental Change of Circumstances, 29 ZaöRV 55 (1969); Aust, supra note 4, at 242.
3. The boundary has not moved according to customary international law.

Under customary international law, slow and gradual accretion in a boundary river alters the boundary, whereas avulsion—a sudden and substantial shift—leaves the respective boundary in place. The total extent of the shift, its duration and the violent nature of the causal event determine such an avulsion. The principal arm shifted at least 50nm southwards, the entire length of the Alma Shoals, resulting from three consecutive hurricanes within only four years—a substantial shift for a delta which saw its last hurricane in 1901. Hurricanes are of a violent nature. Thus, the shift was a prime example for avulsion and therefore the boundary has not moved.

4. It is contrary to the principle of good faith to assume that the boundary has moved.

The principle of good faith is a general principle of international law protecting reliance of States on the effectiveness of statements made under certain attending circumstances by one State to another. In 1947 Erebus only claimed the land up to Pigeon Rock. This statement about an issue as important as territory made during bilateral negotiations, disqualifies—as not acting in good faith—the present claim seeking to establish the border as far south as the present course of the river, south of Pigeon Rock.

For all these reasons, the boundary has not changed and the Alma Shoals still lie in Merapi’s EEZ. Accordingly Merapi has the right to exclude Erebian from fishing there.


B. Merapins Have The Right To Fish The Alma Shoals Under Customary International Law Even If The Boundary Has Moved

1. Merapi has historic rights to fish the Alma Shoals.

Historic rights of States over certain land or maritime areas are recognized under international law. They emanate from acquiescence, over a reasonable period of time, of States directly affected. Merapin citizens have been fishing the Alma Shoals continuously and uninterruptedly, long before Merapi claimed an EEZ. Erebus tolerated Merapi's fishing, whereas Merapi acted in reliance on this situation. Therefore, even if the Court holds that the Alma Shoals are within the EEZ of Erebus, Erebus is precluded from claiming fishing rights neglecting Merapi's historic title.

2. Merapi's economic dependence on fishing establishes the right to fish.

Economic dependence of a State on vital commodities creates certain rights under international law, particularly fishing for coastal States. A developing State even has the right to fish another State's EEZ in order to satisfy its basic needs. Merapi is a small developing coastal State. Over half of its GDP comes from the fishing industry. Merapi's economy is thus highly dependent on fishing the Alma Shoals, contributing 10% to its GDP. By contrast, the Erebian economy is highly developed, with only a minor fishing sector, and therefore not dependent on fishing. Hence,

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18. Continental Shelf, 1985 I.C.J. at 74; Fitzmaurice, supra note 5, at 31; Brownlie, supra note 13, at 163; Y. Blum, Historic Titles in International Law 38 (1965); cf. Grisbadarna, supra note 5, at 161.


22. UNCLOS, supra note 2, at art. 62, ¶ 3.
Merapi has a prevailing right to fish the Alma Shoals to the extent of satisfying its basic needs.

C. Merapi Requests The Court To Declare That The Proposed Seabed Mining Operation Is In Violation Of International Law

1. The seabed mining operation is in violation of Erebus’ obligations under the 1958 convention on the High seas.

Merapi and Erebus are parties to the 1958 Geneva Convention on the High Seas [hereinafter CHS], and therefore bound by its provisions. According to Art.2 CHS the freedoms of the high seas shall be exercised “with reasonable regard to the interests of other States.” Reasonableness must incorporate equitable principles. Any use which by its very nature completely excludes a parallel use by another State is not reasonable. Furthermore, subsistence fishing enjoys preferential treatment in international law.

Erebus’ announcement of the proposed seabed mining operation was met with harsh criticism by prominent scientists indicating that the underwater pollution caused by the operation would severely endanger most fish stocks in the Grand Basin. Fishing from this area contributes 40% to Merapi’s GDP, constituting Merapi’s main source of subsistence. Erebus, by contrast, is not dependent on the seabed mining, since manganese, cobalt, nickel and copper are also available on the world market. Erebian mining would harmfully affect fish stocks, as ascertained by aforementioned scientists, and is therefore not a reasonable use because it would exclude Merapi from its legitimate use of the Grand Basin. This would also not be equitable given Merapi’s dependence on fishing. Therefore, the seabed mining operation is in violation of international law.


2. The seabed mining operation is in violation of customary international environmental law.

Every State is under a fundamental obligation not to endanger or damage the environment beyond its national jurisdiction. Additionally, every State has a good faith obligation to consult with and notify other States who might be affected by possible damage impending on them. These principles, constituting customary international law, are codified in Part XII of the UNCLOS. Construction had already begun on the seabed mining facility, prior to announcement in April 2000. One part of the recently developed mining process Erebus will use, the hydraulic system, is known to have the effect of destroying marine ecosystems and food chains, e.g. killing fish larvae. Thus Erebus' extraction process would severely damage the marine environment beyond Erebian jurisdiction. Furthermore, by not informing Merapi of its plans as soon as they materialized, Erebus disregarded Merapi's right to consultation, since Merapi's fishing is highly affected by the killing of fish larvae in the Grand Basin. For these reasons, the proposed seabed mining operation is in violation of international law.

3. The seabed mining operation contravenes the principle of the common heritage of mankind.

The seabed and subsoil thereof are the common heritage of mankind. This general principle is embodied in several conventions on areas beyond


29. UNCLOS, supra note 2, at arts. 194, ¶ 2, 198; Vignes, supra note 1, at 639; Moore, The Rule of Law in the Oceans, in SECURITY FLASHPOINTS 471 (M. Nordquist & J. Moore eds., 1998).


the limit of national jurisdiction.\textsuperscript{13} Accordingly appropriation of the seabed is prohibited, its use must be peaceful, and in accordance with an institutional regime.\textsuperscript{13} Furthermore, activities shall be carried out for the benefit of mankind as a whole, taking into particular consideration the interests and needs of developing states.\textsuperscript{14} This shall be achieved by active transfer of technology\textsuperscript{15} and equitable sharing of the benefits.\textsuperscript{16} States shall pay reasonable regard to the environment.\textsuperscript{17} All States currently preparing for seabed exploitation, even non-signatories of UNCLOS, have incorporated this principle into their domestic legislation.\textsuperscript{14} Since Erebian seabed mining serves a military end, the operation solely pursues Erebus' national interest. Erebus has not registered with the International Sea-Bed Authority, nor contributed any revenue or technology to developing States.


34. Seabed Principles Declaration, supra note 31, art. 7; UNCLOS, supra note 2, art. 140 ¶ 1; CERDS, supra note 31, at art. 29.


37. Seabed Principles Declaration, supra note 31, at art. 11; UNCLOS, supra note 2, at art. 145; cf. CERDS, supra note 31, at art. 30.

Furthermore, the operation poses a serious threat to the environment. For these reasons, the Erebian seabed mining operation does not respect the principle of the common heritage of mankind and is therefore in violation of international law.

4. The Erebian seabed mining operation contravenes the Security Council’s presidential statement.

In order to prevent an aggravation of a situation which the Security Council [hereinafter SC] has determined to be a threat to international peace and security, the SC may, under Chapter VII, demand the parties concerned to take provisional measures,9 which are binding.40 Such a threat to international peace and security may consist in a humanitarian crisis9 or by a possible extension of a conflict to other states,42 e.g., caused by a massive flow of refugees.45 The Charter does not prescribe any specific form for such decisions by the SC, which enjoys procedural autonomy.44 Beside the traditional form of Resolutions, the SC has also increasingly made use of Presidential Statements for at least twenty years.42 State


42. Frowein, supra note 40, at 611; Sorel, supra note 41, at 42; Gaja, supra note 41, at 304.


practice shows that a decision using the term "demands" is held to be binding by States. The proposed seabed mining operation would have the effect of death and starvation on a massive scale by destroying the basis of subsistence for many Merapins. This humanitarian crisis threatens to prompt an exodus of refugees thus destabilizing the whole region. The SC, acting under Chapter VII, has therefore rightfully determined, by the Presidential Statement of Aug. 15, 2000, the potential environmental catastrophe due to the seabed mining operation to be a threat to international peace and security and demanded Erebus to delay the commencement of the operation. Consequently this SC decision is valid, and binding on Erebus. Erebus has to abort the seabed mining operation and any act of proceeding with it is in violation of international law.

5. Merapi did not violate international law regarding the destruction of the Seabed Mining Facility.

a. **The private action of the Aqua Protectors is not attributable to Merapi.**

A government is not responsible for any acts of private individuals it does not directly control, because such acts are not considered as occurring on its behalf. As the ICJ held in the Nicaragua Case, direct control is lacking even where a government is "preponderant or decisive in the financing, organizing, training, supplying and equipping [the perpetrators], the selection of [their] military or paramilitary targets and the planning of the whole of [their] operation." Merapi's mere financial contribution and knowledge of the operation does not amount to direct control of the Aqua Protectors. Therefore, Merapi is not responsible for the destruction of the seabed mining facility.

b. **Even if the Court decides that Merapi is responsible, the action is justified under the SC Presidential Statement.**

Under international law a doctrine has emerged allowing forcible measures by States under circumstances where the SC is incapable of responding adequately to a security crisis, especially where a threat to, or breach of international peace and security has been determined and specific


measures demanded by the SC were not complied with. Erebus, in a diplomatic note, has expressly denied to comply with the SC's demand to delay the operation. The SC has been unable to agree on any further measure. Since a peaceful solution was precluded by Erebian behavior, Merapi, as the immediately affected State, carried out the Presidential Statement, to prevent the devastating consequences on the Merapin population. Hence, the operation was justified under international law.

c. Even if the Court decides that no authorization by the SC existed, the action was justified by a state of necessity.

Necessity—a fundamental principle of customary international law—precludes the wrongfulness of an otherwise illegal act. A State is under a state of necessity where an act not in conformity with an international obligation is the only means of safeguarding an essential interest against a grave and imminent peril. Furthermore, necessity may not be invoked if the act impairs an essential interest of another State. Seabed mining was to commence in a few days, imminently threatening Merapi. Saving its population from the danger of starvation is an essential interest to Merapi in order to safeguard its own existence, whereas seabed mining is not essential to Erebus. Furthermore, the Aqua Protectors' operation was carried out early in the morning, as a precaution to avoid injury to persons. Therefore, a state of necessity justified the action under international law.

D. Merapi Requests The Court To Declare That It Is Not Required By International Law To Surrender The Members Of The Aqua
Protectors To Erebus For Prosecution, Or To Release The Six Fishing Vessels

1. Merapi is not required to surrender the members of The Aqua Protectors for prosecution.

In the absence of a treaty obligation there exists no duty to extradite alleged criminals under international law. In such cases, extradition usually is effected by non-binding considerations of reciprocity and comity. Since there is no treaty obligation between Merapi and Erebus to extradite wanted fugitives, Merapi's surrendering of fugitives in the past was based on comity and thus has created no obligation for the present case. Therefore, Merapi is under no duty to extradite.

The only crimes that might cause the obligation to extradite under customary international law are international crimes, such as genocide, crimes against humanity, war crimes and the crime of aggression. These crimes, if wide-spread and systematic, are of concern to the international community as a whole. The Aqua Protectors disabled the Seabed Mining Facility to prevent grave pollution of the marine environment. This single, limited act unfortunately resulted in six casualties and property damage, but was not wide-spread or systematic, and was not directed against humanity as a whole. It cannot therefore be considered an international crime. Consequently, Merapi is under no obligation to extradite the Aqua Protectors.


Moreover, Merapi submits that it does not have to extradite political offenders or its nationals. Under customary international law, political offences are exempted from the obligation to extradite owing to their overall political motivation. Extradition treaties and conventions show that it is up to the requested State whether to consider an offence as political or not. An offence is political if the political motivation is predominant over the criminal one and if it is directed against a State. The state-owned mining facility was disabled to prevent famine in Merapi, not for private gain. Since Merapi reasonably considers this act as predominantly politically motivated, it does not have to extradite.

Furthermore, under customary international law, States do not have to extradite their own nationals. This is evidenced by the fact that many States have provided not to extradite their own citizens in their constitutions and national legislations and by inclusion of a clause allowing to deny extradition of nationals in international legal instruments. Therefore, Merapi is under no obligation to extradite the alleged offenders of Merapin nationality.

58. GEOFFREY FREESTONE, COOPERATION AGAINST TERRORISM IN TERRORISM AND INTERNATIONAL LAW 46 (R. Higgins et al. eds., 1997); Geoffrey Gilbert, TERRORISM AND THE POLITICAL OFFENCE EXCEPTION REAPPRaised, 34 INT'L & COMP. L.Q. 696, 700 (1985); AbraHam D. Sofaer, TERRORISM AND THE LAW, 64 FOREIGN AFFAIRS at 906 (Spring 1986); Manuel R. Garcia-Mora, THE NATURE OF POLITICAL OFFENCES, 48 VA. L. REV. 1226 (1962); Hannay, supra note 54, at 411; BROWNlie, supra note 13, at 319; Watts & Jennings, supra note 9, at 959; In re Castioni, 1 Q.B. 148 (1891) reprinted in 5 BRIT. INT. L. CASES 558 (1967); In re Kavic, 19 I.R. 373 (1952).


60. In re Nappi, 19 I.R. 375 (1952); In re Ockert, 7 ANN. DIG. PUB. INT'L L. CASES 370 (1933-4); In re Kavic, 19 I.R. 373 (1952), In re Kaphengst, 5 ANN. DIG. PUB. INT'L L. CASES 293 (1929-30).


64. ECE, supra note 59, at art.6/1(a); Treaty Concerning Extradition (Belg.-Lux.-Neth.),
Finally, according to the principle aut dedere aut judicare, a State not extraditing an accused person, has to "submit the case to its competent authorities for the purpose of prosecution." Since nothing in the Compromis points to Merapi's unwillingness to investigate or to prosecute, Merapi has the option to prosecute and is under no obligation to extradite.

2. Merapi requests the Court to declare that it is not required by international law to release the six fishing vessels.

a. The Erebian ship owners have not exhausted local remedies.

Under customary international law a State may not afford diplomatic protection to its nationals unless said nationals have exhausted local remedies. Since proceedings on Erebian vessels are still pending before Merapi courts, local remedies are not exhausted. Consequently, Erebus cannot claim diplomatic protection and Merapi need not release the six fishing vessels.

b. Merapi need not release the vessels according to customary international law.

Under customary international law coastal States are allowed to take measures—including seizure, detention and judicial proceedings—to ensure compliance with their sovereign rights within their EEZ. The Alma Shoals lie in Merapi's EEZ. Despite the announcement by the Merapi Prime Minister that any Erebian fishing vessel found fishing the


Alma Shoals would be seized, six Erebian vessels fished there in violation of Merapi’s sovereign rights. Therefore seizure and detention pending proceedings are lawful and Merapi need not release the vessels.

The UNCLOS provides for prompt release of detained vessels upon the posting of a reasonable bond or other security. However, no treaty creates a right for a third State unless the States Parties so intend, and such an intention cannot be lightly presumed. Since Erebus is not a party to the UNCLOS, it may not rely on the UNCLOS to claim prompt release of the vessels from Merapi.

Even if the Court decides that Erebus may claim prompt release of the vessels upon the posting of a reasonable bond or other security, no such security has been posted by the Erebian ship owners. Therefore, Merapi need not release the vessels.

E. Merapi Requests The Court To Enjoin Erebus From Starting Up Its Seabed Mining Operation Until It Is Either Upgraded Or Relocated To Ensure The Safety Of The Marine Life Off The Coast Of Merapi

1. Merapi requests the court to indicate provisional measures of protection.

The Court has the power to indicate provisional measures to ensure that no action is taken which might prejudice the disputed rights of either party, notwithstanding whatever decision on the merits the court may render. They may be awarded if there is urgency that such prejudicial action might infringe upon these disputed rights before the final decision is given and if irreparable damage would otherwise be caused. Such provisional measures have been indicated by the Court, e.g. to protect a State's fishing right, considering the possible effects on its fishing

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68. UNCLOS, supra note 2, at 292, art. 73/2.
industry," as well as to protect the environment against pollution.\(^7\) Irreversible injury threatens the marine environment beyond the limits of national jurisdiction, affecting all States. Regarding Merapi, the need for provisional measures derives from the fact that the lives of Merapi's citizens and the health and progress of Merapi's economy are highly endangered, thus posing a threat of irreparable harm. It would be unacceptable to wait and then let Erebus compensate for loss of human lives and massive sea pollution. There is urgency inasmuch as the date of commencement of the operation is not clear and possibly very close and a final decision on the pertinent case is uncertain. Once the operation has started, marine pollution cannot be undone and would render any decision on the merits ineffective. Therefore, the Court should indicate provisional measures to enjoin Erebus from starting up its seabed mining operation.

Even if the Court decides that protection of specific rights is not required, provisional measures may be indicated to prevent any aggravation or extension of the dispute.\(^7\). Considering the devastating consequences to Merapi's economy and the threat to many lives, it cannot be denied that starting the mining operation would severely aggravate the present dispute. Therefore, Merapi requests the Court to indicate provisional measures.

2. Erebus has to either upgrade or relocate the mining facility under international law.

   a. *Erebus must upgrade or relocate the mining facility, according to customary international environmental law.*

   States must protect and preserve the marine environment by taking all appropriate measures to prevent, reduce and control pollution resulting from installations for the exploitation of the seabed. This is well recognized under customary international law as evidenced by numerous conventions,\(^76\) resolutions,\(^77\) and national legislations.\(^78\) Furthermore,
according to the precautionary principle lack of full scientific certainty shall not be used as a reason for postponing measures to prevent environmental degradation where there are threats of serious damage.78 Erebus will use a recently developed hybrid process for its seabed mining, already criticized by prominent scientists, which contains the hydraulic system. Since said system is harmful to the environment, danger from the hybrid process as a whole cannot be ruled out. Due to its recency, computer simulation cannot give sufficient information about its potential environmental impact and data from other seabed mining sites can only give information about already tested technology. Hence, there is a lack of full scientific certainty about the impacts of the hybrid process. Therefore, Erebus has not taken all appropriate measures to prevent pollution and is obliged to upgrade the mining facility by using environmentally safe technology. Furthermore, since this untested technology can lead to an environmental catastrophe threatening the plentiful fish stock in the resource-rich Grand Basin, Erebus at least has to relocate the mining facility in order to prevent pollution of this area of special ecological value.


78. 20 I.L.M. at 1228 et seq. (§§ 970.204, 506, 701); 20 I.L.M. at 1221-23 (art. 5, ¶ 6); 21 I.L.M. 808 et seq. (arts. 8, 14); 21 I.L.M. 551 et seq. (art. 8); 20 I.L.M. 393 et seq. (§§ 1, 8)

b. Erebus has to upgrade or relocate the mining facility, according to Merapi’s historic rights to exploit the resources of the Grand Basin.

Historic rights are recognized under international law. On the high seas, they emanate from acquiescence of the international community. The citizens of Merapi have been fishing the Grand Basin for hundreds of years uninterruptedly, and exclusively for at least half a century. Erebus, being technologically advanced, had the possibility to exploit the area off the coast of Merapi. But it remained inactive and Merapi thus validly trusted this given state of affairs. Deprivation of these rights would result in unequal hardship for Merapi due to the consequence of starvation and death on a massive scale. Therefore, Merapi has established a historic right to fish the Grand Basin and Erebus is under the obligation to respect this right and consequently to upgrade or relocate its mining facility.

c. Erebus has to upgrade or relocate the mining facility, according to the International Law of Development.

According to the right to development, developing States are to be treated in a favorable, preferential manner by creating such conditions as to enable them to compete with more developed States. As it is a human right, this is a common and shared responsibility of the entire international community. It has to be fulfilled in accordance with the concept of sustainable development, thus not harming the environmental needs of present and future generations. Erebus’ mining operation endangers Merapi’s main source of subsistence—fishing the Grand Basin. In destroying the basic pillar of Merapi’s economy, Erebus is violating the human right to development. Furthermore, the seabed mining greatly endangers the marine environment in breach of the principle of sustainable

80. Fitzmaurice, supra note 5, at 30; MacGibbon, supra note 20, at 122; 1951 I.C.J. at 139; cf. BLUM, supra note .18, at 315s.
development. Therefore, Erebus is under the obligation to upgrade or relocate the mining facility.

F. Merapi Requests U.S.$ 1 Billion In Damages In Compensation For The Losses It Has Sustained As A Result Of Erebus' Occupation Of The Waters Surrounding The Alma Shoals

1. Erebus must compensate Merapi for the losses suffered by its nationals.

An internationally wrongful act, i.e. an action or omission in breach of an international obligation attributable to a State, entails the responsibility of that State. The wrongdoing State incurs the obligation to wipe out all consequences of the illegal act and reestablish the situation which would have existed if the act had not been committed. Where restitution is impossible or insufficient, the wrongdoing State must pay compensation. Compensation is due for any financially assessable loss which in the ordinary course of events would not have occurred if the unlawful act had not been committed. Where the damage suffered by nationals is incidental to the direct injury to a State in its very quality, which thus has a legal interest of its own, distinct from that of its nationals, exhaustion of local remedies is not required. The Erebian military has occupied the waters surrounding the Alma Shoals, forcing Merapi fishing vessels to retreat from the area. Since Merapi, and not Erebus, is entitled...


85. Factory at Chorzów (Germany v. Pol.), 1928 P.C.I.J. (ser.A) No.17, 47 (Judgment); Draft Articles on State Responsibility, supra note 47, at art. 36[43].


to exercise sovereign fishing rights in the Alma Shoals, the occupation by Erebus was an internationally wrongful act. This violation of Merapi's sovereign rights constitutes a direct injury to Merapi in its quality as a State. Subsequently, it also caused loss of fishing yields to its nationals. As this loss is incidental to the direct injury to Merapi, exhaustion of local remedies is not required. Erebus has to reestablish the previous situation by withdrawing its navy from the Alma Shoals. Merapi fishing yields during the time of occupation would in the ordinary course of events have accrued to U.S.$ 1 billion. These yields cannot be restituted in kind, thus appropriate compensation is due to Merapi and Erebus has to pay compensation for the loss of fishing yields.

2. Even if the Court does not hold Erebus responsible for damages to Merapin nationals, the infringement on Merapi's sovereign rights renders Erebus responsible.

Under international law compensation is due for the infringement of a State's rights, independently of material damage, reflecting the gravity of the breach. The infringement of a State's sovereign rights is a grave violation of international law. Erebus' occupation of the Alma Shoals using armed force completely excludes Merapi from fishing its own EEZ and infringes on its sovereign rights. Therefore Erebus has to pay compensation.

3. Even if the court does not hold Erebus responsible for the occupation Erebus is unjustly enriched.

The concept of unjust enrichment which is a recognized general principle of international law is based on the idea that no State should enrich itself at the expense of another State without legal cause. Erebus is


profiting from fishing the occupied Alma Shoals. Since the Alma Shoals are part of Merapi's EEZ, this fishing is without legal title. Erebus is therefore unjustly enriched and consequently must reimburse the profit gained.

VI. PRAYER FOR RELIEF

May it therefore please the Court to:

1. Declare that, notwithstanding the change in course of the principal arm of the Krakatoa River, Merapi has the right under international law to exclude vessels and persons of Erebian nationality from fishing the Alma Shoals;

2. Declare that the proposed Erebian seabed mining operation is in violation of international law;

3. Declare that Merapi is not required by international law either to surrender the members of The Aqua Protectors to Erebus for prosecution, or to release the six fishing vessels;

4. Enjoin Erebus from starting up its seabed mining operation until it is either upgraded or relocated to ensure the safety of the marine life off the coast of Merapi;

5. Award to Merapi U.S. $1 billion in damages to compensate it for the losses it has sustained as a result of Erebus' occupation of the Alma Shoals.

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