ILSA Journal of International
And Comparative Law

ARTICLES & ESSAYS

Litigation in the Consumer Interest ........................................ Geraint Howells & Rhoda James
Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Dispute Harmonization? ................................................... Laura M. Piar
The Legality of NATO's Intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law ............................................................. Jeffrey S. Morton
Can Congressional Foreign Affairs Power Justify a Juvenile Death Penalty Prohibition in the United States? ............................................. Serri Miller

NOTES & COMMENTS

Maximizing Plaintiff Protection in the World of Asset Freezing and Bypassing the Due Process Requirement of Notice: The Marevis Injunction as an Alternative to the American Legal Remedies ................................................... Carlos Fabiano
Those Who Could Not Wander and the Creation of a State: The Jews and the Palestinians ......................................................... Adam S. Klein
"Blessed are the Peacemakers": Faith-Based Approaches to Dispute Resolution ........................................................................... R. Seth Shipee

2002 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT
COMPETITION DISTINGUISHED BRIEFS

Memorial for Applicant ................................................................. University of Otago, New Zealand
Memorial for Respondent ............................................................. Harvard University, U.S.A.
TABLE OF CONTENTS

ARTICLES & ESSAYS

Litigation in the Consumer Interest ... Geraint Howells & Rhoda James 1

Cross-Cultural Arbitration: Do the Differences Between Cultures Still Influence International Commercial Arbitration Dispute Harmonization? ........ Laura M. Pair 57

The Legality of NATO's Intervention in Yugoslavia in 1999: Implications for the Progressive Development of International Law ........ Jeffrey S. Morton 75

Can Congressional Foreign Affairs Power Justify a Juvenile Death Penalty Prohibition in the United States? ... Serri Miller 103

NOTES & COMMENTS

Maximizing Plaintiff Protection in the World of Asset Freezing and Bypassing the Due Process Requirement of Notice: The Mareva Injunction as an Alternative to the American Legal Remedies ........................................ Carlos Fabano 131


Those Who Could Not Wander and the Creation of a State: The Jews and the Palestinians ....................... Adam S. Klein 211

"Blessed are the Peacemakers": Faith-Based Approaches to Dispute Resolution ........................................ R. Seth Shippee 237

2002 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION DISTINGUISHED BRIEFS

Memorial for Applicant .................. University of Otago, New Zealand 257
Memorial for Respondent ................. Harvard University, U.S.A. 289
# LITIGATION IN THE CONSUMER INTEREST

*Geraint Howells* & Rhoda James**

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>THE DEVELOPMENT OF CONSUMER RIGHTS</td>
<td>2</td>
</tr>
<tr>
<td>II.</td>
<td>WAVES OF ACCESS TO JUSTICE</td>
<td>3</td>
</tr>
<tr>
<td>III.</td>
<td>ACCESS TO JUSTICE AS A COMPARATIVE VENTURE</td>
<td>6</td>
</tr>
<tr>
<td>IV.</td>
<td>CHARACTERISTICS OF CONSUMER DISPUTES</td>
<td>7</td>
</tr>
<tr>
<td>V.</td>
<td>INDIVIDUAL SMALL CLAIMS</td>
<td>8</td>
</tr>
<tr>
<td>VI.</td>
<td>INDEPENDENCE</td>
<td>12</td>
</tr>
<tr>
<td>VII.</td>
<td>ACCESSIBILITY</td>
<td>15</td>
</tr>
<tr>
<td>VIII.</td>
<td>FAIRNESS</td>
<td>22</td>
</tr>
<tr>
<td>IX.</td>
<td>ACCOUNTABILITY</td>
<td>25</td>
</tr>
<tr>
<td>X.</td>
<td>EFFICIENCY</td>
<td>26</td>
</tr>
<tr>
<td>XI.</td>
<td>EFFECTIVENESS</td>
<td>26</td>
</tr>
<tr>
<td>XII.</td>
<td>SUMMARY</td>
<td>29</td>
</tr>
<tr>
<td>XIII.</td>
<td>COLLECTIVE CLAIMS</td>
<td>31</td>
</tr>
<tr>
<td>XIV.</td>
<td>PRIVATE INTEREST COLLECTIVE ACTION PROCEDURES</td>
<td>33</td>
</tr>
<tr>
<td>XV.</td>
<td>TEST CASES</td>
<td>33</td>
</tr>
<tr>
<td>XVI.</td>
<td>REPRESENTATIVE ACTION</td>
<td>33</td>
</tr>
<tr>
<td>XVII.</td>
<td>CLASS ACTIONS</td>
<td>35</td>
</tr>
<tr>
<td>XVIII.</td>
<td>LEGAL AID</td>
<td>41</td>
</tr>
<tr>
<td>XIX.</td>
<td>PUBLIC AUTHORITIES</td>
<td>41</td>
</tr>
<tr>
<td>XX.</td>
<td>PUBLIC INTEREST COLLECTIVE LITIGATION</td>
<td>42</td>
</tr>
<tr>
<td>XXI.</td>
<td>CONSUMER ORGANIZATIONS</td>
<td>42</td>
</tr>
<tr>
<td>XXII.</td>
<td>DAMAGES FOR COLLECTIVE HARM</td>
<td>43</td>
</tr>
<tr>
<td>XXIII.</td>
<td>CONSUMER GROUPS AND INDIVIDUAL LITIGATION</td>
<td>44</td>
</tr>
<tr>
<td>XXIV.</td>
<td>INJUNCTIONS</td>
<td>45</td>
</tr>
<tr>
<td>XXV.</td>
<td>SOCIAL ACTION LITIGATION</td>
<td>46</td>
</tr>
<tr>
<td>XXVI.</td>
<td>SUMMARY</td>
<td>47</td>
</tr>
<tr>
<td>XXVII.</td>
<td>GLOBALIZATION</td>
<td>48</td>
</tr>
<tr>
<td>XXVIII.</td>
<td>PRIVATE INTERNATIONAL LAW</td>
<td>49</td>
</tr>
<tr>
<td>XXIX.</td>
<td>EUROPEAN INITIATIVES TO IMPROVE CROSS-BORDER CONSUMER REDRESS</td>
<td>51</td>
</tr>
</tbody>
</table>

*Professor of Law and Director of the Centre for European, Comparative and International Law, Faculty of Law, University of Sheffield.

**Senior Lecturer in Law, Faculty of Law, University of Sheffield.

This work derives from research undertaken with the assistance of a grant from the Nuffield Foundation. The authors wish to thank Iain Ramsay, Gerald Thain and Klaus Viitanen for their comments on an earlier draft.
I. THE DEVELOPMENT OF CONSUMER RIGHTS

The identification of the consumer as a discrete party, entitled to specific legal rights, is a product of the latter half of the twentieth century. Looking back on the last four decades, one can now clearly detect a trend for special legislation protecting the interests of consumers. These resonate with the values expounded by President Kennedy, who famously in his 15 March 1962 declaration to the United States Congress said: "Consumers by definition, include us all... They are the largest economic group, affecting and affected by almost every public and private economic decision. Yet they are the only important group... whose views are often not heard." He declared four basic consumer rights: the right to safety, the right to be informed, the right to choose, and the right to be heard. Significantly for our present theme, the right to redress was not mentioned, but as we shall see this has become an important aspect of consumer law and policy and is one of four additional rights developed by Consumers International.1 States in developed economies were relatively quick to start granting rights based on Kennedy's declaration to their consumers, and most now have fairly comprehensive consumer laws. Developing countries continue to catch up under the influence of the United Nations Guidelines on Consumer Protection.2

However, in recent times the legislatures of the First World have become more reluctant to regulate consumer issues. In part, this may be a form of paralysis, because the consumer problems of today are no longer of the manageable order that yesterday's politicians were able to gain plaudits for addressing in a way that produced obvious improvements. Also, whether it was the impact of consumer laws, competitive forces, developments in technology, or other factors, one can certainly say that the quality of cars, white goods, and to some extent the practices of creditors, have improved over the last few decades. A more daunting set of tasks face today's politicians if they wish to claim to be able to use law to control the types of risks3 facing the modern consumer - witness the issues concerning BSE, GM foods, and the threat to state regulation posed by trading on the internet.

---

1. The others are the rights to satisfaction of basic needs, to education, and to a healthy environment.
Even in the traditional arena for consumer law, i.e. the sale of consumer durables, governments are less keen to regulate. This is partly because, on the whole most developed countries have fairly strong consumer laws, and there is a preference for self-regulatory solutions to new problems. This reflects the feeling that there is little sense in adopting laws if they do not actually lead to traders changing their behavior and wronged consumers being able to have access to justice. There is certainly an appreciation that rather than piling up consumer laws, it is important to make those we already have work better.

Of course one way of enforcing consumer laws is through public enforcement. This is especially appropriate with respect to safety issues, where the supervision of the marketplace cannot safely be left to individual initiative. Equally, financial services are so vital for individuals and often involve sums so large that the state clearly has a role in supervising the market. At the other end of the spectrum, state involvement might be desirable to deal with small economic losses which might not justify individual litigation, and also for matters of taste where the state might feel it should be involved and individuals may again not be sufficiently motivated to act themselves. The function of the state as protector of the consumer is, however, another inquiry, for we are concerned in this essay with how consumers as individuals can invoke the law to voice their concerns, obtain redress, and help ensure the development of higher trading standards. Our discussion of public authorities will therefore be limited to their role in assisting consumers to utilize the law. This essay is concerned with assessing the comparative efficacy of different modes of consumer redress within disparate regulatory cultures.

II. WAVES OF ACCESS TO JUSTICE

A good starting point for the legal analysis of consumer access to justice issues must still be the seminal work of Prof. Mauro Capelletti. This influential work has proven to be fertile ground for many subsequent commentators, but we believe there is still merit in reconsidering his theories in the present political and regulatory climate. This is not least because we shall go on to show that, in addition to the three waves in the access to justice movement which Capelletti discerned, two subsequent regulatory and globalization waves can be detected, and we will argue for an extension of his analysis in the form of a further integrative wave. Capelletti’s first wave concerned economic matters (i.e. providing citizens with the legal means to seek justice, i.e. legal aid). The second wave was organizational (i.e. extending standing to bodies that could act

on behalf of diffuse interests and developing class actions). The third wave was
procedural (i.e. developing ADR). It is interesting to reflect on these three
waves with the benefit of hindsight.

Reading the literature of the late seventies and early eighties on how to
make legal services available to the public, one is struck by the optimistic tone
struck by legal radicals. At that time the UK, for instance, had a relatively large
legal aid budget and a flourishing Law Centre movement. With hindsight this
optimism was misplaced. Today in the UK, it would be unrealistic to suggest
that the public purse should finance increased lawyers to fight for the
vulnerable. Although there is the possibility of some legal provision being
given to consumers through the Community Legal Service and grants to bodies
like the Citizen's Advice Bureaux do continue, nevertheless the move is to
restrict legal aid and to privatize the delivery of legal services through the use
of contingent fees. A similar pattern is replicated in other countries.

However, the second and third waves remain strong. The organizational
changes have indeed strengthened the role of bodies such as consumer
organizations and public authorities in representing the consumer collective
interest. This can be rationalized as reflecting the law's recognition that
litigation has increased in significance as a means of protecting consumers as
compared to direct regulation. A very practical manifestation of this is the EC's
Consumer Injunctions Directive. Moreover, class action procedures have
spread throughout the common law world and are being discussed in many civil
law countries, and even introduced in a few. In some rare instances in common
law countries, public bodies are even allowed to support individual
litigation.

In civil law countries with the partie civile procedure, the prosecutors assist
consumers to compensation by bringing criminal actions which can lead to
compensation.

The procedural wave favoring ADR has of course continued apace. There
has always been a certain ambiguity as to the motives for adopting ADR. Some
view it as a sensible and affordable way of dealing with relatively minor
consumer problems. Others champion it as a means to provide a higher form
of justice than that which is served up by the adversarial court process.

6. Access to Justice Act, 1999, c. 22 (Eng.); See at http://www.justask.org.uk (last visited Aug. 29,
2002).
8. Such as Quebec, and to some extent, France.
9. For instance, this is possible for product liability actions in Australia, see the Australian
Consumer and Competition Commission - role and functions, at
10. CAPELLETTI, supra note 4, (referring to it as “co-existential justice”).
others it is seen as merely providing second class justice for the poor. Some recent moves, such as the introduction of compulsory arbitration for small claims in Germany, are clearly primarily motivated by a desire for cost reduction. Indeed one can detect a certain managerial edge to the administration of many ADR schemes, yet instances can still be discovered where ADR is advocated as a better form of justice more suited to the needs of consumers.

Thus some of the same issues continue to be the same as when Capelletti defined his three waves, albeit that the contours of debate have evolved over time. If one were seeking to identify new waves, one might select the regulatory function of redress actions and cross-border or globalization dimension.

Litigation has always had a regulatory function. The nineteenth century German scholar Rudolf von Ihering found it unsatisfactory that individuals should decide whether to institute litigation on the basis of a personal cost-benefit analysis, because they had a duty to take into account the public interest in demonstrating the effectiveness of the law and deterring potential law breakers. The changes in organizational structure have helped emphasize the role litigation plays in developing standards. The motivation behind injunctions brought by state agencies and/or consumer organizations is primarily to promote better trading practices. Class actions often have, as one dimension, the desire to ensure that wrongs are exposed and that remedial action is taken. This learning process function of litigation has also become evident in some ADR schemes. For instance, an important function of private sector Ombudsmen schemes is to provide guidance to industry through published decisions or annual reports. Even arbitration schemes are aware that they have to provide some means of commenting on the poor practices they come across. It is perhaps only in the small claims courts, where the cases are too minor to be reported and there is no supervisory structure, that the need to learn the lessons of disputes is not being appreciated.

The globalization of consumer disputes is becoming more than a mere theoretical problem. This is a factor of increased international travel and trade. It is most prominent in the EC, which as the world’s most integrated free trade zone, has encouraged consumers to shop across borders and has taken

12. See § 15a EGZPO (Gesetz betreffend die Einführung der Zivilprozeßordnung).
15. The events of September 11th may lead to some reduction in travel in the short term at least, but trade will remain increasingly international.
responsibility for making it easier for consumers to obtain redress, should things go wrong.\textsuperscript{16} However, this is now a global phenomenon, given the increasing pervasiveness of Internet trading. This causes problems for regulatory authorities\textsuperscript{17} and also individuals who want to seek redress from overseas. The Internet challenges conventional rules on how law should control businesses. Even if one wanted to hold on to the belief that the traditional court based forms of redress were adequate to deal with consumer problems, this cannot be a realistic response to the Internet. Formal court procedures cannot be the right way to resolve disputes for small amounts between parties on the opposite side of the globe. The only practical solution is some sort of virtual ADR court. This forces one to confront the economics of litigation, but in fact it only confirms and reinforces the existing trend.

We shall conclude with a request for a sixth integrative wave to be generated in the future, which involves bringing the ordinary courts and the ADR schemes into sync. We see a strange phenomenon occurring. The collective dimension is being recognized in the court system (collective injunctions and class actions), yet the focus of consumer litigation is being shifted to ADR mechanisms in which these collective instruments rarely exist. Equally, some ADR mechanisms are taking their function of raising trade standards extremely seriously and are adopting innovative techniques, yet the traditional courts continue to rely upon publicity of decisions, which is not really meaningful for small consumer claims. Thus, we want there to be a sixth wave of integration of innovations between the courts and ADR institutions.

\textbf{III. ACCESS TO JUSTICE AS A COMPARATIVE VENTURE}

There are many examples of good practice in the consumer redress field. However, we will caution that, whilst one should accept that consumer redress mechanisms will be - and indeed we will argue ought to be - different from ordinary court procedures, one should not accept that these differences ought to be an excuse for simply providing a poorer version of what already exists. Consumer problems need unique solutions. Our intention is not to map out a common model for consumer redress institutions which each country should follow. The exact mix (for inevitably there will be a mix) of redress systems will vary from country to country, depending upon national traditions and legal cultures, and will inevitably build upon what already exists. However, we believe a comparative survey will provide some interesting models and reveal some important lessons. We also hope that we can provide some guiding principles of universal value against which national systems can be judged. The

\textsuperscript{16} See infra pp. 51-53.
most fundamental being that one should welcome the uniqueness of redress schemes set up to address consumer problems, and not simply judge them by how closely they replicate the ordinary courts. In fact, we suggest that the potential of new alternatives may not be fully delivered, and problems can result, if they are simply modeled and judged against existing court based redress schemes.

It is with regard to redress schemes dealing with relatively small individual disputes that most work has been undertaken to develop criteria against which they should be judged. We shall review this, but we also seek to paint a broader canvas of consumers' use of litigation. It is harder to put forward universal principles to cover all types of consumer litigation. For instance, different criteria will apply depending on whether the claim is a one-off individual dispute or raises broader collective consumer concerns; equally the ability of the consumer to obtain legal representation will be relevant in some but not all types of dispute.

IV. CHARACTERISTICS OF CONSUMER DISPUTES

At a fundamental level, it is possible to suggest certain special characteristics of consumer litigation which explain why we think it calls for an entirely different and novel approach, rather than simply a slimmed down version of traditional models of justice. Consumers often have small claims, although the total harm caused by a particular problem to the consumer collective can be great. Even small claims can have a significant impact on consumer welfare. This is especially so for the disadvantaged, who ironically are less likely to seek redress. Moreover, consumer problems are likely to be a greater irritant to consumer lives than their mere economic consequences might suggest, because of the distress and wasted time the problems generate. What to lawyers looks like an economic problem, often translates to the consumer as a social problem.

Consumers come in all shapes and sizes and few will have the resources to employ lawyers to deal with their consumer problems, and many will be intimidated by approaching traders or third party dispute resolution procedures. One only has to look at the low levels of literacy even in developed western societies to see how the prospect of writing a formal complaint, yet alone being enmeshed in legal proceedings, might be a forbidding prospect for many. Others will simply not find it worthwhile to expend energy on relatively small claims.

Thus, consumer claims often represent individual losses, but need collective procedures often involving third parties representing them, to find a remedy. Advocating such procedures can be quite a tricky argument to win. The need for such mechanisms is obvious in contexts like the environment,
where there can be no obvious human victim. In contrast, in the consumer context, the jibe can be made that if the victim does not think the claim merits action, then there is no real "mischief" to be remedied. However, it is hoped that the reader can see that whilst it may be a sensible decision for individuals not to take such cases, this may mask real consumer detriment. It has been suggested that many individuals who bring cases have to possess "super-spite" to do so. Nevertheless, society would benefit from wrongs being rectified and trading standards being improved and this requires some mechanisms for consumer grievances to be voiced.

Consumer disputes can be categorized into four categories. Variables might include whether the claim is specific to an individual or if it affects the consumer collective, and whether it is for a large or small amount. Where claims involve large individual claims, the consumer aspect of the claim is perhaps less significant. Such claims raise the same familiar issues, such as funding and the courts’ ability to influence behavior, that are pervasive throughout the law. For this reason we will not spend more time on the problems facing consumers with large claims where they are of an individual nature. We will dwell longer on the issues surrounding large claims, which represent a collective problem. This is both because they raise specific concerns of organization and funding and also because we wish to reflect on the ability of such actions to promote the collective interest. The law in this area is making some hesitant steps at improvement. This allows us to contrast the position with how poorly the law facilitates collective claims where the amounts at stake are small for individuals, even if collectively they are large. However, our focus will first be on the main practical problem which consumers pose for the legal system. Namely, how to manage the numerous small individual disputes consumers have.

V. INDIVIDUAL SMALL CLAIMS

Two main approaches have been adopted to manage disparate consumer disputes often involving small amounts. Under one approach, the dispute is characterized according to the type of consumer product or service involved, and a separate dispute mechanism provided which appropriately matches the dispute characteristics in some sense. This approach has been followed in a number of the countries which we studied, where particular grievance remedial processes are provided for disputes in connection with specific and discrete

---

19. Leaving to one side the debate is about what is a small claim.
20. It should be noted however, that some of the Ombudsmen schemes for instance, can award quite considerable sums, although most operate a ceiling on the awards that are binding on firms.
products. So we see for example, an arbitration scheme set up to deal with complaints about vehicles,\(^1\) a complaints board to deal with insurance disputes,\(^2\) and ombudsmen to deal with specific sector disputes.\(^3\) Commonly, this is a privatized form of justice. This approach carries the advantage that most such schemes abide by standards of fairness,\(^4\) and provide a decision maker who has expertise and specialist knowledge. However, since in many instances the imperative for the setting up of such mechanisms (and indeed the finance) has come from the product or service providers, there may be a trade-off between this managerialist approach and the kind of guarantees of independence and impartiality which are taken for granted in the traditional adjudicative setting.

The other approach is to provide a special state-funded mechanism, and to invest it with the particular characteristics, which are regarded as suitable for ‘small’ consumer disputes of any nature. Most commonly, this mechanism will be a variant or adaptation of the normal court hearing (although the state-funded Scandinavian Consumer Complaints Boards are an exception providing an informal mode of resolution). Here, the advantages of specialism may not pertain (although there are some exceptions, notably the Consumer Credit Tribunals in some Australian jurisdictions and the specialist boards that work within the Scandinavia Consumer Complaints Board structure) and while the independence of the adjudicator is unlikely to be put in question, other concerns may arise as to the suitability of the forum given many of their origins in court-based formal proceedings.

The advantages of court based schemes are that they have the authority of law, are independent, and can hand down binding decisions. These are also the roots of some of the disadvantages of using courts as a means of consumer protection. Judicial processes have to maintain a degree of formalism that can be off-putting to consumers. The judges may have limited knowledge of consumer law and even less appreciation that consumer problems may call for solutions which stretch traditional legal concepts. Also, each court decision is

\(^{21}\) G. Howells & R. James, Litigation in the Consumer Interest, Report for the Nuffield Foundation and paper presentation to the Annual Conference of the Society of Public Teachers of Law, (Sept. 1999) (discussing the Canadian Motor Vehicle Arbitration Plan (CAMVAP)).

\(^{22}\) Id. (discussing Norwegian Bureau for Insurance Disputes Forsikringsklagekontoret Arsberetning).

\(^{23}\) Id. (discussing the example of the banking ombudsmen in Australia, Canada, the UK, and New Zealand); See RHODA JAMES, PRIVATE OMBUDSMEN AND PUBLIC LAW, (1997) (for a discussion on the banking ombudsmen in Australia, Canada, the UK, and New Zealand, and for other private ombudsmen in the UK); R. James & P. Morris, The New Financial Ombudsmen Service in the UK—Has the Second Generation Got it Right?, Paper presented to the 8th International Consumer Law Conference in New Zealand (Apr. 9-11, 2001).

\(^{24}\) In most instances, they also provide for awards which are binding, or binding de facto, on the business.
seen as unique, and there is normally no attempt to obtain an overview of consumer issues in order to tackle systemic problems. Of course some legal systems have done their best to eliminate these problems. New Zealand, is one such example, where the disputes tribunals are quite distinct from traditional courts.\(^{25}\)

One point requires emphasis, since it must colour any conclusions about how well individual redress mechanisms work. Whatever form they take, small claims court or ADR system, consumer redress mechanisms are still unlikely to serve the interests of the most disadvantaged. As one commentator in the United Kingdom has said after studying the small claims courts there “for the most part, small claims hearings involve well-to-do people suing other well-to-do people.”\(^{26}\) This mirrors research findings from the US and Canada.\(^{27}\) ADR procedures have a similar record.\(^{28}\) However accessible and effective they may, they are still operating in a context where the balance is skewed against those who can least bear the loss caused by a faulty product or service, and who may be least able to negotiate successfully with a company.

In setting out to examine mechanisms for individual consumer redress it is immediately clear that here is an area where Capelletti’s third procedural wave is particularly evident, in form at least. But the whole range of consumer redress problems are not usually covered by such procedures, and one should note a broad distinction between disputes concerning the financial services sector, where ADR schemes are quite numerous, and general consumer disputes about goods and services where there continues to be a need to rely on court based solutions, albeit that court procedures have often been modified to accommodate small claims.

Different forms of ADR have been taken up in different countries. In some, notably Australia, Canada, New Zealand, and the UK, the private ombudsman has proved to be a popular consumer remedy with business, government, and broadly with consumer interests. There is evidence of its success in providing an easy-to-use and free process for the individual.


\(^{28}\) John Birds & Cosmo Graham, Complaints Against Insurance Companies, 1 CONSUMER L.J. 92 (1993) (explaining that private ombudsmen have been found to be accessed largely by male, middle class professionals); Rhoda James & Mary Seneviratne, Offering Views in Both Directions: A Survey of Member Agencies and Complainants on Their Views of the Ombudsman for Corporate Estate Agents Schemes, Sheffield Law Faculty (1996).
consumer. Typically, they are able to decide disputes taking into account the relevant law, industry codes of practice, and considerations of what is fair and reasonable and make awards of up to a financial limit, which in the UK is £100,000, which are binding on the companies in the scheme.

Despite its popularity as a consumer grievance mechanism in many countries, the spread of this type of private ombudsman has not been universal. In the US, which is notable for the rapid proliferation of ombudspersons, the office has been largely confined to the governmental or public agency sphere, with some limited individual corporate instances. The idea of an ombudsman to cover a particular industry or corporate sector has not taken hold as it has in other countries. Whether this results from a different regulatory climate or the availability of other, preferred consumer remedies is unclear, but it provides emphasis for the point that it would be impractical to prescribe universal solutions.

Where the idea has taken hold, it has to be said that private ombudsmen are largely concentrated in financial services. The structural features of industries in those sectors have meant that the early provision of an external complaints mechanism was a feasible voluntary response to threats of statutory intervention. The absence of ombudsmen in the retail sector is striking and may, incidentally, go some way to explaining research findings in the UK that ombudsmen played a minimal role in consumer disputes.

In most countries there are some consumer sectors, outside financial services, which operate codes of practice including the provision of a low cost arbitration schemes. One problem with these schemes is their often low visibility to the public eye, and also their perceived lack of independence. Consumers are concerned not so much about the independence of the arbitrator, but rather about attempts to force them to mediate claims. Moves are afoot to improve these schemes, but as a general rule, it is true to say that globally outside the financial service sector, there are few examples of effective industry ADR schemes.

29. The spread continues. See, Government to Appoint Banking Ombudsman, DAWN (London), June 19, 2001, at 1 (discussing Pakistan’s Finance Minister’s announcement of his intention to appoint a banking ombudsman).


The kind of criteria against which to judge mechanisms for individual consumer redress are well known, and there is a general consensus in the literature\(^{33}\) about the kind of points which need to be met, certainly for a non-court based resolution scheme. The benchmarks recently adopted by the Australian Government\(^{34}\) are broadly representative of this consensus identifying considerations of accessibility, independence, fairness, accountability, efficiency and effectiveness. The European Commission, too, has been looking at consumer redress and has produced a Recommendation on the principles applicable to bodies responsible for out-of-court settlement of consumer disputes.\(^ {35}\) These are the principles of independence, transparency, the adversarial principle, and principles of effectiveness, legality, liberty, and representation. Both the benchmarks and principles bear detailed examination. Although they cover much the same ground, there are some interesting differences that serve to illustrate some of the difficulties faced in trying to devise an all-purpose model for consumer redress. They also highlight areas of deficiency. Since, for us, they seem to encompass the kind of considerations which must be integral to an effective consumer redress mechanism, in this article we shall use them to test all the consumer redress schemes we have examined in our comparative survey, whether or not those schemes are court-based or ADR institutions, and regardless of whether the criteria would be formally applicable in their national setting.

The Australian benchmarks seem well suited to an ombudsman type of remedy. The EC principles have inevitably been fashioned to cover the multiplicity of forms of redress which currently exist within the EU, and one can detect in places the influence of the court-based, formal approach favored in civil law countries. Clearly some formal protection is required. The question is as to where the balance should be struck between, on the one hand, imposing the kind of formal protections for the consumer which have their origins in a judicialized forum, and on the other, accepting that for out-of-court procedures to function as a cheap and accessible remedy then some formal procedural requirements must be relaxed.

VI. INDEPENDENCE

Independence is probably the most crucial characteristic. It is also one which is easier to demonstrate the closer the mechanism is to a judicial model.


\(^{34}\) J. Chris Ellison, Minister for Customs and Consumer Affairs, Benchmarks for Industry-Based Customer Dispute Resolution (1997).

Both the benchmark and the EC principles require that institutional arrangements should be in place to guarantee the independence of the decision-making body and thus the impartiality of the decisions. The benchmark requires that the members of the scheme (i.e. the companies), should have no role in the decision making process and the administration of the scheme. Both require that the arrangements made as to the appointment of the decision maker should be such as to ensure independence from the companies, and the principle requires that where a decision is taken by an individual, this independence is to be guaranteed by a range of measures including the requirement that the appointment of that individual should be for a period of time sufficient to ensure independence, and that the individual should not be liable to be relieved of his duties without just cause.

The principle also requires that the person appointed should not have worked for the professional association or one of its members within three years of the appointment, if that professional association is concerned in the appointment or remuneration of the decision maker; but it does not impose any limits on where a post holder might go after holding such an appointment. This might, however, be at least as significant an issue.

These are all criteria which are met by small claims courts. As to arbitration, there is usually no serious question about lack of formal independence of arbitrators, but concerns arise where they are habitually appointed by an industry and may give the appearance of, at the least, familiarity with the company representatives. This is the familiar problem of the advantages of repeat players.

Lack of independence from the industry which funds the private ombudsman has been one long standing criticism. However, the criticism usually relates to the institutional arrangements rather than any suggestion of lack of impartiality on the part of the individuals who hold the office. That said, there has been some evidence of individual ombudsmen having to withstand covert industry pressure.36 The private ombudsman has its origins in the United Kingdom, and the solution devised there to keep the companies at arms length from the ombudsman and his decision making was a tri-partite structure which placed an ombudsman council (chaired by an independent person of high repute and with a majority of independent members) between the ombudsman and the company which funded the scheme. This was the model adopted first by the insurance industry in the United Kingdom when they introduced the first such ombudsman in 1981, and it is a format that has been largely exported to Australia, NZ, and Canada. Concerns have still been voiced however about the

influence of the industry,\textsuperscript{37} and there have also been concerns where the ombudsman company had the final power of approval and reappointment with the result that some schemes have moved to fixed term appointments.\textsuperscript{38} In the United Kingdom, many of these concerns will only be of historic interest, since the new Financial Ombudsman Service is about to take over the work of eight existing ombudsman schemes in the financial services sector. As a statutory scheme, this now represents a reverse in the privatization trend, looking, as it does, rather like a nationalization of a previously self-regulatory mechanism.\textsuperscript{39} Similar plans have been put forward in Canada to introduce one ombudsman in the financial services sector.\textsuperscript{40}

The EC principle of independence further requires that any individual who is the decision maker must possess the abilities, experience and competence, ‘particularly in the field of law’, required to carry out this function. Most arbitrators, ombudsmen and judges in small claims courts are lawyers, although there are notable exceptions, especially for example, in the New Zealand Disputes Tribunals where only ten percent are lawyers.\textsuperscript{41} Some ombudsmen, the current Canadian Banking Ombudsman, for example, and some in the United Kingdom\textsuperscript{42} are drawn from other professional backgrounds. In our view this does not seem to detract from their effectiveness. Indeed, since these ombudsmen are generally required to make rulings in the light of what is fair and reasonable there may well be advantages in a non-lawyer examining established practices with a fresh eye, free from any preconceptions. But as it is, most of the existing ombudsmen are lawyers further confirming the view that

\textsuperscript{37} See Howells & James, \textit{supra} note 21, at 31, for an example of where Democracy watch have argued that subsequent appointments to independent directorships of the Canadian Banking Ombudsman Inc. are inevitably tainted because the original appointees (who made subsequent appointments) were selected by the industry.

\textsuperscript{38} Id.

\textsuperscript{39} James & Morris, \textit{supra} note 23.

\textsuperscript{40} See Report of the Task Force on the Future of the Canadian Financial Services Sector, Change Challenge Opportunity, (1998) (explaining that the relevant legislation finally received the royal assent in June 2001. More recently, it was announced in December 2001, that the five major financial services industries in Canada—banks, life and health insurers, property and casualty insurers, investment dealers, and the mutual fund industry—have agreed to the creation, on a self-regulatory basis, of a National Financial Services OmbudsService (NFSO), which will provide a central contact point for consumers where they can be referred to the relevant industry redress mechanisms, some of which are yet to be put in place. It is understood that the new redress mechanisms are likely to be modeled on the existing Canadian Banking Ombudsman organization, which will itself form part of NFSO. The NFSO is to come into operation in July 2002, \textit{Canada News Wire}, Dec. 20, 2001, and an interview by the authors with Mike Lauber, (Jan. 8, 2002).

\textsuperscript{41} PETER SPIeller, \textit{THE DISPUTES TRIBUNALS OF NEW ZEALAND}, (1997).

\textsuperscript{42} See for example, the current and previous Estates Agents Ombudsman, and the Legal Services Ombudsman. In the case of the latter, the relevant legislation prescribes that the post-holder who oversees complaints against lawyers may \textit{nor} be a lawyer.
the alternative dispute resolution "industry" has been colonized by the legal profession.\textsuperscript{43}

\section*{VII. ACCESSIBILITY}

Accessibility, especially in terms of cheapness and ease of use are crucial elements and most ADR systems would claim these as strengths. The accessibility benchmark also requires that the redress scheme be well publicized, that there should be appropriate assistance for disadvantaged complainants and that a complainant should be able to make contact with the scheme orally, even though the complaint must ultimately be reduced to writing. For the benchmark, industry-based schemes should be free of charge and legal representation should be avoided except in exceptional circumstances. It also suggests that conciliation, mediation and negotiation should be used to attempt to settle complaints and that a legalistic and adversarial approach be discouraged. It is here that there is evidence, perhaps of a cultural difference between the Australian benchmarks and the EC principles, the latter favoring a more adjudicative model. On the one hand, the EC's principle of effectiveness requires that the consumer should have access without being obliged to use a legal representative, that the procedure should either be free or of moderate cost, that only a short period should elapse between the referral of a matter and the decision, and that the competent body should have an active role. On the other, the principle of representation requires that the redress procedure should not deprive the parties of the right to be represented or assisted by a third party at any stage of the procedure. The adversarial principle requires that the procedure followed should allow all the parties concerned to present their viewpoint before the competent body and to hear the arguments and facts put forward by the other party, and any experts' statements. But this tilt towards formality is mitigated to some extent by the preamble to the Recommendation, which states that while the interests of the parties can only be safeguarded if the procedure allows them to express their viewpoint before the decision maker and to know the facts and arguments presented by the other side, this does not necessarily necessitate oral hearings of the parties.

Nevertheless, there seems to be an underlying tension between the perception that procedural rights must always be available and the need to provide an out-of-court remedy which is informal and easy for the consumer to use. For instance, the benchmark emphasis on conciliation may not lead to substantive justice for the consumer given the inequalities that exist and which can be exploited in negotiations.

Most ADR systems score well on accessibility. The state-funded Scandinavian Complaints Boards, for example, are easy to use, comparatively cheap to invoke, and the large numbers of new complaints received each year are testimony to their popularity. However, most are slow, taking on average a year to reach a final decision. This seems to be largely a function of lack of resources. One of the strengths of private ombudsman schemes, too, has been their comparative accessibility. Individuals can make a complaint without the help of a lawyer or other third party and without a charge or fee. That is not to say that they have achieved as wide a coverage as they might, and those few studies which have gathered socio-economic data on complainants tend to suggest that complainants are more usually drawn from the middle-classes.

The paper-only procedure adopted by most ombudsmen seems to make it easy and cheap for certain sections of the population to use. The challenge is to find an approach which allows a wider constituency to use the ombudsman procedure to resolve consumer disputes, and this is something which most ombudsmen try to address with help lines and staff specifically allocated to the giving of advice and assistance. Some are happy to try to resolve complaints over the phone, to obviate the necessity for form filling, and some of the smaller schemes are able to organize visits to complainants.

An issue which goes to accessibility and which has not yet been satisfactorily addressed is the relationship between ombudsmen and the internal complaints procedures within companies. Ombudsmen are designed to form the top rung of an informal complaints ladder, with 'exhaustion' of the internal procedure a prerequisite for access to the ombudsman, and the integrity of the bottom rungs is of considerable importance to the consumer. Publicity for the remedy is essential. Certainly in the United Kingdom there was evidence that companies were not always wholehearted in their commitment to publicizing either their own internal complaints process or the ombudsman. We suspect that deficiencies may often result from a disparity of knowledge and commitment between those in management and those at the counter. We also suspect that it is not a problem specific to the United Kingdom. Certainly there is anecdotal evidence to support this. In our survey work, one of the authors made a spot check on an ATM and Investor Advice Centre close to the head

45. James & Seneviratne, supra note 28.
46. See Howells & James, supra note 21, for a discussion on the Canadian Banking Ombudsman.
47. C. Graham, M. Seneviratne & R. James, Publicising the Bank and Building Societies Ombudsman Schemes, 3 CONSUMER POL'Y REV. 85 (1993); R. James, C. Graham & M. Seneviratne, Building Societies, Customer Complaints, and the Ombudsman, 23 ANGLO-AM. L. REV. 214 (1994) (explaining that it is something which will be largely remedied under the new FOS regime where the new industry regulator, the Financial Services Authority, has responsibility for monitoring compliance with publicity rules).
office of one particular Canadian bank immediately after having met the internal 'bank ombudsman'. This spot check revealed that there were no leaflets on how to complain on view, or available on request, despite confident assertions made earlier by the bank ombudsman that they were on display at every outlet, however small.\textsuperscript{48}

One reason for the importance of effective internal complaints procedures is that they may form a barrier for the consumer to surmount rather than providing the opportunity to have their complaint resolved at the earliest opportunity. The desire to address the issue quickly lies behind much of the argument for conciliation, and there is a trend for ombudsmen and many other ADR systems to lay stress on initial conciliation. The President of the state-funded Consumer Complaints Board in Norway, for example, believes that consumers would benefit if the conciliation function of the Consumer Council were strengthened, not least because of the time it takes the Board to deal with cases. Two of the private complaints boards in Norway, for example, those for banking and finance and for insurance also operate a form of conciliation. Ombudsmen, too, are increasingly placing an emphasis on conciliation rather than formal resolution of complaints and the head of the new Financial Ombudsman Service in the United Kingdom has said he would like to see his scheme operate a system where only a small minority of cases actually reach the more formal stages of investigation and decision.\textsuperscript{49} Whether this emphasis is really to the consumer's benefit or whether it is driven by managerial considerations is not clear although we harbor a suspicion. It is a moot point if consumers benefit most from resolution at an early stage when they may be encouraged to compromise, or from having their claim examined and determined by an independent adjudicator.

Conciliation is not the sole preserve of the ADR sector. Small claims systems commonly provide for a variety of outcomes, including both agreed settlements and decisions. In France, pre-trial conciliation allows one party to bring the other before the court for an attempt at conciliation where a settlement is believed to be possible.\textsuperscript{50} In British Columbia, the new small claims court programme of 1991 introduced mandatory settlement conferences for disputed claims.\textsuperscript{51} In New Zealand, referees are required to assess whether the matter is appropriate for a settlement, and if so, to facilitate that process, but failing that to give a decision in the same forum.\textsuperscript{52} There is perhaps a distinction to be drawn between systems which introduce such a mechanism to improve dispute

\textsuperscript{48} Howells & James, \textit{supra} note 21.

\textsuperscript{49} W. Merricks, Presentation to the Biennial Conference of the British and Irish Ombudsman Association, (May. 2001).

\textsuperscript{50} Howells & James, \textit{supra} note 21.

\textsuperscript{51} \textit{Id.} at 28.

\textsuperscript{52} Disputes Tribunals Act, 1988 (N.Z.)
resolution outcomes and those which see mediation as a short cut to reducing costs on the legal system. The German law permitting states to demand arbitration in small claims cases perhaps falls into the latter category.

Arbitration, although possibly more accessible than the courts, where for instance the fees are kept down by subsidies from trade associations, still involves a degree of formality which may be off-putting to the consumer and usually continues to involve costs for the consumer. In some instances the costs may be prohibitively high in comparison with the amount at stake.\textsuperscript{53}

The hope was that small claims courts and tribunals would be accessible and thus bring justice closer to the ordinary person but there is disquieting evidence, in jurisdictions such as Canada, New Zealand and the UK, that a large proportion of consumer disputes are initiated by traders rather than consumers—what Ramsay has described as "the deformation of small claims courts into collection agencies.\textsuperscript{54}" There is also evidence that the applicants tend to be disproportionately male professionals or self employed and well educated.\textsuperscript{55}

In the US, consumers may choose to take their claim to the small claims courts which have a highly simplified procedure. There is no need for representation and indeed in some states there is a prohibition on the use of lawyers in these courts. The procedure is informal albeit it was originally based on an adjudicative model, although some courts are now adopting modes of ADR. Consumer cases would also commonly go to the Municipal Courts (sometimes known as Magistrates Courts) which have a limited jurisdiction and are staffed by a full-time judge—appointed or elected, depending on the particular circumstances in the State. Formal court procedure is adopted, but these courts also offer \textit{non-binding} arbitration which can be voluntary or mandatory, before getting to court, depending on the way the court operates. It is this procedure which normally applies to consumer cases, normally up to a limit of $15,000-$20,000, and the individual pays a filing fee of $100. Interestingly, this type of consumer arbitration is non-binding, because when the courts adopted the procedure they could not, under the Constitution, deny trial rights. The arbitration procedure has the advantage of speed, as the hearing would normally be held within a few months and the procedure would be streamlined and less formal than an ordinary court. Lawyers can be hired for a small fee and the consumer is not at risk of having to pay the other side's fees.


In these court processes, however, there is still the perception that the business 'repeat player' will be at an advantage in comparison with the unrepresented individual consumer. The point probably is that a way needs to be found to provide low-cost legal advice and representation rather than to ban it. Early neutral evaluation is used in other courts, for instance in some District Courts, but while there might be potential for its use in consumer redress it seems at present not to be used much in that setting.

It is recognized that most parties who attend a small claims process expect and prefer it simply to hand down a decision, and that this reality needs to be respected by the presiding officer.\(^5\) It is also recognized that there are practical constraints on the extent to which there can be true mediation in the small claims forum, bearing in mind time constraints, the fact that the respondent/defendant attends involuntarily, and the role of the presiding officer as an authority figure.\(^6\) Indeed it is unlikely that in small claims the ideal will be achieved of the mediator and the decision-maker being different people. Nevertheless, it is suggested that it is important for small claims process to allow the flexibility to allow disputes to be settled where this is appropriate. Although it should be recognized that many consumers may feel pressurized into agreeing a settlement which deprives them of the full value of their claim, nevertheless the parties' underlying needs may best be met through settlements which they have fashioned and are committed to implementing. There is also the hope that the experience of the consumer and the trader in resolving their dispute will have a remedial and educative effect, not least in heightening the sensitivity of the trader to the consumer's needs.

Cost is an issue with small claims courts and this varies amongst jurisdictions. France, for example, has the admirable principle that the legal system is a free service provided by the state (although since 1991 a tax has been imposed on legal acts).\(^7\) New Zealand for many years operated on the basis of low filing fees, but in 1998 an increased scale of fees from $30 to $200 has proved a deterrent to certain claimants,\(^8\) and in the UK where the Civil Procedure Rules do allow for a small claims track, there is discretion for the judge as to whether this may be invoked and the court fees and allocation fee (payable if a defense is entered) may prove a barrier to the consumer. These fees remain fairly high even for small claims because of the political decision that court fees must cover the cost of running the judicial infrastructure. This

57. Id. at 90, 91.
58. Howells & James, supra note 21, at 7.
59. Disputes Tribunals Rule 5.
is in contrast to the position in Ireland where the issuing fee is in the region of £6.

The scale of cost is also determined by the involvement allowed for lawyers. In jurisdictions such as Quebec and New Zealand, lawyers are excluded from representing clients on either side, and in recognition of this there is only limited scope in New Zealand for the award of costs in relation to the proceedings. Even in jurisdictions where lawyers are allowed there are usually bars on recovery of lawyers' costs unless one party has behaved unreasonably.

Again on accessibility, a concern arises as to the nature of the proceedings and the degree of formality imposed by the judge. The involvement of lawyers as representatives would seem on the face of it to engender an unhelpful legalistic approach which is inimical to the aims of informality which may be reinforced by the physical setting and the court building. However, the issue may not be clear cut since there is some interesting evidence in Canada (other than in Quebec) where some poverty groups have argued that the small claims courts were intimidating for their clients and that reforms such as the introduction of full time inquisitorial judges and duty counsel would make the system more effective for the poor. The nature of the procedure has been addressed in a number of jurisdictions, but with varying success. In France, where consumer disputes are heard in the court system, albeit with simplified procedures, research indicates that these courts are not particularly friendly to individual consumers with small claims. Other jurisdictions provide for small claims courts as distinct parts of the court system. In Quebec, small claims court judges are regular, full-time judges of the Civil Division of the Court who hear cases in the small claims court one day every other week. In New Zealand, the Disputes Tribunals function as a division of the District Court and claims are heard on court premises. Yet other jurisdictions, such as New South Wales, have adopted specialist consumer claims tribunals. Indeed some Australian states have separate tribunals to deal with credit disputes. There is some evidence that small claims judges find the handling of disputes an unpleasant aspect of their work. Clark noted that part-time small claims judges had difficulty switching to this role from their normal duties and that in Tasmania satisfaction was greater where one judge specialized in this type of work. In Canada, it was found that work in the small claims court was not popular with the judiciary and was seen as a demotion. Judges in these courts

60. Disputes Tribunals Act, 38, 43, 1988 (N.Z.)
61. Disputes Tribunals Act, 27, 1988 (N.Z.)
63. Howells & James, supra note 21, at 44.
64. CLARK, supra note 56.
were found not to be particularly good at recognizing the issues being presented by individuals, and there was a mismatch between the perception of the problem on the part of the individual and the way in which the legal system, even at small claims court level, characterized it.\textsuperscript{65}

A recurrent feature of forums designed for small claims is that there is a large measure of flexibility in the procedures used, to respond to the needs of the parties and their situation. In Quebec, small claims judges are authorized to use the procedure which seems most appropriate.\textsuperscript{66} In New Zealand, referees who preside in the Disputes Tribunals may adopt such procedure as is best suited to the ends of justice and may receive any relevant evidence even if not legally admissible in a court of law.\textsuperscript{67} This informality enhances the important role played by the personality of the adjudicator. The situation in New Zealand is striking, as the vast majority of referees are not legally trained. Baldwin noted in the UK that the atmosphere of small claims courts varied markedly even within the same building depending on the character of the judge.\textsuperscript{68} Could these individual idiosyncrasies be altered by better training?

Plaintiffs who make it as far as a small claims hearing have had to overcome a number of obstacles and the strong temptation must often have been to drop the claim somewhere along the line. Those who get to the small claims court represent the tip of the iceberg. Baldwin, in his research in the United Kingdom, found that in talking to small claims litigants many had found it an uphill struggle to pursue the action as far as the county court. He believes it is not enough to provide improved facilities or to expand the scope of informal procedures or to encourage judges to become pro-active: the greater problem is to persuade people confronting serious legal difficulties to make use of the courts and other legal processes. Public awareness of small claims procedures and alternative methods of resolving disputes is very low, and public attitudes to the courts in general remain resistant. For large sections of the population, the courts are seen as uninviting, even forbidding institutions to be visited only in extreme circumstances. They are places to which they are ‘taken’; not somewhere they use to settle disputes, or have their grievances resolved.

In Canada, McGuire and Macdonald’s conclusion has been that:

the use of the court is often correlated with those socio-demographic variables associated with social power and that structural modifications to processes of civil litigation designed to enhance access to justice do not significantly alter the character of any court’s plaintiff pool. Whatever may be the benefits of creating systems of small claims courts, the empirical evidence

\textsuperscript{65} Ramsay, supra note 54.
\textsuperscript{66} Id. at 227.
\textsuperscript{67} Disputes Tribunals Act, 40, 44, 1988 (N.Z.)
\textsuperscript{68} Baldwin, supra note 26.
suggests that greater accessibility of official institutions of dispute resolution is not one of them.  

That point, so powerfully made, should give one pause for thought.

VIII. FAIRNESS

The next benchmark, fairness, entails that the scheme produces decisions which are fair and seen to be fair by observing the principles of procedural fairness, by making decisions on the information before it, and by having specific criteria upon which its decisions are based. Decisions should be based on what is fair and reasonable, taking into account good industry practice, relevant industry codes and the law. Procedurally, due process or natural justice requirements should be observed. An obligation to provide information should be placed on scheme members, subject to certain limitations. These requirements seem to have been written with the private ombudsman in mind. One issue, however, is the extent to which consumers are satisfied by the normal paper-only ombudsman procedure. It is a moot point whether having a paper-based scheme is to the consumer's advantage. Whilst it certainly removes the intimidation of the 'day in court', it may be that some consumers are less able to articulate their views on paper than orally. There is also some evidence that consumers place a high value on 'being heard' whether in person or on the telephone and that an important element in their satisfaction with the system is the feeling that their complaint has been understood and been recognized in some sense by an independent person. Adoption of a more personal approach as a general rule would result in massively increased costs, which might result in a charge having to be made to the consumer, and it would also have implications for the speed and informality of procedures, which are currently part of the ombudsman hallmark.

As to the courts, in New Zealand, there is an important emphasis on the procedures of natural justice in that there are grounds for appeal where proceedings have been conducted unfairly and this unfairness has prejudicially affected the outcome. Furthermore, there is review to the High Court on the basis of breach of natural justice. While the number of appeals is low and the number of successful appeals lower still, and judicial review is rare, the presence of these safeguards acts as an important incentive to referees to pursue fair procedures.

69. McGuire & MacDonald, supra note 27.
70. See Birds & Graham, supra note 28, for research into the views of complainants who had used the estate agent's scheme in the UK; See also James & Seneviratne, supra note 28.
71. Disputes Tribunals Act, 50, 1988 (N.Z.)
72. Spiller, supra note 41, at 137.
73. Id. at 136-137.
Clark is, however, troubled as to whether the right balance has been struck in Australia concerning informality of proceedings and deviations from the rules of evidence, limitation on rights of appeal etc. He notes Pound's view that there is a "continual movement in legal history back and forth between wide discretion and strict detailed rule, between justice without law, as it were, and justice according to law." He clearly sees small claims and ADR procedures as being at the very end of the discretionary spectrum. He points out that many of the legal rules which are being pushed aside in the name of seeking justice were in fact introduced to ensure justice was delivered. His motivation for raising this concern about informality is his finding that people cared most about being given a fair opportunity to present their case and that too much emphasis should not therefore be placed on fast and cheap justice. However, one can agree with Clark that it is important that participants see the process as fair and permitting them the chance to present their cases fully, without resorting to technical legal institutions to achieve these goals. Again, much will depend upon enhancing the training for judges and court staff and developing better information to users. If small claims procedures become too complex there is a danger of killing the goose that lays the golden egg.

In New Zealand referees are directed to decide in terms of the substantial merits and justice. They are not bound by strict legal technicalities and forms, and may disregard contractual terms which appear harsh or unconscionable. Indeed in *Hertz NZ Ltd. v. Disputes Tribunal*, a decision was upheld even though the court admitted the appellant was not and could not be liable at law. There is, then, a strong emphasis on common-sense justice rather than legalistic outcomes. However, referees are required to have regard to the law, and it is a ground of appeal that a referee did not have regard to the provision of an enactment brought to the attention of the referee at the hearing.

Similar rules are found in Australian small claims courts. In Queensland and New South Wales, for instance there is provision that the final order must be "fair and equitable", thus giving the judge leeway to deviate from the strict letter of the law. Nevertheless, their impact has not been as great as in New Zealand, because the decisions have continued to be made by lawyers. Indeed it would be an impossible burden to require lay referees to make decisions according to the law.

One of the interesting issues is whether New Zealand adopts this approach on the pragmatic basis that within the time and cost limitations of the New

---

74. Clark, *supra* note 56.
75. Disputes Tribunals Act, 18-19, 1988 (N.Z.)
76. 8 F.R.N.Z. 145 (1994).
77. Disputes Tribunals Act, 18, 50, 1988 (N.Z.)
78. Howells & James, *supra* note 21, at 46.
Zealand system it is not possible to deliver perfect justice. Alternatively was the system recognizing that laws could be imperfect and that the tribunals would be able to deliver better justice if they looked at the substantial merits of the case? There are some hints of the latter approach, for example when a time limit is ignored which would operate against a meritorious party. On the whole, however, the impression gained is that justice according to the law is an ideal which has to be departed from on cost grounds. Indeed one of the fears of some commentators is the suspicion that this power could be used against consumers. There is a difference between the use of a flexible power of this sort to deliver substantive justice when wielded by an ombudsman within a structure which requires him to justify his use of the power, and the placing of a similar power in the hands of a referee. In the final analysis, however, the result of the New Zealand approach may be simply to make explicit what happens in most small claims courts, for Baldwin’s research indicates that many District Judges in the United Kingdom are happy to depart from the law to achieve a just result despite being formally bound by the law. Nevertheless one might be cautious about the extent to which one is willing to accept adjudication according to substantive justice rather than law. Given the background and training of the modern referees one can expect them to make a good effort to reach fair decisions, which do not treat consumers unfairly. To the extent that there are injustices, one can be reasonably sanguine if the alternative is simply a legal system which prevents small disputes being heard at all. However of course this position is less defensible the higher the monetary amount involved.

The EC principle of legality goes further than the benchmark and is concerned to reinforce the need to preserve strict legal protection which may look strange to those in countries with well developed ADR systems. It stipulates that the consumer must not be deprived of the protection of the mandatory provisions of the law of the state in whose territory the dispute resolution body is established nor should the consumer be deprived of the protection afforded by the mandatory provisions applying under the law of the Member State in which he is normally resident. The first point is covered in most ombudsman systems where the consumer is free to reject the decision and go to court instead. Arbitration is usually binding on both parties, however. The second point, seems to present practical problems. Is it realistic to expect national ADR systems to have specialist knowledge of legal systems within other Member States or, perhaps, globally? And indeed, if the consumer is given the choice to use an informal out of court procedure with its attendant benefits,

81. Id.
is it not a reasonable trade-off that any legal rights available in their own country are relinquished?

IX. ACCOUNTABILITY

The benchmark on accountability requires that the redress scheme should publicly account for its operations by publishing its determinations and information about complaints and highlighting any systemic industry problems. This includes the provision of anonymous written reports of determinations to scheme members and interested bodies both to provide guidance and to demonstrate consistency and fairness in decision-making. There should also be an annual report providing, inter alia, a statistical breakdown of complaints, representative case studies, and highlighting systemic problems. Much of this is mirrored in the EC principle of transparency.

Ombudsmen and complaints boards broadly meet these requirements, although arbitration procedures usually do not. A drawback of many ADR systems stems from the private nature of the process which enables companies to settle disputes without public acknowledgement of their failings. While the state funded Scandinavian Complaints Boards do make full details publicly available, in private schemes case reports are normally on an anonymised basis, and this includes those private complaints boards in Scandinavia as well as the private ombudsmen. There is an exception. In the Canadian Banking Ombudsman scheme there are quite stringent reporting requirements where the ombudsman is required to report quarterly on the number of cases where he has made a recommendation, and cases where the bank has followed his recommendation. These figures identify the banks concerned and are made public. This goes a long way further than reporting requirements in other jurisdictions where ombudsmen commonly simply report anonymised case reports. (In one private scheme in the UK, the Building Societies Ombudsman, the naming of a building society and details of an ombudsman award against it was available as an option to any society that was disinclined to abide by the ombudsman’s decision. In the event, only two societies took the option during the scheme’s existence). Ombudsmen have generally been assiduous to identify common problems in their Annual Reports that have gone some way towards raising public awareness (if only amongst consumer groups and academics) of the systemic problems which affect consumers.

82. See for example, the Norwegian Bureau for Insurance Disputes and the Complaints Board for Consumers in Banking and Finance Matters in Norway.
X. EFFICIENCY

The efficiency benchmark, which requires that schemes should keep track of complaints, ensure they are dealt with by the appropriate process or forum and should regularly review their own performance is now broadly met by ombudsman schemes which have become increasingly aware of the need to ensure a speedy and stream-lined process and one which they can defend under scrutiny from outside observers. There should also be a system for tracking complaints, notifying the parties of progress, and provision for regular monitoring. How well arbitration and small claims courts match these requirements is unclear although case management is assuming greater importance if only on financial grounds.

XI. EFFECTIVENESS

Finally, the effectiveness benchmark’s measure is that the scheme should have appropriate and comprehensive terms of reference and periodic independent reviews of its performance. This is closely linked to the efficiency benchmark but with the former focusing on the operation of the scheme the effectiveness benchmark measures the capacity of the scheme to deliver justice. Schemes should therefore be broad enough to cover the majority of customer complaints, up to monetary limits which are consistent with customer transactions in that industry.

Determinations must be binding on members and members must be encouraged to abide by the rules of the scheme. As regards most of the Scandinavian Complaints Boards where the awards were not enforceable, there was a poor rate of compliance with recommendations, in some cases only 50%, in others only 30-40%. Bad publicity or the encouragement of consumers to take legal action in the court if a recommendation has not been complied with have not proved particularly successful sanctions. The Norwegian Consumer Complaints Board whose decisions are enforceable if the parties do not request that the matter goes to court within four weeks is able to give assistance to the consumer to obtain enforcement if this proves necessary. While only a minority of cases go on to court there had been in 1999 a rash of cases going to court involving disputes about professional services.

83. There is no direct equivalent EC principle on these matters although the principle of transparency covers similar points.

84. Viitanen, supra note 44.

85. This Board received comparatively few complaints. In 1999 it received 256 in total; as to the category of complaints, those about cars constituted the largest total in number (45), of complaints about services those relating to building work topped the list at 18 with electrical work next at 12.
Private ombudsman schemes have a good record on compliance, in most instances the company settles on the ombudsman’s recommendation without a formal award having to be made and awards have been invariably followed. This is true in both voluntary and statutory schemes. For the new Financial Ombudsman Service, statute provides for enforcement of the awards in the county court at the instance of the consumer. 86

It is interesting that the EC principle of liberty goes further on the issue of binding awards and requires that the decision taken by the body concerned may be binding on the parties only if they were informed of its binding nature in advance and specifically accepted that. Further, the consumer’s recourse to the out-of-court procedure must not be the result of a commitment prior to the materialization of the dispute, where such commitment has the effect of depriving the consumer of her right to bring an action before the courts for the settlement of the dispute. The importance of this provision is sharpened when one considers the situation in the US where the courts have largely upheld mandatory arbitration clauses in contracts of adhesion even in circumstances where the consumer was given wholly inadequate notice. 87 Indeed, it has been argued that pre-dispute mandatory arbitration, as employed in the US, is designed to preclude effective redress by consumers and substantially reduce or eliminate the beneficial effects of favorable judicial precedent and legislation. 88 For the consumer in the US, arbitration has significant defects: it is often not as prompt or inexpensive as the small claims courts, the informal rules often favor the company as the repeat player and mandatory arbitration precludes the consumer’s freedom to choose to litigate as a class action. 89

In countries where the ombudsman remedy pertains, the consumer is free to go to court at any time up until acceptance of the ombudsman’s determination. Nevertheless, the point has been well made elsewhere that, given the practical realities, recourse to the courts may only be a theoretical alternative. 90

86. Financial Services and Markets Act, 2000, 3, c. 8, s. 229, sched. 17.
90. Philip Rawlings & Chris Willet, Ombudsman Schemes in the United Kingdom's Financial
It is usually implicit in an arbitration process that both parties agree to be bound by the arbitrator's decision and this certainly pertains in the UK, Netherlands, Spain and Portugal for example. Although agreements in EC countries are subject to provisions arising from the EC Directive on Unfair Terms in Consumer Contracts.  

As to small claims courts and tribunals, it would seem to be essential that the outcome of the small claims process be binding and effective, subject to the earlier discussion above about conciliation. There is little point in either consumer or trader initiating and pursuing a process which has inevitable financial and emotional cost and which ends with an outcome that makes no difference. Unfortunately, even obtaining a judgment is not the end of the matter. The reality is that many judgments debtors do not voluntarily comply with court orders, and law enforcement officers are unable to exact fulfillment of the order (because of the party's lack of means, disappearance or bankruptcy). The experience of many litigants in obtaining remedies which are not complied with, and which sometimes can never be enforced, has caused some observers to question the value of the small claims system.

Small claims systems commonly provide for enforcement of outcomes of the process, either because the small claims system is part of the court process or because there is provision for registration of the outcome for purposes of enforcement. In New Zealand, orders for the payment of money or the delivery of property automatically become orders of the District Court and are enforceable through the court process.  

In Victoria, there is a “funds in trust” model, whereby if a consumer disputes payment of an account the money must be paid by the consumer into a trust account until the order is decided.

It is recognized that the enforceability of court orders is an issue not only for the small claims process: throughout the court process, there is the experience of successful litigants being unable to translate their orders into tangible benefit. Nevertheless, it is submitted that it is essential that the orders of small claims forums be given the maximum support possible by the state if citizens are to have faith in their justice system.

Under the effectiveness benchmark, schemes should also be designed to pick up systemic problems, and here it may be important, ironically, that the dispute 'goes the distance' so that a record is kept of the type of issues involved. Most complaints boards and ombudsmen claim some success in influencing good practice, particularly those which are industry specific. In some settings,
the Norwegian complaints boards for example, decisions of these ADR bodies are taken into account by the courts in comparable cases so that there is the potential, at least, for benefit to the collective consumer interest by the influencing of judicial precedent. Ombudsmen have had some influence in identifying systemic problems within an industry although their effectiveness here has been tempered by the willingness or otherwise of an industry to accept the strictures of the ombudsman. In many instances, changes in practice have seemed rather slow moving to the onlooker, and changes to policy infrequent. Some ombudsmen have regularly been consulted about industry codes of practice; it may well be time to give them increased powers in this area.

XII. SUMMARY

Forms of redress for the individual consumer dispute have the potential at least to provide an adequate mode of resolution, but they have yet to meet their promise. Small claims courts or tribunals have yet to become truly accessible to the more vulnerable consumer, and there is a debate as to whether or not access to (free) legal assistance is a benefit or not. Certainly Capelletti's first wave of economic assistance is not very apparent for consumers litigating small claims (this applies a fortiori in the ADR sector). Moreover, while decisions may be authoritative, in some jurisdictions at least the consumer can be left high and dry if enforcement of judgment is problematic. Again, the role and commitment of the adjudicator is crucial; where the judge is a reluctant one then the consumer is unlikely to get the "best" justice.

Arbitration, while less formal than the courts, seems to us to have considerable disadvantages for the consumer. The consumer is likely to incur considerable costs through the arbitration fee, and costs for any expert witnesses etc. While arbitrators are drawn from independent panels, there will be an advantage to the company as repeat player both structurally and informally and the consumer usually has to agree to be bound by the arbitrator's decision. Here, developments in the US towards mandatory binding arbitration are of particular concern.

Consumer Complaints Boards and Ombudsmen are assuming considerable importance in terms of the number of consumer complaints with which they deal, and the implicit acceptance in many jurisdictions that they are not alternative forms of resolution for particular disputes, but the only form of dispute resolution for all but the most unusual consumer who has the time, money, and willingness to take the long road through the ordinary court system. They provide a helpful remedy which is free, accessible, informal, and, in the case of ombudsmen, they are able to make considerable financial awards where appropriate (where awards are not formally binding, recommendations have usually become de facto binding). The consumer can reject the award and go
to the courts. But there have been doubts about the perceived independence of the ombudsman in some of the industry sponsored schemes and the remedy is not always as speedy as the informality of the processes would promise. Most are able to depart from the law and codes of practice to take decisions based on what is fair and reasonable; this allows them to do justice in the individual case unencumbered by strict precedent but with the consequence of potential unpredictability for future consumers and companies in dispute.

Capelletti’s third procedural wave is therefore evidenced in some strength in particular areas of consumer redress but even so, and even where the forms of ADR are apparently strong, close examination reveals inadequacies which have yet to redress the structural imbalance between the parties. More needs to be done to subject the modes of dispute resolution to scrutiny and to effect change.

There is too, another concern. The issue of individualized justice, as against such rule of law considerations as certainty and consistency, has a further dimension. The general consumer interest is better served if conclusions can be drawn from individual decisions. It is desirable that decisions form more than mere guidance to the industry concerned and have in some measure the value of precedent. Can this be achieved in a system which rightly values speed, accessibility, and probably the desire to resolve disputes at the earliest level? ADR is commonly a private form of justice; while it may be successful for the individual consumer, its essential characteristics seem by their very nature to rule out the wider role of creating beneficial precedent for future consumers. Some forms of ADR, notably ombudsmen, are making brave attempts to draw attention to system weaknesses and to bring about change. However, there are factors preventing the regulatory wave taking hold with ease in ADR and small claims jurisdictions.

The increased use of mediation, or conciliation, to try to reach a conclusion may be of benefit to the individual consumer but there is insufficient evidence at present to make a judgment about it and it takes consumer redress even further from the public gaze. Justice behind closed doors can only have a minimal effect on corporate policy and behavior.

The crucial next step is to take action against systemic problems and to find a way of addressing the collective consumer interest. This is where our call for a sixth integrative wave to allow a cross-fertilization between the courts and ADR institutions has importance. The court’s power to make decisions public, and the impetus which comes from the ability of some ADR systems to draw attention to corporate practices and policies which are detrimental to consumers could, if brought together, make a significant impact for all consumers, including those who do not even get as far as seeking redress. One way of achieving this might be to open small claims courts and ADR procedures up to the type of collective procedures seen in main stream litigation i.e. class actions,
injunction procedures etc. These collective procedures will be considered next before the cross-border dimension is focused on. However, it should also be noted that small claims and ADR schemes will also increasingly have to consider how they can handle cross-border disputes or be honest in admitting that they are not suitable for them and encouraging appropriate alternatives to be developed.

XIII. COLLECTIVE CLAIMS

The use of collective actions is a good example of Cappelletti's second wave of organizational changes. There is a trend both towards making it easier to bring civil actions through procedures analogous to class action procedures and the development of public law style controls permitting government bodies and consumer organizations to seek injunctions. To some extent collective actions also link to the economic trend Cappelletti noted as they can be a mechanism for making access to justice more affordable. It also fits into the regulatory wave we noted for this type of litigation often has a broader political concern to protect the public interest (even where cases are framed as the protection of private rights). They can also be a mechanism for making cross-border litigation viable and thus feeds into the globalization wave. Such mechanisms need to be adapted to the new consumer litigation climate by incorporating them into the new ADR procedures, for otherwise one could have the situation where the legal system had developed the means to represent the consumer collective interest at the very time these sorts of claims were being litigated outside the court system.

This section covers both the collective litigation of individual claims for damages and the use of actions to settle points of dispute in a prospective manner. One of the problems in this area is to categorise the many different types of collective action available. It is possible, for instance, to distinguish between regimes where the litigation in theory remains under the control of private parties (which we label private interest collective litigation) and where some third party takes control such as a public body or NGO like a consumer organization (public interest collective litigation). At the heart of many of the debates in this area is the question of whether there is a collective consumer interest over and above the sum of the individual claims. We think there certainly is, at least to the extent of ensuring the law can regulate market failures where individuals may not have adequate incentives to act against wrongdoing.

It is possible to see the large-scale personal injury problem as falling into the private interest collective action model and other consumer claims falling into the public interest category. The private interest collective action procedure could then be seen as having less of a political dimension. Instead, it could be viewed as a means of permitting access to the courts to those whose interest
would not otherwise be represented and as a means of increasing efficiency by reducing costs and helping the courts manage a workload which otherwise might threaten to overwhelm the court system. However, the position is not so black and white. Some large-scale personal injury cases certainly have a political agenda. The tobacco litigation in the US is one such example. The Agent Orange case is another good example where the litigation involved more than the sum of its individual parts, for in addition to compensation many of the claimants sought to shame the Government for the way they had treated Vietnam veterans. On the other hand, there are some examples of public bodies and consumer groups being able to assist individuals recover damages.

Nevertheless, private action collective actions for large amounts, such as large-scale personal injury (and to some extent financial service) claims, often raise quite different issues from the public interest collective action which is the focus of our concern. The debate concerning private interest collective actions often concerns the question of whether claimants grouping together to press claims for large amounts of money is an unfair threat to defendants. The debates tend to center around whether individual assessments of causation and damages dominate the common issues to such an extent that it is pointless to bring a collective action. Defendants have argued that the system is wrong to force them to expend a lot of resources defending generic issues without testing the underlying strength of the particular cases at hand.

However, if, what is being considered in a collective action is a point of principle removed for the issue of compensation, then one might overcome these objections. We shall see that there is a modern trend to grant standing (especially within the EC) to consumer groups and public bodies charged with protecting consumers to seek injunctions in cases involving matters such as unfair terms, advertising and trade practices. Indeed, this use of the class action as a form of legislative adjudication is more in keeping with the historical origins of the representative action in common law as a way of defining the rules that governed feudal relations.

For some, the modern notion of the class action for damages sits uneasily in a legal system which requires that individuals satisfy all elements of their claim. Although such objections seem to be aimed at the personal injury class action, similar sentiments seem to underpin those who argue that the line should be drawn at collective injunctions to protect the consumer interest and that damages should not be available in such cases. However, we believe a case can be made out for damages to be

96. See The Australian Consumer and Competition Commission, supra note 9.
recovered in collective actions involving small scale but widely disseminated consumer detriment in order to ensure there is no unjust enrichment (although the manner of distributing the compensation may involve innovative techniques rather than simply paying sums over to individuals). Thus a role remains for private interest collective action procedures in protecting the consumer interest. The problem is not so evident where large amounts are at stake, as in these cases consumers can often obtain legal assistance under contingency or conditional fee arrangements. The challenge is to find ways where consumers who have suffered small amounts of detriment individually, can group together to make litigation a viable option. Indeed this underlines our central argument that consumer litigation needs more than modification of existing principles, it needs new principles structured to respond to the needs of consumers.

XIV. PRIVATE INTEREST COLLECTIVE ACTION PROCEDURES

Defining a private interest collective action procedure is a difficult task. There are at least three models for how the courts can handle claims brought by large numbers of consumers – the test case approach, the representative action and a dedicated class or group action procedure.

XV. TEST CASES

The traditional way would be for lawyers to bring test cases and for claims to be settled in the wake of the test cases. The problem with such an approach for claimants is that it does not permit them to benefit fully from the advantages that should be available if many consumers have similar claims. These include economies of scale; sharing of legal and expert costs and potential liability for the other sides' costs (at least in a system where the loser pays rule applies); demonstrating the full impact of the defendant's conduct and novel opportunities for fashioning appropriate remedies. From the defendant's perspective it does not produce the desired finality to such claims as new claims can be lodged so long as they fall within limitation periods. The courts also do not have the necessary control over such actions so as to reduce the impact of such mass claims on the machinery of justice.

XVI. REPRESENTATIVE ACTION

Where claims are similar a representative action has traditionally been possible in some common law systems. In England such actions had initially been thwarted by the rule that they were not available for damage claims as each case was considered to be unique. In England, this particular restriction has now been overcome and indeed even before the development of a group litigation order there was a greater willingness to adapt procedures to group
The strictures of the procedure meant it never really functioned well, however, in some common law countries like Canada. In Australia the representative action has also proven to be less malleable, despite some good intentions. For instance, the New South Wales Court of Appeal in *Carnie v. Esanda Finance Corp.*, a case involving a challenge to interest charged, had first rejected attempts to use a representative action as each credit transaction was viewed as discrete and not a series of transactions. The High Court of Australia took a more liberal approach admitting the approach in principle, but when the matter was remitted back to Mr. Justice Young, his order requiring the parties to give notice to all other parties made the action impracticable. Such a course of action may have been necessary for the defendants had adopted the divisive tactic of only seeking interest against those who were a party to the proceedings, but this only underlines the need for a more sophisticated procedure than the representative action.

The approach in Victoria was to introduce a new representative action on a statutory basis. However, the judiciary remained resistant. In *Marino v. Esanda Ltd.*, they interpreted the rules restrictively in the face of the clear legislative intent and held a representative action was not appropriate as the borrowers had separate contracts.

In 1986 a new representative action was introduced by ss 34-35 of the Supreme Court Act. This was essentially an opt-in scheme available where three or more persons have the right to the same or essentially the same relief and some common question of law or fact would arise irrespective of whether the claims arose out of the same transaction or series of transactions. Again the judges were not sympathetic. In *Bellotti v. Zentahope Pty Ltd.*, they criticized the brevity of the rule describing it as "an attempt to break a butterfly upon a wheel: the gear is ill-fitted to the task, raising more problems than it can conveniently bear, yet offering greater torment than the subject deserves" and suggested there were so many ambiguities that virtually no case could be brought under it and that joinder provisions were a better way forward. The analogy with joinder provisions is perhaps appropriate to some extent under an opt-in procedure and the opt-out nature of most class action procedures serves

---

104. S. 62(1c).
105. 1986 V.R. 735.
106. 1992 BC9203164 3474 at 19.
to distinguish them from representative actions. Although there is no clear borderline between the two types of private interest collective action procedures.

The criticism of the brevity of the rules touches on a sensitive issue. Detailed rules undoubtedly promote certainty, which is an element which is highly sought after in most legal systems. On the other hand, it also reduces flexibility. We shall see in the next section the contrast between the United States class action and the United Kingdom group litigation order. The United States class action has strict criteria, but relatively established pathways once the gateway is opened. By contrast the United Kingdom system has laxer entry criteria, but then leaves the judge with a great deal of discretion as to how far and for what aspects of the litigation he departs from the model adopted for individual redress.

XVII. CLASS ACTIONS

The class action is a prime example of Cappelletti's second organizational wave, where the legal system adapted to the changes needs by developing new organizational structures. The United States class action procedure found in rule 23 of the Federal Rules of Civil Procedure, and mirrored in each United States state, is the most famous example. However, similar models have also been developed in Canada in Ontario, British Columbia \(^{107}\) and even the civil law jurisdiction of Quebec. \(^{108}\) Australia also has an effective class action procedure at the federal level as well as a less well functioning scheme in South Australia with reform being discussed in other states. The United Kingdom now has the Group Litigation Order (GLO) procedure. \(^{109}\) Civil law countries have generally been more conservative in their procedural reform, but we have seen that Quebec has a class action procedure and France has some mechanisms which seek the same results, but in a French way through using consumer associations as the bodies responsible for developing group actions.

Traditionally, following the United States model, class actions have required certification. This can be a very important stage in litigation for the viability of the claim may depend upon whether the court accepts to hear them as class actions. There are, however, some recent trends to make certification less crucial. The Australian Federal procedure for instance has no certification stage and the making of a GLO in the United Kingdom is less like an all or nothing step. Nevertheless most systems have some requirements before such a process is permitted.

---

108. See an Act Respecting the Class Action, Chapter R-2.1.
Some systems specify a minimum number of parties. The United States requires the class be so numerous as to make joinder impracticable, whilst the Australian Federal procedure requires seven. In Ontario and British Columbia, two suffice to form a class. The United Kingdom's GLO is silent on this issue. In practice this is not as crucial as the test for determining whether a class action is desirable.

The United States has three criteria for class actions to cover different situations. Where damages are being claimed, the issue is usually framed as whether "the questions of law or fact common to the class as a whole predominate over any questions affecting only individual members and that the class action is superior to other available methods for the fair and efficient adjudication of the controversy."¹¹⁰ In other jurisdictions the test is less strict. In Ontario and British Columbia for instance, the claims must raise common (but not necessarily identical issues) and be the preferable procedure for resolving the common issues, not necessarily all the issues. In the Australian Federal procedure, the claim must simply arise out of the same, similar or related circumstances and there must be a common question of law or fact arising with respect to all the claims. The United Kingdom's GLO is the most flexible as it is simply a form of case management and can apply to claims which give rise to common or related issues of fact or law.

In the United States, there have been some high profile cases where rule 23 (b)(3) has been used for mass tort cases, such as the recent tobacco case of Engle,¹¹¹ where a state wide class action against tobacco companies resulted in a $144 billion award of punitive damages. Indeed, in an asbestos case, certification was upheld as it was seen to be the best way to conclude litigation, for the court said "there may be cases in which class resolution of one issue or a small group of them will so advance the litigation that they may be fairly said to predominate."¹¹² But the majority view is that "The ill-advised deployment of the class action technique imposes a relatively cumbersome format on largely personal disputes, while achieving very little, if any, gain in efficiency and economy."¹¹³ Also, the flexible remedy regime which is a hallmark of the United States system is more suited to smaller consumer claims where aggregate damages make more sense than in litigation involving significant individual damages.

The United States use of class actions to remedy mass small scale consumer abuses is worth dwelling on for one characteristic of the collective

¹¹⁰ FED. R. CIV. P. 23(b)(3).
¹¹¹ This award was made in Dade County on July 14, 2000.
¹¹² In re School Asbestos Litigation, 789 F.2d 996 (3rd Cir. 1986).
action elsewhere is that in its private interest version it has predominantly been used for personal injury litigation, rather than this type of mass small scale consumer problem. One sentiment driving the Americans is undoubtedly the notion of access to justice. This was eloquently expressed by Judge Weinstein who thought: "this matter touches on the credibility of our judicial system. Either we are committed to make reasonable efforts to provide a forum for the adjudication of disputes involving our citizens - including...consumers who overpay for products because of anti-trust violations... -or we are not.\textsuperscript{114} Part of the explanation for the importance of this form of legal action in the United States is revealed in the next quote which well illustrates the role of the class action in the United States as not merely a means to provide individual justice but also as a method of controlling business behavior in the absence of public forms of control:

to consumerists, the consumer class action is an inviting procedural device to cope with frauds causing small damages to large groups. The slight loss to the individual, when aggregates in the coffers of the wrongdoer, results in gains which are both handsome and tempting. The alternatives to the class action - private suits or government actions - have so often been found wanting in controlling consumer frauds that not even the ardent critics of class actions seriously contend that they are truly effective. The consumer class action, when brought by those who have no other avenue of legal redress, provides restitution to the injured, and deterrence of the wrongdoer.\textsuperscript{115}

In other systems a similar function may be played by public law enforcement or action by consumer organizations. The distinguishing characteristic of the United States approach is that it can deliver damages to individuals and fully recover from businesses the profits they made. There is a marked reluctance in other systems to provide compensation based on such mass small-scale widely disbursed damage claims. There is also less incentive for lawyers to become involved, for unlike in the United States, there is rarely the functional equivalents of contingent fees and special statutory provisions concerning recovery of attorney fees in consumer protection statutes. However, a criticism of these consumer class actions in the United States is that very few consumers actually recover meaningful compensation. The criticism is that in return for say a discount voucher as compensation, lawyers often settle the cases

\textsuperscript{114.} Excerpt from a Symposium before the Judicial Conference of the Fifth Circuit, quoted in a National Consumer Law Centre Publication (1973) \textit{Fed. R. Civ. P.} 58, 299, 305.
on terms where the amount of lawyer’s fees recovered from the defendant is the prime bargaining issue.

The United States National Consumer Law Center has advised lawyers to consider bringing class actions under Rule 23(b)(2), as this usually removes the need for notice until the central liability issues have been settled. This authorizes a class action where “The party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole.” However, as this again involves no damages flowing to the injured parties the outcome for most consumers may not be too different under the United States procedure than under other systems depending more upon public enforcement.

A significant differentiating feature is whether class action procedures are of the opt-in or opt-out variety. Closely connected to this is the issue of notice, which is clearly most crucial in an opt-out system which has the capacity to bind individuals, although they may never have taken part in the proceedings. Equally the steps required to give notice are crucial for if they are too onerous they may make the case impractical to run. Most class action procedures are differentiated from representative actions by being opt-out in nature. The United Kingdom GLO is different in this respect for it only covers claims that have been entered on to the group register i.e. it is an opt-in scheme.

Under most schemes the judge is given wide discretion as to the appropriate form of notice. Ontario has the innovative feature that notification costs can be funded through the Class Proceedings Fund (see below). For a personal injury claim, the preference for a representative action style opt-in procedure or a class action opt-out procedure is finely balanced. Given the amounts at stake it may be thought unfair to place the conduct of someone’s claim in the hands of a third party without their express permission. By contrast, where small claims are involved individuals are likely to suffer little by having the action taken on their behalf and indeed the only likely alternative is that the case does not get litigated at all. As the point of principle is decided by an independent arbiter, the consumer can only win by the proper development of the law and any possible compensation going either to him directly or cy-presed to activities that benefit him indirectly as a consumer.

Funding for class actions in the United States is uncomplicated. Lawyers work on contingent fees and there is usually no liability for the other party’s costs, even if the case is lost. That is not to say that the level of such fees should not be a proper topic for debate, taking as they do usually one third of the damages. We have already noted the criticism that in many consumer class actions only the lawyers gain much financially. In most countries funding is more problematic. Indeed, funding is the most problematic aspect of collective
litigation.\textsuperscript{116} Although class actions are normally more cost effective than individual actions, they can still be expensive to run. There is a general drift towards contingent fees, although a reluctance to replicate completely the United States' system. In the United Kingdom for instance, successful lawyers can obtain an uplift of up to 100 percent of their normal fee and in Ontario there is a non-percentage contingent fee based on the lawyer's hourly rate, number of hours worked and a multiplier.

The more serious problem however is to deal with the liability to the other party for their costs if the case is unsuccessful in full or in part. In the Australian Federal and Ontario procedure the representative is personally liable (although he may have an agreement with those he represents regarding cost sharing), whereas the United Kingdom approach is for the costs to be borne by all parties represented. This rule was problematic when confirmed by the courts.\textsuperscript{117} It disturbed the practice of selecting legally aided plaintiffs against whom costs were not awarded as representatives in test cases.

The idea of waiving the loser pays rule fees is appropriate in class actions. This is especially so as far as low value consumer claims are concerned, for one can readily understand why few individuals would find it beneficial to risk costs liability for small individual personal gain.

Ontario has adopted a novel approach to address this issue. Not only is the representative not to be liable in test cases where a novel point of law is raised or where a matter of public interest was involved; but also where a plaintiff has received assistance from the Class Proceedings Fund then the Fund will be liable rather than the representative. For this reason, funding from the Fund can be crucial despite the fact that it only covers disbursements and not lawyer's fees.\textsuperscript{118} In Quebec, a government agency (the Fonds) provides assistance for both disbursements and lawyer's fees, and the problem of the other sides' costs is now covered by a rule that the claim is treated as one for a modest amount for which only moderate costs are recoverable.

In Hong Kong, a loan from the state lottery was used to establish a scheme which meets the legal expenses of litigants in return for a percentage of damages. It seems clear that if class actions are to work, at least outside the realm of personal injury litigation, then novel forms of funding and liability for costs need to be addressed. This is another example of how consumer litigation challenges the legal system to find novel solutions.

\textsuperscript{118} Ontario Law Commission: Report on Class Actions (1982) (explaining that the commission had proposed that the loser pays rule not apply in class actions)
Where class actions are simply used as an efficient means for processing individual claims then individual assessment of damages may be appropriate. However, even in personal injury cases there are examples of class actions giving rise to novel solutions which better reflect the collective dimension of the problem. The provision in the Agent Orange settlement providing for part of the damages to be used to improve Veteran healthcare is one example. In small-scale consumer claims, it may sometimes be possible to award individualized compensation. For instance, if a utility charges an unlawful amount it could be ordered to reimburse that amount to all its customers. It may be more difficult to see how a taxi company that overcharged its customers could trace them to effect repayment. However, this novel problem was overcome in the New York class action case of *Daar v. Yellow Cab Co.*,\(^{119}\) where the cab drivers were ordered to undercharge for a period so that the unlawful profits were returned to the customers. Of course this was rough and ready in the sense that not all customers would be compensated to the same degree, depending on their cab hiring habits during the two periods, but unjust enrichment was avoided and some form of compensation received by those who used New York cabs regularly. Any more exact distribution of damages would have been impractical. Most class action procedures make provision for the award of aggregate damages so long as some sound basis for that assessment can be discerned. The United Kingdom is out of line in this respect, but even here settlements can have cy-pres characteristics. For instance, Rover paid £1M for car research to the Consumers' Association to compensate for breach of competition laws.\(^{120}\) Once again consumer disputes require reconsideration of existing principles.

The payment of damages to consumer associations in appropriate cases might be a way forward for overcoming the problem of providing incentives for them to bring small consumer claims. As Olsen well demonstrates, there is every reason why individuals will not follow Ihering's call to invoke the law in the general interest.\(^{121}\) The United States' solution is to provide this incentive to private lawyers through the lure of attractive fees. In China, the peasant Wang Hai is using the laws on exemplary damage for counterfeiting as the basis for a nice income generation scheme based on uncovering counterfeit goods.\(^{122}\) However, in many cultures there seem something distasteful about leaving recovery to such private enterprise initiatives. This is not to say that the role of individual litigation in developing good standards should be underestimated.

---

119. See 63 Cal. Rptr. 724 (Cal. 1967).
Indeed, one sometimes wonders whether the energies put into obtaining standing and lobbying for new procedures by consumer organizations might not be more effectively spent in litigating test cases. However, such a strategy requires resources, often from the public purse, which are increasingly scarce.

XVIII. LEGAL AID

Public funding of lawyers is on the retreat. The one time fairly extensive United Kingdom legal aid system is now in decline with lawyers being looked to take cases on a conditional fee basis under which they can claim a success fee of up to 100 percent if they win depending upon the risk involved. To some extent, we do not regret some aspects of the decline of Capellitti's first economic wave for in many respects lawyers rather than litigants or society seemed to be the main beneficiaries of legal aid. One of the main stimulants for reform in the United Kingdom was the benzodiazepine cases where £33 M of public money was spent on a product liability action that never got to court. However, there is a tendency to throw the baby out with the bath water, and public funding needs to be more available than it is for high-risk cases that are unsuitable for conditional fees. Also, there is a need for a more developed system of legal advice to consumers than exists in most countries.

One interesting model is the New South Wales Legal Aid Commission, which although with a far smaller budget that their counterparts in the United Kingdom, seems to have achieved some notable successes by retaining in house lawyers to work on cases in areas prioritized by the Commission.123 This shows that Capelletti's economic wave still has some life left in it although the funding of consumer litigation from the public purse may need to be rethought.

Indeed it is noticeable that in Australia there is a lot of case law (at least in contrast to the United Kingdom) on consumer credit. This seems to be due to the activity of specialist law centers for financial service funded out of cy-pres type settlements where creditors have failed to comply with disclosure requirements and, as a result, agreed to pay money into a financial counseling trust fund. This is interesting and could be the possible basis for a holy cycle, whereby such cy-pres arrangements provide an incentive for consumer organizations to bring actions to protect the consumer interest and then use the profits to bring further actions and thereby effectively police the market at the expense of the market.

XIX. PUBLIC AUTHORITIES

One alternative to private initiative class actions is the use of public authorities. The faith in public authorities to regulate the market place varies

from culture to culture. It is probably at its highest in Scandinavia where the Consumer Ombudsmen play an important role, and at its lowest in the United States where citizens distrust the power of Government to control powerful business interests, and in developing countries where resources are too scarce to permit effective enforcement. However, public authorities are likely to place less emphasis on providing individuals with compensation than with efforts to protect the general public interest. It is true that in some countries criminal prosecutions can be an important means of providing consumers with the means to compensation. For instance, in France the action civile allows the criminal courts to award compensation to those injured by the breach of the law. Similar rules allowed the victims of the Colza cooking oil affair in Spain to recover. In other countries, especially in S. America, the Attorney Generals help consumers recover damages as well as police the criminal laws. The United Kingdom courts do have powers to award compensation in such situations under s. 35 of the Power of Criminal Courts Act 1973, but these powers are rarely utilized to their full extent and more generally public authorities do not see it as their function to expend resources in providing compensation.

The Australian Consumer and Competition Commission has a novel power to intervene in assisting product liability victims. This has been little used as private practice lawyers are quick to take up the most likely cases and there is no provision for similar powers where they are most needed, in claims of modest value.

XX. PUBLIC INTEREST COLLECTIVE LITIGATION

As public bodies become involved in the litigation of claims on behalf of individuals, we see that the line between public and private interest litigation is not distinct. We will however now turn our attention to ways in which such bodies act with the predominant purpose of improving consumer welfare generally, rather than recovering damages for consumers.

XXI. CONSUMER ORGANIZATIONS

Particularly in France and Germany, consumer organizations have a tradition of using litigation to promote the consumer interest. However, especially in Germany consumer organizations (Verbrauecher Zentrale in each Land and a central Verbraucher Schutz Verein) should not be viewed in the same light as the organic grassroots organizations that exist in most of the common law world. They are part of the corporatist state structure being funded

124. Even there, there is some good work being done by bodies such as the Federal Trade Commission, the Consumer Product Safety Commission, and the State Attorney Generals.
125. Not all are equally active in using their powers.
by the state and perform an important structural role in market surveillance. In Germany the consumer organizations main powers have traditionally been to challenge unfair trade practices under the Law Against Unfair Competition 1965, and in more recent times unfair contract terms under the Law on Standard Contract Terms 1976, as amended. The consumer organizations typically negotiate with traders and obtain their agreement to desist in the practice or failing that seek injunctions. If these are breached, fines are payable but these go to the court. It has from time to time been proposed that consumer groups be allowed to recover damages, but this has not come to fruition. 126

In France, the consumer organizations have also had this market surveillance role, but whilst some powers merely provide for injunctive relief (for example in 1988 they were given the power to challenge unfair terms) 127 the majority also permit consumer organizations to become involved in claims for damages. French consumer organizations were first given the right to bring actions in the collective interest by art. 46 of the Royer Law of 27 December 1973. 128 A decision of the Court de Cassation in 1985 made it clear that this only applied where there was an action civile in the strict sense i.e. there must have been a breach of the criminal law. The offence must have harmed, directly or indirectly, the collective interest of consumers. This is an interesting principle for the consumer organizations are seen as representing the collective consumer interest. This has been described by Calais-Auloy and Steinmetz as being half-way between the individual interest of consumers and the general interest of citizens. 129 The former can be protected by the individuals themselves, the latter by the ministèr e public. By contrast consumer groups are best placed to protect the collective consumer interest. Consumer groups can seek injunctions, damages or publicity for the judgment at the defendant's expense.

XXII. Damages For Collective Harm

The nature of damages for harm to the collective interest are difficult to discern with certainty. Calais-Auloy and Steinmetz suggests it is to compensate the consumer organizations for their efforts. However, they also comment that they might be viewed as private fines and this fits best with the belief they form part of a deterrence strategy. 130 They note that often the judges fail to confront the issue and only award a symbolic franc. However the consumer

127. See C. CON. art. 421-6 (Fr.)
128. *id.* (now the Consumer Code).
organization, Que Choisir in their booklet, *20 ans d'action civile*, cite a decision of the Court of Appeal of Paris of 11 December 1995 which states that there should be full compensation and not merely a symbolic amount. How should this be calculated? One approach might be for it to cover damages that cannot be compensated to individuals for practical/logistical reasons. A more satisfying theoretical justification might be one based on the harm to consumer confidence in the market caused by misleading advertising or the sale of dangerous products. Thus, whilst France has introduced the interesting concept of damage to the collective consumer interest as something distinct from the accumulation of individual claims, the implications of this new principle have yet to be worked out. This goes beyond our view of the collective interest being to recover damages that otherwise would not have been recovered by individual proceedings. It is an interesting concept which can perhaps be invoked when the amount of individual damages is difficult to assess. It might be possible to argue that poor business practices actually cause more than the sum of individual losses because of the impact on market confidence in general. Thus, harm for the collective interest is closely linked to a fine. Payment to a consumer organization, in addition to individual losses, may provide the incentive for consumer organizations to bring such cases, but we suspect there will be strong resistance to such an approach where full compensation is also awarded. It is more likely that awards to consumer organizations will be more easily accepted if they are viewed as part of the compensatory package.

**XXIII. Consumer Groups and Individual Litigation**

Consumer groups in France can also become a party to individual litigation, \(^{131}\) but this power is severely limited and adds little to the consumer’s groups power simply to assist consumers. As actual harm is required, it cannot be used as a mechanism to prevent harm occurring in the first place. Such instances show how blurred the distinction between public and private interest collective litigation can be.

The French Consumer Law Reform Commission had proposed a class action procedure based on the N. American model, but having the French characteristic that the action would have been brought by a consumer organization. \(^{132}\) The organization would have been able to bring an action on the question of liability in principle without even informing the consumers they claimed to represent. Once the decision was handed down publicity would be given to it, and consumers could decide whether to benefit from the decision or take their own action. In fact, the French legislator adopted a half-way house

---

131. C. CON. art. 421-7 (Fr.)
132. COMMISSION DE REFONT: PROPOSITION POUR UN CODE DE LA CONSUMMATION, (1990)
in its Neietz law of 18 January 1992, which was supplemented by a decree of 11 December 1992. The right of action arises where several identified individual consumers suffer harm from the same cause as the result of the act of the same trader. Thus, it provides a mechanism for them to represent the sum of individual interests, rather than simply the collective interest which is protected by the action civile. It is broader than the action civile in that it can concern both an action civile or a civil law claim. This procedure is unlikely to have a great impact. In part this is because of the need to identify victims and have them mandate the organization to represent them. This is hampered by the restriction that only the written press may be used, for fear that using audio-visual media might unfairly tarnish a company's image before it has been found to have done wrong. More fundamentally, one might question why a consumer organization would wish to involve itself in such a procedure. It can in any event assist consumers to bring actions and this new procedure does not entitle it to claim damages in its own right. Under this procedure consumer organizations simply expose themselves to liabilities in terms of claims by consumers if they do not exercise their mandate properly and by producers if they damage their reputations unfairly. They may also be held liable for the producers’ costs if the action fails.

XXIV. INJUNCTIONS

The notion of collective injunction actions has clearly taken root in Europe driven by EC law. Starting with the misleading advertisement directive, successive consumer protection directives included provision for injunction procedures. Drawing upon the diverse traditions within the Community these provided standing to either public bodies whose task it was to protect consumers or consumer organizations having the same function. Sometimes these were clearly alternatives, at other times it was arguable that the wording of the directives required member states to give standing to consumer groups as well as public authorities. This development culminated in a Consumer Injunctions Directive, to which we shall return when considering cross-border regulation. Here it is clear member states have the choice of whether standing be granted to public authorities or consumer organizations or both. Granting it to both is becoming the standard preference of legislators, although actual practice remains linked to national traditions. The Directive’s policy is aimed at the

133. See C. CON. art. 422 (Fr.)
135. As in misleading advertising directive.
137. Id.
protection of the collective interests of consumers. Its policy is not complete as it does not cover all areas of consumer law - safety laws are one notable omission - and of course it only provides for injunctive relief not damages.

The impact of this new European policy on the United Kingdom is interesting. The United Kingdom has little history of consumer organizations having standing to enforce consumer laws and indeed the Control of Misleading Advertisement Regulations (implementing the EC Directive) only gave such power to the Director General of Fair Trading. The first implementation of the Unfair Terms in Consumer Contracts Regulations similarly restricted standing to the Director General. However the Consumers Association challenged this in the European courts and the incoming Labour Government agreed to settle the case by granting standing to the Consumers' Association and a host of other bodies. A similar approach has been adopted when implementing of the Consumer Injunctions Directive. It is not yet clear whether this represents a change of culture. One suspects that so long as the public authorities make a good fist of market surveillance, the private consumer organizations will be happy not to invest their resources in court battles.

Indeed, the notion of representative action was taken to heart by the Labour Government who set up a committee to look into how such a procedure should work not only in the consumer context, but also in any setting where a collective interest was at stake. Whilst the notion of representative actions for injunctions and declaratory relief were accepted in principle, there is more hesitation over including damage claims, although interesting this possibility was not excluded in the final report. However, if consumer organizations are to participate in market surveillance, they need some encouragement, possibly in the form of allowing the cy-presing at least part of the damages or allowing the recovery of legal fees. Under the current situation all they have is the threat of costs liability against them.

XXV. SOCIAL ACTION LITIGATION

Before concluding this survey of collective redress mechanism, it is worth mentioning the Indian experience of Social Action Litigation. This provides

---

138. Id. at art. 1.
139. The Control of Misleading Advertisements Regulations, No. 915 (1988) (Eng.).
140. See now, the Unfair Terms in Consumer Contracts Regulations, No. 2083 (1999) (Eng.).
142. Although there remain some problems about bringing such actions before a private law right of action has accrued if damage is an element of the cause of action.
144. D. Harland, Collective Access to Justice-Some Perspectives from Asia and the Pacific, 90
that where a person or class of person is unable to approach the Supreme Court by virtue of poverty, disability or their socially or economically disadvantaged position then any member of the public or a social action group acting bona fide can apply seeking judicial redress for the legal wrong or injury caused. The Court has been willing to act on a simple letter directed to the court and in some cases has taken over the proceedings, for example establishing a socio-legal commission to investigate the complaint. Although primarily aimed at instances of state repression and exploitation of disadvantaged groups, it has been used to further consumer concerns. Doubtless this model is the product of the particular socio-economic conditions prevailing in India, but it nevertheless serves to remind us of the need to give voice to the collective concerns of groups which might be ordinarily excluded from the legal process, including consumers.

XXVI. SUMMARY

Leaving to one side the special experience of India, we have a bleak picture of how consumers are protected as a collective so far as compensation procedures are concerned. Only in France and to some extent at the EC level by virtue of the Injunctions Directive, is the notion of collective interest recognized as a distinct legal category, but it is only in France and even their hesitantly that there is seen as a need to compensate for harm caused to the collective. It might be argued that the consumer class actions in the United States represent an attempt to provide compensation for small but widely dispersed losses that affect the consumer collective. The problem there is that the incentives to lawyers tend not to require them to extract the best compensation for consumers. Elsewhere the position with regard to public bodies and consumer organizations seeking injunctive and declaratory relief seems better, but the United States class action model where copied has almost exclusively been used for high ticket value cases and not for the mass, small, widely dispersed consumer claims. Indeed some systems seem to turn their face against such a use of the class action procedure: the Australian federal procedure contains a power to stop proceedings where the cost of distributing money would be excessive as the class is too large and individual amounts claimed are small.  

One argument might be that there is not the same need for the regulatory role performed by private lawyers in United States class action cases in other Western countries, as in Europe and other common law countries, this function is performed by regulators and consumer groups. However, evidently there is a unmet need in these countries to deliver justice to consumers who have

suffered small losses and to prevent traders being unjustly enriched. If this cannot be achieved directly by compensating consumers then attempts can be made to achieve this indirectly by cy-pres orders giving damages to bodies promoting the consumer interest.

However, it is undeniable that collective actions to protect the consumer interest is a dynamic area of law which one can expect to see develop in the future both as regards injunctive and declaratory relief and representative and class actions. However, we have already commented that a lot of consumer litigation takes place in the lowest level courts and in alternative dispute resolution forums. It is arguable that many class actions for small individual amounts are in reality large claims and do not belong in the small claims courts. However, such claims may have to be litigated there and indeed one could imagine localized problems affecting the residents of a particular area being best sorted out by the local small claims court. Yet some class action schemes, such as Ontario’s, exclude small claims courts. This may be because there is a feeling that small claims courts cannot handle the complexity of a class action. By contrast, many ADR schemes are sophisticated enough to handle collective disputes, and some indeed actually do accept some collective disputes. Some individual complaints become, in effect, test cases where a decision in one case is enforced at least on behalf of all others who bring a complaint on the same terms, although not necessarily with respect to those consumers who have suffered but have not contacted the ADR institution. These examples should be followed and publicized so that the waves for organizational and procedural reform Cappellti detected, converge rather than flow in separate directions. This is the sixth wave of integration that we want to see developed.

XXVII. GLOBALIZATION

Our fifth wave in consumer litigation: the globalization of consumer disputes, is perhaps the most talked about new wave in consumer access to justice. One might suspect sometimes that it is a phenomenon that is more talked about than real. For instance, a Eurobarometer survey found that only 2% of European consumers had a complaint about goods purchased overseas. Given the internal market in Europe, one might expect this figure to be even less elsewhere in the globe. Of this 2%, 43% complained in person or by telephone to the seller, 36% did not react and only 6% consulted a lawyer. Interestingly,

146. Guy Dennis, Borrowers In Line for Mortgage Payout, SUNDAY TIMES (London), Aug. 26, 2001. (showing a recent example in the UK concerning a decision by the Banking Omubudsman against lenders who gave new customers a better deal on mortgage rates than existing customers, and that complaints have been upheld against several banks and building societies who adopted this practice, and the implication is that significant compensation will have to be paid to a large number of borrowers).

147. Les Europeens et l'accès à la justice- Resultats significatifs de l'Europobarometre 52.1.
the most popular choice for European consumers as a means of resolving disputes purchased abroad was a public consumer body. As we shall see this option is not on the Community's agenda.

Although still small in numbers, it is reasonable to predict that cross border consumer complaints will grow in significance. There are several factors giving rise to the globalization of consumer disputes. As the inexorable rise (at least before 11 September) in air traffic indicates the world's population is simply becoming more mobile. It is to be expected that consumers will not leave their passion for shopping at home and indeed will take advantage of local bargains and differential pricing. This phenomenon is being encouraged by regional free trade zones which not only remove taxation barriers, but (at least in the case of the EC) positively encourage the consumer to act as an active competitive dynamic within the internal market though the adoption of minimum consumer protection rules throughout the Community.

Obviously the development of e-commerce is going to be a major factor in the globalization of consumer disputes. Another dimension of the internet is that it has the ability to take the consumer away from even its regional bloc and allow him to contract anywhere in the globe and frequently in N. America!

The globalization of disputes also keys into many of the other waves we have identified. Most obvious is the link with procedural changes, for the distance between consumer and trader in global disputes makes the traditional courts even more impracticable as a forum and inevitably gives succor to the procedural wave and the trend towards ADR. However, it also gives impetus to the organizational wave, for as individuals become less able to resolve disputes across borders, so there is more need for collective solutions. Equally one might argue that new economic solutions need to be adopted as individuals who can afford to litigate at home, or can use self-help solutions within their own jurisdictions, are more vulnerable when faced with the additional cost and complexity of suing across borders. However, one sees little sign of there being a lot of money to assist consumers resolve cross border disputes. We will also suggest that if global mechanisms can be set up to assist consumers then this might indeed help enhance the regulatory role of consumer litigation, which we argue should be seen as an important element in modern redress regimes. Amongst the consequences of this will be the ability of global regulators to identify more easily bad practices in particular states and bring trading standards up to international norms.

XXVIII. PRIVATE INTERNATIONAL LAW

There have certainly been some attempts to make the traditional court based remedies responsive to consumer needs. This is evidenced by the rules of private international law. Within Europe, the 1968 Brussels Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial
Matters contained special consumer protection rules ensuring that in certain circumstances consumers could sue in their domestic courts and also only be sued there. Similarly, the Rome Convention on the Law Applicable to Contractual Obligations 1980 provides for circumstances in which consumers cannot be deprived of the mandatory rules of their state. These rules are currently being updated with the intention of making them part of EC law rather than merely Conventions that member states sign up to. This process has already been completed for jurisdictional issues and negotiations on choice of law matters are in progress.

The EC Regulation 44/2001 on jurisdiction and recognition and enforcement of judgments in civil and commercial matters was adopted with an eye on the development of Internet shopping. Its provisions give consumers access to their domestic courts where:

the contract has been concluded with a person who pursues commercial or professional activities in the Member State of the consumer’s domicile or, by any means, directs such activities to that Member State or to several States including that Member State, and the contract falls within the scope of such activities.

There is a certain ambiguity as to whether the provision covers sales made on both passive and interactive web-sites, but the general view is that this is a consumer friendly provision, as it seems to give consumers purchasing over the net the right to sue in their home jurisdiction. However, the reality is that few consumers will make use of it, because there are numerous practical obstacles which militate against consumers suing parties across borders. Also, it has been calculated that the average cost of suing across borders in the EU for a 2000 Ecu claim is 2500 Ecu, and the proceedings will take between 12 and 64 months depending on the country. Allowing the consumer to sue in his own

courts alleviates the problem, but there remain significant practical problems for consumers when suing a party in another state.

There is another problem that the European rules on jurisdiction face as regards regulating the Internet and that is that they do not extend beyond Europe. In particular, they do not cover companies based in the United States. There are attempts to renegotiate the Hague Convention to deal with this issue, but these negotiations look like being prolonged and when agreement is finally reached it will be necessary for states to ratify the Convention. Indeed action to deal with the consumer problems associated with globalization is most evident within Europe, because the EC has both the need for such rules to promote its internal market and the political mechanisms to address the issue. One might hope that a body such as the OECD would take the lead in expanding these rules beyond the member states of the EC. However, despite some efforts at promoting guidelines for consumer protection and e-commerce, which raises issues of dispute resolution and redress, this has not taken concrete form to-date. Indeed in the field of product safety one sees the opposite phenomenon. The OECD’s notification system on consumer safety matters has suffered from the development of binding notification procedures at the EC level.

XXIX. EUROPEAN INITIATIVES TO IMPROVE CROSS-BORDER CONSUMER REDRESS

Although access to justice issues have long been mentioned in consumer policy debates at the EC level the main impetus has been since the 1993 Green Paper on Access of Consumers to Justice and the Settlement of Consumer Disputes in the Single Market.\textsuperscript{154} We have already noted that it adopted a Resolution on the principles applicable to the bodies responsible for out-of-court settlements of consumer disputes.\textsuperscript{155} It has recently followed this up with a Recommendation on the principles for out-of-court bodies involved in the consensual resolution of consumer disputes.\textsuperscript{156} Whilst the former covers third parties who propose or impose solutions, the latter deals with third parties who seek to find an agreement by common consent. Neither therefore covers company internal procedures. The intention is to give consumers confidence that these bodies are truly impartial, transparent, effective and fair. The guidelines by and large reflect good practice. Our main concern, as regards the


\textsuperscript{155} Commission Recommendation on the Principles Applicable to the Bodies Responsible for Out-of-Court Settlement of Consumer Disputes, 1998 O.J. (L 115) 31.

\textsuperscript{156} Commission Recommendation on the Principles for Out-of-Court Bodies Involved in the Consensual Resolution of Consumer Disputes, 2001 O.J. (L 109) 56.
impact of globalization is whether the obligation to comply with the Rome Convention requirement that in some circumstances the mandatory rules of the consumer’s state should apply might not be too onerous for many ADR schemes that lack adequate legal resources.

At the same time as the 1998 Recommendation was issued, a consumer complaints form was produced. Interestingly, this had originally been intended as a means of making it easier for EC consumers to use the courts of other member states. This had to be abandoned as “[c]omplexity [has shown] that use of the form as a legal instrument for simplifying seizure of the national courts is incompatible with the heterogeneity and rigidity of the procedural rules of the individual legal orders.”

This is evidence that globalization of disputes will lead to increased use of ADR because of the inability of the traditional courts to adapt. Although interestingly Ireland has mooted the possibility of its small claims court system being available on-line, there has generally been little movement in traditional courts to respond to the globalized nature of consumer disputes, despite the United Kingdom devoting a conference to this topic when it held the presidency of the EC in June 1998.

The complaints form guides the consumer to explain the nature of her problem and the remedy sought through a series of multiple choice and free text boxes. As the form is available in all the official languages, the use of multiple choice clearly circumvents some of the language problems, but does not remove them entirely as there is still some textual content required. The form is intended in the first instance for use in negotiations between consumer and trader, and if that fails, for facilitating the use of ADR procedures. Consumers may turn to consumer organizations to assist them, but such bodies are aware of their lack of expertise and the European Advisors Forum has sought to develop a protocol on how cross border disputes should be handled. To assist consumers with disputes the Commission has set up thirteen European Consumer Advice Centres. These have expertise in advising consumers about cross-border consumer problems. However, these resources are obviously thinly spread and another example of the wane of the first wave of providing economic assistance to ensure consumers have legal redress. Mitchell has made envious comparisons with the Action for Single Market schemes which are located within ministries and therefore receive government backing. They investigate queries and complaints from business and can take up the matter.


159. Samantha Mitchell, Cross Border Disputes: To Sue or Not to Sue, 9 CONSUMER POL’Y REV. 97, 101-102 (1999).
with the Commission or member states concerned, whereas the consumer centers merely offer advice.\textsuperscript{160}

The Commission has created a European Extra-Judicial Network (EEJ-NET), comprised of notified bodies which comply with its guidelines for ADR bodies and national clearing houses.\textsuperscript{161} A similar scheme (FIN-NET) is already up and running for financial services. Under EEJ-NET, the national clearing houses will be both a national contact point providing domestic consumers with information on ADR bodies in their jurisdiction, and also enabling European consumers to access ADR schemes in other countries by contacts with the clearing house in the supplier’s state. It will also provide the consumer with assistance in formatting and filing his complaint, although it is unclear to what extent this covers assistance with translation costs.

In addition to its role as an information source and facilitator, it is also foreseen that the clearing houses will provide support for policy makers through its strategic role in monitoring and storing information about the level and nature of complaints. This is a good example of how the regulatory function of consumer litigation is being recognized.

The Commission has appreciated the need to enhance consumer access to justice, but the barriers to this are immense. Frequently, for instance, it comments upon the impossibility of interfering with national judicial procedures. Yet it is bravely trying to promote the cause of consumer access to justice. In its recent discussion document, Ideas for a Consumer Policy Strategy,\textsuperscript{162} it talks about the need to ensure access to justice for consumers “both individual (agreement on applicable law for contractual and non-contractual disputes, building on the approach for jurisdiction and enforcement of judgments, alternative dispute resolutions and small claims courts) and collectively (examining the potential of a mechanism for collective redress of consumers at EU level).”\textsuperscript{163}

\textbf{XXX. INTERNET}

Similar hopes concerning regulatory objectives are also being expressed for the global online dispute resolution (ODR rather than ADR!) bodies in the field of e-commerce. For instance, the American Bar Association’s Task Force on E-Commerce and Dispute Resolution has suggested that as part of adhering to an ODR Trustmark scheme there should be an obligation on the online

\textsuperscript{160} Id. at 102.
\textsuperscript{161} Commission Working Document on the Creation of a European Extra-Judicial Network (EEJNET)
\textsuperscript{163} Id.
dispute resolution provider and/or trustmark entity to notify the public authorities that have jurisdiction over the business activities of the particular merchant.\footnote{Draft Preliminary Report \& Concept Paper, 2001 A.B.A. ASS'N TASK FORCE ON E-COMMERCE \& ALTERNATIVE Disp. RESOL.} A lot could be said about the moves to create online dispute resolution schemes. It is clearly based on self-regulatory structures and a recognition that traditional court structures cannot deal with low value cross border disputes. However, equally there is also a recognition that consumers need to have confidence in these schemes and a range of private and public accreditation scheme are developing. The problem is to develop principles which offer a globally recognized standard for a global medium. There are some national standards, such as Trust UK, but these need to be part of an international framework. Unfortunately, as the issue becomes globalized so it becomes more difficult to agree standards and to ensure consumers have confidence in those standards. Much more could be said on this topic, but for present purposes it suffices to say that it is a clear example of the globalizing trend in consumer litigation and also clear evidence that this will lead to increased use of ADR.

**XXXI. MAKING TRADERS ACCOUNTABLE ACROSS BORDERS**

Of course as companies trade more and more across borders, there is a problem of how to hold them accountable for compliance with consumer protection laws. Indeed, the variety of consumer laws can be a headache even for a firm seeking to trade ethically. Failing harmonization, one way around this is for country of origin controls and systems of mutual recognition. These are indeed hallmarks of EC internal market law. However, regulators still find it harder to enforce laws in the global environment. There are some initiatives such as the 24/7 initiative by the Attorney Generals in the United States to ensure there is always someone available in every state to respond to urgent internet problems. There are also examples of consumer agencies around the world setting particular days aside to collaborate on seeking out Internet scams. However, such efforts appear to involve running to stand still against the welter of problems thrown up by the increased globalization of trade.

Once again the EC has developed a novel solution. It was apparent that there was a need to develop strategies to prevent companies from taking advantage of the fact that the internal market had not been matched by the development of an internal legal order. This was obvious when French companies targeted German consumers with misleading advertising. The German consumer organizations had no standing before the French courts and
the French authorities had no interest (in some countries the problem would be a lack of authority) to protect German consumers.\(^{165}\)

As previously described the Community had developed the notion of collective injunctions in several consumer law directives. This policy culminated in Directive 98/27/EC on injunctions for the protection of consumers’ interests,\(^{166}\) which gave it an internal market dimension. This Directive requires member states to notify bodies who can bring injunction actions to prevent the infringement of the laws implementing a list of directives found in its annex where this would harm the collective interest of consumers.\(^{167}\) Although the Directive clearly offers the choice of these bodies being either independent public bodies or consumer organizations, or both,\(^{168}\) in practice both sorts of body are given standing. Not only do these bodies have standing in domestic matters,\(^{169}\) but they can also seek injunctions in other member states where the interests they protect are affected. Thus, a German consumer organization can seek an injunction before the French courts for misleading advertising aimed at German consumers, but emanating from France. Member states can introduce a requirement that the entity first consult with the defendant and/or a qualified entity within the state where the injunction is sought. This is again an instance of a regional rather than a global solution. It is of limited assistance when one of the parties is outside that region. Again, one approach may be to try to develop international agreements or bilateral agreements to take these principles further, but one may doubt how fast developments of this nature can take place. Nevertheless, this example serves to show how organizational changes in consumer litigation (in the form of collective injunctions) are made even more necessary because of the trend to globalization.

XXXII. CONCLUSIONS

Globalization enhances several of the trends that were becoming apparent in consumer litigation and concerns to address this phenomenon will underpin our thinking in the future. At the same time there is a need to remember most consumer disputes are still for small amounts and concern products and services purchased locally. Currently, there are few realistic avenues for redress for such claims. The only practical way of improving redress is through development of the organizational and procedural reform waves identified by Capelletti. These


\(^{167}\) Guidance has been provided on what amounts to collective interest, but this term remains undefined in the legislation.


will assist the local as well as the global consumer. Indeed, many local problems are likely to be found replicated in other parts of the globe and so the distinction should not be too strongly defined between the two types of consumer problem. The economic reform wave has certainly faltered. However, what is needed is new thinking on how limited public funds for consumer advice can best be used. How can consumer advice centers best be organized, how can litigation strategies be developed to best increase welfare? Part of this may be to appreciate the regulatory impact of litigation in both the court and ADR sectors. Above all, the legal system in the broadest sense must be viewed as a whole. Innovative solutions developed in the traditional legal system may have to be transplanted into the ADR sector if their benefits are to be realized to the full. We have seen decades of experimentation and innovation. This has also resulted in fragmentation in the procedures and avenues for consumer redress. Our final call is for the cross-fertilization of ideas and the integration of solutions. This has been an essay in comparative law, but our call is for the lessons of comparisons not to stop at national borders, but also for the various consumer redress mechanisms within national legal systems to learn from the experiences of one another.
CROSS - CULTURAL ARBITRATION: DO THE DIFFERENCES BETWEEN CULTURES STILL INFLUENCE INTERNATIONAL COMMERCIAL ARBITRATION DESPITE HARMONIZATION?

Lara M. Pair J.D.

I. INTRODUCTION ............................................ 57
II. WHAT IS CULTURE ANYWAY? ............................... 59
III. DIFFERENCES IN LEGAL CULTURE .......................... 61
   A. Common Law & Civil Law ............................... 61
       1. Oral or Written Proceedings .................... 63
       2. Discovery and Pre-Hearing Procedures .......... 64
       3. Treatment of Witnesses .......................... 65
       4. Record Keeping ................................ 66
   B. Regional Cultures ................................... 67
       1. Non-Arab Africa ................................. 67
       2. East Asia .................................. 68
       3. Latin America ................................. 70
       4. Arab World ................................ 71
IV. USING THIS INFORMATION ................................ 73
V. CONCLUSION ........................................... 73

I. INTRODUCTION

Imagine an International Commercial Arbitration hearing. Imagine how the procedure of your International Commercial Arbitration works. Maybe you are already savvy and know of some international rules or you have looked up the UNCITRAL Model Law on International Commercial Arbitration to get a picture.¹ You are, for example, an Anglo-American plaintiff’s lawyer. Now imagine the other party to this International Commercial Arbitration. Where are they from? Let us say they are East Asian. So you assume the other party has read the same rules since you have agreed to the use of the UNCITRAL Model Law on International Commercial Arbitration. The arbitrator is French and

knows the rules quite well, mainly because she is the arbitrator. Now, as a plaintiff's lawyer you want to "start the show", when the French arbitrator tells you to limit your witness examination to 20 minutes each. Perplexed you protest, because this is not what you are used to, but the arbitrator will hear nothing.

What has happened? Differing expectations. In International Commercial Arbitration more than just the legal issues are issues. Whether procedure is agreed upon ad hoc, or institutional rules are used, expectations of the process may well differ from participant to participant. Why? Divergence in cultural backgrounds. This paper argues that despite harmonization of procedural rules in International Commercial Arbitration, expectations of the process differ based on cultural background of parties or arbitrators. In order to overcome cultural barriers of this and other sorts, one should understand the differences and use them creatively. This paper is intended to shed light on some of the differences and thereby advocate understanding.

There are two caveats for this text. First, it must be clarified that the lawyers may well be better informed than the parties and the expectations may differ with increased experience and knowledge of background of other participants. Second, my analysis applies to both ad hoc and institutional arbitrations. The extent of the cultural influence on the process may differ. Institutional arbitrations usually have more clearly defined rules of procedure and tend to adopt a common approach for arbitrations, instead of a case-by-case determination.

"Every person operates in his or her own private world perceptual field." Culture is part of what creates this field. This paper discusses how the differences in culture influence the arbitral process. Notwithstanding the actual norms prevailing in the International Commercial Arbitration process, participants who may not know enough about this process (and who are basing their expectations on experience gathered within their own legal culture) are

2. Participant in this paper is used to describe both parties and arbitrators.
4. With increased experience, the participants will schedule conferences in advance and discuss issues of preference and procedure in more detail, so that initial expectations based on one's own, or the other participant's cultures doesn't get the better of the proceeding. These issues often influence the choice of arbitrators. Malkom Wilkey, The Practicalities of Cross-Cultural Arbitration, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION 79, 80 (Stefan Frommel & Barry Rider eds., 1999). The location of the arbitration can also be influenced by culture. For example, due to their cultural background Switzerland has arbitration rules advantageous for litigation against a foreign sovereign. Sigvord Jarvin, Leading Arbitration Seats - A (Mostly European) Comparative View, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION 39, 52 (Stefan Frommel & Barry Rider eds., 1999); see also Cbernado Cermades, Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION 147, 165ff (Stefan Frommel & Barry Rider eds., 1999).
5. See HARRIS & MORAN, supra note 3, at 29.
bound to face surprise. This cannot be an exhaustive treatment of the matter and will be a mere sample. To this end I will set a framework of reference based on Harris’ and Moran’s definition of culture and introduce three different levels of the concept ‘culture’. Then this text will go on to show procedural differences in the main legal cultures (Common Law and Civil Law) and how these differences came about. Regionally based distinctions within these main systems follow. This analysis will not include differences in substantive law.

II. WHAT IS CULTURE ANYWAY?

This section will identify what makes culture and create a working definition. Some definitions, which can be found in dictionaries or sociologists’ writings define culture as "the total pattern of human behavior and its products embodied in thought, speech, action, and artifacts and dependant of man’s capacity for learning and transmitting knowledge to succeeding generations through the use of tools, language, and systems of abstract thought."

Others define culture as a complex of typical behavior and standardized social forms particular to one social group, or an atmosphere of social beliefs, preferences, expectations, and common principles.

I will adopt Phillip Harris’ and Robert Moran’s definition. “Culture gives people a sense of who they are, of belonging, of how they should behave, and what they should be doing.” It implies values and patterns that influence attitudes and actions. In short, it is that which makes one function on a very subconscious level.

Culture can be separated into different subcategories. There are three analytical levels, which group together certain aspects of culture. The first level is called technical and is the unemotional, easily transferable part of culture, such as grammar of a language. The second, so-called formal aspect refers to rituals both obvious and hidden, such as taking off one’s hat when entering a room. These rituals are learned by trial and error. Obviously, the hidden ones are not easily learned and one of differing culture will not easily admit to

---

8. See Harris & Moran, supra note 3, at 12.
9. Id.
10. Insights into the workings of culture have been discovered by the behavioral sciences, i.e. sociology, psychology and anthropology.
12. Id. at 39, 40.
13. This is a western cultural habit.
therefore. This level is prone to misunderstandings and is emotionally charged. The third level is the informal level. It describes automatic and almost unconscious responses. This level is also highly emotional and is only learned through modeling, e.g., how males and females interact. These levels form the basis of culture.

Culture influences many aspects of life, attitude, social organization, thought patterns, space requirements, body language, and time sense. Thought patterns bear effect on the process of reasoning, be it legal or otherwise. What is perfectly logical, self-evident and reasonable for one culture may be offensive, illogical, and unreasonable for the other. Cultural background strongly influences the legal systems and understandings. International Commercial Arbitration being an alternative legal instrument will be expected to be similar in goals and procedure to the legal system the participant is used to. Persons always expect what they are used to, to be the norm. Therefore, cultural backgrounds, by birth or education, also influences how people approach arbitration and what they expect of it in substance as well as in procedure and formalities. This expectation will in many instances be based on repeated experience in the person's cultural context.

While the substantive outcome in International Commercial Arbitration is not usually based on cultural expectation, procedure is. Substantive law and even basic norms will differ not only from culture to culture but also from country to country. Laws are specific and while the expectation is that the decision is at least based on some legal principle, there is no expectation of one concrete and certain outcome. Procedure however, in its most basic form is expected to be the same based on continuous, substantially identical reoccurrence in one's own culture. Participants expect procedure as a part of the formal aspect of culture. A common law, Anglo-American Lawyer will most likely expect a highly adversarial approach, while a civil law East Asian will expect that an inquisitorial and conciliatory approach be taken by the arbitral panel and all parties involved. This basic difference plays out in the timing and ease of introduction of evidence, record keeping, and other examples further discussed below.

15. Id.
16. Id.
17. See generally the works of E.T. Hall, THE SILENT LANGUAGE; THE HIDDEN DIMENSION: BEYOND CULTURE; AND THE DANCE OF LIFE.
18. See Harris & Moran, supra note 3, at 40-42.
20. Even the two common law countries, the United Kingdom and United States, differ widely on how much discovery is allowed.
21. This is not to mean that participants cannot be completely surprised by an outcome. Often a different legal principal was applied than expected.
Expectancy of a certain procedure is worth analyzing in light of the predominant legal systems. The arbitrator may be of a culture that expects the proceeding to be conducted in one way, while the parties may be prepared for another, their own way. What the main differences are and how exactly they can play out will be discussed below.

III. DIFFERENCES IN LEGAL CULTURE

Two legal systems or cultures are predominant in the world today: Common Law and Civil Law. Within these main legal systems, different regionally based sub-cultures exist, which maintain their own special traditions. This section will discuss the attributes of first Common and Civil Law, and then continue to describe local distinctions. This paper will briefly sketch infra how these differences and distinctions arose and what purposes they serve in their respective environments.

Recent doctrinal writings indicate an increasing trend toward harmonization of international arbitral procedure. For example, it is generally accepted that a person who has served as mediator or conciliator between the parties to the current dispute shall not serve as umpire. Domestic legislation and procedures of international organizations concerning International Commercial Arbitration evidence this assessment further. This text will focus on the remaining differences. Nevertheless, cultural differences are far from irrelevant today, because neither ad hoc nor institutional rules adopted by the parties answer all procedural questions.

A. Common Law & Civil Law

While rules, which have been agreed upon by the parties, give some guidelines for the procedure, the individual preference of the participants plays an important role. This preference relates to the cultural background of each

22. See generally SANDERS, supra note 19.
23. These attributes will be directed at procedure only.
24. See e.g., SANDERS, supra note 19, at 55; see also Lucy Reed & Jonathan Sutcliffe, The "Americanization of International Arbitration?, 16(4) MEALEY'S INT'L ARB. REP. 37,(2001).
25. Bernardo M. Cremades, Overcoming the Clash of Legal Cultures: The Role of Interactive Arbitration, in CONFLICTING LEGAL CULTURES IN COMMERCIAL ARBITRATION (Stefan Frommel & Barry Rider eds., 1999). He limits this statement by saying that parties can still nominate the person if so desired.
26. Most modern international arbitration conventions such as the PCA rules on arbitration of environmental disputes, as well as the increasing adoption of the UNCITRAL model law into domestic law (or its use as guiding light), are only examples of increased harmonization of rules for arbitration. This is true for both institutional and ad hoc arbitrations, as discussed before.
participant and influences all aspects of the International Commercial Arbitration, for example, choice of International Commercial Arbitration rules, arbitrators, location for the International Commercial Arbitration, and expectations in process and outcome.\textsuperscript{28}

Methodology of the approach makes the first difference, which impacts expectations, apparent. A Common Law lawyer expects an adversarial approach,\textsuperscript{29} where the judge or arbitrator has a limited role. The adversarial approach manifests itself in all stages of the proceeding: notification, identification of facts, responsibilities of the parties, and so forth.\textsuperscript{30} This system was created because of mistrust of judges, the smaller the roles of judges in the proceedings the easier for the parties to believe in the justice and fairness of the outcome.\textsuperscript{31} The Civil Law expects an active judge and an inquisitorial system.\textsuperscript{32} This distinction appears logical, based on the assumption that not a jury but the judge decides the case and hence needs to make sure he has all the information. In Civil Law countries, judges were not mistrusted. Their education made them experts in assessing a case correctly, while the juror, potentially a neighbor, was considered more concerned with his or her own interests and not trained to deal with important legal issues.\textsuperscript{33}

The second distinction between Common Law and Civil Law is that there is no clear division of interlocutory proceeding and hearing in Civil Law.\textsuperscript{34} Common Law admits information of the pre-hearing stage only in exceptional circumstances. This separation can be explained by reference to the mistrust of judges and the jury system in Common Law countries once again. Where, as in Civil Law, the judge is also the fact-finder, he will get to know everything about the case regardless. There is no practical reason for a divorce of hearing and pre-hearing phase. In Common Law, the jurymen do not receive any information before the proceeding.\textsuperscript{35} Therefore, all the information needs to be introduced to the jury again. Lawyers have to select and properly present information, because the jury is composed of laypersons, which might consider irrelevant evidence or fail to understand anything too complicated.

\textsuperscript{28} RICHARD GARNETT ET AL., A PRACTICAL GUIDE TO INTERNATIONAL COMMERCIAL ARBITRATION 52 (1999).

\textsuperscript{29} See Reed & Sutcliffe, supra note 24.

\textsuperscript{30} See GARNETT ET AL., supra note 27, at 53.

\textsuperscript{31} See Borris, supra note 27, at 6. In the U.S. judges were English and were disliked and the United States mistrusted authority, mainly because of the age of their democracy.

\textsuperscript{32} See BORRIS, COMMON LAW AND CIVIL LAW: FUNDAMENTAL DIFFERENCES AND THEIR IMPACT ON ARBITRATION, 78 (1994); see also Lucy Reed & Jonathan Sutcliffe, supra note 24.

\textsuperscript{33} See BORRIS, supra note 32, at 178.

\textsuperscript{34} See GARNETT ET AL., supra note 28, at 54.

\textsuperscript{35} They are not yet selected.
To illustrate the cultural impact at all stages of the proceeding, this paper will discuss the UNCITRAL Model Law on International Commercial Arbitration in light of some specific expectations in the proceedings, differing between Common Law and Civil Law. This paper will treat only the UNCITRAL rules for this purpose due to their representativeness and their wide use. These rules provide for great discretion in determination of procedure.

Most commonly cited differences that influence the expectations are:

a) Whether the proceedings are oral or in writing;

b) Discovery and pre-hearing procedure;

c) Treatment of other witnesses, specifically parties and cross-examination; and

d) Record keeping.

1. Oral or Written Proceedings

The UNCITRAL rule 24(1) leaves the decision whether to hold a hearing to the arbitral tribunal, unless parties agree otherwise. A hearing shall be held if a party so requests. It is not stated which weight will be given to such pleadings and how much detail will be good practice depends on any given arbitrator's preference.

Under the Common Law, pleadings have little value, because the oral hearing is of most importance. The fact finder has to be convinced during the "show", the proceeding of whatever nature. This can largely be explained by the need for persuasion of a jury of laypersons. Paper tends to be less persuasive than emotions and live testimony. In Civil Law all information has to be identified and provided in writing and often in excessive detail as soon as possible. This is evidenced by e.g., the German Code of Civil Procedure § 296. A judge is not (should not be as easily) moved by emotion and a judge could extract the relevant facts more quickly from paper than from lengthy witness testimony and cross-examination. The Civil Law lawyer expects the documents provided to amply support the point of view, and the Common Law

36. See UNCITRAL supra note 1.

37. There are regional arbitration rules precisely because there are differences in culture. See SANDERS, supra note 3, at 13.

38. UNCITRAL, supra note 1, at § 19.

39. UNCITRAL, supra note 1, at § 24(1).

40. See Borris, supra note 27, at 6.


42. The judge can ask a witness everything he needs to know when documents are not sufficient. Often this will be unavailable. Thus, the Civil Law judge prefers paper as a general matter.
lawyer is perplexed because of the lack of weight given to his advocacy by the Civil Law arbitrator. 43

2. Discovery and Pre-Hearing Procedures

The secondly impacted area of arbitral procedure is the pre-hearing stage, including discovery. The UNCITRAL rules provide in article 23(1) that parties should support their claims and defenses with all relevant documents, but are also allowed to use references to evidence to be submitted later only, unless otherwise agreed. 44 In other words, information must be provided, but the point in time is up to the party, so long as a reference to this evidence exists. In article 24(3), UNCITRAL requires all material submitted to the panel to be submitted to the other party as well. 45 This is the extent to which pre-hearing procedure is discussed in the Model Law.

Due to this freedom of procedure, culture has room to create expectations. In Common Law, discovery and pre-hearing procedure are considered one of the most important tools in dispute resolution (either judicial or through ADR). 46 Pre-hearing discovery is necessary in Common Law. The evidence needs to be neatly presented for the reasons discussed supra, which is impossible if the hearing is the first time the evidence is encountered by the parties. Thus, while attempting to receive as much information as possible before the hearing, the Common Law advocate will seek to delay rendering information to obtain a strategic benefit. With these considerations in mind, the advocate will submit evidence late and potentially upset the Civil Law arbitrator, who seeks prompt disclosure of all relevant information.

In Civil Law the obligation to disclose every relevant piece of information as soon as possible renders extensive Common Law discovery (partially) unnecessary. 47 For many Civil Law jurisdictions, such as Germany, discovery is also connected with privacy concerns. 48 In Civil Law there is no need to present the evidence the neat Common Law way. Evidence is presented over time and is reviewed by the judge regardless of when it becomes known. If any information appears to be missing, the arbitrator or judge will request it. Also depositions take on varying degrees of importance for Common Lawyer and Civil Lawyer. If the hearing is approached with the expectation of a deposition not being primary evidence, the conduct at the deposition (if they take place at all) is going to be different from the expectation of it being

43. Compare Lucy Reed & Jonathan Sutcliffe, supra note 24, at II.
44. UNCITRAL, supra note 1, at § 23(1).
45. UNCITRAL, supra note 1, at § 24(3).
46. See Christian Borris, supra note 27, at 10.
47. Id. at 10ff.
48. Id. at 11.
equivalent to a witness statement on the stand. Preparation needs to be adapted, the lawyer has to take into account that the entire material will be reviewed and that withholding of information harms the case rather than helping it. In addition, a Civil Law arbitrator may even prefer a written statement to an oral one for reasons of efficiency, as mentioned above.

3. Treatment of Witnesses

Treatment of witnesses is another area where cultural difference is most visible. The UNCITRAL is silent on the matter. Several issues are implicated in the treatment of witnesses:

1) Whether a party can be a witness;
2) Whether the statements can be written;
3) Whether written statements are preferable over directly examined witnesses; and
4) Whether cross-examination should take place.

In Common Law a party may be called as witness, while the Civil Law does generally not allow parties to be witnesses. In Civil Law, the expectation is that the position of parties will be amply reproduced through other documents. In Civil Law, managers of a company are considered parties. Although the question whether a party can be a witness remains a distinction between Common and Civil Law, in International Commercial Arbitration it is a distinction without a difference. Practice has settled toward the Common Law approach.

Whether written witness statements are admissible depends on the procedure chosen, but largely, as in the UNCITRAL. The inference drawn from a written statement depends on the legal culture of the arbitrator. In Common Law countries, due to the importance of the actual hearing and the separation of information gained before the hearing from information presented at the hearing, cross-examination remains the best tool to test witness credibility and to bring out facts not otherwise presentable. In Civil Law countries, the judge examines witnesses as to contentious issues. He, as the

49. See Reed & Sutcliffe, supra note 24, at III.
50. Id. at IV.
51. See Borris, supra note 28, at 15; see also Reed & Sutcliffe, supra note 24, at IV.
52. Id.
53. See Reed & Sutcliffe, supra note 24, at IV.
fact-finder and a professional, is deemed to assess the witness credibility by himself and only with reference to statements he deems important.\textsuperscript{56} Although a difference between the two traditions, this point adds little to the point made supra concerning pretrial procedure.

The distinction in treatment for unwilling witnesses depends less on culture and more on country, the procedure what one needs to compel the witness differs.\textsuperscript{57} These issues are related much more to substantive law and does not relate as strongly to culture. Hence, it exceeds the scope of this paper and will not be treated in more detail.\textsuperscript{58}

4. Record Keeping

The UNCITRAL does not mention record keeping. In the Common Law tradition, a reporter records the proceeding verbatim.\textsuperscript{59} In the Civil Law system, the chairman usually takes notes of the witness statement in the manner in which he sees fit. The parties discuss these notes and supplement them to prepare a written summary.\textsuperscript{60} A summary makes sense where the evidence is mostly documentary and witnesses are heard for specific information only. This method obviously reduces the impact of cross-examination in case it is conducted and can be the source of great dismay on Common Law lawyers, who rely on every word that the witness utters.

Although the above-mentioned differences in legal cultures factor into the proceedings, they are not the only issues to be considered. Within the predominant legal systems, further subdivisions exist.

The Common Law and Civil Law concepts and the respective conceptions of International Commercial Arbitration and legal culture have radiated throughout the world.\textsuperscript{61} The concepts are largely colonial remainders and can

\textsuperscript{56} Id.

\textsuperscript{57} In the United States, arbitrators can subpoena witnesses. In England, only the court may do so. In Denmark, the arbitral tribunal has to make a request to the court to subpoena, while in Belgium, the parties can ask a court themselves. See SANDERS, supra note 3 at 256f.

\textsuperscript{58} For an American case illustrating this point see In Re: Application of Technostroy Export, 853 F.Supp. 695 (S.D.N.Y. 1994). In this case arbitration took place in Sweden. The Russian party to the arbitration proceedings sought discovery in New York in connection with the arbitration. The American party objected on grounds that discovery in the place or arbitration was not available without the ruling of the arbitrator and that discovery must, if at all, be mutual. The court agreed on this basis. While this case shows differences from country to country, it is not truly culturally based. The Russian party was well aware of the differences and sought to use them in their favor.

\textsuperscript{59} See Newman, supra note 54, at 84.

\textsuperscript{60} Id.

\textsuperscript{61} Id.
be traced in individual tradition to the respective colonial powers and their legal systems.  

B. Regional Cultures

Today, either Civil or Common Law influence most nations; nevertheless differences lay in the regional applications. This section discusses each culture and its distinction and the impact on the International Commercial Arbitration. The main cultures this paper refers to are Non-Arab African Countries, Latin American Countries, East Asian, and Arab Countries; e.g., Belgium for the former Congo, the Netherlands for Indonesia.

1. Non-Arab Africa

This section excludes Arab countries like the Sudan, because cultural differences in Arab Countries are considered together, due to the shared feature of Shari’a law.

There is currently no African distinctiveness in the procedural rules. This however, does not prejudice certain culturally based expectations. In non-Arab Africa, a common dislike of arbitration is based on the perceived potential for the bigger bargaining power to abuse the freedom of contract and thus oppress the other party. Countries in Africa are particularly well known for their dispute settlement processes that are conciliatory in nature. African social values in conjunction with strong family units fostered this conciliatory environment rather than the (in comparison) more adversarial arbitration process. Before colonialization every region in Africa had these conciliatory methods of dispute resolution, which were suppressed but not destroyed during the colonialization period.

In the francophone areas of Africa, International Commercial Arbitration was largely suppressed. This might also explain the current lack of significant participation of African arbitrators in International Commercial Arbitration. As

63. Id.
64. Roland Amoussou-Guenou, Part IV – Francophone Africa, in ARBITRATION IN AFRICA 269, 276, 277 (Cotran et al. eds., 1996).
66. Id. at 15.
67. Id. at 16.
68. Id. at 115.
69. See SANDERS, supra note 19, at chap. II intro.
Africa consists mostly of developing countries, International Commercial Arbitration is viewed with skepticism.\footnote{70} In traditional African alternative dispute resolution, little procedural uniformity can be found. Much of African tradition ADR is based on custom and thus, widely varies and is highly informal.\footnote{71} There is for example no formal requirement of writing or record keeping in traditional African dispute resolution\footnote{72} and a written agreement to arbitrate is today almost unknown.\footnote{73}

This results, usually in much control of courts over procedure. Lawyers may have to get leave from a court for many things they would usually expect to be handled by the arbitral panel. In fact, the courts form an essential element of procedure and process in arbitration in Africa. Arbitral functions required under a law or treaty in Africa could, for the sake of efficiency, specialization and centralization be conferred to a court.\footnote{74}

2. East Asia

Asia has a very distinct cultural approach to International Commercial Arbitration. Two important differences dominate the picture. First, the conception of Western Common Law and Civil Law (which form the basis of Asian legal systems as well) has certain assumption for the role of codes and contracts that are not shared in most of Asia.\footnote{75} The conceptions of the contractual or institutional rules for International Commercial Arbitration are thus approached (like any other contract or code) with different understandings of their meanings, although the terms may be clear. East Asian culture prefers non-confrontational methods of conflict resolution.\footnote{76} A typical example is Japan. Under a stable feudal regime, which lasted for more than 250 years until 1868 (Tokugawa period), the practice of law was not allowed. There was a strong communal system to promote amicable settlement of disputes and to suppress litigation. Litigation was condemned as a moral wrongdoing to the society and to the other party. A good judge was not supposed to give a judgment but to try to bring about a good conciliation. This tradition was deeply embedded in the people's mind and formed the dispute resolution culture in Japan,\footnote{77} as well as other East Asian Countries. The legal basis for modern

\footnote{70} This skepticism is slowly declining. See David Butler & Eyvind Finsen, *Southern Africa*, in *ARBITRATION IN AFRICA* 193, 198 (Cotran et al. eds., 1996).
\footnote{71} See ASOUZU, *supra* note 65, at 118.
\footnote{72} Id. at 119.
\footnote{73} Id. at 141.
\footnote{74} Id. at 172.
\footnote{75} See McConnaughay, *supra* note 62, at 458.
\footnote{76} Id.
arbitration procedure was first established in Japan in 1890, with the enactment of the Code of Civil Procedure (Law No. 29, 1890), which substantially followed the German Code of Civil Procedure of 1877 as a model. But even though Japan has modernized its arbitral practice, the mistrust of arbitration can still be felt in e.g., the requirement of specificity of the arbitral agreement. Another aspect of Japanese arbitration is the remaining tendency to structure an arbitration in a conciliatory fashion, e.g., the default number of arbitrators is two, an even number as opposed to the otherwise chosen odd numbers. And will approach International Commercial Arbitration with the same culturally based attitude.

More than 120 years ago, von Jhering wrote about Der Kampf ums Recht (the fight for the right). Litigation is an arena where such a fight takes place. It is a moral wrong not to assert one's right. What I call the conciliation culture, on the other hand, is based on a diametrically opposed ideology. It stems from a deep mistrust in any pre-set rules of law and the concept of right as an absolute entitlement.

When a Western culture and a East Asian culture join for International Commercial Arbitration, the approach of the lawyers have to be adapted to the culturally based preference of the arbitrator. Overly confrontational behavior may lead an East Asian arbitrator to draw different inferences from a non-East Asian arbitrator.

The second important difference of culture influencing the arbitral procedure is confidentiality. International Commercial Arbitration is a loss of face for the East Asian party. While Western culture prefers open proceedings, the East Asian party will prefer to keep it proceedings and most information confidential. These differences in preference will also influence how the proceeding will be conducted despite general and very loose norms about it in institutional rules and most International Commercial Arbitration contracts.

78. See Prof. Teruo Doi, Japan, in ICCA HANDBOOK chap. I (1)(1996).
79. Id. at chap. I.
80. Id. at chap. I(3).
81. See SANDERS, supra note 19, at 64.
82. See TANIGUCHI supra note 77, at section (III).
83. See Urs Martin Lauchli, Cross Cultural Negotiations with a Special Focus on ADR with the Chinese, 26 WM. MITCHELL L. REV. 1045, 1076 (2000). Promotion of long-term relations and the preference for conciliation will always the guide the Chinese mediator.
84. See McConnaughay, supra note 62, at 459.
85. The UNCITRAL is silent on the matter.
In CIETAC (China International Economic and Trade Arbitration Commission) for example, rules for arbitration are structured very differently from common western arbitration rules. The rules provide for no appellate process, which is usually common for international commercial arbitration institutions. Another difference, again showing the preference for conciliation is that the arbitral tribunal may conciliate if they so choose. The last important difference in the Cietac procedure is the availability of a summary procedure for amounts below RMB 500,000 Yuan. Many western lawyers find the CIETAC rules oppressive and unworkable.

3. Latin America

Latin America has a slowly disappearing hostile attitude toward International Commercial Arbitration. Traditionally, Latin American countries developed theories such as the "Calvo" and "Drago" doctrines to prevent complete freedom of contract concerning international commercial arbitration. A number of Latin American countries have modernized their arbitration laws or are in the process of doing so, mainly to attract international arbitration business. Some countries modernizing their laws base their new arbitration legislation on the Model Law of UNCITRAL. This is the case in Brazil, Guatemala, Mexico, and Peru. Where International Commercial Arbitration is conducted, the arbitral panels have an even stronger stand during the proceeding than even ordinary Civil Law arbitrators would take. They act mostly without judicial assistance. A Latin American participant would thus expect strong control during the proceeding itself from the arbitrator. Latin American participants in International Commercial Arbitration would expect rather inflexible rules and may thus be surprised at International Commercial Arbitration, where the rules are so amendable toward party autonomy. Nevertheless, Latin American courts maintain strong supervisory powers over

88. See SANDERS, supra note 19, at 39; see also Fernando Mantilla-Serrano, Major Trends in International Commercial Arbitration in Latin America, 17(1) J. INT’L ARB. 139 (2000).
89. See ASOUZU, supra note 65, at 413.
92. See Mantilla-Serrano, supra note 88, at 141.
93. Id.
the arbitral process. Party autonomy is not paramount like in the traditional Western World.

4. Arab World

Arbitration has an important role in the mentality, history, and customs of Arab Nations. In contrast to other regional structures, the concept of International Commercial Arbitration in the Arab world is truly culturally based, (the basis is the Muslim faith.) because both Civil Law and Common Law have influenced different Arab countries.

The predominantly impacting factor is the Shari'a, the religious law for Muslims. In Moslem Law the very concept of International Commercial Arbitration was disputed. There are two views on this topic: the first holds that International Commercial Arbitration is a form of amiable composition, conciliation. According to this view, the number of arbitrators is even and a decision requires unanimity. The other sees it as judicial action with an odd number of arbitrators. The Ottoman Empire adopted the conciliation approach.

In the Arab World, much like in Asia, International Commercial Arbitration is more similar to conciliation, because the focus is on the spiritual and the relationships not on an allocation of blame. A very important distinction is that it is expected that the Shari'a and its procedural requirements apply regardless of what the contract states. This is especially true for International Commercial International Commercial Arbitration because the Shari'a law has an element of international law. It applies regardless of the jurisdiction the Muslim is in, based on religion, transcending national boundaries.

Expectations of Muslim arbitrators and participants in specific parts of the arbitral procedure vary distinctly from Western approaches. The UNCITRAL provides for party autonomy, but in absence of an agreement, the number of

94. See e.g., Prof. Marco Gerando Monroy Cabra, Colombia, in ICCA HANDBOOK.
95. See Abdul Hamid El-Ahdab, General Introduction on Arbitration in Arab Countries, in 1 ICCA HANDBOOK chap. 1.
96. See SANDERS, supra note 19, at 50. Common Law for Iraq, Jordan, Sudan and Civil Law for Algeria, Lebanon and Libya.
97. Although it contains only few references to arbitration.
98. See El-Ahdab, supra note 95, at chapter II.
99. Id.
100. Id.
101. Id. at 133.
102. It is further applicable extraterritorially.
103. See Austin Amissah, Ghana, in ARBITRATION IN AFRICA 113, 128 (Cotran et al. eds., 1996).
arbitrators is three, not one.\textsuperscript{104} A Muslim Lawyer from a traditionally religious country will expect that only one arbitrator is chosen. The Shari‘a permits exceptions to the one arbitrator rule, but if an exception is permitted, the decision of the panel has to be unanimous.\textsuperscript{105} In non-Arab cultures, the majority rule applies. This leads to different expectations in the choice of arbitrators and if there is more than one arbitrator a different expectation in the outcome (ay a close case has 5 arbitrators). The Arabic parties may well expect that at least one sees the other side, thus avoiding any result of the arbitration and encouraging a settlement.

Shari‘a also limits the expectations of who can be an umpire. An Arab party will expect, in accordance with the Shari‘a, that the arbitrator must be a male and familiar with the Shari‘a,\textsuperscript{106} while other cultures will not expect such limitations. UNCITRAL article 11 does not provide for qualifications or gender, but contains complete party autonomy. The Shari‘a law, however, provides for much procedural freedom. The only requirements for Arbitration procedure are that the award must specify that the arbitrator heard the parties' arguments and that the proceedings took place in his presence.\textsuperscript{107}

The influence of Shari‘a on International Commercial International Commercial Arbitration is however declining, since it does not apply where e.g., international conventions supercede.\textsuperscript{108}

I will address these modern developments by contrasting the examples of Egyptian and Tunisian treatment of International Commercial Arbitration with what has been described so far. The Egyptian arbitration laws are inspired by the UNCITRAL rather than Shari‘a, as it is the case in Saudi Arabia.\textsuperscript{109} In the new Egyptian Legislation enacted in 1994 for example the application of the act is limited by territory, unlike earlier arbitral acts that were applied extraterritorially like in Shari‘a. Arbitrators needed to be appointed in the instrument already under older legislation, the new legislation provides for party autonomy.\textsuperscript{110}

In Tunisia, prior to 1993 only domestic arbitration was regulated. Again, the act is modeled on the UNCITRAL model law. The number of arbitrators needs to be uneven and the majority rule applies unlike prescribed in Shari‘a

\textsuperscript{104} UNCITRAL, supra note 1, at § 10.
\textsuperscript{105} See SANDERS, supra note 19, at 51.
\textsuperscript{106} See generally Afchar, The Muslim conception of Law, in INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW, vol 2 ch. 1 (1975); see also SANDERS, QUO VADIS ARBITRATION 51 (1999).
\textsuperscript{107} See Abdul Hamid El-Ahdab, General Introduction on Arbitration in Arab Countries, in ICCA HANDBOOK, chapter 2(4)(1996).
\textsuperscript{108} See Amissah, supra note 103, at 130.
\textsuperscript{109} ABDULHAMEDEL-AHDAB, ARBITRATION WITH THE ARAB COUNTRIES 155 (2nd ed. 1999).
\textsuperscript{110} Id. at 173.
Law, where unanimity is the norm. Nevertheless, an inexperienced lawyer or layperson may still expect some of the commands of the Shari’a law to be universal, or at least the norm.

IV. USING THIS INFORMATION

Knowing the distinctions this paper has shown is helpful in every International Commercial Arbitration. However, knowledge is only the key, not the solution. Depending on the stage of the process, the solution is one of two things: either the choice of the right arbitrator or an initial conference.

The participants to International Commercial Arbitration should select an arbitrator according to his experience (both life and legal) and cultural background (not just nationality) to obtain a strategic benefit. What the ‘best bet’ concerning background and experience is depends on what the parties want to achieve.

An initial conference should take place regardless, to clear any misunderstandings before any further steps after the arbitrators are chosen. During the initial conference, not only should applicable law and location of the proceeding be discussed, but also the weight of specific forms of evidence, the treatment of witnesses, and the role of the arbitrator (whether he should be attempting conciliatory techniques where he sees the possibility, or whether such techniques would be regarded by the parties as bias). Depending on the cultures and backgrounds of the participants, the list of what should be discussed varies. This paper gives a useful set of possible considerations for each culture.

V. CONCLUSION

There are problems that rules do not solve. Neither ad hoc nor institutional rules contain answers for all procedural questions that may arise in International Commercial Arbitration. On the contrary, as seen on the example of the UNCITRAL rules, these rules are often deliberately vague to avoid prejudicing the arbitral tribunal’s discretion. There is a recognizable influence of culture even in the experienced lawyer or arbitrator. Despite harmonization of rules governing International Commercial Arbitration, increased globalization and perforation of information about other legal systems, this paper showed that culture continues to play a role.

113. See GARNETT supra note 28, at 4.
This paper was intended to serve a guide for the unwary to begin to research what to expect and what strategy may be more successful with which culture. It is also intended to advocate initial conferences with all participants about their expectations to avoid embarrassing moments in the course of the International Commercial Arbitration. As stated in the introduction, this text attempted to create a new understanding and respect for the other cultures, an understanding that avoids judging others by one’s own standards, because at one point the other’s standards might be there to judge you. Preparation, insight, and respect are very helpful tools to avoid problems in cross-cultural International Commercial Arbitration.
THE LEGALITY OF NATO'S INTERVENTION IN YUGOSLAVIA IN 1999: IMPLICATIONS FOR THE PROGRESSIVE DEVELOPMENT OF INTERNATIONAL LAW

Jeffrey S. Morton*

I. INTRODUCTION ........................................ 75

II. THE NATO INTERVENTION ................................ 76

III. THE LAWS OF WAR ........................................ 79
   A. The Historical Evolution of the Laws of War .... 79
   B. Jus ad Bellum ...................................... 80
   C. Charter Law: Contemporary Extensions of Jus Ad Bellum ... 82

IV. YUGOSLAVIA’S CLAIMS AGAINST NATO STATES .............. 82

V. THE LEGALITY OF THE USE OF FORCE BY NATO DURING THE KOSOVO WAR ........................................ 84
   A. A Strict Application of Charter Principles
      Relating to the Use of Force .......................... 88
      2. Security Council Authorization ..................... 89
   B. A Liberal Analysis of Charter Law ...................... 92
      1. Ambiguous Authorization .......................... 92
      2. The Council’s Refusal to Deem NATO’s Actions Illegal 93
      3. Ex Post Facto Authorization ........................ 93
      4. Regional Responses to Threats to the Peace .......... 94
   C. Extra-Charter International Law .................... 95
      1. Humanitarian Intervention ........................ 95
      2. Intervention in Response to Genocide ............. 98

VI. CONCLUSION ........................................... 99

I. INTRODUCTION

NATO’s intervention in Yugoslavia in 1999 in response to violations of human rights raises a number of legal and moral questions concerning the right

---

* Professor Jeffrey S. Morton received his Ph.D. from the University of South Carolina in 1995, specializing in international law. The author of The International Law Commission of the United Nations (University of South Carolina Press, 2000) and numerous journal articles, professor Morton is currently Associate Professor of International Law & Politics and Director of Graduate Studies in the Department of political science at Florida Atlantic University.
of states to respond to humanitarian disasters. The decision by ten NATO members to intervene without an explicit authorization from the United Nations Security Council brings to the fore several legal issues relating to the right of states to impede upon the territorial sovereignty of other states, the balance between state rights and individual rights, and the role of the Security Council in controlling the international use of force. The scholarly debate over the legality of NATO's intervention has not produced a consensus on these issues. Despite a general agreement on the historical facts involved in the case the legal community is deeply divided over the most relevant and authoritative legal principles which should be used to reach a judgement on NATO's actions. As Pellet correctly notes, the divergent legal positions taken by leading scholars reflect the different "angles" from which they analyze the same debate.\(^1\)

While a full legal account of NATO's intervention requires both an assessment of the onset of the war as well as an analysis of the conduct of NATO forces once the war had begun, the scope of this article will be limited to the right of NATO to intervene, as restricted by contemporary *jus ad bellum* legal principles. A strict application of the United Nations Charter's requirement of a Council authorization results in a conclusion that NATO's intervention in Yugoslavia constitutes a violation of international law, while an assessment of the intervention that takes into account additional Charter principles, the totality of Security Council resolutions addressing the situation in Kosovo, and non-Charter international law provides grounds for a legal justification for NATO's actions. The International Court of Justice, where cases by Yugoslavia have been filed against the states involved in the intervention, will be the final arbiter of which assessment will prevail.

This article begins with an overview of NATO's intervention in 1999. Next, a review of the evolution of the laws of war is undertaken, with particular attention paid to the emergence of Charter law and its implications for the traditional laws of nations. The following section outlines the case filed by Yugoslavia against the NATO states that participated in the intervention, which leads to a legal assessment of the intervention. A conclusion section addresses the chief legal and political issues raised by the NATO intervention in Yugoslavia and its implications for the progressive development of international law.

II. THE NATO INTERVENTION

Background information on the Kosovo crisis is well documented in the literature. Kosovo gained autonomy within the state of Serbia in 1946, and this special status was confirmed in the 1974 Yugoslav Constitution. The

---

autonomy, however, was revoked in 1989, a move justified by Serbian President Slobodan Milosevic who claimed that the Serb minority in Kosovo was at risk. Kosovo Albanians, in response, resorted to the development of parallel institutions to protect the interests of the general population of the province, along with insurrection tactics aimed at either retaining the province’s lost autonomy or gaining independence from Yugoslavia.

The situation in Kosovo became more explosive after the financial and governmental collapse in neighboring Albania in 1997, after which men, materiel and arms flowed freely across the unguarded border. The Kosovo Liberation Army (KLA) capitalized on the situation by increasing its attacks on Yugoslav positions and officials. Yugoslav forces responded with large-scale attacks on KLA and ethnic Albanian positions, resulting in more than 200,000 Kosovar refugees and displaced persons in 1998 alone. Three United Nations Security Council resolutions, invoking Chapter VII of the Charter, addressed the situation in Kosovo, regretting the loss of life and qualifying the situation as a threat to regional peace and security. The Russian Federation emphasized that despite the reference to Chapter VII no use of force was contemplated, whereas the United States announced that NATO was planning military operations to guarantee, if necessary, compliance with the terms of the resolutions. The military threat pushed the Belgrade government to sign two agreements. The first agreement, concluded with the OSCE, established the Kosovo Verification Mission (KVM), which was charged with monitoring compliance with Security Council Resolution 1199. The second agreement, concluded with NATO, established a NATO air surveillance mission over Kosovo and defined the main technical aspects of the operation.

A diplomatic initiative was undertaken in January of 1999, when members of the Contact Group (France, Italy, Germany, Russia, the United Kingdom, and the United States) convened negotiations between the Kosovo Albanians and the Yugoslav government to address a political framework for Kosovo’s autonomy within Serbia for a three-year period, deferring a final settlement. The agreement drafted at the Rambouillet conference warned of NATO action in the event that an interim settlement was not reached. When the Kosovo representatives accepted the provisions in the Rambouillet Accord and Belgrade rejected them, NATO commenced its military campaign ostensibly to halt what Vaclav Havel, President of the Czech Republic, referred to as “...the systematic, state-directed murder of other people.”

3. Id. at 5.
4. Vaclav Havel, President of the Czech Republic, Address to the Canadian Senate and House of Commons, (Apr. 29, 1999).
On March 24, 1999, NATO launched its air attack against Yugoslavia. The 78-day attack was commenced in response to failed efforts to negotiate a political settlement of the crisis over Kosovo’s autonomy and the ensuing humanitarian dilemma in the province. The NATO intervention, labeled Operation Allied Force, was undertaken with five stated non-negotiable objectives, as follows:

1. An end to the killing by Yugoslav army and police forces in Kosovo;
2. Withdrawal of those forces;
3. The deployment of a NATO-led international force;
4. The return of all refugees; and
5. A political settlement for Kosovo.

On the day that the NATO bombing began, President Clinton referenced three intentions of the intervention, namely, to avert a humanitarian catastrophe, preserve stability in a key part of Europe, and maintain the credibility of NATO. In the months following the conclusion of the war, United States Secretary of Defense William Cohen and General Henry Shelton, Chairman of the Joint Chiefs of Staff, gave a joint statement before the United States Senate Armed Services Committee which outlined the following objectives of Operation Allied Force:

1) Demonstrate the seriousness of NATO’s opposition to Belgrade’s aggression in the Balkans;
2) Deter Yugoslav President Slobodan Milosevic from continuing and escalating his attacks on helpless civilians and create conditions to reverse his ethnic cleansing; and
3) Damage Serbia’s capacity to wage war against Kosovo in the future or spread the war to neighbors by diminishing or degrading its ability to wage military operations.

A common denominator of the three expressions of intent that underpinned NATO’s decision to intervene in Yugoslavia is the objective to end Yugoslav attacks on innocent civilians. It is upon the humanitarian objective that some NATO members justified their participation in the intervention.

III. THE LAWS OF WAR

The laws that regulate the use of force in international relations date to antiquity. In contemporary times, the international laws of war were codified in a series of multilateral treaties that sought to provide specificity to the legal rights and responsibilities of combatants involved in war. Before outlining the laws that regulate nations and their combatants, a brief review of the pre-modern development of the laws of war is provided. That section is followed by an examination of the laws of war with respect to the right of nations to go to war.

A. The Historical Evolution of the Laws of War

Rules that regulate warfare date, at a minimum, to classical Greek times, with two documented agreements establishing limitations on recourse in time of war. The first effort is reported by the geographer Strabo, who claimed that in the course of the War of the Lelantine Plain on the island of Euboea (circa 700 B.C.) the parties to the conflict agreed to ban the use of projectile missiles. A second agreement, again limiting combatants in time of war, is found in the writings of the orator Aeschines, who suggests that after the First Sacred War (circa 600 B.C.) the victorious states swore never again to cut off besieged fellow Greeks from food or water. While the formal development of the laws of war during classical Greek times appears to be limited to these two instances, less formal rules that regulate warfare developed in the form of unwritten conventions governing interstate conflict. Chief among these rules are the necessity of a declaration of war, the binding nature of treaties during war, the respect for non-military symbols, the right to request a return of dead soldiers, restrictions on the treatment of prisoners of war, and prohibitions on the targeting of non-combatants.

During the Age of Chivalry, the rules that regulate military behavior were influenced by the Romans, whose principal focus was the regulation of the right to go to war, which, accordingly, required justification. Stacey notes that the two central justifications for going to war were defense of frontiers and the

10. For a review of literature relating to the norms of warfare during classical Greek times, see also Frank E. Adcock & D.J. Moseley, DIPLOMACY IN ANCIENT GREECE (St. Martin's Press 1975); Yvon Garlan, War in the Ancient World (Janet Lloyd trans., W. W. Norton ed., 1975); Pierre Ducrey, Guerre et Guerriers Dans La Grece Antique (Payot 1985); W. Kendrick Pritchett, The Greek State At War (University of California Press 1971); Peter Karavites, Capitulations and Greek Interstate Relations (Vandenhoek and Ruprecht eds., 1982); and Victor D. Hanson, The Western Way of War (Alfred A. Knopf ed., 1989).
pacification of barbarians living beyond the frontiers.\textsuperscript{11} While the Romans contributed to the development of the laws of war as they pertain to the right to initiate conflict, the rules developed during classical Greek times relating to conduct in time of war were degraded. Prisoners could be enslaved or massacred, plunder was general, and no distinction was recognized between combatants and non-combatants.

By the eleventh century, however, the distinction between combatant and non-combatant began to re-emerge.\textsuperscript{12} Knights were regulated in their treatment of other combatants at a time when the number of combatants was increasing. By the fourteenth century, the combined effect of knightly practice and legal theory gave rise to a formal system of military law. Secular in their creation, the laws of war at the time were little influenced by a more restrictive code of conduct that emerged from the church. In some ways, the church's position on the laws of war was more advanced and restrictive than the laws that emerged from either proclamation or practice of participants. On the issue of the right to go to war, the church held that for a war to be 'just' it must be preceded by a declaration issued by a competent authority, fought for a just cause, proportional, and toward the aim of establishing a condition of peace. The church's position on the rights and duties of combatants once war had commenced was much less developed, reflecting the church's primary concern with the onset of war.

Thus, while the evolution of international law as it pertains to war can be traced to pre-modern times, the development of a system of laws designed to regulate both the occurrence and conduct of interstate war remained at a primitive stage both in theory and practice until modern times. Parker concludes that most of the modern rules concerning restraint in war did not appear before the middle of the sixteenth century.\textsuperscript{13} The sections that follow examine the contemporary laws of war, with reference to their post-1500 development. The review focuses on the right of states to enter into war, \textit{jus ad bellum}, solely, as that set of laws is essential to undertaking a legal analysis of NATO's intervention in Yugoslavia in 1999.

\textbf{B. Jus ad Bellum}

The legal right of states to enter into war has undergone a transformation over the course of modern history. In the aftermath of the Thirty Years' War (1618-1648) the Treaties of Westphalia ushered in the birth of modern


\textsuperscript{13} Geoffrey Parker, \textit{Early Modern Europe}, in \textit{THE LAWS OF WAR: CONSTRAINTS ON WARFARE IN THE WESTERN WORLD}, supra note 9, at 40.
international law. Without the overarching presence of the church, which had imposed a set of binding laws on states within the geographic confines of the Holy Roman Empire, states were required to negotiate a set of acceptable rules of military engagement. During the era of legal positivism, which peaked during the eighteenth and nineteenth centuries and continued to strongly influence international law during the twentieth century, influential legal scholars\textsuperscript{1} upheld the position that recourse to war was a sovereign right of states and that the competent authority of states enjoyed nearly unfettered \textit{competence de guerre}. According to Beck, Arend and Vander Lugt, the essential characteristic of legal positivism is that international laws are binding only when grounded firmly in state consent.\textsuperscript{15}

It was not until the conclusion of the First World War that international law began to move in the direction of a prohibition of the right of states to enter into war. Through its justification of the imposition of sanctions on Germany by maintaining that Germany and its allies were responsible for an act of aggression, Article 231 of the Treaty of Versailles characterized aggression as an illegal act.\textsuperscript{16} Article 15, paragraph 7 of the Covenant of the League of Nations restricted entry into war to instances when the aim was the "maintenance of right and justice."\textsuperscript{17} The movement to prohibit recourse to war was furthered by the 1928 Kellogg-Briand Pact,\textsuperscript{18} which bound states not to be the first to opt for war. The treaty states:

\begin{quote}
The High Contracting Parties solemnly declare...that they condemn recourse to war for the solution of international controversies, and renounce it as an instrument of national policy in their relations with one another. The High Contracting Parties agree that the settlement or solution of all disputes or conflicts of whatever nature or of whatever origin they may be, which may arise among them, shall never be sought except by pacific means.\textsuperscript{19}
\end{quote}

\begin{footnotes}
\item[14.] E.g., Johann Jacob Moser, Emerich de Vattel, Richard Zouche, John Austin, and Hans Kelsen.
\item[15.] \textsc{International Rules: Approaches From International Law and International Relations} (Robert J. Beck et al., eds., 1996).
\item[17.] \textsc{League of Nations Covenant} art. 15, para. 7.
\item[18.] General Treaty for the Renunciation of War as an Instrument of National Policy, Aug. 27, 1928, art.1 L.N.T.S. 1.
\item[19.] \textit{Id.} at art. 2.
\end{footnotes}
C. Charter Law: Contemporary Extensions of Jus Ad Bellum

It is, however, not until the entry into force of the United Nations Charter that the international community adopted a general prohibition on the right of states to go to war. Article 2, paragraph 4, states "All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state."

On the basis of the principle of non-intervention alone, as espoused in Article 2(4) of the United Nations Charter, there is no legal recourse to war. The force of this prohibition has been reiterated and confirmed by a series of legal documents and agreements. General Assembly Resolution 2131 (1965) on the inadmissibility of intervention in the internal affairs of states, as well as General Assembly Resolution 2625 (1970) stand out in this regard. Further, the International Court of Justice, in its ruling in the Nicaragua case, reaffirmed the sovereignty and territorial integrity of states and the United Nations' prohibition on intervention. It can be argued, with reference to the 1969 Vienna Convention on the Law of Treaties, that the prohibition on resorting to force has evolved to the point of jus cogens, or compelling law.

At the same time, Charter law does make exceptions to the general rule that war is illegal. In three instances, states may legally enter into war: self-defense, collective self-defense, and authorization by the United Nations Security Council acting under Chapter VII of the United Nations Charter. While there is much disagreement among international lawyers and scholars over precisely what gives rise to each of these three exceptions to the principle of non-intervention, it is clear that the right of states to go to war was dramatically restricted by the United Nations Charter.

IV. YUGOSLAVIA'S CLAIMS AGAINST NATO STATES

In response to NATO's bombing campaign, Yugoslavia instituted proceedings before the International Court of Justice on April 29, 1999, against the ten NATO members directly involved in the attack. Yugoslavia asked the
court to hold each of the respondents individually responsible for certain breaches of international law arising from their participation in the air campaign. The Yugoslav case centered upon a series of alleged violations of the law of nations, specifically:

1) The obligation not to violate the sovereignty of another state;
2) The obligation banning the use of force against another state;
3) The obligation not to intervene in the internal affairs of another state;
4) The obligation to protect the civilian population and civilian objects in wartime;
5) The obligation to protect the environment;
6) The obligation relating to free navigation on international rivers;
7) The obligation to respect fundamental human rights and freedoms;
8) The obligation not to use prohibited weapons; and
9) The obligation not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group.

Simultaneously, Yugoslavia submitted requests for the indication of provisional measures asking the Court to order each of the respondents to “cease immediately acts of use of force” and to “refrain from any act of threat or use of force” against Yugoslavia. The allegations submitted by Yugoslavia against the NATO powers cover a vast range of international law, including the laws of war and human rights law. Since the scope of this article is to limited to the legal restrictions on states relating to the onset of war, only the first three alleged breaches are relevant.

In order to establish the Court’s jurisdiction in each of the ten cases submitted, Yugoslavia invoked various bases of jurisdiction, including:

1) Article 36, paragraph 2 of the ICJ Statute in the cases against Belgium, Canada, the Netherlands, Portugal, Spain, and the United Kingdom;
2) Article 38, paragraph 5 of the Rules of Court in the cases against France, Germany, Italy, and the United States;
3) Article IX of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide in the cases against all ten respondents;
4) Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between Belgium and the Kingdom of Yugoslavia (1930); and

---

5) Article 4 of the Convention of Conciliation, Judicial Settlement and Arbitration between the Netherlands and the Kingdom of Yugoslavia (1931).\(^{27}\)

The Court rejected Yugoslavia's requests for the indication of provisional measures on the basis that it lacked jurisdiction \textit{prima facie}. The Court's rejection of the request for provisional measures by Yugoslavia to require the respondents to cease the military campaign was a serious blow to Yugoslavia's attempt to end the conflict, however, it did not affect the underlying issues relating to the legal status of the NATO intervention. In that regard, the Court declared itself profoundly concerned with the use of force in Yugoslavia, which "under the present circumstances ...raises very serious issues of international law."\(^{28}\) It emphasized that all parties before it must act in conformity with their obligations under the United Nations Charter and other rules of international law, including humanitarian law.\(^{29}\) Finally, the Court reminded the parties that they should take care not to aggravate or extend the dispute between them and that, when such a dispute gives rise to a breach of the peace, the United Nations Security Council has special responsibilities under Chapter VII of the United Nations Charter.\(^{30}\)

The underlying claim that NATO members violated the sovereignty and territorial integrity of Yugoslavia was not dismissed, save for the cases against Spain and the United States on the ground that the Court was manifestly without jurisdiction in the two cases since neither state had signed the Court's compulsory jurisdiction clause without reservation. The cases brought by Yugoslavia against the eight remaining NATO respondents, therefore, remains on the Court's docket.

V. THE LEGALITY OF THE USE OF FORCE BY NATO DURING THE KOSOVO WAR

A determination of the legal status of NATO's intervention in Yugoslavia in 1999 depends on a consideration of several issues, namely:

1) The extent to which international law upholds the sovereign rights and territorial integrity of states;\(^{31}\)

\(^{27}\) \textit{Id.}\n
\(^{28}\) \textit{Id. at ¶ 17}.

\(^{29}\) \textit{Id. at ¶ 19, 48}.

\(^{30}\) \textit{Id. at ¶ 37-38, 49-50}.

\(^{31}\) \textit{U.N. CHARTER} art. 2, para 7.
2) The impact of the rise of individual rights, as reflected in contemporary human rights law, on the sovereign rights of states;
3) The legal restrictions placed on states to prohibit the use of military force against other states;\(^{32}\)
4) The role of the UN Security Council in controlling the international use of force;\(^{33}\)
5) The interpretation of Security Council authorization of activity short of the use of force in response to threats to regional or international peace and security; and

While the aforementioned issue areas provide a definitive set of criteria upon which a determination of the legal status of NATO’s intervention in Yugoslavia can be based, a final judgment of NATO’s action depends on one’s interpretation of Council resolutions, core Charter principles, legal principles embodied in traditional (pre-Charter) international law, and the legal obligations of states. As Falk remarks, “...the NATO initiative on behalf of the Kosovars has provoked extremely divergent interpretations of what was truly at stake, the prudence of what was undertaken, and the bearing of law and morality on this course of events.”\(^{34}\)

At the heart of the debate are the values believed to be central to the world community. On this point, Cassese notes that “in the current framework of the international community, three sets of values underpin the overarching system of interstate relations: peace, human rights, and self-determination.”\(^{35}\) While legal scholars may concur with Cassese as to the three principle values underpinning interstate relations, there is disagreement over which of the values prevail over the others. At the time of the drafting of the United Nations Charter in 1945, it can be readily concluded that the “peace among nations” value predominated. This proposition is strengthened by the Charter’s restrictive position taken on the right of states to use force in their international relations, the territorial integrity of nation-states, and the Security Council’s monopoly on the authorization of force except in the case of self-defense.

\(^{32}\) U.N. CHARTER art. 2, para. 4.
\(^{33}\) U.N. CHARTER art. 33, 42.
\(^{35}\) Anthony Cassese, Ex Iniuria Ius Oritur: Are We Moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community? 10 Eur. J. Int’l L. 23, 24 (1999). (The “peace” that Cassese refers to would more accurately be termed “peace among nations” in order to distinguish it from “peace within nations.”)
Prioritizing interstate stability comes at the expense of intrastate stability, as exemplified by the Security Council's non-involvement in numerous internal conflicts during the Cold War era.

Since the framing of the Charter, however, international human rights laws have been codified and have entered into force. The drafting of the Universal Declaration of Human Rights, considered by many to have entered into custom, the entry into force of the Genocide Convention, and the codification of numerous human rights conventions,\(^3\) reflect a jurisprudence challenge to the notion that the peace among nations value prevails over the human rights value.\(^7\) Since the Security Council's monopoly on non-defensive uses of force is based on the view that the peace among nations value takes priority over other values, it can be argued that the emergence of international human rights erodes the centrality of the Council in determining the legitimacy of intervention in support of human rights.

In performing a legal analysis of NATO's intervention in Kosovo in 1999, therefore, we are confronted with a dilemma. Do we strictly apply the United Nations Charter as it was drafted in 1945, with its preference for peace among nations over alternative values such as human rights? Do we allow a more liberal application of the Charter as it relates to the process of attaining Security Council authorization for intervention? Do we take into account the post-Charter development of human rights law and its implication for the use of force in response to humanitarian disasters? Is the NATO intervention in Kosovo simply another of a long list of post-World War II military interventions that a strict interpretation of Charter law deems illegal, or is it instead a watershed event that ushers in a new era of legally acceptable humanitarian interventions that do not require Security Council authorization? Hilpold states that the NATO intervention may constitute the most far-reaching challenge to the

---


37. I leave out of this discussion the self-determination value since, in my opinion, self-determination, despite a widespread acknowledgment of its existence in contemporary international law, has not risen to the level of the peace among nations or human rights values.
doctrine on non-intervention. These are difficult questions that cannot be answered definitively at the present. There is no broad consensus among legal experts on the subject. The amount of scholarly attention paid to a legal assessment of NATO’s intervention, however, underscores the vitality of the debate and signals that this jurisprudence debate is not over.

Three distinct analyses of NATO’s intervention in Yugoslavia are presented below. The first, reflecting a strict interpretation of Charter law’s restriction on the use of force, leads to the conclusion that NATO members acted outside the bounds of international law in intervening in Yugoslavia in 1999. Simma reflects a strict interpretation of Charter law when he states:

[If the Security Council determines that massive violations of human rights occurring within a country constitute a threat to the peace, and then calls for or authorizes an enforcement action to put an end to these violations, a humanitarian intervention by military means is permissible. In the absence of such authorization, military coercion...constitutes a breach of Article 2(4) of the Charter.]

The second analysis, which reads more liberally into Charter principles as they relate to the process by which authorization for intervention is granted, takes into account implied Security Council authorization for intervention, a failed effort by the Russian Federation to formally label the intervention as illegal, and a Council resolution adopted after the Kosovo War was completed. Working within Charter law, this perspective makes possible the argument that NATO members, despite the lack of an explicit Security Council authorization


to intervene militarily, did not violate international law. Falk supports this more liberal interpretation of Charter processes, contending that "[s]o long as a purely textual analysis of the relevant norms is relied upon, the divergences between humanitarian imperatives and the prohibition of forcible intervention unauthorized by the United Nations cannot be satisfactorily reconciled."\(^{41}\)

The third analysis moves beyond Charter law, taking into account the totality of the unfolding situation in Kosovo, and recognizes the erosion of state sovereignty as a result of the rise of human rights. Reisman represents this perspective when he states that while "...all appreciate that NATO's action in Kosovo did not accord with the design of the United Nations Charter ...a judgment must be made in light of the law at stake, the facts and feasible alternatives at the moment of the decision."\(^{42}\)

A. A Strict Application of Charter Principles Relating to the Use of Force


1. Self-defense and Collective Self-defense

The right of self-defense is firmly rooted in the United Nations Charter, as reflected in Article 51, which states: "Nothing in the present Charter shall impair the inherent right of individual or collective self-defense if an armed attack occurs against a Member of the United Nations ..."\(^{43}\)

It is commonly recognized that unless a humanitarian crisis transcends international borders and leads to armed attacks against other states, recourse to Article 51 [self-defense and collective self-defense] is not available.\(^{44}\) Any effort to expand the concept of self-defense to include the right to grant emergency help to a people that is victim of an oppressive government has no basis in international law. It is clear, therefore, that a justification of the NATO intervention in 1999 cannot be found in an application of either self-defense or collective self-defense.

---

41. Falk, supra note 34, at 847.
42. Reisman, supra note 39, at 3.
44. See, Simma, supra note 40; Cassese, supra note 35.
2. Security Council Authorization

The determination of the legal status of the intervention from a strict interpretation of the Charter, therefore, rests on the presence or absence of an authorization issued by the Security Council. Scholars that base their legal assessment of NATO's intervention on a strict interpretation of Charter provisions conclude that the use of force by NATO members constitutes a violation of international law.\(^{45}\)

The Security Council addressed the deteriorating situation in Kosovo in a series of meetings in 1998 that resulted in three resolutions prior to the onset of NATO's aerial campaign. In its first resolution on the topic, the Security Council condemned the use of excessive force by Serbian police forces against civilians and peaceful demonstrators in Kosovo, as well as acts of terrorism by the Kosovo Liberation Army.\(^{46}\) Resolution 1160 also called upon the Federal Republic of Yugoslavia to take the necessary steps to achieve a political solution to the issue of Kosovo through dialogue and to implement the actions indicated by the Contact Group in its statements dated March 9 and March 25, 1998. The resolution prohibited the sale or supply of weapons, ammunition, military vehicles, equipment, and spare parts to Yugoslavia. The first Security Council resolution contained two important guidelines relating to the future international response to the situation in Kosovo. In a preambular clause, which was restated in operative clause five, the Security Council affirmed the commitment of all Member States to the sovereignty and territorial integrity of Yugoslavia. In so doing, the Council denied any right of intervention at that time. The affirmation of Yugoslav sovereignty and territorial integrity, however, was balanced by a warning found in operative clause nineteen, which emphasized that a failure to make constructive progress towards the peaceful resolution of the situation in Kosovo "will lead to the consideration of additional measures."\(^{47}\) It is clear that the first Security Council Resolution on Kosovo does not provide an authorization for military intervention.

A second Security Council resolution was passed on 23 September 1998, in response to intense fighting in Kosovo that resulted in numerous civilian casualties and 230,000 displaced persons.\(^{48}\) The resolution underlined the responsibility of Yugoslavia to create the conditions necessary for the return of refugees and displaced persons. While Resolution 1199 reaffirmed the sovereignty and territorial integrity of Yugoslavia, it also emphasized the need to ensure that the rights of all inhabitants of Kosovo were respected. The

\(^{45}\) See id.; Chamey, supra note 39.


\(^{47}\) Id. at 4.

second Security Council resolution, moving in the direction of an authorization for intervention, affirmed that the deteriorating situation in Kosovo constituted a threat to peace and security. The rights of states to address the situation were limited by Resolution 1199, however, to the provision of available personnel to fulfill the responsibility of effective and continuous international monitoring in Kosovo, the provision of adequate resources for humanitarian assistance, and the application of the principles embodied in Resolution 1160. The Security Council again decided that “should the concrete measures demanded in Resolutions 1160 and 1199 not be taken, to consider further actions and additional measures to maintain or restore peace and stability in the region.”

In its third resolution, the Security Council expressed its concern and alarm over the deteriorating situation in Kosovo. The resolution also reiterated the commitment of Member States to the sovereignty and territorial integrity of Yugoslavia. The Council’s endorsement of the sovereignty and territorial integrity of Yugoslavia was qualified but not undermined by the thirteenth operative of Resolution 1203, which states: “Urges Member States and others concerned to provide adequate resources for humanitarian assistance in the region and to respond promptly and generously to the United Nations Consolidated Inter-Agency Appeal for Humanitarian Assistance Related to the Kosovo Crisis.”

Cassese notes that the action of NATO countries radically departs from the Charter system for collective security, “which hinges on a rule (collective enforcement action authorized by the Security Council) and an exception (self-defense).” Lobel and Ratner argue that, as a result of Article 2(4), explicit and not implicit Security Council authorization is necessary before a nation may use force that does not derive from the right of self-defense under Article 51. They continue by noting that “[r]equireing clear Security Council authorization acts as a brake on the use of force by the international community: it is a procedural condition designed to fulfill the Charter’s substantive goal of ensuring that force be employed only when absolutely necessary.” Simma, while recognizing that NATO’s action was in response to gross violations of human rights, concludes that countermeasures to such atrocities must not

49. Id. at 5.
51. Id. at 5.
53. Lobel & Ratner, supra note 39, at 129.
54. Id.
55. Simma, supra note 40.
involve the threat or use of force, a legal position confirmed by the General Assembly's Declaration on Friendly Relations of 1970.\textsuperscript{56}

In the midst of the military campaign, the Security Council drafted and passed Resolution 1239 (1999) which effectively avoided a comment on NATO's actions.\textsuperscript{57} The resolution commended the efforts of member states, the UNHCR, and other international relief organizations in providing relief assistance to the Kosovo refugees and urged all concerned to work towards the aim of a political solution to the crisis. At the conclusion of the aerial bombardment, the Security Council addressed the situation in Kosovo and passed Resolution 1244 (1999), which established an international security presence in Kosovo with express responsibility to:

a) Deter renewed hostilities, maintain and where necessary enforce a cease-fire, and ensure the withdrawal and prevent the return into Kosovo of Federal and Republic military, police and paramilitary forces;

b) Demilitarize the Kosovo Liberation Army (KLA);

c) Establish a secure environment in which refugees and displaced persons could return home;

d) Ensure public safety and order;

e) Supervise demining;

f) Support the work of the international civil presence;

g) Conduct border monitoring duties; and

h) Ensure the protection and freedom of movement of itself, the international civil presence, and other international organizations.\textsuperscript{58}

The opinion of the ICJ on the matter of the legal status of NATO's intervention will weigh heavily upon the international legal community. While the Court has yet to render a decision in Yugoslavia v. NATO members, its first pronouncements indicate that it is not willing to set aside the Charter's prohibition on the use of force in favor of a right of humanitarian intervention, as it declared itself to be "profoundly concerned with the use of force in Yugoslavia" and that "under the present circumstances such use raises very serious issues of international law."\textsuperscript{59}

The conclusion that NATO's actions constitute a violation of core principles of international law and, as a result, must be categorized as illegal

\textsuperscript{56} G.A. Res. 2625, supra note 21.


\textsuperscript{59} See Concerning Legality of the Use of Force (Yugoslavia v. Belg.): Request for the Indication of Provisional Measures, 1999 I.C.J. No. 105 (June 2).
reflects a strict adherence to Charter Law as it was initially codified, reluctant to take into account norms or legal developments since 1945.

B. A Liberal Analysis of Charter Law

To conclude that the NATO intervention in Yugoslavia in 1999 absent of explicit Security Council authorization was a legal act requires a closer examination of the actions of the Council as they relate to the unfolding humanitarian disaster in Kosovo and a consideration of alternative interpretations of Charter provisions as they relate to Council authorization for intervention. It is clear that the Security Council did not explicitly authorize states to use force to relieve the Kosovo population of its humanitarian plight. In fact, in each Council resolution the sovereignty and territorial integrity of Yugoslavia were explicitly upheld. Therefore, to contend that NATO acted in accord with prevailing international laws and norms, a more liberal interpretation of Charter principles as they relate to the process of authorized intervention must be undertaken.

1. Ambiguous Authorization

While an explicit Security Council authorization to use force is a central requirement of a strict interpretation of the United Nations Charter, the ambiguous nature of Council resolutions historically has given rise to the notion that authorization may exist despite the absence of an explicit Council authorization. Lobel and Ratner note that the Iraqi inspections crisis of 1998 raises similar questions relating to state intervention on the basis of an ambiguous Council authorization to use force.60 In the Iraqi case, the United States and the United Kingdom asserted the right to use force in order to enforce inspections of weapons facilities based on Resolution 678 (1990), which authorized the use of force to liberate Kuwait from Iraqi control.61 In the Kosovo case, United States officials argued that the mere invocation of Charter Chapter VII with regard to the Kosovo situation was sufficient to authorize a resort to force.62 The Dutch representative on the Security Council contended that Resolution 1203 clearly stated that the Council was acting under Chapter VIII of the Charter and that NATO action followed directly from Resolution 1203.63

60. Lobel & Ratner, supra note 39.
2. The Council’s Refusal to Deem NATO’s Actions Illegal

Scholars have referenced the fact that the Security Council explicitly rejected the proposition that NATO’s actions were illegal. A resolution sponsored by the Russian Federation declaring that the NATO action was unlawful and directed that it be terminated was supported by only three states—Russia, China, Namibia—and was rejected by the remaining twelve Council members. Thus, while no one contends that the Security Council specifically authorized the NATO intervention, Wedgwood recognizes that the omission of a Council authorization represents the unwillingness of Russia to endorse NATO’s actions, which would have undermined Russia’s influence over an issue that directly involved its interests. Speaking before the vote, the Russian representative stated that the aggressive military action taken by NATO was a threat to international peace and security and grossly violated key provisions of the United Nations Charter. The United States representative, also speaking before the resolution was voted on, focused attention on the actions of Yugoslavia, stating that the Charter did not sanction armed assaults on ethnic groups or imply that the world should turn a blind eye to a growing humanitarian disaster. Canada’s position was that the supporters of the Russian resolution placed themselves outside of the international consensus which held that “...the time had come to stop the continued violence perpetrated by the Government of the Federal Republic of Yugoslavia against its own people.”

3. Ex Post Facto Authorization

While strict Charter advocates claim that explicit Security Council authorization for non-defensive uses of force must be granted prior to the onset of war, more liberal interpretations allow for Council authorization ex post facto, or after the fact. Much attention has been paid to Security Council Resolution 1244, which was passed after the aerial campaign had ended and an agreement on the resolution of the Kosovo situation had been concluded. Resolution 1244 (1999), as Pellet notes, dramatically changed the picture. While it did not formally declare that NATO’s intervention was lawful, it clearly endorsed the consequences of the intervention. Pellet concludes that “...there certainly were doubts as to the legality of NATO’s action before 10

64. Pellet, supra note 1; Wedgwood, supra note 39.
65. Id.
66. Wedgwood, supra note 39.
68. Pellet, supra note 1, at 387 (quoting Wedgewood, supra note 39).
June 1999, however, when put together, the arguments in favor of its lawfulness become persuasive—and particularly so in light of Resolution 1244."\(^{69}\)

4. Regional Responses to Threats to the Peace

Further support for a legal defense of NATO's intervention can be found in Charter Article 52(1), which provides:

Nothing in the present Charter precludes the existence of regional arrangements or agencies for dealing with such matters relating to the maintenance of international peace and security as are appropriate for regional action, provided that such arrangements or agencies and their activities are consistent with the Purposes and Principles of the United Nations.\(^{70}\)

Pellet concludes that NATO's intervention is an illustration of "regional or collective unilateralism."\(^{71}\) He continues by arguing that actions taken by groups of states imply some checks and balances, both in the decision-making process and in action that purely unilateral interventions cannot.\(^{72}\)

A problem created by Article 52(1) is that, in the event of what Lobel and Ratner refer to as "contracting out" by the Security Council to individual member states or regional organizations to revolve a dilemma, the Council leaves states with wide discretion to use ambiguous, open-textured resolutions to exercise control over the initiation, conduct and termination of hostilities.\(^{73}\) This problem is reflected in attempts by United States officials, in particular, to claim that the mere invocation of Charter Chapter VII with regard to the Kosovo situation was sufficient to authorize the resort to force.

The crucial question, however, remains the conditions under which a regional organization can carry out enforcement actions pursuant to subsequent Charter Article 53(1), which addresses the degree of control that the Security Council ought to exercise over such operations. Gazzini notes that Article 53(1) introduces a distinction between the utilization of regional organizations by the Security Council and the autonomous enforcement by regional organizations acting upon a Security Council authorization.\(^{74}\) The scholarly community remains divided on this later, and most crucial, point. Some claim a strict

\(^{69}\) Id.

\(^{70}\) U.N. CHARTER art. 51.

\(^{71}\) Pellet, supra note 1.

\(^{72}\) Id.

\(^{73}\) Lobel & Ratner, supra note 39.

\(^{74}\) Gazzini, supra note 39.
control by the Council, including the start-up, supervision, and termination of
enforcement actions, while others recognize that under certain circumstances,
such as genocide, an implicit authorization or ex post facto authorization by the
Council may suffice. In any case, Article 54 imposes upon regional
organizations the obligation to keep the Security Council fully informed on the
activities they contemplate to undertake or have already undertaken.

C. Extra-Charter International Law

The strongest case for the legality of NATO’s intervention in Yugoslavia
in 1999 is made with reference to extra-Charter international law. This position
rejects the notion that international law begins and ends with the entry into force
of the United Nations Charter, recognizing that pre-Charter legal principles and
post-1945 legal developments provide states with certain rights and duties
irregardless of the provisions laid down in the UN Charter.

1. Humanitarian Intervention

Hilpold notes that "...the events in the first half of 1999 reanimated the old
discussions of whether there is a right to humanitarian intervention in
international law." Perhaps the strongest argument supporting the legality of
NATO’s intervention in Yugoslavia is one that rests on a perceived
humanitarian intervention right. Wedgwood concurs that “humanitarian
necessity” remains the core of NATO’s justification for military force in
Kosovo and, as noted earlier, was an expressed objective in every major NATO
statement on the intervention. Chinkin confirms that several official
statements by NATO members reference the humanitarian interest in
intervening in Yugoslavia in 1999. Schacht writes that “Even in the absence of ...prior
approval [by the Security Council], a state or group of states using force to put
an end to atrocities when the necessity is evident and the humanitarian intention
is clear is likely to have its action pardoned.”

75. A. Gioia, The United Nations and Regional Organizations in the Maintenance of Peace and
Security, in The OSCE in the Maintenance of Peace and Security (M. Bothe et al. eds., Klumer Law
International, 1997).
76. Simma, supra note 40.
77. Hilpold, supra note 38, at 442.
78. Wedgwood, supra note 39, at 832.
79. Christine Chinkin, The State that Acts Alone: Bully, Good Samaritan or Iconoclast?, 11 EUR.
80. B.G. Ramcharan, International Law and Practice of Early-Warning and Preventive
This legal justification for NATO's intervention is strongest because it reduces the role of the Security Council in authorizing the non-defensive use of force, the linchpin of the strict Charter interpretation school. The humanitarian intervention defense requires differentiating Charter Law from traditional international law, recognizing the two as concurrent legal systems albeit with substantial overlap. Even though both bodies of legal rules function in a similar way in many respects, Pellet observes that this does not mean that the Charter mechanisms are part of the general law of international responsibility or that both regimes are entirely intermingled. He continues by noting that "...some arguments in favor of NATO's intervention...can...be based on the law of state responsibility," a distinct yet complimentary legal regime that co-exists with Charter Law.

A legal justification of NATO's intervention on humanitarian grounds is supported by what French scholars have termed the *devoir d'ingerence*, or duty to intervene in response to a humanitarian catastrophe. Advocates of the principle contend that regardless of the cause of a humanitarian catastrophe, external actors have a right and/or duty to intervene. Initially, the doctrine was designed to justify an intervention by humanitarian NGOs, however; its leading proponents have more recently attempted to extend the duty of intervention to states.

The humanitarian intervention defense, while not well-grounded in contemporary international law, led Hilpold to observe that "NATO's intervention in Kosovo has brought about a flurry of contributions in the legal literature suggesting the need to take a completely different stance towards the perennial controversial subject of humanitarian intervention." Cassese provides a series of conditions, which could give rise to the right of humanitarian intervention even in the absence of any authorization by the Security Council, as follows:

1. Gross and egregious breaches of human rights involving loss of life of hundreds or thousands of innocent people, and amounting to crimes against humanity, are carried out on the territory of a sovereign state, either by the central governmental authorities or with their connivance and support, or because of the total collapse of such authorities cannot impede those atrocities;

---

81. Pellet, supra note 1, at 387.
82. Id.
84. Hilpold, supra note 38, at 442.
ii) If the crimes against humanity result from anarchy in a sovereign state, proof is necessary that the central authorities are utterly unable to put an end to those crimes, while at the same time refusing to call upon or to allow other states or international organizations to enter the territory to assist in terminating the crimes. If, on the contrary, such crimes are the work of the central authorities, it must be shown that those authorities have consistently withheld their cooperation from the United Nations or other international organizations, or have systematically refused to comply with appeals, recommendations or decisions of such organizations;

iii) The Security Council is unable to take any coercive action to stop the massacres because of disagreement among the Permanent Members or because one or more of them exercises its veto power. Consequently, the Security Council either refrains from any action or only confines itself to deploiring or condemning the massacres, plus possibly terming the situation a threat to the peace;

iv) All peaceful avenues which may be explored consistent with the urgency of the situation to achieve a solution based on negotiation, discussion, and any other means short of force have been exhausted, notwithstanding which, no solution can be agreed upon by the parties to the conflict;

v) A group of states decides to try to halt the atrocities, with the support or at least the non-opposition of the majority of Member States of the United Nations;

vi) Armed force is exclusively used for the limited purpose of stopping the atrocities and restoring respect for human rights, not for any goal going beyond this limited purpose. Consequently, the use of force must be discontinued as soon as this purpose is attained. Moreover, it is axiomatic that use of force should be commensurate with and proportionate to the human rights exigencies on the ground. The more urgent the situation of killings and atrocities, the more intensive and immediate may be the military in response thereto. Conversely, military action would not be warranted in the case of a crisis which is slowly unfolding and which still presents avenues for diplomatic resolution aside from armed confrontation.85

Application of the aforementioned criteria to the situation in Kosovo in the period leading up to NATO's intervention provides a strong justification for NATO's resort to force. For each criterion, a compelling case can be made for humanitarian intervention.

85. Cassese, supra note 35, at 27.
2. Intervention in Response to Genocide

The principal obstacle to establishing a right of humanitarian intervention, even under the conditions forwarded by Cassese, is that states could abuse the right in order to provide legal cover for interventions that serve their own narrow self-interest. The fear historically has been that once granted, a right of humanitarian intervention would so undermine state sovereignty that the institution of international law would be rendered ineffective. What is possible, however, is an established right of humanitarian intervention in extreme cases, most notably in response to genocide. Justification for the assertion that protections afforded under the doctrine of state sovereignty are called into question in the event of the commission of the crime of genocide is found in Falk, who states that "genocidal behavior cannot be shielded by claims of sovereignty..."

It is established in international law that genocide constitutes an *erga omnes* offense, making it a concern of all states. Consequently, in the event of the crime of genocide, every state may lawfully consider itself injured and is thus entitled to resort to countermeasures against the perpetrator. Simma concludes that "[i]n the face of genocide, the right of states, or collectivities of states, to counter breaches of human rights most likely becomes an obligation." Support for this contention is found in the judgment of the International Court of Justice in the 1996 case brought by Bosnia-Herzegovina against Yugoslavia.

Lobel and Ratner, who label NATO's intervention in Yugoslavia as a violation of international law, nonetheless open the door to the possibility of unauthorized intervention in response to genocide. They state that "[b]ut in the extreme case of an ongoing genocide for which the Security Council will not authorize force, perhaps the formal law ought to be violated to achieve the higher goal of saving thousands or millions of lives." They continue by stating that "[s]ilence by the Security Council might then reflect a community consensus that the legal requirement for its authorization ought to give way to

---

86. Id.
87. Falk, supra note 34, at 847.
89. Simma, supra note 40, at 2.
91. Lobel & Ratner, supra note 39.
the moral imperative."³² Franck and Rodley provide support of the humanitarian intervention defense without recognizing an existing norm or rule in international law that permits it.³³ They state that "In exceptional circumstances ...a large power may indeed go selflessly to the rescue of a foreign people facing oppression. But surely no general law is needed to cover such actions."³⁴

VI. CONCLUSION

The anticipated implications of NATO's intervention in Yugoslavia for the progressive development of international law and order are divergent, reflecting the three schools of thought on the right of state intervention. If the prevailing legal opinion is that the intervention, by virtue of its lack of Council authorization, constitutes a violation of international law, the principal implication is that the rights of individuals remain subservient to the rights of states.

If, however, a consensus develops around the proposition that NATO actions in response to the Kosovo crisis were legal, despite the absence of a formal Security Council authorization, the international legal order will have undergone a significant revision. Wedgwood notes that the war over Kosovo may mark the end of Security Council "classicism," and the emergence of a limited and conditional right of humanitarian intervention, permitting the use of force to protect the lives of a threatened population when the decision is taken by what most of the world would recognize as a responsible multilateral organization and the Security Council does not oppose the action.³⁵ Cassese claims that "this particular instance of a breach of international law may gradually lead to the crystallization of a general rule of international law authorizing armed countermeasures for the exclusive purpose of putting an end to large-scale atrocities amounting to crimes against humanity and constituting a threat to the peace."³⁶ Gazzini claims that a process of reinterpreting Article 2(4) is underway, and has been gaining ground since post-Cold War military activities took place in Somalia, Bosnia, Rwanda, Haiti and Liberia.³⁷ While state practice remains insufficiently consistent to make a broad-based claim on the emergence of an international norm allowing intervention in response to

---

³² Id. at 136.
³⁴ Id. at 290-1.
³⁵ Wedgwood, supra note 39, at 828.
³⁶ Cassese, supra note 35, at 29.
³⁷ Gazzini, supra note 39.
humanitarian disasters, a determination that NATO's intervention in Yugoslavia in 1999 was legal would represent a continuation of the trend since 1990. What distinguishes the Kosovo case from those that preceded it is that, in the previous cases, there was no claim that intervention was permissible absent of a Security Council authorization. Finally, the Secretary General's call for Council action to meet future humanitarian crises may draw support for what he referenced as the development of an "international norm in favor of intervention to protect civilians from wholesale slaughter." Pellet concludes that it is essential that new 'community' mechanisms be found in the future in order to avoid being restricted to a choice between unqualified respect for the sovereignty and territorial integrity of a state committing gross violations of human rights, on the one hand, and the right of intervention without Security Council authorization, on the other.

What is clear from a review of the literature on the legal status of NATO's intervention in Yugoslavia is that very few scholars provide unqualified conclusions on the legality or illegality of the intervention. The majority of scholars that qualify the intervention as a violation of international law recognize that a counter case can be made. Simma, for example, despite his contention that NATO violated Charter Law, seems to consider that the intervention was "not that much illegal." At the same time, those that conclude that NATO's actions reflect the emergence of a new legal norm permitting intervention without an explicit Security Council authorization to do so recognize the general United Nations prohibition on the use of force. Cassese downplays the illegality of the intervention, stating that "...any person deeply alert to and concerned with human rights must perforce see that important moral values militated for the NATO military action." And, it appears, the lines dividing the scholarly community are not static. Hilpold observes that "[t]he number of writers criticizing the concept of a right to humanitarian intervention—once decisively preponderant—seems to dwindle; even writers with a long record of opposition against such a legal right were looking for suitable justifications." It is also evident that the Kosovo case is not an exception, but rather another critical example of a rapidly changing norm of international law that places human rights on par with, or at exceptional times, superior to states rights. At present, Slobodan Milosevic stands trial on

99. Pellet, supra note 1, at 385.
100. Simma, supra note 40.
102. Hilpold, supra note 38, at 442.
sixty-six counts of war crimes, crimes against humanity, and genocide, all committed while he was head of state. Prior to that, but also recently, it was determined that head of state immunity for Augusto Pinochet was superceded by recent human rights conventions, despite the fact that the crimes charged against him occurred while he was the head of state of Chile. If the international community is willing to sacrifice classic principles of immunity in order to uphold emerging principles of human rights, sacrificing state sovereignty to uphold the same principles is a matter of degree and does not represent a fundamental shift in legal thinking. As was evident in the judgment in the Nicaragua Case, the Article 2(4) prohibition on the use of force is a legal principle that is subject to change as the result of the development of a customary law norm.
CAN CONGRESSIONAL FOREIGN AFFAIRS POWER JUSTIFY A JUVENILE DEATH PENALTY PROHIBITION IN THE UNITED STATES?

Serri Miller*

I. INTRODUCTION ............................................. 103

II. INTERNATIONAL SCRUTINY OF THE JUVENILE DEATH PENALTY ............ 106
   A. The ICCPR and the United Nations Position .................................. 106
   B. U.S. Supreme Court Approval of U.S. State Law ................................ 107

III. THE CONCEPT OF INTERNALIZATION .................................. 109

IV. JUVENILE DEATH PENALTY PROHIBITION AS A FOREIGN COMMERCE REGULATION ........... 111
   A. Congressional Authority over Foreign Commerce .................................. 111
   B. Congressional Concern: The Cost of Non-Compliance .............................. 112
   C. The Fate of a State Challenge ..................................................... 113

V. JUVENILE DEATH PENALTY PROHIBITION AS ARTICLE II LEGISLATION .................. 116
   A. The Domestically Intrusive Nature of Human Rights Treaties ................ 116
   B. Executive as Lawmaker: Sole Executive Agreements ............................. 117
   C. Congress as Lawmaker: Enabling Treaties and Agreements ...................... 118
   D. Congressional Concern: Policy Implications of Human Rights Treaties .......... 119
      1. Concern for Cohesive Human Rights Agenda .................................... 119
      2. Concern for International Public Opinion .................................... 120
      3. Concern for National Security .................................................. 121
   E. The Fate of a State Challenge ..................................................... 122
      1. Attacks on Congress's Rational Basis .......................................... 122
      2. Tenth Amendment State Sovereignty Argument ................................ 124
      3. Structural Federalism Argument ................................................ 126

VI. CONCLUSION ............................................. 129

* J.D. summa cum laude, B.A. summa cum laude. The author respectfully dedicates this article to the remarkable faculty and administrators of law at the Nova Southeastern University Shepard Broad Law Center, with special thanks to Professor Steve Friedland, who guided this article's development as an independent research project.
I. INTRODUCTION

In the United States federalist model, constituent states haven't much opportunity to irritate foreign nations. They cannot declare war, nor make treaties, nor assist or prevent immigration, nor offer or deny amnesty, nor pass legislation that unduly burdens international trade. In short, most state activity that could touch on foreign relations is insulated from international criticism by the Constitutional provisions committing such things to the federal government.

One thing states may do, however, is execute criminal offenders who are under the age of eighteen. This practice puts the states of the United States into a very small minority on a global scale, and it has drawn the ire of the international community.

While no pending congressional legislation compels U.S. constituent states to abolish their death penalties, at least one proposal provides for the federal government to "urge" states to do so. In 2001, Wisconsin Democrat Senator Russell Feingold introduced two bills in the United States Senate. The first (S.191) sought to abolish the Federal death penalty and the second (S.233) to impose "a moratorium on executions by the Federal Government and urge the States to do the same, while a National Commission on the Death Penalty reviews the fairness of the imposition of the death penalty." This National Death Penalty Moratorium Act (NDPMA) requested the appointment of a federal Commission to study the federal death penalty policy. On June 13, 2001, it was referred to the Judiciary Committee's Subcommittee on Constitution, Federalism, and Property Rights for hearings.

In light of the September 11th, 2001 attacks on the United States (with foreign relations issues much on Congress’s mind), one might posit that Congress could pass an Act forbidding states to carry out the death penalty for fear of the backlash this United States policy invites from the international community.

When Congress is silent, the United States Supreme Court crafts federal common law to either approve a state practice by finding it constitutional— as

1. This is not the first time Congress has ruminated upon Senator Feingold's proposals for a ban on the death penalty. See, for example, the Federal Death Penalty Abolition Act of 1999, available at http://feingold.senate.gov/issuearea/abolitionbill.html (last visited Oct. 12, 2002) (introduced in the first session of the 106th Congress as S. 1917) and the National Death Penalty Moratorium Act of 2000, which was referred to the Senate Judiciary Committee in April 2000. The 2000 bill's status is available on the Library of Congress' Bill Summary and Status for the 106th Congress, linked at http://thomas.loc.gov/ (last visited Oct. 12, 2002).


it has done to date in the juvenile death penalty— or sanction a state practice by finding it unconstitutional, as it did in Brown v. Board of Education. Although the Supreme Court has decided a few such cases during and since the Cold War, the Court usually abstains from meddling in foreign affairs by way of federal common law, preferring to leave such matters to Congress.

When Congress is vague, the Supreme Court can interpret federal statutes to incorporate international law standards into a federal common law that overrides states’ domestic policies. In so doing, the Court tries to avoid policy conflicts with other branches’ foreign affairs activities: “[o]ne reason so few questions of foreign relations federalism get answered is because the Court has chastened itself to avoid constitutional grounds for decision, including by construing statutes in order to avoid them.”

But when Congress clearly speaks (in our hypothetical, to say “you must strike the juvenile death penalty from your state law”), a statutory pre-emption inquiry attaches: “The Constitution enables the Federal Government to pre-empt state regulation [that is] contrary to federal interests.” A valid congressional Act trumps state law every time, so a state that wants to retain its juvenile death penalty laws must attack the Act on grounds that Congress did not have power to pass such an Act, i.e., that the federal government’s interest

---


7. Brown v. Board of Education, 349 U.S. 294 (1955). See also infra note 114 for scholarly commentary. But see Edward T. Swaine, The Undersea World of Foreign Relations Federalism, 2 CHI. J. INT’L L. 337, 352 (2001) (“Congress should be given the opportunity to override state activities with which it would disagree; at the same time, if a fully informed Congress elects not to preempt the relevant activities, it seems inappropriate to presume that they are incompatible with the national interest.”).

8. For a detailed discussion, see Swaine, supra note 7, at 339, n.6 (citing at n.6 Zschernig v. Miller, 389 U.S. 429 (1968), in which the Supreme Court held unconstitutional, as applied, an Oregon intestacy statute that imposed conditions discriminating against East Germans. The Court was famously unclear as to the precise basis for its concern— the effect of the state courts’ polemical decisions abroad, their potential for embarrassing the executive branch, or the fact that the state was attempting to conduct foreign relations— and why doing any of those things would be unconstitutional.


10. See id. at 449. See also Filartiga v. Pena-Irala, 630 F.2d 876 (2d Cir. 1980) (standing for the proposition that international law standards, when adopted by the United States Supreme Court as federal common law standards, become the supreme law of the land).

11. Swaine, supra note 7, at 342. See also the cases Bradley examines, supra note 9.

is insufficient to pre-empt state legislation. This paper will explore whether federal foreign affairs concern justifies a juvenile death penalty prohibition and evaluate the likely fate of states’ challenges to the constitutionality of such an Act.

II. INTERNATIONAL SCRUTINY OF THE JUVENILE DEATH PENALTY

A. The ICCPR and the United Nations Position

The International Covenant on Civil and Political Rights (ICCPR) is an international human rights treaty, entered into by the Executive and ratified by the United States Senate. The ICCPR provides that “[s]entence of death shall not be imposed for crimes committed by persons below eighteen years of age and shall not be carried out on pregnant women.”

The United States does not comply with this ICCPR provision; it took a reservation to this part of the ICCPR during treaty ratification. As of early 2001, the United States is one of only six nations in the world that executes citizens under the age of eighteen years. Amnesty International reported in 1998 that the United States had executed nine persons between 1990 and 1998, all of whom were age seventeen at the time of offense.

As of 2000, eleven nations “filed complaints [against the United States] with the Human Rights Commission (the commission in charge of monitoring compliance with the terms of the ICCPR)” protesting the United States’s ICCPR reservation and the U.S. constituent states’ policy of permitting juvenile executions. Amnesty International has likewise criticized the United States’ ICCPR reservation. In 1997, the United Nations Commission on Human Rights itself also obliquely chastised the United States for its ICCPR

15. ICCPR, supra note 13, Part III, art. 6, ¶ 5.
18. AMNESTY INTERNATIONAL, supra note 17, at 5.
19. Templeton, supra note 6, at 1186.
reservation: the Commission "[urged] all States that still maintain the death penalty to comply fully with their obligations under the International Covenant on Civil and Political Rights and the Convention on the Rights of the Child, notably not to impose the death penalty . . . for crimes committed by persons below eighteen years of age . . . ."21 The United Nations Sub-Commission on Human Rights "Condemns unequivocally the imposition and execution of the death penalty on those aged under 18 at the time of the commission of the offence . . . . Calls upon also States . . . to abolish by law as soon as possible the death penalty for those aged under 18 at the time of the commission of the offence and, in the meantime, to remind their judges that the imposition of the death penalty against such offenders is in violation of international law . . . ."22

B. U.S. Supreme Court Approval of U.S. State Law

An impressive body of scholarly debate has coalesced around the question of whether the United States Supreme Court should give the international community's standards of conduct the force of United States law.23 Historical federal cases such as Chisholm v. Georgia24 and modern ones such as Filartiga v. Pena-Irala25 support the proposition that the United States Supreme Court is legally bound by the tenets of customary international law.26 Scholars also argue that older piracy cases indicate that the United States Supreme Court's concern for international law standards is specifically recognized in context of human rights.27

The Supreme Court, however, does not consider itself bound by standards of international conduct with regard to the juvenile death penalty. During the late 1980s, the Court set schizophrenic precedent on the issue of whether international standards should play any role in analyzing whether the juvenile death penalty passes an Eighth Amendment "cruel and unusual punishment" challenge. In 1988's Thompson v. Oklahoma,28 the Court comfortably

24. Chisholm v. Georgia, 2 U.S. 419, 2 Dall. 419, 1 L.Ed 440 (1793).
25. 630 F.2d 876 (2d Cir. 1980).
integrated the international community’s majority standard into its opinion. Thompson, age fifteen at the time of offense, “was convicted of first-degree murder and sentenced to death.”29 The Oklahoma statute at issue provided that a “Child’ means any person under eighteen (18) years of age, except for any person sixteen (16) or seventeen (17) years of age who is charged with murder.”30 The trial court, after a hearing, determined that Thompson could be tried as an adult.31 This decision was perhaps due to the fact that Thompson acted in concert with others, as well as due to the evidence surrounding the victim’s death: “The evidence disclosed that the victim had been shot twice, and that his throat, chest, and abdomen had been cut. He also had multiple bruises and a broken leg. His body had been chained to a concrete block and thrown into a river. . . .”32 “We have previously recognized,” said the Court, “the relevance of the views of the international community in determining whether a punishment is cruel and unusual.”33 The Court surveyed the policies of several international States to conclude that “it would offend civilized standards of decency to execute a person who was less than 16 years old at the time of his or her offense.”34

The following year, in Stanford v. Kentucky,35 the Supreme Court eroded its Thompson holding to announce that “in the United States, the juvenile death penalty is constitutional as applied to sixteen and seventeen-year-old defendants.”36 Stanford was a consolidated case. Petitioner Stanford was just over seventeen when he and an accomplice “repeatedly raped and sodomized [a gas station attendant] . . . during and after their commission of a robbery . . . . They then drove her to a secluded area near the station, where Stanford shot her point-blank in the face and then in the back of her head . . . .”37 The second petitioner, Wilkins, was just over sixteen when he and an accomplice robbed a convenience store.38 He stabbed the attendant eight times on three separate occasions, leaving her to die on the floor.39 Both Kentucky and Missouri

29. Id. at 818.
30. Id. at n.2 (citing OKLA. STAT., Tit. 10, § 1101(1) (Supp. 1987)).
31. Id. at 819-20.
32. Id. at 819.
33. Thompson, 487 U.S. at n.31
34. Id. at 830. See also Templeton, supra note 6, at 1183-84 (citing Thompson v. Oklahoma, 487 U.S. 815 (1988)) (noting that the Supreme Court “emphasized that the views of the international community are relevant in determining whether punishment is cruel and unusual” under the United States Constitution’s Eighth Amendment.).
36. Templeton, supra note 6, at 1184-85 (citing Stanford v. Kentucky, 492 U.S. 361 (1989)).
38. Id. at 366.
39. Id.
allowed the petitioners to be tried as adults because of the gravity of the crimes. 40

Considering an Eighth Amendment challenge that the punishment was too cruel and unusual to pass constitutional muster, the Court noted that execution of young people was probably not prohibited in the Framers’ time because “the common law set the rebuttable presumption of incapacity to commit any felony at the age of 14, and theoretically permitted capital punishment to be imposed on anyone over the age of 7.” 41 The Court then said any Eighth Amendment violation would arise from a violation of decency as defined by the values “of modern American society as a whole.” 42 Affirming these two convictions, the Court specifically rejected Thompson’s reliance on international standards: “We emphasize that it is American conceptions of decency that are dispositive, rejecting the contention . . . that the sentencing practices of other countries are relevant.” 43

Thus, as law of the land exists today, Congress stands silent; the ICCPR is non-binding; and no other treaty provisions prevent U.S. constituent states from enforcing their juvenile death penalties. To the contrary, the United States Supreme Court has formulated a “federal common law” that finds the death penalty a constitutional punishment when imposed by states on a person under age eighteen at the time of offense. 44 Under Stanford’s reasoning, the international “community’s conceptions of decency” matter not at all. 45

III. THE CONCEPT OF INTERNALIZATION

Where the Supreme Court closes a door, Congress and the Executive may open windows. In the United States, any of the government’s three branches may legally internalize international norms, making them binding on federal courts. 46 “Sometimes, as in the case of the United Nations Convention on the Law of the Sea, the executive branch takes the lead . . . . Sometimes Congress takes the lead, spurred by nongovernmental organizations . . . [and] in recent human rights cases, federal courts have taken the lead, but only with the express

40. Id. at 365-66.
41. Id. at 368.
42. Stanford, 492 U.S. at 369.
43. Id. at n.1.
44. See, e.g., id. But see Jack L. Goldsmith, Federal Courts, Foreign Affairs, and Federalism, 83 VA. L. REV. 1617, 1639-1641 (1997) (asserting that customary international law guides most federal courts in human rights decisions). See also id at 1713 (“[T]hese customary international human rights norms are based almost exclusively on the very treaties that the political branches have taken pains to exclude from the domain of federal law.”).
45. See Stanford, 492 U.S. at n.1.
46. Koh, State Law, supra note 22, at 1860.
congressional directives in the ATCA [Alien Tort Claims Act] and the TVPA [Torture Victims Protection Act].”

Harold Hongju Koh, in discussing the ways in which a State internalizes international standards of conduct, suggests four steps along a spectrum of compliance, drawing a distinction “among four relationships between stated norms and observed conduct: coincidence, conformity, compliance, and obedience.” A State can move toward “willing compliance” with one or more internal tactics: a State socially internalizes “international human rights norms” when “a given standard of conduct acquires so much public legitimacy that there is widespread general obedience to it.” A State legally internalizes an international standard of conduct when the standard is “incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three.” Finally, a state politically internalizes an international standard of conduct “when political elites accept an international norm, and adopt it as a matter of government policy.” Koh does not specify whether this governmental policymaking is consistently formal (legislation) or informal (consistent political practice), but one may posit that either would qualify.

Assuming arguendo that the forbearance to juvenile offenders is indeed an international standard of conduct (justified either by common practice or by jus cogens), any U.S. constituent state’s forbearance to do so is only coincidentally obedient to the international standard, because the Supreme Court of the United States has given the practice its stamp of approval. This places the United States at the far end of Koh’s spectrum because of the wide disparity between the “stated [international] norms and [the constituent states’] observed conduct.”

Senator Feingold’s NDPMA represents movement toward “conformity” or “compliance,” because it suggests a formal moratorium on the internationally questionable conduct. Adopting Koh’s terminology, our hypothetical Juvenile


49. Id. at 2656.

50. Id. at 2657.

51. Id. at 2656-57.

52. See generally Stanford, 492 U.S. 361.

53. See Koh, Why Do Nations Obey, supra note 48, at n.3.

54. See id.
Death Penalty Prohibition Act would place the United States farther along the internalization spectrum: it would be a legally internalized obedience to the international standard of conduct.55

IV. JUVENILE DEATH PENALTY PROHIBITION AS A FOREIGN COMMERCE REGULATION

The first way Congress could legally internalize a national juvenile death penalty prohibition is through a pre-emptive federal regulatory scheme enacted under congressional foreign commerce power. Removing from analysis for the moment the question of Congressional authority to legislate in support of executive treaty-making power (discussed in the next section), this section will explore whether Congress could defend a juvenile death penalty prohibition by claiming that constituent states' policies impermissibly burden foreign commerce.

A. Congressional Authority over Foreign Commerce

The United States Constitution textually authorizes Congress "[t]o regulate Commerce with foreign Nations . . . ."56 This authority is characterized as Dormant Foreign Commerce Clause power when Congress uses it to limit state action.57 When Congress acts pursuant to this plenary power, its authority is limited only by other checks and balances built into the Constitution's text and, arguably, by the structure of the Constitution itself. Congress cannot, for example, legislate in "areas beyond the reach of the Commerce Clause," nor may Congress "commande[er] . . . the executive or legislative branches of the state governments, [nor] overrid[e] state sovereign immunity in either federal or state court . . . ."58

In 2000, Crosby v. National Foreign Trade Council59 laid out the latest federal pre-emption tests that apply when a state law allegedly burdens foreign commerce. No standard of international conduct comes into play; the analysis looks to domestic congressional intent. A state law is pre-empted if "Congress intends federal law to 'occupy the field' . . . in that area."60 Similarly, "state law is naturally preempted to the extent of any conflict with a federal statute,"61 with "conflict" defined as a situation "where it is impossible for a private party to
comply with both state and federal law . . . [or] where [state legislation] stands as an obstacle to the accomplishment . . . of the full purposes and objectives of Congress."

To determine whether state law "stands as an obstacle" to federal purposes, the Supreme Court will "examin[e] the federal statute as a whole" to identify the statute's "purpose and intended effects."

B. Congressional Concern: The Cost of Non-Compliance

Some human rights treaties, such as the American Convention on Human Rights (ACHR), provide by their terms that the treaties may affect member States' internal economic affairs. For example, in the ACHR, member States voluntarily submit to the jurisdiction of the treaty-created Inter-American Court of Human Rights and agree to pay such judgments or sanctions as the that court may impose. Although this is an economic concern, it is not necessarily a commercial concern in the sense of transnational monetary exchange.

The ICCPR, as a resolution of the United Nations general assembly, is subject to the United Nations' charter-authorized enforcement procedures. The United Nations generally eschews strong-arm enforcement tactics. However, when a member State's practice becomes truly offensive to the United Nations' collective membership, the United Nations Security Council can and will authorize enforcement actions that may include both non-coercive tactics such as multinational agreements and coercive tactics such as authorized trade sanctions.

Although some scholars argue that because "none of the parties [to a human rights agreement] are exchanging rights or benefits . . . individual states have no coercive power," the United Nations recognizes that trade sanctions do impact States' economies, sometimes to the extent that they interfere with

62. Id. at 372-73 (internal citations omitted).
63. Id. at 373 (internal citations omitted).
66. See id.
68. Templeton, supra note 6, at 1192 (citing William A. Schabas, Invalid Reservations to the International Covenant on Civil and Political Rights: Is the United States Still a Party?, 21 BROOK. J. INT'L L. 277 (1995)).
States' overall economic development. The United Nations has urged States to refrain from taking "unilateral measures . . . in particular those of a coercive nature with extraterritorial effects, which create obstacles to trade relations among [international] States . . . impeded the full realization of the rights set forth in . . . international human rights instruments." Congress will argue that, if an international State imposed a unilateral trade sanction on the United States in protest to the federal government's failure to prohibit its constituent states from imposing a juvenile death penalty, the State's action would affect the United States' economy as a whole. Congress can easily identify the potential economic impact. The countries objecting to the United States' ICCPR reservation include some of "the United States' closest allies: France, Sweden, Belgium, Denmark, Finland, Germany, Italy, Netherlands, Norway, Portugal and Spain." These States are also major United States trading partners. As of 1999, Western Europe accepted 22.5% of the United States' total exports, generating United States revenues of nearly $153 billion. Norway alone imported $1.8 billion of United States goods during 2001.

C. The Fate of a State Challenge

To determine whether Congress can pre-empt the state's death penalty with this rationale, the Supreme Court, upon a challenge, will look to Congress' purpose: avoiding unilateral trade sanctions and preserving economic relationships with the identified trading partners. A state could argue that a mere potential for trade sanctions—when no foreign State has yet imposed such sanctions nor threatened to do so—is not a sufficient federal concern to justify Congress in forbidding states to enforce their own criminal laws.

70. Id.
71. Most NGO reporting in this area examines the effect on the United States economy of sanctions imposed by the United States on a foreign State—rather than against the United States as suggested here—but the import-export revenue numbers apply to either situation.
72. Templeton, supra note 6, at n.98.
73. See, e.g., CONGRESSIONAL BUDGET OFFICE, THE DOMESTIC COSTS OF SANCTIONS ON FOREIGN COMMERCE 30 (Mar. 1999).
74. Id.. See also id at 39 et seq. (discussing and providing statistics on additional "trickle-down" economic effects of trade restrictions).
76. See Crosby, 530 U.S. at n.17 (implying that the Supreme Court's recognition of a general Congressional desire to maintain cooperative relationships with allies is a valid rationale for federal legislation). See also id. at 390 (Scalia, J., concurring) ("It is perfectly obvious from the record . . . that the inflexibility produced by the Massachusetts statute has in fact caused difficulties with our allies.")
If the state was arguing that the juvenile death penalty does not pose a domestic interstate commerce burden, this argument might succeed. "'[S]anctioning authority is rarely granted by treaty, rarely used when granted, and likely to be ineffective when used.'" Domestic commerce power requires Congress to show some actual effect on interstate commerce, an effect that is not de minimis. *United States v. Lopez* overruled a congressional gun control act because the Act was not sufficiently related to interstate commerce concerns. The government argued that handguns in schools engendered violent crime and interfered with the "learning environment," and that both endangered the economy by threatening interstate travel and economic participation. The Court held that Congress's regulatory power under the domestic Commerce Clause was limited to concerns with a "substantial effect" on interstate commerce.

In domestic commerce clause legislation "Congress normally is not required to make formal findings as to the substantial burdens that an activity has on interstate commerce," but the *Lopez* Court refused "to pile inference upon inference" to find a commerce link where Congress had provided no record to aid the court in evaluating a commerce effect. The Court affirmed this reasoning in *Jones v. United States*, holding that arson of a private home could not be prosecuted under federal criminal law. The mere fact that the home was used to secure an interstate loan and received natural gas from outside the state did not establish a sufficient interstate commerce relationship to trigger federal jurisdiction.

If Congress passed a national juvenile death penalty prohibition based solely upon its speculation that economic sanctions might be imposed, the *Lopez* and *Jones* precedents would allow—although they would not compel—the Supreme Court to find that the state legislation should stand until and unless Congress shows that the state law actually affects international economic relations.

However, the dormant foreign commerce clause analysis is different, and the scrutiny of state action "more rigorous." First, the test for a state's foreign
commerce burden is more broad and more vague than the domestic commerce power. If the federal legislative scheme seeks to achieve uniformity in foreign commerce relations, it receives judicial deference when it conflicts with a state statute.\textsuperscript{86} Second, although the pre-emption rules for matters touching on foreign commerce are the same as those used in a domestic pre-emption analysis,\textsuperscript{87} the foreign and domestic inquiries diverge when the Supreme Court begins to examine Congressional purpose and the effect of the federal statutory scheme.

In 2000, \textit{Crosby v. National Foreign Trade Council}\textsuperscript{88} illustrated this divergence. \textit{Crosby} analyzed foreign commerce clause pre-emption to find that a Massachusetts law restricting state businesses’ trade with the State of Burma (now Myanmar) was pre-empted by the federal Foreign Operations, Export Financing, and Related Programs Appropriations Act (hereinafter the “Foreign Operations Act”), which also regulated trade with Burma.\textsuperscript{89} Even to the extent that Massachusetts’s law did not directly conflict with the Foreign Operations Act, the Supreme Court found that the law kept the Executive from “working together with other nations in hopes of reaching common policy and ‘comprehensive’ strategy” with regard to Burma relations, a power granted to the Executive by the Foreign Operations Act.\textsuperscript{90} \textit{Crosby} did not examine whether the Massachusetts law had an actual impact on foreign commerce, nor did it ask the extent of such impact if indeed it existed.\textsuperscript{91} The mere potential of state interference with the bargaining power conferred upon the Executive by the Foreign Operations Act was sufficient to pre-empt the state’s statute.\textsuperscript{92} As compared to the “show us some record” \textit{Lopez} test for domestic commerce power, the “if you can imagine it, you can pre-empt it” \textit{Crosby} test illustrates that Congress’ foreign commerce legislation receives a higher level of judicial deference.

\textit{Crosby} does offer slight hope for states with language implying that a state regulation that merely “complicates” diplomatic relations might not present the same danger as a state regulation that substantively restricts federal economic

\textsuperscript{86} See, e.g., \textit{Crosby}, 530 U.S. at 381. \textit{See also} Japan Line Ltd., et al. v. County of Los Angeles et al., 441 U.S. 434 (1979) (invalidating California’s \textit{ad valorem} property tax levied against ships of Japanese nationality, when the ships were owned by a Japanese shipping line, subject to property tax in Japan, and solely used for interstate commerce).


\textsuperscript{88} 530 U.S. 363 (2000).

\textsuperscript{89} \textit{Id.} at 389.

\textsuperscript{90} \textit{Id.} at 382.

\textsuperscript{91} \textit{See generally id}.

\textsuperscript{92} \textit{See id.} at 382.
bargaining power. Congress has also been known to indulge U.S. constituent states' foreign commerce goals by recognizing states' wishes and custom-tailoring international trade agreements. However, in light of Crosby's deferential standard and federal courts' general reluctance to countermand any congressional foreign policy goal, these are dangerously flimsy hooks on which to hang a state challenge against federal foreign commerce pre-emption.

V. JUVENILE DEATH PENALTY PROHIBITION AS ARTICLE II LEGISLATION

The second way Congress could legally internalize a national juvenile death penalty prohibition is by passing legislation to execute the terms of treaties and agreements adopted by the Executive. In this scenario, Congressional "Article II" power is precipitated by Executive power. The Executive cooperates with other international States to formulate United States international policy, and Congress is charged with promulgating domestic legislation that supports those policy goals.

A. The Domestically Intrusive Nature of Human Rights Treaties

The ICCPR, and similar human rights treaties, represent an emerging trend toward international agreements specifically designed to influence the member States' domestic laws. As international States become more economically and socially interdependent, international treaties and agreements begin to "resemble domestic legislation in directly mandating norms of public and private conduct . . . [and] the treaty power . . . threatens to supplant the domestic lawmaking process." Two treaties similar to the ICCPR illustrate this claim; the United States has ratified neither of them.

93. Crosby, 530 U.S. at 381.
94. Swaine, supra note 7, at 344 (discussing United States negotiations for the World Trade Organization's 1994 Agreement on Government Procurement and noting that "the US wound up permitting substantial variation among state commitments, even excluding more than a dozen states from any obligation.").
95. See supra notes 8, 9. See also Swaine, supra note 7, at 338 (discussing and citing Miami Light Proj. v. Miami-Dade County, 97 F Supp 2d 1174 (S.D. Fla. 2000); Gerling Global Reins Corp. v. Quackenbush, 2000 U.S. Dist LEXIS 8815 (E.D. Cal. 2000); and Gerling Global on appeal at 240 F3d 739 (9th Cir. 2001)).
96. See U.S. CONST. art. II; U.S. CONST. art. I sec. 8.
97. Bradley, supra note 9, at 444-45 (noting also the effect of Missouri v. Holland).
98. Id.
99. For a list of treaties see Bradley, supra note 9, at n.29.
100. Bradley, supra note 9, at 396-97.
101. Yoo, supra note 14, at 760.
102. Templeton, supra note 6, at 1187; Yoo, supra note 14, at 807 (discussing treaties that the Clinton Administration had not ratified at the time of publication).
The Convention on the Rights of the Child (CRC), for example, provides that "1. States Parties recognize that every child has the inherent right to life. . . . 2. States Parties shall ensure to the maximum extent possible the survival and development of the child," and that "[n]either capital punishment nor life imprisonment without possibility of release shall be imposed for offences [sic] committed by persons below eighteen years of age . . . ." Member States agree to submit regular compliance reports "to [a] Committee, through the Secretary-General of the United Nations." Although the CRC creates no specialized international court and does not textually require member States to change their constituent states' domestic laws, this Convention "contains a number of provisions that may be inconsistent with current U.S. [constituent states'] family law."

Like the CRC, the ACHR also forbids capital punishment for people under age eighteen at the time of offense. The ACHR is more legislatively robust than the CRC, featuring a "Federal States" section that specifically provides for intrusion into member States’ domestic policymaking: "Where a State Party is constituted as a federal state, the national government of such State Party shall implement all the provisions of the Convention over whose subject matter it exercises legislative and judicial jurisdiction." The ACHR also admits that a federalist system might struggle with Constitutional limitations, and it allows—in fact compels—such a State’s federal government to exercise upon its "constituent units" all persuasive power it can leverage: "[T]he national government shall immediately take suitable measures, in accordance with its constitution and its laws, to the end that the competent authorities of the constituent units may adopt appropriate provisions for the fulfillment of this Convention."

B. Executive as Lawmaker: Sole Executive Agreements

Provisions such as these give the Executive a de facto lawmaking role if they appear in Sole Executive Agreements. The President, acting alone, enters into a Sole Executive Agreement, which "generally has the same legal effects

104. Id. at Part I, art. 6(1)-(2).
105. Id. at Part I, art. 37(a).
106. Id. at Part II, art. 44(1)(a)-(b).
107. Bradley, supra note 9, at 402.
108. ACHR, supra note 64, ch. II, art. 4(5).
109. Id. at ch. III, art. 28(1).
110. Id.
111. BORN, supra note 47, at 20.
as a treaty." A Sole Executive Agreement can "trump inconsistent state law" as long as it is enacted on subject matter that the Constitution commits to Presidential authority. As discussed in the state challenge section below, this "invisible lawmaking" begs an inquiry into the proper exercise of Executive power if such power is used to override U.S. constituent states' sovereignty.

C. Congress as Lawmaker: Enabling Treaties and Agreements

In contrast to a Sole Executive Agreement, a "treaty" is an agreement approved by both the Executive and by two-thirds of the Senate. Self-executing treaties made by the Executive are direct exercises of a constitutionally authorized Executive power. When the Executive acts, self-executing treaties become the law of the land, but non-self-executing treaties need enabling legislation from Congress before they bind United States courts.

A Congressional-Executive Agreement is not a "treaty" under the United States Constitution, because it is "approved by . . . the President and a majority of each House of Congress." However, like treaties, these Agreements may also be self-executing or non-self-executing. They are generally considered to have the same legal force as a treaty. The North American Free Trade and World Trade Organization Agreements, for example, are Congressional-Executive agreements.

In treaties and Congressional-Executive agreements, most of the lawmaking role remains with Congress; the Necessary and Proper Clause authorizes Congress to pass enabling legislation for non-self-executing treaties and to further the goals of other agreements made by the Executive. Some

---

112. Id. (citing RESTATEMENT [THIRD] OF FOREIGN RELATIONS LAW § 303(4) and Reporter's Note 11 (1987); United States v. Pink, 315 U.S. 203 (1942); United States v. Guy W. Capps, Inc., 204 F.2d 655 (4th Cir. 1953), aff'd on other grounds, 348 U.S. 296 (1955)).

113. Yoo, supra note 14, at 778.

114. See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634 (1952) (finding unconstitutional an executive order to nationalize private steel mills in support of the United States war effort).

115. See, e.g., BORN, supra note 47, at 19. See also U.S. CONST. art. II sec. 2.


117. See, e.g., BORN, supra note 47, at 19-20. See also U.S. CONST. art. VI.

118. See U.S. CONST. art. II sec. 2.


120. Id. at 20, n.105.

121. Yoo, supra note 14, at 759.

122. Id. at 758-59. See also Bradley, supra note 9, at 444 (discussing "federalism concerns" in the context of NAFTA and the General Agreement on Tariffs and Trade (GATT)).

123. "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers, and all other Powers vested by this Constitution in the Government of the United States,
also argue that the Senate also retains a significant policymaking role even when
the Executive exercises plenary treaty-making power: “Congressional interests
are often directly represented at the negotiating table. Even when Members of
Congress are not allowed to participate directly in such treaty negotiations, the
knowledge that any negotiated agreement must return to Congress for
ratification necessarily pervades the executive branch’s negotiating position.”

On the other hand, although the Senate has the power to refuse ratification, it
“has little freedom to modify [a treaty’s] substantive provisions” when the treaty
is presented for ratification. In either scenario, Article II authority allows
both House and Senate to legislate in areas traditionally reserved to states’
domestic policy when furthering the policy goals of a Sole Executive
Agreement, a treaty, or a Congressional-Executive Agreement.

D. Congressional Concern: Policy Implications of Human Rights Treaties

1. Concern for Cohesive Human Rights Agenda

In defending a juvenile death penalty prohibition enacted as part of an
Article II policy initiative, Congress will argue that the prohibition must be
federally enforced against U.S. constituent states, because an international State
simply cannot advance a human rights policy agenda without interfering with
actions historically considered domestic. “Human rights violations usually
take place within a nation’s territory and usually involve a nation’s own
citizens. But as these purely ‘domestic’ acts take on international legal and
political significance, they too implicate foreign relations.” Congress will
argue that a human rights policy agenda— as opposed to, for instance, an
economic policy agenda—necessarily controls the treatment of individuals, and
to the extent that such control used to rest in the hands of constituent states, it
must now become federal control to further a greater good. “The usual
explanation for the federal privilege is that national power is required to resolve
collective action problems. Foreign policy often looks like a public
good . . . .”

or in any Department or Officer thereof.” U.S. CONST. art. I sec. 8.
124. Koh, State Law, supra note 23, at 1854 (internal citations omitted).
125. Yoo, supra note 14, at 847.
126. Bradley, supra note 9, at 444-45 (noting also the effect of Missouri v. Holland).
127. See id. at 453 (discussing a “demonstrable need” for transnational cooperation in setting
standards for human rights).
128. Goldsmith, supra note 44, at 1673.
129. See id.
130. Swaine, supra note 7, at 343.
2. Concern for International Public Opinion

Senator Feingold's arguments in support of federal death penalty abolition included low deterrent value, potential for equal protection violation, risk of erroneous execution, and—germane to this section—concern over international public opinion and the United States's global reputation.\footnote{See generally 147 CONG. REC. S581 et seq. (daily ed. Jan. 25, 2001) (statement of Sen. Feingold).} Decrying the death penalty in general, Senator Feingold expressed special concern over the international public reaction to the United States' juvenile death penalty:

Courtesy of the Internet and CNN International, the world observes, perplexed and sometimes horrified, the violence in our nation . . . . Even China--the country that many members of Congress, including myself, have criticized for its human rights abuses--apparently has the decency not to execute its children. This is embarrassing. Is this the kind of company we want to keep? Is this the kind of world leader we want to be? . . . [N]o one can reasonably argue that . . . executing child offenders is a normal or acceptable practice in the world community. And I don't think we should be proud of the fact that the United States is the world leader in the execution of child offenders.\footnote{147 CONG. REC. S582 (daily ed. Jan. 25, 2001) (statement of Sen. Feingold).}

When all entities involved in creating a standard accept that standard, the entity that "defies" the norm loses face in the eyes of its peers.\footnote{Koh, Why Do Nations Obey, supra note 48, at 2639 (discussing and citing ABRAN CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS 120 (1995)).} Templeton asserts that if the United States continues to allow the juvenile death penalty, "[c]osts to the United States will include loss of leadership and prestige . . . [and] disrespect for international law . . . ."\footnote{Templeton, supra note 6, at 1215.} Specifically, if the United States shows no intention of enforcing treaties such as the ICCPR against its own states, it will be hard-pressed to explain why its initial participation in the human rights treaty-making process is anything more than pro forma ink-spreading.\footnote{Id. at 1187 (noting that although the United States has actively participated in drafting both the Convention on the Rights of the Child and the American Convention on Human Rights, it has not yet ratified either treaty). See also Norman Dorsen, Civil Liberties, National Security and Human Rights Treaties: A Snapshot in Context, 3 U.C. DAVIS J. INT'L L. & POL'Y 143, 153 (1997) ("[T]he United States has not taken appropriate steps to ensure its own compliance with the international human rights treaties that it has ratified, and this diminishes its authority in speaking to others.").} At best, this could make other negotiations uncomfortable for the
Executive; at worst, it could result in a loss of allies' trust and an associated reluctance to enter into other agreements with the United States.\footnote{136 See \textit{supra} note 76(discussing the Supreme Court's recognition in \textit{Crosby} that a desire to preserve allied relationships is a valid Congressional concern).}

3. Concern for National Security

Congress could also characterize a national juvenile death penalty legislation as part of a national security agenda rather than—or in addition to—a human rights agenda that simply calls for "collective action."\footnote{137 Bradley, \textit{supra} note 9, at 453.}

In the context of formal military security, it is difficult if not impossible to imagine the United Nations authorizing peacekeeping forces to convene on a Kentucky courthouse. Although the United Nations technically has authority to attempt such action, the imagination is further challenged in light of the facts that 1) United States contributions comprise twenty-five percent of the United Nations' annual budget,\footnote{138 \textit{UNITED NATIONS DEPT. OF PUBLIC INFORMATION, FACTS ABOUT THE UNITED NATIONS, U.N. Doc. DPI/1753/Rev.17 (June 1999), available at http://www.un.org/News/facts/setting.htm (last visited Oct. 12, 2002) ("The top seven contributors to the UN are the USA (25%); Japan (17.98%); Germany (9.63%); France (6.49%); Italy (5.39%); the United Kingdom (5.07%); and Russia (2.87%). Collectively, they account for more than 72% of the regular UN budget.")}. 2) United States contributions comprise over thirty percent of the United Nations' peacekeeping budget,\footnote{139 Id.. But see \textit{UN PEACEKEEPING, supra} note 65(noting that the United States owes the United Nations over \$1 billion on its peacekeeping share assessment).} and 3) as a permanent member of the United Nations Security Council, the United States can veto any proposed peacekeeping operation.\footnote{140 \textit{UN PEACEKEEPING, supra} note 65.}

If official sanction by the United Nations is beyond the reach of reasonable imagination, however, terrorist retaliation by a rogue State certainly is not. "If one state's activities raise hackles in a foreign country, that country may retaliate in a way that affects other states."\footnote{141 Swaine, \textit{supra} note 7, at 343.} "Costs to the United States will include . . . endangerment of U.S. citizens . . . ."\footnote{142 Templeton, \textit{supra} note 6, at 1215.} In the wake of the September 11th, 2001 attacks on the United States, such claims hardly need the support of examples; "[e]ven the most exquisitely targeted retaliation has spillover effects."\footnote{143 Swaine, \textit{supra} note 7, at 344.} The 1995 United States Oklahoma City bombing took 168 lives, and insurance claims alone totaled an estimated \$125 million.\footnote{144 CNN.com Europe, \textit{Insurance claims to reach billions}, Sept. 12, 2001, at http://www.cnn.com/2001/BUSINESS/09/12/ins/ (last visited Oct. 12, 2002).} The insurance industry similarly reported a \$510 million impact from the 1993
United States World Trade Center bombing.\textsuperscript{145} From the September 2001 United States World Trade Center attacks, insurance claims are expected to exceed $775 million for insurance companies in the United States and worldwide;\textsuperscript{146} United States airlines anticipate an industry-wide loss of at least $2 billion in consumer dollars;\textsuperscript{147} and publicly traded stocks on every worldwide have struggled to regain their post-attack financial positions.\textsuperscript{148}

\textbf{E. The Fate of a State Challenge}

1. Attacks on Congress's Rational Basis

a. On the Need for a Cohesive Human Rights Agenda

A state can invoke precedent to argue that a mere Congressional preoccupation with "speaking with one voice" in foreign affairs policy does not override a Constitutional protection as fundamental as states' rights to maintain their own criminal laws.\textsuperscript{149} In the same vein, a state can note that the participation of all three federal branches in foreign affairs policymaking already counteracts the "speak with one voice" argument in favor of nationalizing all foreign relations.\textsuperscript{150} However, Congress can counter-argue that these precedents primarily apply in pre-emption cases where Congress stands silent, and that when Congress has actively legislated, the "one voice" broadcasts at a much higher volume to override states' domestic law.\textsuperscript{151}

b. On Concern for International Public Opinion

If a state tries to challenge Congress' concern for international public opinion as a legislative basis, it should note that the Supreme Court already believes that "public opinion [is] an appropriate factor" to consider in constitutional analysis.\textsuperscript{152} The only real argument a state could pose in this context is that Congress acted irrationally when considering international, rather

\textsuperscript{145}\hspace{1em} Id.
\textsuperscript{146}\hspace{1em} Id.
\textsuperscript{147}\hspace{1em} Id.
\textsuperscript{149}\hspace{1em} See Swaine, supra note 7, 338, n.1 (citing Barclays Bank, PLC v. Franchise Tax Board, 512 U.S. 298, 303 (1994) to observe that the "one voice" justification was not enough to trigger dormant foreign commerce clause pre-emption).
\textsuperscript{150}\hspace{1em} Bradley, supra note 9, at 444-45.
\textsuperscript{151}\hspace{1em} See Crosby, 530 U.S. at 381 (discussing uniformity when a Congressional Act has been passed). \textit{Compare Japan Line}, 441 U.S. 434 (invalidating California's \textit{ad valorem} property tax with a "one voice" analysis).
than domestic, public opinion. The state will cite in its support *Stanford*, wherein the Supreme Court clearly stated that it did not care to invite other countries' standards of morality into federal common law *vis-à-vis* the constitutionality of a juvenile death penalty.153

However, *Stanford* merely reflected the Supreme Court's refusal to incorporate international "conceptions of decency"154 into an Eighth Amendment analysis. *Stanford* does not indicate that the Supreme Court would find irrational a congressional record indicating that Congress has chosen to consider international public opinion. The Supreme Court holds no grudge against public opinion *per se*: it has itself weighed international public opinion, particularly during the Civil Rights era when federal *amicus* briefs argued that international disapproval of the United States' apartheid customs were interfering with the Executive Department's ability to conduct foreign affairs.155

Further, nothing in Supreme Court precedent indicates that Congress would be considered irrational for relying on policy recommendations that come from scholars and sources outside United States borders.156 United Nations authorities have made their opinions on the juvenile death penalty quite clear.157 If Congress chooses to consider these standards and incorporate them against constituent U.S. states through legislative channels, the Supreme Court might well shrug at a state challenge and conclude *vox populii vox dei*.158

c. On Concern for National Security

A state can argue that Congress is irrational to concern itself with the possibility of formal UN-authorized military action against the United States, simply because international political realities make that scenario so far-fetched. Similarly, a state can argue that while Congress is rational to concern itself with rogue state retaliation, such concessions would fly in the face of the United States very public commitment itself to a zero-tolerance policy for terroristic pressures.159 These arguments are sound, but in light of Congress' reaction to


154. Id.


156. Wilson, *supra* note 152, at 1085 (discussing the treatment of scholarly work and legal commentary in Weems v. United States, 217 U.S. 349 (1910)).

157. See *supra* notes 21, 22.

158. See Wilson, *supra* note 152, at 1085 (discussing Furman v. Georgia, 408 U.S. 238 (1972) and quoting Justice Powell's dissent: "The assessment of popular opinion is essentially a legislative, not a judicial, function.").

159. See, e.g., UNITED STATES DEPT. OF STATE, TERRORIST THREATS AGAINST AMERICA,
the September 2001 attacks,\textsuperscript{160} the current political climate, and the Supreme Court's history of deferring to Congress' national security legislation, the Supreme Court might not care to publicly agree that any Congressional legislation reflecting a national security concern is irrational. When Congress invokes "national security" as its rational basis for federal legislation, the Court may invoke standing, mootness, or ripeness concerns to justify abstention from decision.\textsuperscript{161} It may employ a "balancing test" that often balances in favor of the asserted national security concern.\textsuperscript{162} Or it may simply decline to examine the issue at all; the Supreme Court exercises a "virtually unlimited judicial deference to the government" in cases touching on national security.\textsuperscript{163}

2. Tenth Amendment State Sovereignty Argument

In 1920, the Supreme Court, in Missouri \textit{v.} Holland,\textsuperscript{164} set the tone for Congressional control of state action touching on international relations. "Prior to [Missouri \textit{v.} Holland] . . . it was at least unclear whether the Tenth Amendment restricted the national government's treaty power,"\textsuperscript{165} but the Supreme Court made the issue quite clear: the Tenth Amendment fell to federal foreign affairs interests.

The treaty in Missouri \textit{v.} Holland, made between the United States and Britain, provided protection for migratory geese and "agreed that the two

\begin{itemize}
\item First, make no concessions to terrorists and strike no deals; Second, bring terrorists to justice for their crimes; Third, isolate and apply pressure on states that sponsor terrorism to force them to change their behavior; and Fourth, bolster the counterterrorism capabilities of those countries that work with the U.S. and require assistance.
\end{itemize}

\textsuperscript{160} A representative sample of the 107th Congress post-attack Public Laws include the Public Safety Officer Benefits Bill (H.R. 2882); the Victims of Terrorism Relief Act of 2001 (H.R. 2884); the 2001 Emergency Supplemental Appropriations Act for Recovery from and Response to Terrorist Attacks on the United States (H.R. 2888); the Air Transportation Safety and System Stabilization Act (H.R. 2926); The "USA PATRIOT" Act (H.R. 3162); the National Defense Authorization Act for Fiscal Year 2002 (S. 1438); and the Aviation and Transportation Security Act (S. 1447). All these bills and public laws are available online from the Library of Congress, \textit{Legislation Related to the Attack of September 11}, at http://thomas.loc.gov/home/terrorleg.htm (last visited Oct. 12, 2002).

\textsuperscript{161} Dorsen, supra note 135, at 147.

\textsuperscript{162} Id. at 146.

\textsuperscript{163} Id.

\textsuperscript{164} 252 U.S. 416 (1920).

\textsuperscript{165} Swaine, supra note 7, at 340.
powers would take or propose to their law-making bodies the necessary measures for carrying the treaty out.\textsuperscript{166} A Congressional Act recognizing the treaty’s terms authorized the Secretary of Agriculture to promulgate the enabling regulations.\textsuperscript{167} The State of Missouri lodged a Tenth Amendment argument that its internal regulations governing migrating geese in Missouri airspace should take precedence over the federal treaty.\textsuperscript{168} The Court concluded that, even though the federal treaty affected states’ rights to govern actions on state soil (or, in this case, state skies), states had no Tenth Amendment right to gainsay federal treaty power when the treaty sought to further “a national interest of very nearly the first magnitude.”\textsuperscript{169}

This power survives today: when Congress legislates pursuant to the Necessary and Proper Clause to enforce the Executive’s Article II power, Congress can override state sovereignty even in areas traditionally committed to states’ domestic policymaking.\textsuperscript{170} And perhaps that was exactly what the Court in 1920 sought to achieve: “We might reasonably conclude . . . that the Court unwittingly created a nationalist monster. But the Court rendering Holland might also (perhaps even simultaneously) be dismayed by the blossoming of state-conducted international relations and their tension with national authority . . . .”\textsuperscript{171}

A state could assert its Tenth Amendment rights against the broad Missouri v. Holland reasoning by arguing two rather esoteric points. First, a state could claim that in light of the political climate at the time of that decision,\textsuperscript{172} Missouri v. Holland contemplates a structural “subject matter limitation” on Congressional legislation, one that tracks the Executive’s subject matter limitation.\textsuperscript{173} Swaine argues that “the President’s negotiating function . . . warrants the dormant preemption of state activities approximating the negotiation with foreign powers— but would not extend, for example, to state conduct concerning foreign private parties, or applying equally to foreign and domestic parties alike.”\textsuperscript{174}

If this is true, it logically follows that state conduct concerning domestic private parties would also fall outside of Missouri v. Holland, and Tenth

\begin{enumerate}
\item \textsuperscript{166} Holland, 252 U.S. at 431.
\item \textsuperscript{167} Id. at 431-32.
\item \textsuperscript{168} Id. at 431-34.
\item \textsuperscript{169} Id. at 433-34, 435. See also Swaine, supra note 7, at 340 (discussing Missouri v. Holland’s expansion of federal treaty power beyond “purely international matters”).
\item \textsuperscript{170} Bradley, supra note 9, at 444-45; Yoo, supra note 14, at 827.
\item \textsuperscript{171} Swaine, supra note 7, at 341.
\item \textsuperscript{172} See, e.g., Bradley, supra note 9, at 458-61 (arguing that the Holland decision was made in a different political context than that of modern-day foreign affairs).
\item \textsuperscript{173} Swaine, supra note 7, at 353; Bradley, supra note 9, at 451 (“Holland itself arguably assumed that there was such a limitation on the treaty power.”).
\item \textsuperscript{174} Swaine, supra note 7, at 353.
\end{enumerate}
Amendment protections would still apply to state decisions to enforce the juvenile death penalty. "These [human rights] foreign relations issues are much more closely tied to traditional state prerogatives than traditional foreign relations issues, and decentralization of these matters often serves salutary ends." Unfortunately, this theory is not widely accepted.

Second, the state could seek to distinguish Missouri v. Holland by asserting that geese are distinguishable from juvenile offenders. The Court in Holland made much of the fact that the treaty in question was designed to preserve geese, and if Missouri killed all the subject geese there would be little point in having a treaty at all. The Court also noted that the geese were "only transitorily within [Missouri and had] no permanent habitat therein."

Holland is a brief opinion, drafted with an elegant economy of word and phrase. There is no reason to assume that these qualifying phrases are anything less than deliberate loopholes that allow a state to argue the fundamental Tenth Amendment principle "that a State's government will represent and remain accountable to its own citizens." Constituent states that legislate and enforce the juvenile death penalty against their own citizens do not, by so doing, undermine the entire human rights agenda of the ICCPR and other treaties. Nor do the states seek to control with these criminal laws anything, or anyone, other than people properly subject to state jurisdiction. Therefore, the state can argue, Holland's extension of Article II power simply was not meant to apply to every provision of every treaty that Congress seeks to enforce.

3. Structural Federalism Argument
   a. Supreme Court Precedent

Assuming arguendo that neither argument works and that the Tenth Amendment lies crushed under the wheels of Missouri v. Holland, structural federalism itself protects states' rights to flirt with international disapproval by enforcing their own criminal laws. If Congress forbids such enforcement

175. Goldsmith, supra note 44, at 1714.
176. Bradley, supra note 9, at 451.
178. Id.
180. The jurisdictional and prudential questions surrounding enforcement of these laws against a citizens of foreign States who commit crimes in the United States are beyond the scope of this paper.
181. See, e.g., Yoo, supra note 14, at 769-71 (rebuiting the proposition that the Necessary and Proper Clause leaves Congress largely unchecked in this area with the proposition that state sovereignty curbs the constitutionality of legislation enacted pursuant to the Necessary and Proper Clause). Cf. Swaine, supra note 7, at 344 ("[T]he availability of plenary national foreign affairs authority substantially rebuts any such claim, since (so far as we know) it may be exercised without regard to limits on domestic authority.").
pursuant to the ICCPR or another ratified human rights treaty, the state will find itself arguing against the scope of plenary Executive power, because Congress is acting under the Necessary and Proper Clause to enforce the Executive's Article II prerogatives.182

The state can argue that under a separation-of-powers doctrine (as distinguished from the "subject matter limitation" proposed in the Tenth Amendment analysis above), Congress may not use its Article II power to effect against states an action that the Executive alone could not effect.183 This is a high hurdle to leap because of the Executive's broad foreign affairs power, but there is some helpful case law for the state.

First, dicta in the "Pentagon Papers" case implies that the Supreme Court finds some constitutional protections to be fundamental to "the very foundation of constitutional government."184 The Court refused to enjoin newspapers from publishing government documents, even over government arguments of national security concerns: "The word 'security' is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment."185 The state challenging a Congressional Act prohibiting the death penalty can argue that even if Missouri v. Holland overrides the Tenth Amendment, the Constitution's structure—i.e., the very fact that it provides for state sovereignty and a check-and-balance system—is at least as "fundamental" as the First Amendment. However, because the "Pentagon Papers" case is only a plurality decision, and because at least one Justice believed that Congressional legislation itself denied the Executive this injunctive power,186 a state might not want to rely too heavily on this case when challenging a congressional Act. Youngstown Sheet & Tube187 gives a state better ammunition for its argument. There, the Supreme Court considered, and rejected as unconstitutional, an Executive Order that sought to nationalize steel mills in the interest of preventing a labor strike and ensuring a source of steel supply for the war effort.188 The state can cite Youngstown's holding that "[i]n the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is to be a lawmaker."189 The state can argue

---

183. See Wilson, supra note 152, at 1114 (discussing Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579 (1952)). See also Yoo, supra note 14, at 839-840 (discussing the Framers' textual decision to enumerate certain powers in Article I and others in Article II, with the effect of restricting most lawmaking functions to Congress rather than the Executive, even when the Executive acts pursuant to plenary power).
185. Id. at 719 (Black, J., concurring).
186. See id. at 744 (Marshall, J., concurring).
188. Id. at 582-83.
189. Id. at 587.
that an Executive treaty that binds the federal government to promulgate certain federal laws and influence state laws— as does the ACHR, with its "Federal States" section— represents a lawmaking function, and one beyond Presidential power. If the Executive exceeded Article II power in signing the treaty, Congress's enabling legislation for that same treaty is neither necessary nor proper. 190

Finally, a state can argue a compelling prudential consideration in favor of a structural federalism check: even if neither the Constitution nor precedent outright prohibits Congress from passing a national juvenile death penalty prohibition, the Supreme Court's blessing on such an Act would open the door to a cascade of nationalist powers neither intended nor desired by the Framers. Lopez recognizes this possibility and firmly decides against such an expansion of federal power. 191 Jones, while its language is not as compelling as that of Lopez, 192 cements Lopez in Supreme Court jurisprudence by following its general anti-nationalist tone.

b. History of Congressional Deference

Although Congressional goodwill is not legally binding, a state can argue that Congress' history of deference to states' rights in the context of human rights treaties evinces a general belief among the political branches that the Constitution protects a state's right to enforce its own criminal laws. 193 "Political branches . . . often choose to protect state interests over foreign relations interests when the two appear to clash . . . a variety of international human rights treaties . . . create numerous potential conflicts with state law." 194

190. Congress could, however, authorize the President to sign such a treaty as part of the Congressional lawmaking function. See id at 585.

191. Lopez, 514 U.S. at 567-68
   To uphold the Government's contentions here, we would have to pile inference upon inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power of the sort retained by the States. Admittedly, some of our prior cases have taken long steps down that road . . . but we decline here to proceed any further. To do so would require us to conclude . . . that there never will be a distinction between what is truly national and what is truly local . . . . This we are unwilling to do.
   (internal citations omitted).

192. Jones, 529 U.S. at 857-58 (following Lopez in its unwillingness to construe a Federal statute to criminalize state activity on basis of the Commerce power, but implying that if Congress had clearly spoken the result might be different).

193. See Yoo, supra note 14, at 807-08 ("Some human rights agreements have languished in the Senate for up to 30 years . . . . Senate leaders opposed several of these treaties because of the concern that they require more expansive individual rights than those in the Constitution.").

194. Goldsmith, supra note 44, at 1675. See also Bradley, supra note 9, at 444 (discussing deference).
When the Senate ratifies treaties that affect domestic law, it usually attaches to the ratification a set of "reservations, understandings, and declarations . . . that limit the treaties' effect on domestic law."195 Some human rights treaties invite legislative "overlap and conflict . . . at the state level."196 The ICCPR in particular triggers Congressional concern because its provisions seek to override state law.197 The ACHR and CRC, as discussed above, threaten to do the same if ratified. When the United States established its reservation to the ICCPR, it clarified that part of its reason for doing so was to retain "the constitutional balance of authority between State and Federal governments."198 Although certainly the Senate can decide to ratify those treaties, the state can assert (albeit a bit hyperbolically) that rejecting this deference to states' rights—a move that fundamentally calls into question the United States' three-pronged governmental system as a whole—might harm the United States' international image even more than would the irritating practice of executing juvenile offenders.

VI. CONCLUSION

If Congress adopts the international majority's standard against executing juvenile offenders, internalizes that standard with an Act that enables a treaty or stands alone under Congressional foreign commerce power, and supports its decision with a congressional record that shows a rational basis for the Act, a state will have a hard time challenging such action on any clearly-established legal or constitutional grounds. The Supreme Court, considering such a challenge, can choose to follow one of two paths. It can find that that the United States federalist model must shift to accommodate the United States' greater role as a global citizen-State. Under that rubric, the Supreme Court could easily decide that Congress' reach in pursuit of that goal extends to tinkering with states' criminal laws.

Conversely, the Court can support the state legislation in favor of a greater concern for states' interest in promulgating their own criminal laws. Although the Constitution does commit most federal affairs to the nationalist agenda, "[p]erhaps states need to be recognized as not just the objects of customary international law, but also as its subjects, and acknowledged as potential contributors to its norms."199 And while "[s]tate initiatives to protect human

195. Bradley, supra note 9, at 428 (1998). See also Goldsmith, supra note 44, at 1675 (making the same point).
196. Bradley, supra note 9, at 397 (1998). See also Dorsen, supra note 135, at 152-53 (discussing the overlap in the context of individual civil rights).
197. See Goldsmith, supra note 44, at n.235.
198. Id. (quoting S. Rep. No. 102-23, at 18-19 (1992)).
199. Swaine, supra note 7, at 354.
rights in places like South Africa and Burma are striking in part because they seem unlikely," that is no reason to exclude states-*qua*-states from the arena of international human rights initiatives. Perhaps U.S. constituent states are willing to become active and educated participants in the international juvenile death penalty debate. If so, a Supreme Court decision approving a Congressional fiat that not only extinguishes states’ laws but also excludes states from further participation in the internalization process is both unnecessarily patriarchal and a dangerous precedent.

200. *Id.* at 343.
MAXIMIZING PLAINTIFF PROTECTION IN THE WORLD OF ASSET FREEZING AND BYPASSING THE DUE PROCESS REQUIREMENT OF NOTICE: THE MAREVA INJUNCTION AS AN ALTERNATIVE TO THE AMERICAN LEGAL REMEDIES.

Carlos Fabano*

I. INTRODUCTION ........................................... 131
II. THE PRE-JUDGMENT ATTACHMENT .......................... 132
III. THE PRELIMINARY INJUNCTION ............................ 133
IV. THE TEMPORARY RESTRAINING ORDER (TRO) .............. 136
V. THE MAREVA INJUNCTION DEFINED .......................... 137
   A. Origin .............................................. 137
   B. Scope of the Mareva Injunction ........................ 139
   C. Limits .............................................. 141
   D. Procedure ........................................... 143
   E. The Worldwide Mareva Injunction ...................... 143
VI. CONCLUSION ........................................... 146

I. INTRODUCTION

The feeling of security is something that everyone covets and pursues, more so, when you are in the position of a plaintiff initiating a lawsuit. You would want to have some reason to believe that there will be money awarded to you in the event that you are successful in the litigation. This expectation can become a mere fantasy and an absolute nightmare when you encounter a defendant who is certain to remove all of his assets out of the country in order to avoid the court's judgment, which in turn leaves you, the plaintiff, with absolutely nothing to collect. While there are some safeguards available to a plaintiff in these situations, the purpose of this paper is to show that the American legal system falls short of fully protecting plaintiffs in these matters. Moreover, it also examines the alternative available to the American legal system, the Mareva injunction.

The American legal system offers a few choices to a plaintiff who seeks protection from a defendant removing his assets before or during trial. Let us first take a look at these choices to understand them and to allow us to compare

* J.D. Candidate, May 2004, Nova Southeastern University, Shepard Broad Law Center, B.A. Florida International University, 2000.
them to the Mareva injunction, in order to point out their shortcomings and inadequacies and show how they fail to give the plaintiff the complete protection and security that the Mareva injunction provides.

II. THE PRE-JUDGMENT ATTACHMENT

The pre-judgment attachment is issued by a court when a plaintiff shows that not only are his claims valid, but that there is also a likelihood that the defendant will remove or dissipate his assets or property from the jurisdiction.1 The order would allow a sheriff to physically seize the defendant’s tangible property located within the jurisdiction, and it would also create a security lien on the defendant’s assets that the order is targeting.2 Nevertheless, the problem with the pre-judgment attachment arises when we look at the plaintiff’s particular claim.3 Since the pre-judgment attachment is controlled by state statute, it is limited to only certain claims listed by the statute.4 However, the most important factor that makes this choice unappealing to a plaintiff, is the fact that it requires the court to have in rem jurisdiction over the property.5 In rem jurisdiction is an action against property within the jurisdiction, not against any person in particular.6 So if the defendant has assets anywhere outside of the court’s jurisdiction, the court would be unable to seize them, and a defendant that acts swiftly may transfer his assets held within the jurisdiction.7 The latter point is crucial in the analysis of this paper, since it is concerned with the freezing of assets located overseas, and the pre-judgment attachment would automatically be ruled out as a remedy because of its jurisdictional limitations.

Many commentators also argue that the pre-judgment attachment is intrusive because it has the effect of creating a security lien in the defendant’s assets and it encumbers titles.8 These additional liabilities that it imposes upon the defendant, can force him into bankruptcy, thus leaving him with nothing to satisfy the plaintiff’s judgment.9

2. Id.
3. Id.
4. Mary A. Nation, Granting a Preliminary Injunction Freezing Assets Not Part of the Pending Litigation: Abuse of Discretion or an Important Advance in Creditors’ Rights?, 7 TUL. J. INT’L. COMP. L. 367, 369 (1999) (discussing that the attachment is not available to a plaintiff seeking monetary damages).
5. Johansson, supra note 1, at 1099.
6. BLACK’S LAW DICTIONARY 856 (7th ed. 1999).
7. Johansson, supra note 1, at 1096.
8. Id. at 1098.
9. Id. at 1102.
If we look at the amount of people and businesses that have their assets located overseas, the chances that plaintiffs involved in litigation in the international arena will encounter such problems and face the reality of a pre-judgment attachment's ineffectiveness in those matters are significant. Consequently, it becomes clear after looking at the pre-judgment attachment’s features, that from an international law standpoint, it is completely ineffective because a court will never be able to have control or power over any asset that is found outside of the country.

III. THE PRELIMINARY INJUNCTION

Another form of protection that the American legal system makes available to a plaintiff is the preliminary injunction, which is issued before the trial begins in order to prevent irreparable injury to the plaintiff while the court considers whether to grant permanent relief. Its purpose is to preserve the status quo between the parties pending a final determination on the merits. However, it is only granted after the defendant has been given notice and an opportunity to participate in a hearing on the issue. Moreover, the preliminary injunction is only available if the plaintiff is seeking equitable relief. Some authorities argue that if the plaintiff seeks “legal” relief, then only a preliminary attachment can be used, and that a court granting a preliminary injunction under those circumstances when the assets being frozen are not part of the pending litigation, is abusing its discretion. Nevertheless, the majority leans towards granting a preliminary injunction regardless of the type of relief sought by the plaintiff, as long as the plaintiff can show he will suffer irreparable injury or that failure to grant it would make the defendant judgment proof.

Some courts have granted preliminary injunctions even though the remedy sought was legal, but it was granted because if not, any other available equitable remedies would have been extinguished. In the case of De Beers Consol. Mines v. U.S., 325 U.S. 212 (1945), the United States sued a corporation that produced gems and industrial diamonds and exported them to the United States. The United States claimed that the defendant conspired to monopolize United States commerce with foreign

10. MARC ROHR, CASES AND MATERIALS ON CIVIL PROCEDURE, 26 (2002).
12. Id. at 525.
15. Id. at 369.
16. Id. at 382 (discussing that the preliminary injunction was justified because removal of the assets by the defendant would have made any other remedy inadequate to the plaintiff).
17. Id. at 373.
nations, and the United States tried to prevent further monopolization by the defendant by obtaining a preliminary injunction freezing their assets and property in the United States. The Court reversed the granting of the injunction because it would create a "sweeping effect" where every plaintiff going to the court for any type of relief, would be able to impose an injunction on the defendant by merely stating that the defendant might transfer his goods.

The court in reversing the injunction, reasoned that the injunction requested dealt with a matter wholly outside of the issues in the lawsuit, and that it involved property which in no circumstances could be dealt with in any final injunction that could be entered.

In In Re Estate of Ferdinand Marcos, 25 F.3d 1467 (1994), the families of torture victims sued Ferdinand Marcos and his estate, and applied for an injunction against it. The purpose of the injunction was to prevent the defendant from encumbering real property that was located in New York, which had been allegedly purchased with funds illegally taken from the Philippines.

When the case finished, the plaintiff sought a continuance of an injunction in another suit against the Marcoses in California, which was granted. However, since the plaintiff only sought monetary damages, the defendant claimed that the court had abused its discretion in granting a preliminary injunction. The purpose of the injunction in this case was to personally prevent them from transferring assets wherever they might have been located, including assets in banks in other countries. The court said that it could issue the injunction in order to prevent a defendant from dissipating assets, in order to preserve the possibility of equitable remedies that could have arisen later in the proceedings. Thus, in this case, the court said that the district courts had the authority to issue preliminary injunctions where the plaintiff could show that monetary damages would be inadequate due to "impending insolvency of the defendant or that the defendant [had] engaged in a pattern ... of dissipating assets to avoid judgment." The court mentioned the De Beers case in reasoning that only allowing preliminary injunctions in extraordinary cases

19. Nation, supra note 4, at 383 (explaining that granting the injunction under those circumstances would be completely unjustified by the long history of equity jurisprudence).
21. See generally 25 F.3d 1467 (9th Cir. 1994).
22. Id.
23. Id.
24. Id.
25. Id.
26. Nation, supra note 4, at 382 (explaining that the asset freeze was a provisional remedy to giving final relief).
27. Id. at 383.
where equitable relief is not sought, the "sweeping effect" of concern in the DeBeers case, could be avoided. 28

So we have seen that the United States courts may grant preliminary injunctions outside of suits asking for equitable relief, and we saw its denial where the funds sought to be frozen, had nothing to do with the final relief or decree sought. On the other hand, this shows a rather inconsistent if not unpredictable argument and trend between the different courts of the American legal system. It seems unlikely that a plaintiff could rely on a strong precedent for expecting the preliminary injunction to serve as protection in freezing a defendant's assets.

In the case of Grupo Mexicano de Desarollo, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, (1999), the plaintiff, an investment company, bought $75 million in unsecured notes from a Mexican company, who along with four other subsidiaries named as defendants in the suit, guaranteed the notes. 29 The plaintiff alleged that the defendant was insolvent and claimed that it was giving its Mexican creditors preference on the notes, which frustrated any judgment the plaintiff could obtain in the United States. 30 The plaintiff sued for the amount of the notes and to obtain a preliminary injunction to prevent the defendant from removing its assets. 31 The Court held that granting the preliminary injunction to freeze the defendant's assets was beyond the district court's equitable authority, and since the plaintiff sought a legal remedy based on a breach of contract and not an equitable remedy based on an existing statute, the preliminary injunction was inappropriate. 32 Furthermore, the Court held that a United States district court could only award a preliminary injunction if it provides a remedy that would have been available from the English Court of Chancery at the time the United States Constitution was adopted in 1787. 33

To complicate matters further, the injunction requires that the plaintiff meet several requirements, such as showing that they will suffer irreparable injury if the injunction is not issued, which is a requirement that is normally not satisfied and leads to a denial of the granting of the injunction. 34

These two remedies, while providing some protection to a plaintiff, do not give enough coverage and foster more uncertainty than assurance, because the preliminary injunction will be denied if it targets a legal remedy, and the pre-judgment attachment will not be granted if the plaintiff's claim falls outside of

28. Id.
29. See generally 143 F.3d 688 (2nd Cir. 1998).
30. Id.
31. Id.
32. Id.
33. Id (arguing that the English Court of Chancery is the foundation of the American legal system).
34. Johansson, supra note 1, at 1100.
the statute’s scope.\textsuperscript{35} The Mareva injunction applies to claims that these two remedies cannot.\textsuperscript{36}

Our constitution requires that notice and a hearing be given before our property or assets may be seized by way of these procedures.\textsuperscript{37} Yet it is quite disturbing to think that the notice given in order to comply with due process, is what would allow a defendant to remove his assets from the jurisdiction of the court.

IV. THE TEMPORARY RESTRAINING ORDER (TRO)

There is perhaps one choice available to a plaintiff that can solve the problem of having to give notice to the defendant that his assets are being seized, which has the effect of giving him time and a warning that he should remove them if he wants to make himself judgment proof.\textsuperscript{38} Rule 65 of the Federal Rules of Civil Procedure authorizes United States district courts to issue a temporary restraining order to freeze assets when there is a threat of dissipation of assets.\textsuperscript{39} The importance of the TRO for the purposes of this paper, is that it is sometimes granted to a plaintiff without giving notice to the defendant.\textsuperscript{40} A TRO is issued on an ex parte basis, as is the Mareva injunction, and it will be issued without written or oral notice to the adverse party only if: immediate and irreparable harm is likely to result, and the attorney certifies the efforts made to give notice or reasons supporting why notice should not be required.\textsuperscript{41} However, the courts make every effort to give notice to the defendant, and they also require that the plaintiff show that he will suffer irreparable injury if the order is not issued, a requirement that is not commonly met, as well as requiring a hearing on the issue, at which time the TRO’s effect ends.\textsuperscript{42}

It seems as if the TRO, which can be seen as the harshest and most extreme order that can be issued against a defendant, defeats its own purpose, because in most cases it exhausts all possible avenues in order to give notice to the defendant, thus eliminating the element of surprise that one would hope and imagine it was designed to accomplish. Moreover, when we look at the fact that the plaintiff has to meet several strict requirements in order to receive the grant, the TRO seems to be an unattainable remedy. As we will see later in this paper,

\textsuperscript{35} ld.
\textsuperscript{36} ld.
\textsuperscript{37} Alexander, III, supra note 11, at 525.
\textsuperscript{38} ld. at 526.
\textsuperscript{39} ld.
\textsuperscript{40} ROHR, supra note 10, at 26.
\textsuperscript{41} ld.
\textsuperscript{42} Alexander, III, supra note 11, at 526 (explaining that a hearing is required after the TRO is issued to determine if it should remain in effect).
the TRO has some similarities with the Mareva injunction, but we will find that
the Mareva Injunction has a much more potent and restrictive effect on a
deceitful defendant.

V. THE MAREVA INJECTION DEFINED

The Mareva Injunction is an interlocutory order generally obtained in an
ex parte hearing before a lawsuit is filed, but it may be obtained at any stage of
the proceedings and in aid of execution.\footnote{43} It has been referred to by many
commentators as a creditor's legal "nuclear weapon."\footnote{44} The term ex parte
means without notice to or argument from the adverse party or anyone adversely
affected.\footnote{45} The reason why an ex parte application is made, is that the order
would be ineffective if the defendant knew about its existence and disposed of
his assets before the injunction could be granted.\footnote{46} This is important in the
analysis because the element of surprise and lack of notice to a dishonest
defendant, is what this paper attempts to highlight in the application of the
Mareva injunction. It restrains a defendant from disposing of his assets where
there is a real risk or danger that he may dispose of them to frustrate any
judgment that the court might award.\footnote{47} So foreign defendants will not have a
chance to remove or dissipate their assets from the jurisdiction in an attempt to
avoid a judgment from the court.\footnote{48} Likewise, if a foreign debtor has assets in
the United States that it is seeking to remove for the benefit of creditors in its
home country, the Mareva injunction is an invaluable weapon to prevent this
from happening.\footnote{49}

A. Origin

In 1975, in the case of \textit{Nippon Yusen Kaisha v. Karageorgis}, 1 W.L.R. 1093 (Eng. C.A. 1975), the English Court of Appeals reversed a High Court
judge's ruling that denied the plaintiff's application for an emergency
injunction, thus giving rise to the first grant of an injunction with the aim of
preventing a defendant from disposing of his property in lieu of a judgment in

44. Nation, supra note 4, at 399.
45. BLACK'S LAW DICTIONARY, supra note 6, at 597.
46. Nation, supra note 4, at 400.
47. Id. at 397.
48. Alexander, \textit{Im}, supra note 11, at 505.
favor of the plaintiff. The plaintiffs in Nippon were ship owners who had issued a writ against defendants, Greek charterers, who failed to pay a certain amount for the use of the plaintiff’s ship. At a later point in the proceedings, when the plaintiffs feared that the defendants would remove their assets out of the jurisdiction, they applied ex parte for an injunction to restrain the defendant from transferring assets outside of the English jurisdiction, and even though the defendant lacked an effective defense and the plaintiff had clearly shown that the money was owed to him, the absence of case law supporting the request of the injunction resulted in the denial of their application. Nevertheless, the plaintiffs appealed and were successful when the judge, Lord Denning, held that the High Court could grant an injunction by an interlocutory order in every case where it appeared to be convenient and just, and that if the court failed to grant the injunction in this case, the money owed to the plaintiffs would be transferred out of the jurisdiction and they would encounter difficulty in retrieving any payment whatsoever. Even though the Nippon case is not the case considered to be the origin of the Mareva Injunction, it certainly signaled the change in practice of the English Courts in granting an emergency injunction to prevent a defendant from dissipating his assets in view of a judgment for the plaintiff.

The case that gives the Mareva injunction its name, Mareva Compania Naviera S.A. v. Int’l Bulkcarriers S.A., 1975 L. Lloyd’s Rep. 509 (Eng. C.A.), dealt with plaintiffs who had chartered their ship, the Mareva, to the defendants, who in turn had contracted with the Indian government to deliver phosphate to India. After delivery of the phosphate, the Indian government deposited its payment to the defendant for the phosphate in a London account, but the defendant defaulted on its last payment for the ship to the plaintiffs, and claimed that it did not have the money to satisfy the debt. The plaintiff made an ex parte application on June 20, 1975 to freeze the account because they feared removal of the $30,800 owed to them, and Lord Denning, again applying the reasoning from the Nippon case and using the Supreme Court of Judicature (Consolidated) Act 1925, granted the injunction.

As we can see from the dates of the aforementioned decisions, the change in English law in terms of granting the injunctions, has been a relatively recent phenomena. The two cases can be seen as the triggers for the change,

51. Id.
52. Id.
53. Id.
54. Alexander, supra note 11, at 508.
56. Id.
although the latter is the one widely recognized as the origin of the Mareva Injunction. 59

B. Scope of the Mareva Injunction

A Mareva Injunction may be granted against a defendant or a third party that is holding assets for the defendant. 60 The subject of a Mareva injunction is any asset in legal or beneficial ownership of the defendant, which is potentially available to an anticipated judgment award. 61 Perhaps a feature of this injunction that makes it even more attractive and favorable than the available United States remedies, is the fact that it can attach to assets either tangible or intangible, personal or realty. 62 This factor weighs heavily on the Mareva Injunction’s utility and scope when we compare it to the shortcomings and limitations of the pre-judgment attachment and preliminary injunction. Moreover, when we consider Lord Denning’s reasoning and the Mareva injunction’s broad attachment power, it is safe to say that as long as the basis for granting the injunction is reasonable, it will be granted and applied to all types of property regardless of the cause of action or debt owed to the plaintiff. 63 We can easily contrast this approach with that of the TRO, which seems to impose more of a barrier on the plaintiff than an available solution.

In terms of jurisdiction, the Mareva injunction will bind a defendant even if he is not domiciled or present within the jurisdiction, and it will specify which assets belonging to the defendant it will cover, and it will only be valid against those assets which are specified. 64 Its jurisdiction extends to debts and commercial transactions, as well as to any action for damages for breach of contract or tort. 65

If a plaintiff’s claim is for a small sum, the injunction may be limited to that specific amount, but if the claim is significant, the plaintiff will normally make an application to freeze all of the defendant’s assets. 66 However, a defendant will not be deprived of living expenses, so courts will normally allow the defendant to decrease the assets below the amount indicated by the injunction if he needs money for those basic expenses. 67 It is also not

59. Id. at 425.
60. Zicherman, supra note 43, at 675.
61. Scope of Mareva Injunction, supra note 57, at 2.
63. Id. at 507.
64. Zicherman, supra note 43, at 674.
65. Scope of Mareva Injunction, supra note 57, at 2.
uncommon for the defendant himself to apply to the court so that the injunction will allow him to meet ordinary living and business expenses, but this will only be allowed if he has disclosed all of his assets.\(^{68}\)

The Mareva injunction's scope is far greater than that of an ordinary injunction, but it will only be granted if there is evidence showing that the defendant possesses assets within the court’s jurisdiction, or that there is a likelihood of their removal.\(^{69}\)

It applies on an in rem basis, but it is an in personam order, and it takes effect from the moment it is pronounced on every asset of the defendant in relation to which it is granted.\(^{70}\) The fact that it applies in rem in some circumstances, presents complications when it requires the court to have jurisdiction over foreign assets.\(^{71}\) Nevertheless, there are disclosure orders which require a defendant to reveal all of his assets within or outside of the court’s jurisdiction, and they allow the plaintiff to attach assets located in foreign jurisdictions as well to seek enforcement of the judgment.\(^{72}\) So this is yet another key factor in favor of the Mareva injunction, because as was mentioned earlier, the prejudgment attachment used in the American legal system requires in rem jurisdiction, so a foreign defendant’s assets would be untouchable.\(^{73}\)

The Mareva injunction does not directly affect third parties, except to the extent that they are not allowed to “aid and abet a breach of its orders.”\(^{74}\) For example, a bank that is holding a defendant’s assets that are the target of the injunction, is not permitted to transfer the defendant’s funds or use any of the assets to make payments that would violate the injunction.\(^{75}\) A third party could face contempt charges without even being aware that an injunction is in effect.\(^{76}\) Every person who has knowledge or notice of the injunction is obliged to do whatever he reasonably can to preserve the assets affected by its terms.\(^{77}\) So we see that not only is the need to give notice to the defendant bypassed, but it would also affect others without giving them any type of notice either. I believe that this factor serves as a perfect example of the power and value that the Mareva injunction possesses.

---

70. *Id.*
72. *Id.*
73. Nation, *supra* note 4, at 399.
74. *Id.*
75. *Id.*
76. *Id.* at 400.
77. *Scope of Mareva Injunction, supra* note 57, at 2.
The Mareva injunction can also be issued against a trustee, ordering him to freeze all of the assets and compelling him to provide access to his files to the plaintiff, in order to allow him to modify his complaint if necessary. However, a plaintiff will almost always apply for an order that would require a defendant to file an affidavit disclosing his assets within a specified time, because many times the plaintiff will not know the amount or nature of the assets held by the defendant. If the trustee transfers the assets out of the jurisdiction himself, he faces contempt of court charges and can be charged for fraudulent transfer. In addition, the grant can affect assets that are located within the court's jurisdiction, or they can apply to assets on a worldwide basis.

Many countries use the Mareva injunction, and the trend is toward giving it more recognition and use as a tool to protect plaintiffs from insolvent or untrustworthy defendants. Mareva injunctions have been granted in Australia, New South Wales, Western Australia, the Australian Capital Territories, New Zealand, the Canadian Federal court, the Provincial courts of Ontario, British Columbia, New Brunswick, Nova Scotia, Singapore, Malaysia, and Hong Kong. It can also be granted in a jurisdiction that is a party to the Brussels or Lugano conventions, which relate to jurisdiction and judgments. These conventions recognize the use of the Mareva throughout the European Union.

C. Limits

The Mareva injunction, although wide and sometimes unlimited in scope, does not give the plaintiff a security interest in the defendant's frozen assets prior to a final judgment from the court. It only serves to freeze the assets until a judgment is reached later in time. As was mentioned earlier, if a plaintiff's claim is relatively small, the injunction will only freeze as much of the defendant's assets as is necessary to satisfy the plaintiff's claim. This can

80. Mooney Jr., supra note 78, at 1.
81. Mareva Injunctions- Uses and Abuses, supra note 66, at 1.
83. Zicherman, supra note 43, at 676.
84. Alexander, Ill, supra note 11, at 528.
85. Id.
88. Mareva Injunctions- Uses and Abuses, supra note 66, at 2.
be seen not only as a limit on the plaintiff and of the injunction’s scope, but also as a measure of protection for the defendant.  

Another limit imposed on a plaintiff seeking a Mareva injunction, is that if the defendant that he is targeting is either bankrupt or insolvent, he will rank in order of priority with all of the other defendant’s creditors; he will not get preference in receiving the defendant’s assets. Furthermore, another one of the limits of the Mareva injunction, which can also be viewed as both a hurdle for the plaintiff and a safeguard for the defendant, is the burden of proof requirement imposed on the plaintiff. The plaintiff must show a “good arguable case”, and the factors required of him to meet the burden of proof are conjunctive, thus if he fails to meet just one, the injunction should not be granted. The plaintiff must fully disclose all matters of which he has knowledge that are material for the judge to know, as well as the grounds for his claim, the amount, and any other particulars regarding his claim against the defendant. In addition, the plaintiff should give his reasons for believing that there is a risk of the assets being removed before a final judgment, and his grounds for believing that the defendant has assets within the jurisdiction.  

There are several factors used by the courts to determine if there is a risk of removal of assets. Real risk is present and immediate when the defendant has in the past, removed assets out of the jurisdiction, when the defendant is a foreign business and can easily become judgment proof, and when the defendant’s past business dealings show dishonesty. Finally, the plaintiff must pay a sum of money that works as a bond or security interest in case the injunction is erroneously granted. These requirements differ from those of the TRO because they are only asking the plaintiff to give some reasons for why the injunction should be granted, he is not being asked to show irreparable injury and to try everything in his power to give notice to the defendant.  

Nevertheless, even if the plaintiff has met the burden of proof, there is yet another limit on the injunction’s effectiveness that arises after it has been granted, this is the injunction’s duration. The duration of the Mareva injunction is normally between five days to a week, and if the plaintiff wishes
to extend it beyond the expiration date, he must give notice to the defendant of his intention to apply for an extension of the injunction.\(^9\)

**D. Procedure**

The procedural requirements that a plaintiff must meet in order to apply for a Mareva injunction, include all of the requirements previously mentioned to meet the burden of proof, as well as a statement of the plaintiff’s claim, an affidavit in support of his claim, and copies of the draft of the order that the plaintiff is requesting the court to issue.\(^10\) The draft of the order includes the terms or parts of the injunction that the plaintiff is applying for, and it is delivered to the court before the hearing.\(^11\) Oral arguments then take place based on the documents that were submitted, and the order will be given and become immediately operative upon the judge’s approval of the application.\(^12\) In terms of the legal fees that accompany a Mareva injunction, the party that receives the order for the injunction may recover legal fees and costs by filing a motion with the court with an attached affidavit of attorneys’ fees and cost.\(^13\)

**E. The Worldwide Mareva Injunction**

The origin, scope, and development of the Worldwide Mareva injunction differ from the injunction that only affects assets within the jurisdiction.\(^14\) When we consider the amount of business that is conducted today in the international arena, and we take into account how many illegal and corrupt maneuvers accompany those transactions, it would be absurd not to think of extending an asset freeze or Mareva injunction to a defendant’s assets that are located in another country. When a court issues a worldwide Mareva injunction, it is not attempting to exercise jurisdiction in foreign territories, instead it is directing the defendant that is subject to its jurisdiction, not to dissipate or transfer his assets wherever they are situated.\(^15\) The order will bind him whether his acts or omissions take place within the jurisdiction or abroad.\(^16\) It was not until the late 1980’s that England began to issue Worldwide Mareva injunctions.\(^17\) The Worldwide Mareva was established in the case of *Babanaft Int’l Co S.A. v. Bassatne*, 1990 Ch. 13 (Eng. C.A.), where the court authorized

---

99. *Id.*
101. *Id.* at 510.
102. *Id.*
103. *Id.* at 512.
105. *Id.*
106. *Id.*
the granting of an order against the defendant otherwise within its jurisdiction, relating to assets that he held overseas.\(^{108}\) The issue in that case was whether a Mareva injunction could be granted to freeze a defendant's foreign assets so that "notice can be given by the plaintiffs to all and sundry abroad."\(^{109}\)

When foreign assets are involved in the matter, the court will apply a proviso to the order, known as the Babanaf proviso.\(^{110}\) This proviso states that nobody in the foreign jurisdiction will be affected by the order of the injunction until it is declared enforceable by a foreign court, at which point it will only be enforceable to the extent that they are: a person addressed by the order or, persons subject to the court's jurisdiction who have received notice of the order within the jurisdiction and are able to prevent acts outside the jurisdiction that would assist in a breach of the order.\(^{111}\) So a plaintiff that wants a Worldwide Mareva injunction to be issued by the court, must make a further application in the foreign jurisdiction where he believes the defendant's assets are located.\(^{112}\)

The requirements that a plaintiff needs to meet for the Worldwide Mareva injunction are similar to those needed for the basic Mareva injunction.\(^{113}\) The plaintiff must show a good arguable case on the merits, that there are insufficient assets in England to meet his judgment, that the defendant has foreign assets, and that there is a real risk of disposal of the assets that would frustrate enforcement of the plaintiff's judgment if one were to be obtained.\(^{114}\) It appears that a Worldwide Mareva injunction will only be appropriate where large sums are involved and there is evidence that the defendants are used to moving assets around the world through sophisticated means so that enforcement of the judgment would cause great difficulty to the plaintiff.\(^{115}\)

In the case of Republic of Haiti v. Duvalier, 1990 Q.B. 202 (Eng. C.A.), the Court upheld the granting of a worldwide Mareva injunction against Jean-Claude Duvalier, his wife, and his mother, that prevented them from transferring their assets, wherever they were located, which represented funds allegedly embezzled from the Republic of Haiti.\(^{116}\) The Haitian government filed suit in France and then sought a restraining order in England, and even though the Duvaliers did not reside in England, the court said that there was jurisdiction to
grant the Mareva injunction pending trial, over assets worldwide.117 The court came to this conclusion because it said that the determining factor was the "plain and admitted intention of the defendants to move their assets out of the reach of courts of law and the vast amounts of money involved," and the resources and skill that they showed in doing so.118

A case where the United States pursued and resorted to the use of a Mareva injunction, was the case of FTC v. On Line Communications.119 This was a landmark case where the United States for the first time, obtained an asset freeze issued by a foreign court and was successful in returning those frozen assets to United States telemarketing fraud victims.120 The FTC filed suit against On Line Communications and their hidden principal, but after learning that the principal had transferred assets to the Bahamas, it requested that the Department of Justice's Office of Foreign Litigation bring an action in the Bahamian court for the purpose of freezing the assets and returning them to the United States.121 The Bahamian court issued a Mareva injunction that froze the principal's assets pending inclusion of the Bahamas proceeding.122

However, even though the United States was successful in protecting those assets, it had to initiate suit in the Bahamas by way of its foreign litigation office, and the Bahamian court was the one that issued the Mareva injunction.123 Had the United States adopted the Mareva injunction as a remedy available in its own courts, it could have been operational earlier, and they would have resolved the problem in a more time-efficient manner. The FTC could have applied for a Mareva in the United States when it made its initial complaint, and then all it would have had to do to have it enforced in the Bahamian court was to make a further application to that court. Even though the freeze was successful, it required extra steps that would not have been necessary had the United States already possessed the Mareva as a possible remedy in the first place.

If the Mareva injunction's utility is valuable to a plaintiff when he is pursuing a defendant with assets located inside the court's jurisdiction, then it only multiplies when its reach is extended on a global basis when the defendant's assets are located in another country. Imagine someone initiating a lawsuit in the United States, against a company or individual who has enough money to satisfy a judgment against him, but his money is not only likely to be

117. Id.
118. Id.
120. Id.
121. Id.
122. Id.
123. Id.
transferred so as to render it untouchable by the court, but it is located outside of the United States. Next, consider what the United States remedies could accomplish for the plaintiff. As we saw earlier, the pre-judgment attachment’s requirement of in rem jurisdiction, does not allow it to have power over the money. Furthermore, the preliminary injunction would be useless because the plaintiff is looking for monetary relief, which renders the preliminary injunction completely ineffective. In contrast, when we apply the Worldwide Mareva Injunction, we see that not only would the plaintiff be able to freeze the foreign assets, but most importantly, he would be able to do so without having to give any type of notice to the defendant himself.

After September 11th, when examining the topic of asset freezing, it is necessary to briefly mention the United States effort in freezing the assets of corporations suspected of financing terrorist groups. Even these types of asset freezes by the United States, in a time of heightened national security, have faced some resistance and close scrutiny. Lawsuits alleging violation of due process and equal protection under the Fifth Amendment because the government’s functions were not exercised with a proper hearing and other processes, are not uncommon. However, freezing the assets of suspected terrorist groups, while deserving mention, differs from the analysis of this paper because they tend to have a degree of governmental immunity and are powered by executive orders and national security concerns.

VI. CONCLUSION

There are numerous reasons why the United States might want to resist adopting the Mareva injunction. Perhaps they do not want to go against a strong precedent, or because the principles of due process would be offended by its adoption. Nevertheless, the service and protection that they would be providing for a plaintiff, could in some instances, justify such an effect.

When discussing the Mareva injunction, we are usually considering its use when an American plaintiff is dealing with a foreign defendant in possession of foreign assets, or assets that have the potential to be removed to another country. So the person who requires the protection here is the plaintiff. If not, what is to stop the defendant from committing the same act in the future? The second that the court gives the defendant notice of a proceeding against him, the plaintiff’s chances of recovery will have decreased substantially. This paper does not seek to bypass or attack the need for notice that the Constitution calls

125. Id.
for, but when we consider a situation from an international perspective, we need to realize that the dealings between individuals and companies and the potential for a defendant making not only himself but his assets disappear, calls for different and more severe measures. It seems fair to say that the person being protected here is an American plaintiff, and his own Constitution acting as the source of the problem by requiring the very notice that gives the defendant the chance to elude a judgment against him, is completely unjustified.

A plaintiff dealing with a defendant in the international business arena needs to feel that there is a sure and effective remedy for him in the event that he has to initiate a lawsuit. As we have seen from the analysis of the American legal system, the plaintiff will face more uncertainty than peace of mind. Many of the requirements that need to be met to obtain either the Mareva injunction or any one of the American remedies, share some similarities as well as some differences. Nevertheless, the fact that notice is not required, as well as the Mareva injunction’s ability to apply on a worldwide basis, thereby surpassing the jurisdictional shortcomings of the American remedies, marks the difference that separates a secure plaintiff from one that will be left empty-handed.
A SAFETY NET IN THE E-MARKETPLACE: THE SAFE HARBOR PRINCIPLES OFFER COMPREHENSIVE PRIVACY PROTECTION WITHOUT STOPPING DATA FLOW

William J. Kambas*

I. INTRODUCTION ..................................... 150
II. A BRIEF CHRONOLOGICAL DEVELOPMENT OF COMPREHENSIVE CONSUMER PRIVACY PROTECTION ........ 151
III. A GOOD START: THE FAIR INFORMATION PRACTICE PRINCIPLES AND THE OECD GUIDELINES .......... 155
   A. FIPP ........................................ 155
      1. OECD Guidelines ......................... 157
      2. Limitations of the FIPP and OECD Guidelines .... 160
      3. The E.U. Data Directive: in harmony with the FIPP and OECD Guidelines ..................... 161
IV. SAFE HARBOR PRINCIPLES: A SAFETY NET FOR THE PROTECTION OF CONSUMER PRIVACY .................... 164
    1. The Creation Of The SHP ..................... 165
    2. The Substance of the SHP ..................... 165
    3. Implementation of the SHP in the U.S. .......... 170
V. PENDING QUESTIONS: CRITICISM OF THE SAFE HARBOR PRINCIPLES ........................................ 171
   1. Does the SHP offer sufficient protection? ......... 171
   2. Is There Protection From Discrimination? .......... 172
   4. Does the SHP Lack Enforcement and Accountability? . 173
VI. SHARING THE BURDEN: TECHNOLOGIES THAT ENHANCE THE EFFECTIVENESS OF THE SAFE HARBOR PRINCIPLES ........................................ 176
    2. Code: Creating The Need For Protection .......... 176

* J.D./M.B.A., University of Connecticut, expected 2003; B.A., Skidmore College, 1996. The author would like to thank Professor Paul Schiff Berman, University of Connecticut School of Law. Professor Berman not only provided guidance, but also encouraged a belief in and respect for academic dialogue.
I. INTRODUCTION

In May of 2000, the FTC, under Chairman Robert Pitofsky, concluded that industry self-regulation was not effective in protecting consumer privacy and in a report to Congress the FTC expressed the view "that legislation [was] necessary to ensure further implementation of consumer data protection devices."1 At the same time, the U.S. Department of Commerce ("DOC") and the European Commission jointly developed the so-called Safe Harbor Principles ("SHP").2 The Safe Harbor Principles signify mutual agreement regarding basic and internationally accepted principles for the protection of consumer privacy.

On October 4, 2001, the Federal Trade Commission ("FTC") announced that it has changed its course.3 Chairman, Timothy Muris, shifted the FTC's position and stated that it is still "to soon" to "fashion workable legislation"4 and the that FTC would instead concentrate on the enforcement of existing privacy laws. In so doing, Muris has abandoned three important steps to creating comprehensive consumer privacy protection. These steps were: First, the FTC's Fair Information Practice Principles ("FIPP"); Second, the Organization for Economic Cooperation and Development's Privacy Guidelines (the "OECD" and the "OECD Guidelines"); and lastly, the FTC's latest move backs away from the recent culmination of comprehensive privacy protection guidelines as established by the SHP (as referenced above). Although there has been some criticism about the effectiveness of comprehensive international privacy protection standards, the SHP are a logical and rational progression in consumer privacy protection.

In this article, I will argue that the SHP mark significant progress over the FIPP and OECD Guidelines (despite the fact that they are currently limited to the protection of European Union citizens). Further, I will discuss why criticism


2. The SHP was developed by the U.S. Department of Commerce in consultation with the European Commission and became effective November 2000.


4. Id.
surrounding the SHP, in particular concerns about its enforceability, is misplaced, or at least premature. Rather, when combined with emerging technologies and services, the SHP help level the playing field between consumers and data collectors and provide a safety net that will benefit both. Lastly, because of the strengths of the SHP, they should serve as a model for comprehensive US legislation. The 106th Congress considered numerous privacy bills and 107th has continued with those efforts. The SHP offer a valuable model.

The time is right for comprehensive consumer privacy protection. There is considerable evidence that the e-marketplace recognizes the benefits of collecting consumer data and is taking steps to maximize its unhindered use of consumer information. Consider the brief example of Amazon.com's August 2000 privacy policy amendment. Amazon.com now "classifies customer information as a business asset, and is transferable to third parties if Amazon or one of its business units is sold. Previously, the company promised its customers that it would not sell, trade or rent personally identifying consumer data." Although European consumers are still protected from un-consented to transfers, non-E.U. citizens are not protected. Amazon.com's rationale behind this move is that "such restrictions on data-sharing would impede its budding partnerships." Although this type of corporate discretion may allow for added commercial conveniences, fundamental rights are at issue and the consumer must be a willing and informed participant.

II. A BRIEF CHRONOLOGICAL DEVELOPMENT OF COMPREHENSIVE CONSUMER PRIVACY PROTECTION

There is little question that consumers need privacy protection. Privacy is an important part of an effective society. It is necessary for participatory governance and is a basic right of citizens in a democratic state. Further,
Consumers themselves are concerned with privacy. An October 1999 survey indicated that 72% of internet users in the United States, Germany, and the United Kingdom were "very" concerned about personal privacy, another 20% were "somewhat" concerned. Forrester Research estimated that, in 1999 alone, 2.8 billion dollars of internet related transactions were lost due to consumer concerns about privacy.

Concerns for consumer privacy have not gone ignored. Privacy has sometimes been recognized as an individual's fundamental right or as a constitutive value that helps form individual identities or social consensus. Although numerous legislative and private industry efforts have been undertaken, few have been successful in adapting to changes in society, in particular, the changes brought by the internet.

The FTC articulated its FIPP in 1998 report, Privacy Online: A Report to Congress. The FTC was responding to a concern about "privacy" and the effectiveness of "self-regulation." The FTC revisited the FIPP in May of 2000, and, perhaps attesting to the importance of fair information practices, the FTC re-endorsed the FIPP and offered renewed support.

As the FIPP were being developed, the OECD, an international working to "co-ordinate domestic and international policies," began work on privacy...
guidelines to facilitate the creation of privacy policies by governments, businesses, individuals, and law enforcement officials. The OECD Guidelines were promulgated on September 23, 1980 in the OECD Guidelines on Protection of Privacy and Transborder Flows of Personal Data and purport to "represent an international consensus on how best to balance effective privacy protection with the free flow of personal data."

Both the FIPP and the OECD Guidelines provide guidance to legislative efforts and the development of private sector privacy policies. However, despite the fact that both the FIPP and OECD Guidelines have withstood the tests of time, the e-marketplace is still void of effective consumer privacy protection.

Following the development and acceptance of the FIPP and OECD Guidelines, the European Union adopted Directive 95/46/EC Of The European Parliament And Of The Council Of 24 October 1995 On The Protection Of Individuals With Regard To The Processing Of Personal Data And On The Free Movement Of Such Data. The E.U. Data Directive were enacted in October 1995 and went into effect in October 1998. It affirmatively established standards for the protection consumer data and privacy in an effort to promote the free flow of information between member nations. Not only does the E.U. Data Directive create a standard to serve as the common law between member nations, but it also prohibits the transfer of information from one of those countries to any third party without adequate privacy protections in place. It requires that those who wish to use consumers' personal data must provide "an adequate level of protection" for that personal data.

The OECD Guidelines were adopted by the 29 member nations of the Organization for Economic Cooperation and Development (OECD) (1994), The Netherlands (1961), New Zealand (1973), Norway (1961), Poland (1996), Portugal (1961), Spain (1961), Sweden (1961), Switzerland (1961), Turkey (1961), United Kingdom (1961), and United States (1961). The goals of the OECD are to promote "an open market economy, democratic pluralism and respect for human rights." Interestingly, in addition to developing guidelines, the 29 member nations have also "agreed to participate in the exercise ... called "peer review", which is based on transparency, explanation, and, when needed, self-criticism by the countries examined." OECD Online, About: Membership at http://www.oecd.org.

---

20. TRUSTe, a "leader in promoting privacy policy disclosure, informed user consent, and consumer education", has established its privacy protection practices "based on long-standing principles of fair information practices as interpreted by the U.S. government." http://www.truste.com/about/about_whitepaper.html.
21. EUR. PARL. DIR., supra note 6.
22. Id.
in collecting personal data from citizens of European Union member nations must comply with the comprehensive standards of the E.U. Data Directive.

In this era of increasing globalization, international harmony is necessary. Recognizing this, the U.S. Department of Commerce ("DOC") and the European Commission jointly developed standards meant to enable U.S. businesses to meet the requirements of the E.U. Data Directive. The so-called Safe Harbor Principles ("SHP") were developed to facilitate international commerce by creating a bridge between the E.U. Data Directive and U.S. practices. Additionally, by creating means for compliance with the E.U. Data Directive, the SHP attempted to ensure the fundamental right of privacy and security of personal data. The SHP require that consumers be notified of actions to collect data, be provided the opportunity to withhold information, be offered the chance to review and correct collected information, and be assured of security measures and redress in case of abuse.

This is a valuable step toward comprehensive consumer privacy protection because consumers become active participants in the transfer of their personal data. The SHP are flexible enough to adjust to changing times and changing preferences, consistent with the current trend of "mass-customization." As Professor Anita L. Allen-Castellito points out, "imposing privacy norms to make sure everyone lives in accordance with a particular vision of privacy would be problematic." Consistent with a liberal conception of private choice, the SHP provide for choices crucial to a successful privacy regime. Further, by providing a comprehensive approach to consumer privacy and data protection, the SHP avoid some of setbacks other efforts have suffered.

23. The SHP was developed by "the U.S. Department of Commerce in consultation with the European Commission" and became effective November 2000.


25. See generally Allen, Coercing Privacy, 40 WM & MARY L. REV. 723. Professor Allen describes the liberal conception of private choice as "the idea that government ought to promote interests in decisional privacy, chiefly by allowing individuals...to make many, though not all, of the most important decisions..." Id. Privacy and private choice are "indispensable, foundational goods." Id. Further, although Professor Allen encourages choice, she argues that some people must be coerced into privacy. This is problematic, as pointed out by Neal Devins in Reflections on Coercing Privacy, 40 WM & MARY L. REV. 795 (1999). The Safe Harbor Principles strike a balance by giving subjects choice while requiring responsible use and protection of personal information on collectors. Therefore, although one consumer may wish to give up as much data as practical, that data will not color the use of another subject's data.

26. A recent agreement between the Federal Trade Commission and leading online advertisers (including Doubleclick and Engage) pledged to give consumers choice "about when such companies can snoop on their Web-surfing habits." The agreement was easily side stepped by Pharmatrak, Inc., a specialized consulting firm, that is not an "advertiser" but helps drug companies compare and improve their websites. The data collection is "invisible to consumers unless their browsers are specifically set up to alert them when such "bugs" are being used." Marcia Stepanek, Surf At Your Own Risk, BUS. WK., Oct. 30, 2000, at 143.
III. A GOOD START: THE FAIR INFORMATION PRACTICE PRINCIPLES AND THE OECD GUIDELINES

A. FIPP

As privacy legislation matured in the 1970’s, the FTC compiled principles that would serve as guidance in the protection of consumer privacy. These were not enacted into law; rather, they were a distillation of existing legislation.\(^{27}\) The FIPP focuses on five issues: 1) Notice/Awareness; 2) Choice/Consent; 3) Access/Participation; 4) Integrity/Security; and 5) Enforcement/Redress.\(^{28}\) These elements encourage consumer involvement in the data collection process. They keep consumers in the loop and keep them informed of potentially invisible practices while facilitating consumers’ ability to choose whether or not they wish to share their personal data. As Professor Schwartz has stated, “fair information practices are the building blocks of modern information privacy law.”\(^{29}\)

The first principle of the FIPP is notice. Notice is the element that makes the other elements – choice/consent, access/participation, and enforcement/redress – possible. While the nature of the notice may vary depending on what is collected, the FIPP state that data subjects should be notified of the following: 1) identification of the entity collecting the data; 2) identification of the uses to which the data will be put; 3) identification of any potential recipients of the data; 4) the nature of the data collected and the means by which it is collected...; 5) whether the ... requested data is voluntary or required; 6) the consequences of a refusal to provide the requested information; and 7) the steps taken by the data collector to ensure the confidentiality, integrity and quality of the data.\(^{30}\) With such information, the consumer will have the building blocks for informed decision making.

---


Once notice is established, it is a logical step for the consumer to have the ability to make choices based on preferences. Choice makes the consumer an active participant of the transaction. This includes marketing, sale to third parties or any other use. Without the informed consent of the data subject, data collectors are prohibited from using personal information for their own gain.

Notice and choice facilitate awareness, access permits participation. For meaningful participation, consumers should have "ability both to access data [collected] about him or herself" and to "contest [its] accuracy and completeness." Further, access must be reasonable. A data collector should provide "simple means for contesting inaccurate or incomplete data, a mechanism by which the data collector can verify the information, and the means by which corrections and/or consumer objections can be added to the data file and sent to all data recipients." Such qualifications help ensure that consumers do not get caught behind a web of hurdles or red tape. Such consumer involvement also facilitates data accuracy.

Providing consumers with information about what is being collected, choices regarding collection, and the ability to check and correct inaccurate information promotes cooperative management of consumer data. Adequate management is also facilitated by sufficient security of collected data.

The FIPP addresses precautionary measures. Data collectors are encouraged to structure their internal organizational processes to prevent inadvertent misuse or dissemination of sensitive data. Data collectors are also encouraged to use encryption "in the transmission and storage of data." And once data is collected, it should be stored on "secure servers or computers that are inaccessible by modem."

These principles, when put into practice, provide a foundation for the safe and open collection and use of data. However, such principles may not be put into practice. The FIPP conclude by suggesting that data collectors develop methods of enforcement through either "industry self-regulation; legislation that would create private remedies for consumers; and/or regulatory schemes enforceable through civil and criminal sanctions." This, however, is too flexible. Although Congressional bills based on the FIPP have been introduced, and industry groups are growing concerned over privacy

31. Id.
32. Id.
33. Id.
34. Id.
36. Id.
37. See id ¶ 5
legislation, the FIPP are at risk of becoming merely suggestive by remaining unenforceable.

Interestingly, the FTC, which has been a proponent for self-regulation in the past, now acknowledges that legislative measures may be necessary. The conclusion of the FTC's 1998 Report to Congress indicates that the FTC is prepared to take action, where appropriate, through the authority of the Federal Trade Commission Act. The FTC Act "authorizes the Commission to seek injunctive and other equitable relief, including redress, for violations of the Act. It therefore provides a basis for "government enforcement" of the FIPP. The FTC openly warns: "failure to comply with stated information practices may constitute a deceptive practice in certain circumstances."

The FIPP were developed to ensure "that the collection, use, and dissemination of personal information are conducted fairly and in a manner consistent with consumer privacy interests." They are comprehensive and provide for the general wellbeing of consumers. Interestingly, the FIPP are not the only attempt at comprehensive consumer privacy protection. Another prominent development is the OECD Guidelines.

1. OECD Guidelines

The OECD Guidelines followed the FIPP and address similar concerns. These concerns include: 1) limits on collection of information; 2) mechanisms to promote data quality; 3) notification of the specific purpose for collection; 4) limits on the use of data collected; 5) safeguards for the security of data collected; 6) openness with regard to practices and policies for the collection and use of personal data; 7) data subject's participation in maintaining the integrity of data collected; and 8) accountability of data collectors for compliance with the Guidelines.

These eight elements are based on the principle of "openness." Openness allows the consumer to become a meaningful participant in the e-marketplace.
This is important for the creation of a democratic e-marketplace. As Paul Schwartz states in *Privacy and Democracy in Cyberspace*, if consumers are not given procedural and substantive rights they will be deterred “from participating in activities that promote cyber-democracy and self-definition on the Internet.”

Openness begins by making consumers aware of data collectors’ practices. This is achieved by providing notice of collectors’ practice. The Collection Limitation Principle, the Purpose Specification Principle, and the Openness Principle each direct data collectors to notify data subjects of the practices they will be subject to.

The Collection Limitation Principle of the OECD Guidelines only permits collection of data “where appropriate [and] with the knowledge or consent of the data subject.” This implies notice and provides the first parallel to the FIPP. Further, the purpose for the collection of consumer data must be stated either before or at the time of collection as stated by the Purpose Specification Principle. Notice also extends to changes of use, collectors must notify consumers of “each occasion of change of purpose.”

The Openness Principle further expands the notice requirements. Data collectors must disclose practices and policies and provide data subjects with information regarding the “existence and nature of personal data, and the main purposes of their use (as established by the Purpose Specification Principle), as well as the identity and usual residence of the data controller.” This is the foundation to transparent practices and a level playing field.

Like the FIPP, the OECD Guidelines address consumer choice. The Collection Limitation Principle allows data subjects to choose whether or not they want data collected and collection is restricted to consumer preferences.

The Use Limitation Principle also implicates consumer choice. Consumers must consent to the data collector’s use of personal information. The data

47. Schwartz, *supra* note 29 at 1677-78. For effective community on the internet Professor Schwartz states that data subjects must “(1) be able to allow or refuse collection of more than a minimum amount of these data or further use for a non-compatible use; (2) be informed of the data consequences of relevant behavior, such as signing up for service with an ISP or entering a specific Web site; and (3) be granted a mechanism by which she can inspect and correct personal data and find out which parties have gained access to her records.” Notice how closely these elements that Professor Schwartz advocates mirror the standards imposed by the Safe Harbor Principles. Each of these objectives are met through the Safe Harbor Principles.


49. See Id. at ¶ 9.

50. Id.

51. Id. at ¶ 12.

52. Id. at ¶ 7.

53. See O.E.C.D., *supra* note 18 at ¶ 10. This is also assuming that there is no overriding legal authority requiring collection regardless of a data subject’s consent as provided by this paragraph of the
collector is then limited to the extent that the data subject has permitted use. The Purpose Specification Principle further limits permitted uses to those purposes explicitly stated by the data collector. In other words, the data collector is restricted from using consumer data in ways not previously disclosed.

These elements of the OECD Guidelines illustrate clear concern for consumer notice and choice. In accordance with the FIPP, the OECD Guidelines suggest that consumers become active participants of the data collection process.

The Purpose Specification Principle of the OECD Guidelines address the possibility of trade of consumer personal data. This principle limits transfer of personal information after the initial purpose of collection is met or if any use is incompatible with the initially specified purpose. The Use Limitation Principle further develops the concept that use must be consistent with the initial purpose for collection and "should not be disclosed" or "made available" without the consent of the data subject or as authorized by law.

The OECD Guidelines also promote data integrity by preventing inappropriate or potentially harmful alteration of a consumer data. This is done through the Data Quality Principle. This principle requires that the data collected be "relevant," "accurate," "complete," and "kept up-to-date." To achieve these ends, the OECD Guidelines, like the FIPP, encourage consumer access to collected data.

The Individual Participation Principle of the OECD Guidelines corresponds directly to the access element of the FIPP. Data subjects are unambiguously afforded the opportunity to obtain confirmation whether or not data is collected. Data subjects are also given the opportunity to challenge and possibly erase, rectify, complete or amend any inconsistencies in the information held by a data collector. The OECD Guidelines provide for data subjects to directly request information from data collectors and if a reasonable request is denied, the data subject should "be able to challenge such denial." Consumers therefore play a valuable role in maintaining the integrity of collected data. The groundwork for data collector and data subject cooperation is created.

In addition to allowing the data subject access to information, the concept of making the data subject a meaningful participant in the e-marketplace reflects

Guidelines.

54. See id. at ¶ 9.
55. See id. at ¶ 10.
56. See id. at ¶ 8.
57. See id. at ¶ 13.
the OECD's concern for openness. Without the ability to access information it would be impossible for data subjects to evaluate "the existence and nature of personal data." 59

The Openness Principle, true to its title, prescribes transparency on behalf of data collectors. Data subjects must have knowledge of the collection of their personal data. In theory, this is good; however, without imposing accountability on a data collector, there is no incentive for data collectors to comply. Thus, the OECD included an Accountability Principle.

Though broad, the Accountability Principle states that a data collector should "be accountable for complying with measures which give effect to the principles stated above." 60 This illustrates concern for enforceability. It also recognizes that the privacy-protecting measures of the OECD Guidelines are at risk of inadequate implementation or of not being followed at all.

2. Limitations of the FIPP and OECD Guidelines

The OECD Guidelines and the FIPP are straightforward. They both address comprehensive protection of consumer data through the establishment of a privacy friendly environment. One in which the consumer plays an active and informed role in the data collection process.

Both the FIPP and the OECD Guidelines, however, are weakened by the fact that they only "suggest" proper practices. The FIPP are the result of a "series of reports, guidelines, and model codes that represent widely-accepted principles concerning fair information practices." 61 They were drafted as a distillation of common beliefs on appropriate methods to protect consumer privacy. Similarly, the OECD Guidelines were drafted to serve as a "recommendation" to "harmonize national privacy legislation" with an eye towards "human rights" and at the same time promote "international flows of data." 62 Neither has been adopted into U.S. law. Further, neither the FIPP nor the OECD Guidelines has been adopted in full by U.S. business. 63 As we stand today, U.S. consumers lack comprehensive privacy protection. The FIPP and the OECD Guidelines offer models, but these models have not been formally adopted.

59.  Id. at ¶ 12.

60.  Id.


63.  The Georgetown Internet Privacy Policy Survey conducted by Professor Mary Culnan "[drew a random sample] of the most-heavily trafficked sites on the World Wide Web and [surveyed] the busiest 100 sites. The survey found that "only 10% of the sites posted disclosures that even touched on all four fair information practice principles." Federal Trade Comm’n, supra note 28.
On the other, the European Union has adopted and enacted comprehensive privacy protection legislation. Although the E.U. Data Directive was not simply based on the OECD Guidelines or the FIPP, the intentions are noticeably similar. Professor Marc Rotenberg has pointed out that the E.U. Data Directive was indirectly influenced by the development of United State's privacy law. The most notable difference, for the purposes of this article, is that the E.U. Data Directive mandates privacy-friendly practices and procedures for data collectors and data subjects.

3. The E.U. Data Directive: in harmony with the FIPP and OECD Guidelines

The E.U. Data Directive recognizes and affirmatively establishes transparent practices for data collectors. By enacting a pan-European "directive" these transparent practices are binding enforceable by law. Although not organized like the FIPP or the OECD Guidelines (which set out specific principles as discussed above), the E.U. Data Directive does address the elements of notice, choice, access, security, and enforcement.

Notice is addressed in Articles 10 and 11 of the E.U. Data Directive. Together, these articles require disclosure of a data collector's identity, purpose for processing data, whether the data collection is obligatory or voluntary, the

64. Graham Greenleaf, Associate Professor of Law at the University of New South Wales has compared the E.U. Data Directive to the OECD Guidelines and has found that the E.U. Data Directive is in "general terms similar to the information privacy principles found in the OECD Guidelines and the Council of Europe Convention. A rough comparison of the articles in Chapter II with the titles of the OECD's eight principles is as follows: collection limitation principles (art 10, art 11, parts of art 7); data quality principles (art 6); purpose specification principle (art 6); use limitation principle (art 16); security safeguards principle (art 17); openness principle (art 21); individual participation principle (art 12, art 14); and accountability principle (definition of 'controller'). Other articles cover matters not always found in previous sets of principles, such as purpose justification (art 7), 'sensitive' data (art 8), automated decision-making (art 15), and notification (arts 18, 19, 20)." Graham Greenleaf, The European Privacy Directive – Completed, Privacy Law & Policy Reporter, Art. 2, No. 5 (1995) 2 PRIV. L. & POLICY REP. 81, available at http://www.austlii.edu.au/aul/other/plpr/vol2/Vol2No05/v02n05a.html#fn1.

65. Marc Rotenberg, Fair Information Practices and the Architecture of Privacy (What Larry Doesn't Get), 2001 Stan. Tech. L. Rev. 1 (2001). Professor Rotenberg states that offering privacy protection is not just a "European approach... in contrast to a US approach." Developments in privacy law were "derived from the Brandeis and Warren article of 1890, which was even characterized by European scholars as the 'American tort.'" Other examples of influential efforts by the U.S. include the Federal Wiretap Act of 1968 and the Privacy Act of 1974.

66. The E.U. Data Directive requires that each E.U. member nation appoint a "supervisory authority" to ensure the Directive is followed. Among other powers, the supervisory authority has "the power to engage in legal proceedings where the national provisions adopted pursuant to this Directive have been violated or to bring these violations to the attention of the judicial authorities. EUR. PARL. DIR., supra note 6.
consequences of failure to reply to collection questions, and whether a right of access exists.\(^6\) Article 7 of the E.U. Data Directive then provides that personal data may only be processed where an individual’s consent has been obtained (or in certain cases of necessity, such as the compliance with a legal obligation or to protect the vital interests of the data subject among others\(^6\)). After giving notice, the data subject’s consent must be “unambiguously given.”

The E.U. Data Directive also addresses consumer consent. Article 7 explicitly states that “personal data may be processed only if: the data subject has unambiguously given his consent; or [ ... ] processing is necessary for “the performance of a contract” at the request of the data subject, “for compliance with a legal obligation,” “to protect the vital interests of the data subject”, processing is necessary for the public interest or official authority.”\(^6\) Article 8 offers further protection to specific types of data. Data that is especially sensitive or unique to the consumer such as: “racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership” as well as details of a person’s health or sex life\(^7\) requires explicit consumer consent must before it can be processed.\(^7\) Article 13 provides another exemption to the protection of personal data. This article provides that national security; defense; public security; the prevention, investigation, detection or prosecution of criminal offenses; important economic or financial interests; certain inspection and regulatory functions; or the protection of the data subject or the rights and freedoms of others will trump the individual’s rights to privacy protection.\(^7\)

Although the E.U. Data Directive allows freedom to collect data in circumstances of “journalistic purposes or for the purpose of artistic or literary expression...,” Article 9 states that the collection of data is only permissible “if necessary to reconcile the right to privacy with the rules governing freedom of expression.”\(^7\) Given the tough stance on protecting consumer data, it is unlikely that this exemption will be abused.

Consumers are also given the right to access information that has been collected. The consumer’s right to access includes “confirmation [that personal data is] being processed” notice of the “categories of recipients to whom the data are disclosed”, as well as information concerning the “automatic processing of data.”\(^7\) Article 12 of the E.U. Data Directive also grants data subjects the

\(^{67}\) See id. at Arts. 10-11.

\(^{68}\) Id. at Art. 7.

\(^{69}\) Id.

\(^{70}\) Id. at Art. 8.

\(^{71}\) EUR. PARL. DIR., supra note 6, at Art. 8.

\(^{72}\) Id. at Art. 13.

\(^{73}\) Id. at Art. 9.

\(^{74}\) Id. at Art. 12.
right to "rectify, erase or block data" that is collected but not used in accordance with the Data Directive.

To promote stepped up security for consumer's personal data, the E.U. Data Directive limits any processing of consumer data to necessity. In other words, fewer attempts at processing will help safeguard from accidental disclosure. Article 17 of the Directive also requires that data collectors take precautionary steps to prevent "accidental or unlawful destruction, loss, alteration, or unauthorized disclosure or access." Data collectors must take "technical security measures" (such as employing sufficient cryptography) as well as take "organizational measures" to prevent internal or employee mishaps.

The development and implementation of the E.U. Data Directive had international consequences. It thrust a new hurdle in international consumer data collection. Any data collector wishing to collect data from citizens of European Union member nations had to comply with the E.U. Data Directive or be subject to the legal ramifications of breaking E.U. law. As mentioned above, Safe Harbor Principles are a consequence of the E.U. Data Directive.

4. A Bridge: The Safe Harbor Principles

The final version of the SHP was released on July 21, 2000. It consists of seven elements: 1) Notice; 2) Choice; 3) Onward Transfer; 4) Data Security; 5) Data Integrity; 6) Access; and 7) Enforcement. To ease implementing the SHP, the DOC set up a compliance checklist for data collectors.

It is apparent from titles alone that the SHP mirror the FIPP and the OECD Guidelines. The reemergence of these principles can be seen as an affirmation accepted thought on consumer privacy and data protection. The SHP are merely an elaboration of existing U.S. principles. Because the SHP are international in nature, they potentially create a world-wide safety net for consumers; something necessary in our borderless e-marketplace.

75. Id. Art. 17.
76. EUR. PARL. DIR., supra note 6.
77. Id.
79. Id.
IV. SAFE HARBOR PRINCIPLES: A SAFETY NET FOR THE PROTECTION OF CONSUMER PRIVACY

There have been numerous attempts to secure effective protection for consumer privacy. The 106th Congress considered numerous privacy related bills\(^81\) and the 107th Congress is following continues to address the protection of consumer privacy.\(^82\) However, Congress is still only beginning to recognize the importance of comprehensive consumer privacy legislation. For example, Congress is not considering the Consumer Internet Privacy Enhancement Act.\(^83\) This bill, consistent with the FIPP, would require data collectors to provide notice to data subjects about the identity of the data collector, whether information would be collected, the types of information collected, how the information would be used, and how the data subject can prevent collection.\(^84\) If enacted into law, this bill would be enforced under the FTC Act because a violation would be considered "an unfair or deceptive act or practice in or affecting commerce."\(^85\) Although this bill addresses Notice, Choice, and Enforcement, it falls short of the comprehensive protections created by the FIPP and the OECD Guidelines. It also falls short of the standards imposed by E.U. Data Directive. The proposed Consumer Internet Privacy Enhancement Act represents an initial, yet still incomprehensive, approach to protecting consumer privacy.

As Professor Joel R. Reidenberg argues in *Restoring Americans' Privacy in Electronic Commerce*,\(^86\) The OECD Guidelines, as a reflection of the FIPP "should be adopted in law as the American framework for information privacy."\(^87\) All five elements of the FIPP, as reaffirmed in the OECD Guidelines, when taken together, are necessary for an effective privacy

---

\(^{81}\) The 106th Congress considered 50 bills relating to privacy, 48 of which were specifically concerned with "consumer privacy." See thomas.loc.gov.


\(^{83}\) H. R. 237, 107th Cong. (2001). Introduced to protect the privacy of consumers who use the Internet.

\(^{84}\) H. R. 237 at § 2(b)(1).


\(^{87}\) Id. at 788.
The SHP offer just such a combination. They reflect the values and ideas of the FIPP and the OECD Guidelines and do so in compliance with the E.U. Data Directive.

1. The Creation Of The SHP

As discussed above, the SHP were developed to help U.S. businesses meet the requirements of the E.U. Data Directive. The theory behind the E.U. Data Directive is that privacy is a fundamental human right and that collected data should be protected. The SHP serve as a bridge between privacy protection and international trade.

The SHP are necessary because Article 25 of the E.U. Data Directive restricts the transfer of personal data outside of the European Union. The United States and by implication, those businesses operating in the U.S., does not meet the standards of Article 25 because, as discussed above, no comprehensive consumer data protection legislation exists. Although data collectors that operate exclusively in the United States are not subject to the E.U. Data Directive, those businesses with European operations or intending to do business with E.U. member countries must comply.

Although the U.S. has historically taken a “sectional” approach to consumer privacy protection and the European Union has now adopted a “comprehensive” privacy protection program, globalization has led to increased interaction between countries. This convergence of cultures requires that differences be ironed out. The SHP do just that.

2. The Substance of the SHP

As discussed above, the SHP address the same topics as the FIPP and the OECD Guidelines: Notice, Choice, Access, Security, and Enforcement. However, the SHP also explicitly address onward transfer of consumer data and the maintenance of data integrity.

---

88. EUR. PARL. DIR., supra note 6.

89. Rotenberg, supra note 65; see also, U.S. Department of Commerce website for the implementation of the Safe Harbor Principles which states that “while the United States and the European Union share the goal of enhancing privacy protection for their citizens, the United States takes a different approach to privacy from that taken by the European Union. The United States uses a sectoral approach that relies on a mix of legislation, regulation, and self regulation. The European Union, however, relies on comprehensive legislation” http://www.export.gov/safeharbor/.

90. See id.
a. Notice

The SHP require that consumers be provided with the identity and contact information of the data collector. Data collectors must also provide "clear and conspicuous" notice when personal information is collected.91 Fine print will probably not suffice. Additionally, the information collected must be "relevant for the purposes for which it is to be used."92

For example, a shoe salesman would most likely not be allowed to collect information about a consumer's race, religion, or medical conditions. Further, "an organization may not process personal information in a way that is incompatible with the purposes for which it has been collected or subsequently authorized by the individual."93 Notice must also be provided before the organization uses such information or discloses it to a third party.94

b. Choice

Consumers must also be able to choose – choose whether or not to give information and what information to give. Data collectors are required to provide the option of opting-out of disclosure of personal information to third parties. Consumers may also opt-out of disclosure if the information is to be used for purposes other than as authorized by the data subject.95 As discussed when addressing the FIPP and OECD Guidelines, choice and notice make consumers informed participants in the e-marketplace.

c. Data Integrity

The SHP require the data collector to take "reasonable steps to ensure that the data collected is reliable for its intended use, accurate, complete, and current."96 Although this places the data collector in the potentially precarious position of having the responsibility to validate personal information, it also prevents the circulation of false or misleading information. Interestingly, this element, does target those consumers who would otherwise wish to be identified as a "dog."97

93. Id.
94. See id.
95. Department of Comm., supra note 78.
96. Id.
97. As in the famous cartoon by Peter Steiner from page 61 of July 5, 1993 issue of The New Yorker, (Vol.69 (LXIX) no. 20).
Information has value and "data has power." If data is not correct, its value is reduced and its power is illegitimate. The data integrity element helps prevents spoliation of collected information. Allowing the consumer access to review the data that has been collected also enhances data integrity.

d. Access

Consumers are often in the best position to verify the accuracy of their personal information. They are also in the best position to keep it up to date. The access principle provides that consumers be permitted to view the data collected about them and "to correct, amend, or delete that information where it is inaccurate." This right of access, however, is limited to situations where "the burden or expense of providing access" would not be "disproportionate to the risks to the individual's privacy in the case in question, or where the rights of persons other than the individual would be violated."

Advising consumers of the data collection process, giving consumers the opportunity to consent to collection, and providing access to review and correct data promote transparent practices and make the consumer a meaningful participant in the collection process. However, effective consumer privacy protection also includes secure and responsible use of consumer data.

e. Onward Transfer

Onward transfer requires that third party transferees provide the same protections that the data collector was required to provide. This protects information used at point B even when it was collected at point A.

Transfer of consumer data is restricted to instances where the consumer has consented to such transfer. However, once consent has been obtained, and there are assurances that the third party (the new data user) complies the SHP use and security restrictions, consumer data can be used by that third party.

Although transfer is limited to those parties that comply with the objectives of the SHP, effort is made to facilitate the transfer of data. As discussed above, the SHP were developed with the understanding that consumer privacy concerns are linked to international commerce. The SHP bridge these two interests.

100. Id.
101. Id. The notice provision restricts use to those uses specified at the time of collection. The security provision requires that third party data users provide "adequate" security for consumer data.
102. Although further discussion of the criticisms of the SHP are discussed in following sections, the concept of privacy as fundamental "human right" versus "commercial concern" was fundamental to the Trans Atlantic Consumer Dialogue's (TACD) criticism of the SHP. In paragraph four of the TACD Resolution On
Even if a third party has not completely adopted the SHP but still wants consumer data, that party may execute a written agreement “requiring that the third party provide at least the same level of privacy protection as is required by the relevant Principles.”

f. Security

Collection of consumer data will inevitably yield files of consumer data. Once these files are created, they must be protected from misuse (both internal and external) and from inadvertent dissemination. Measures must be taken to ensure the security of information collected. That which is not secure cannot be considered private.

It is clear that data controllers are responsible for the confidentiality and security of consumer data. “Organizations creating, maintaining, using or disseminating personal information must take reasonable precautions to protect it from loss, misuse and unauthorized access, disclosure, alteration and destruction.” Although not mentioned, cryptography and encryption are likely requirements.

Recognizing that some information may require special treatment, the SHP differentiate between types of personal information and encourage special treatment of sensitive information. Consistent with the E.U. Data Directive, sensitive information includes “personal information specifying medical or health conditions, racial or ethnic origin, political opinions, religious or philosophical beliefs, trade union membership or information specifying the sex life of the individual.” Data subjects must give “affirmative or explicit (opt-in)” consent if sensitive information is going be disclosed to a third party or used outside of the immediate transaction. This provides heightened protection

Safe Harbor Principles, TACD criticizes the SHP for not recognizing that privacy is a “human right” and placing it on the same ground as “commercial concerns.” TACD Doc No. Ecom-18-00 (February, 2000) at ¶ 4. The purpose behind the SHP is to “provide a more predictable framework for such data transfers.” Safe Harbor Privacy Principles Issued By The U.S. Department Of Commerce (July 21, 2000). This implies that commercial concerns are to be considered the rights and concerns are intimately linked and by addressing them together will facilitate a comprehensive solution.

103. Department of Comm., supra note 6.

104. Id.

105. “Encryption technologies” are “the locks and keys of the information age. “They” are special programs designed to protect sensitive information on digital communications networks. Encryption technologies work by scrambling and encoding information so that it can only be read by the proper recipient.” Center For Democracy and Technology, Introduction to “what is crypto” at http://www.cdt.org/crypto/new2crypto/1.shtml “Strong encryption is freely available today inside the United States.”

to a sphere of information that could be particularly harmful to a data subject if mishandled.\textsuperscript{107}

\textbf{g. Enforcement}

The old adage that knowledge is power is just as true in the e-marketplace as it is outside.\textsuperscript{108} Information therefore becomes an easy target for abuse and proper enforcement is needed. Further, enforcement measures add confidence. Enforcement must be available through mechanisms that: 1) ensure compliance, 2) acknowledge that recourse is available and affordable, and 3) illustrate that consequences exist.\textsuperscript{109} This includes independent recourse (in accordance with applicable law or private sector initiatives).\textsuperscript{110} Data collectors must follow-up on complaints of violation and work to remedy problems. These efforts must also be backed up by self-imposed consequences that are serious enough to ensure compliance when violations occur.\textsuperscript{111} If these measures are not taken and recourse is not available, the data collector will be considered to be in breach of its duties to the consumer and therefore subject to the ramifications of unfair and deceptive practices under the FTC Act.

Although the technicalities of this element are vague, the objective is clear. Data subjects must be made aware that recourse is available when personal data is misused. This is achieved when data collectors publicly acknowledge that they are in compliance, acknowledge that there are consequences of misuse of personal data, and that they have an obligation to remedy problems. Because the breadth of this principle may lead to varied application, SHP Frequently Asked Question (FAQ) number 11 specifically addresses methods of compliance\textsuperscript{112} and encourages data collectors to work with a third party to test

\textsuperscript{107} This element opens the door to a theoretical question regarding the right to privacy and that different rights may extend to different kinds of information. This, although very interesting, is beyond the scope of this paper.

\textsuperscript{108} Consider the success of online marketing firms such as Engage.com. Engage is a "leader in audience profiling technology and maintains the world's largest database of anonymous Internet profiles." See Engage Company information available at http://www.engage.com/company. (Fortunately, Engage maintains the practice of keeping anonymous profile technology and thus recognizes the importance of protecting consumer privacy.)

\textsuperscript{109} Department of Comm., supra note 6.

\textsuperscript{110} See id.

\textsuperscript{111} Id.

\textsuperscript{112} See Frequently Asked Question (FAQ) number 11 available at http://www.ita.doc.gov/td/ecom/FAQ11FINAL.htm (regarding dispute resolution and enforcement). To satisfy the first and third elements of the enforcement principle, an organization can either (1) comply with a privacy program developed in the private sector that incorporates the Safe Harbor Principles into its rules and that includes effective enforcement mechanisms; (2) comply with legal or regulatory supervisory authorities that provide for handling of complaints; or (3) commit to cooperate with European data protection authorities. To
its practices. By bringing in a third party, such as a certifying organization (like TRUSTe) or legal counsel, there is a greater likelihood that unbiased judgment will be made that the data collector could serve the needs of concerned consumers.

3. Implementation of the SHP in the U.S.

The principles of Safe Harbor allow for "controlled self-regulation." Data collectors could implement the principles themselves and get a stamp of approval from a government agency (currently the United States Department of Commerce). This would appeal to U.S. interests that believe business should decide how to manage the collection of consumer data. Further, pursuant to Article 4 of the E.U. Data Directive, American law will still govern U.S. businesses. Despite criticism from the European Parliament, the European Council and the United States have agreed to follow the SHP.

The DOC (or its designee) will serve as a liaison for U.S. companies. It will register organizations that are certified under the SHP and maintain a

satisfy the second point, an organization must verify that the assertions it makes about its privacy program are true either through self-assessment or outside compliance reviews.


114. This, however, is being challenged. It was recently reported that "The European Parliament approved ... a measure that lets customers sue operators of foreign e-commerce sites in the courts of the consumers' home countries." See Rick Perera, E.U. strengthens consumers' e-commerce rights, The Industry Standard, September 22, 2000 available at http://www.thestandard.com/article/display/0,1151,18785,00.html.

115. E.U. Parliament stated that the Safe Harbor Principles do not offer adequate protections because they neither provide for monetary damages for breach nor right of appeal in the United States.

116. An organization can obtain acknowledgement that it is in compliance with the SHP by self certifying. To qualify, organizations must "provide to the Department of Commerce (or its designee) a letter, signed by a corporate officer on behalf of the organization that is joining the safe harbor, that contains at least the following information:

1. name of organization, mailing address, email address, telephone and fax numbers;
2. description of the activities of the organization with respect to personal information received from the EU; and
3. description of the organization's privacy policy for such personal information, including:
   a. where the privacy policy is available for viewing by the public,
   b. its effective date of implementation,
   c. a contact office for the handling of complaints, access requests, and any
publicly available list of all organizations that are in compliance with the SHP.\textsuperscript{117} This will facilitate business to business transfers of information by reducing the pre-transfer due diligence. The DOC’s list currently registers sixty-seven registered U.S. based data collectors.\textsuperscript{118}

V. PENDING QUESTIONS: CRITICISM OF THE SAFE HARBOR PRINCIPLES

1. Does the SHP offer sufficient protection?

Privacy advocates have long been skeptical of self-regulation. In February of 2000, Marc Rotenberg, director of the Electronic Privacy Information Center, stated that U.S. "self-regulation is inviting a 'race to the bottom.'"\textsuperscript{119} This concern illustrates a need for a mandatory and enforceable standard-of-care for data collectors. It also speaks to the weaknesses behind the FIPP and OECD Guidelines. Because neither required comprehensive adoption, they were subject to being applied incompletely and therefore only offering incomplete protection. In essence, both were subject to abuse because data collectors could partially adopt the recommendations and still say that they were attentive to FIPP.

The Transatlantic Consumer Dialogue ("TACD"), a consumer advocate, has expressed concern that international consumer privacy protection is necessary.\textsuperscript{120} The increasingly international e-marketplace demands an international set of standards. Further, the TACD does "acknowledge that the other issues arising under the safe harbor,

d. the specific statutory body that has jurisdiction to hear any claims against the organization regarding possible unfair or deceptive practices and violations of laws or regulations governing privacy (and that is listed in the annex to the Principles),

e. name of any privacy programs in which the organization is a member,

f. method of verification (e.g. in-house, third party), and

g. the independent recourse mechanism that is available to investigate unresolved complaints." http://www.ita.doc.gov/td/ecom/FAQ6SelfCertFINAL.htm.


current text of the safe harbor agreement represents some progress” despite the fact that they “maintain their reservations.”

The progress that the SHP represent is significant. It is distillation of the widely supported U.S. FIPP and OECD Guidelines. Rather that risking a race to the bottom, the SHP represent affirmative action in favor of comprehensive adoption of the FIPP and the OECD Guidelines.

2. Is There Protection From Discrimination?

Another concern about the SHP, as with any standard, is that data collectors will discriminate against consumers that choose not to disclose their personal information. Goods or services may be withheld if information is not provided. Or worse, goods or services may not be offered based on the information collected.

Although this is a concern, there is no provision in the SHP to address discriminatory practices by data collectors. In the event of such discrimination, national discrimination laws would most likely apply. Although this is beyond the scope to this article, the desire for transparent data collection practices would most likely reveal such discrimination and facilitate proper prosecution.

3. Does the E.U. Gets Greater Protection Than U.S.?

The TACD also criticizes the SHP because they are a watered down version of the E.U. Data Directive and therefore “compromise the privacy interests of European citizens.” The compromise, however, is not substantial. As discussed above, the SHP has adopted the elements of the E.U. Data Directive and was developed in accordance with the E.U. Data Directive. Although, the SHP streamline the E.U. Data Directive, they still serve to maintain the rights provided through the E.U. Data Directive. European citizens are not sacrificing their legal rights with the implementation of the SHP. Further, because legislative intent is a well established technique for interpreting legislation, courts will most likely look directly to the E.U. Data Directive to interpret violations of the SHP. Admittedly, this will be on a case by case basis and will not be determined until the SHP is the subject of court proceedings.

As discussed above, the SHP only apply to citizens of E.U. member nations. This affords E.U. citizens greater protections than U.S. citizens. Comprehensive U.S. consumer privacy legislation has been slow in the making. Although there have been some efforts nothing has been passed. Likewise,

121. Id.


123. See supra notes 86 and 87.
I advocate that the SHP be used as a template for comprehensive U.S. consumer privacy legislation. This would raise the bar in the U.S. to one closer to that of Europe.

4. Does the SHP Lack Enforcement and Accountability?

Enforcement of the SHP has been questioned. One of the primary and most often cited criticisms of the SHP is that the SHP will be unenforceable. This concern is based in part on the belief that consumers will not have a forum to bring complaints, making redress difficult. Although in the past this concern may have been well grounded, recent developments offer a promising likelihood that redress will be available.

Recent FTC actions and statements illustrates that consumer privacy is an area of concern. The FTC’s traditionally pro-business reputation is ebbing. The FTC has abandoned its support of industry self-regulation in favor of legislative efforts to protect consumer privacy. In addition to this revised, consumer-privacy-friendly stance, the FTC has created precedent for the enforcement of privacy policies. Consider the FTC’s actions in the case against GeoCities. The FTC brought action for deceptive practices in the collection and use of consumers’ personal information because GoeCities misrepresented their privacy policy in violation of the FTC Act.

124. See generally Julie Fromholz, The European Union Data Privacy Directive, 15 Berkeley Tech. L.J. 461 (2000). See also, Press Release, supra note 120. TACD maintains “reservations [...] above all, on the issue of effective enforcement; and TACD, Safe Harbor, Doc. Ecom-07/03/01 The most significant shortfall of the Safe Harbor Principles is the lack of enforcement and accountability.

125. See Fromholz, supra note 124 at 475. In this article, Ms. Fromholz argues that safe harbor will not be enough of a permanent protection because protection laws are still outstanding and cannot be effective without further US policy and law enforcement. “In addition, the Directive requires so much oversight of even individual data transfers that the transaction costs of implementing a system that fulfilled the requirements for every transfer could be prohibitive. It would seem to make little sense for the U.S. and other third countries to spend significant resources attempting to comply with a regulation that cannot realistically be enforced.”

126. See Federal Trade Comm’n, supra note 8. The FTC states “that self-regulatory initiatives to date fail far short of broad-based implementation of effective self-regulatory programs” (emphasis added).

127. See Reidenberg, supra note 86.


130. See id.
GeoCities operated a website that created a community of individual homepages. This community consisted of about 2 million users, including adults and children. Consumers were required to complete an online application form disclosing personal information. GeoCities then created a database that included e-mail and postal addresses, member interest areas, and demographics including income, education, gender, marital status and occupation. This information was then disclosed to third parties. The FTC brought the complaint and followed up with the charge. Although GeoCities settled the case with no admission of wrongdoing, this shows that the FTC is concerned with consumer privacy and is willing to investigate potential violations of consumer rights. The FTC has also probed sites such as iVillage.com and HeathCentral.com "for possible unfair and deceptive trade practices" resulting from "improperly shar[ing] information with third parties" or "violat[ing] their stated privacy policies." Foreseeing the concern for the protection of consumer privacy, there has also been Congressional action and the U.S. Department of Commerce released a memorandum addressing the issue. Enforcement will be initiated in the private sector and will move to the federal arena if the private sector does not respond effectively. Data collectors are required to have a dispute resolution system to investigate and resolve complaints. This provides for the initial contact. If matters are not handled adequately, a data subject can seek relief under "federal or state law prohibiting unfair and deceptive acts" or the False Statements Act. The FTC would be a likely candidate to challenge violations


132. See id.


136. Id.

137. Id. The Federal Trade Commission and the Department of Transportation with respect to air carriers and ticket agents have both stated in letters to the European Commission that they will take enforcement action against organizations that state that they are in compliance with the safe harbor framework but then fail to live up to their statements.” Id. Further, If an organization “frequently fails to comply with
where websites claim to adhere to the SHP but do not offer the required protections.

The remaining criticism over the enforcement of the SHP is that they only apply to Europeans and others living outside of the United States. They should serve as a framework for comprehensive U.S. legislation. In fact, a bill was introduced in the 106th Congress to adopt legislation to “protect the privacy of American consumers.” This bill, short title “Consumer Privacy Protection Act”, embraces the FIPP in full and applies not only to data collectors but also to third parties, thus accounting for onward transfer of data.

Although the FTC is still developing its privacy protection expertise, it has made commendable strides toward the protection of consumer privacy and is currently the only agency overseeing compliance with privacy protection policies. Other options include setting up a separate agency to monitor privacy violations. Professor Paul Schwartz advocates the appointment of a privacy commissioner. Professor Schwartz believes that this commissioner should do more than just enforce privacy standards and should “assist the public, social groups, and the legislature in understanding strengths and weaknesses in the boundaries of existing information territories.” Similar suggestions have also arisen through the TACD. Although this is an interesting option and one that deserves consideration, I will not discuss it further in this article. For the purposes of this article, it is sufficient to note that some federal entity (currently the FTC) is monitoring privacy violations.

Lastly, the element of enforcement gives the SHP teeth. These teeth, however, must adapt to inevitable changes in technology. By not specifying which specific mechanisms must be in place, the SHP remain flexible and enable a system of communication between data collector and data subject rather than rigid specifications. This communication will facilitate an environment that will “create new markets and opportunities for the development of privacy protecting products.”

the requirements to the point where its claim to comply is no longer credible” action may be taken under the False Statements Act (18 U.S.C. § 1001). This also addresses the Trans Atlantic Consumer Dialogue (TACD) concern that there are not satisfactory procedures for consumers when they have a grievance. See http://www.epic.org/privacy/intl/TACD_SH_comments_0300.html (Submission of the TACD concerning the U.S. Department of Commerce Draft International Safe Harbor Privacy Principles and FAQs, published on March 15, 2000).

140. Id.
141. See TACD, supra note 122.
142. Reidenberg, supra note 127 at 790. Reidenberg argues that adoption of the OECD Guidelines, combined with the creation of a “data privacy commissioner”, would enhance consumer privacy protections.
adaptable. What might seem required today may become antiquated by tomorrow. Effective regulations are adaptive regulations and enforcement is thus strengthened by such flexibility.

VI. SHARING THE BURDEN: TECHNOLOGIES THAT ENHANCE THE EFFECTIVENESS OF THE SAFE HARBOR PRINCIPLES

It is not hard for an individual to recognize when their home or vehicle has been broken into; the evidence of broken windows or missing items is apparent to the naked eye. The collection of data, on the other hand, is not so apparent. With the aid of developments in technology, consumers will be able to help defend themselves against abuses. The victim of theft can report that theft to the appropriate authorities as soon as it is noticed. With the SHP in place, the involved and educated consumer who becomes victim to privacy or data collection abuses will be able to seek redress with haste. Consumer privacy technology can help prevent "the tremendous risk that incomplete national assumptions will be powerful, that multinational media giants will assert themselves, and that imperfect enforcement schemes will allow loopholes and cheating."\textsuperscript{143}


There are three aspects of the e-marketplace that have considerable impact on the consumers' ability to navigate safely. These areas are: 1) the existing technology and architecture of the internet, 2) software upgrades, and 3) third party service providers. They each represent avenues impacting consumers' ability to enforce privacy rights and personal data protection. The SHP may provide a safety net but that net must be secure. Technology will enable consumers to become experienced and proficient in the protection of personal data and thus serves to offer security on the frontlines of privacy abuses — with the consumers.

2. Code: Creating The Need For Protection

Before evaluating the services and technologies available, it is important to consider why they are helpful. The history of privacy protection in the U.S. has been one of competing interests. Products are developed that facilitate communication. However, in facilitating communication, these products also

\textsuperscript{143} Lance Liebman, \textit{An Institutional Emphasis}, 32 CONN. L. REV. 923 at 927.
expose the user to easy intrusions to privacy. Consider the telephone, which led to wiretapping and caller identification. These developments made it necessary for regulations to be imposed and legal boundaries considered.\textsuperscript{144}

Privacy protection has developed part and parcel with efforts to regulate technology (also known as "code," a term made famous by Lawrence Lessig in his book, \textit{Code and Other Laws of Cyberspace}\textsuperscript{145}). Regulation can be achieved either through imposing laws (such as forbidding wiretapping without a warrant) or by erecting walls (such as allowing the use of a caller-identification unit that can take advantage of telecommunications code to identify callers).\textsuperscript{146} However, despite its heavy influence, "architecture is not pre-determined" and "can be made subject to reason, public debate, and the rule of law."\textsuperscript{147} On the internet, code permits not only considerable collection, but also undetected collection. There are no walls to protect the flow of personal data. Although cookies may pop up to inform the user they are being set, many cookies never get noticed. They sit in the consumers hard-drive until they expire. This is the code we have. Effective enforcement of privacy standards will depend on adapting to it.

Professor Lawrence Lessig convincingly argues that the internet can be governed by architectural techniques ("code") to protect fundamental and constitutional values. He also illustrates that the same architecture or code can be used to destroy those values.\textsuperscript{148} The truth of this is undisputed; however the impact of this concept is widely discussed.\textsuperscript{149} For purposes of this article, however, the fact that code plays a predominant role in the governing of fundamental rights is taken as a given. Further, as communication technologies become more sophisticated, numerous devices are capable of using the internet, all with different operating systems (and therefore different codes). Consider Microsoft’s closed source software, Linux’s open source software, Palm, Inc.’s

\textsuperscript{144} Consider two widely cited U.S. Supreme Court cases, Olmstead v. United States, 277 U.S. 438 (1928). Although the majority held that telephone conversations were not protected within the 4th Amendment, Justice Brandeis dissented on the ground that time works changes and brings into existence new conditions and purposes. Katz v. United States, 389 U.S. 347 (1967). One has a reasonable expectation of privacy in a telephone booth.

\textsuperscript{145} See infra note 154.

\textsuperscript{146} See Paul Schiff Berman, \textit{Cyberspace And The State Action Debate: The Cultural Value Of Applying Constitutional Norms To Private Regulation}, 71 U. COLO. L. REV. 1263-64 (2000). Although Professor Berman is primarily concerned with the State Action Doctrine of the 14th Amendment, he states that "it is important to realize that both the law and the wall function as regulatory tools."

\textsuperscript{147} Rotenberg, \textit{supra} note 65.

\textsuperscript{148} See Lawrence Lessig, \textit{CODE AND OTHER LAWS OF CYBERSPACE} (1999).

hand held devices, and the variety of internet capable cellular telephones. Each of these use the internet to communicate and each of these is capable of collecting and transmitting data.

The code itself is secondary to the fundamental rights of consumers. The safety net provided by the SHP does not distinguish between codes any more that it distinguishes retail transactions from wholesale (i.e. not at all).

Increased use of the e-marketplace will create an educated consumer base and familiar landscape. Consumers could then watch out for each other. Consider the Neighborhood Crime Watch programs. If a violation is spotted, it is reported to the proper authorities. In the case of internet privacy, a data collector who abuses consumer privacy and personal data can be reported by those in the “neighborhood.” Therefore, with the proper tools the consumer can work with the code of the e-marketplace and play a valuable role in the enforcement of standards.

3. For The Do-It-Yourselfers: Privacy And Data Protection Technology

The e-marketplace is what we make of it. It provides mass-customization by default. The sites I visit, the products I buy, and the services I use are all a product of my preferences. My preferences are also valued for the information that it reveals about me. I accept this; however, I also want some control.

Development of an open source system that codes my preferences may be above my abilities and is generally reserved to those sophisticated enough to develop software programs. As Paul Schwartz discussed in the third section of Privacy and Democracy in Cyberspace, it may be best to have a variety of privacy protection devices and techniques. Fortunately, software developers are creating programs to expose industry practices. Examples include: Platform for Privacy Preferences (P3P); Firewalls; and/or Microsoft’s Beta security

150. For an example of a Neighborhood Crime Watch program see http://www.state.ma.us/dhcd/components/crimewatch/programs.htm.

151. Professor Schwartz states that “information technology in cyberspace also affects privacy in ways that are dramatically different from anything previously possible. By generating comprehensive records of online behavior, information technology can broadcast an individual’s secrets in ways that she can neither anticipate nor control. Once linked to the Internet, the computer on our desk becomes a potential recorder and betrayer of our confidences. In the absence of strong privacy rules, cyberspace’s civic potential will never be attained.” Schwartz, supra note 29 at 1610-11.

152. Id. at 1681-1701 (1999). Although Professor Schwartz does not specifically advocate software developments as a means of protecting the consumer, he recognizes that one technique alone may not be enough.

153. P3P is a filtering technology developed by the World Wide Web Consortium. Once a consumer downloads P3P and responds to questions, P3P reviews website’s privacy policies and notifies the consumer if the policy does not conform to the preferences indicated. Consumers can also set preferences in their browsers to control data released and are notified if more information is requested. See http://www.w3.org/P3P.
patch for Internet Explorer 5.5. There are numerous other products also, information for which is easily accessible on the internet.

These software developments facilitate consumer education and independence. If you do not want your home broken into, put locks or an alarm on the door. Consumer technology works in a similar manner. P3P lets consumers program their browsers to alert them of incompatible requests for data. It then allows the consumer decide when to "open the door" and let data go. However, this alone is not enough without the SHP. It places the burden of protection on consumers.

Although consumers need to be informed decision makers, they should not be solely responsible. As Graham Pearce and Nicholas Platten observe in their article *Orchestrating Transatlantic Approaches To Personal Data Protection: A European Perspective*, products such as P3P "must be applied within the context of a framework of enforceable data protection rules, which provide a minimum and non-negotiable level of privacy protection for all individuals." Therefore, products like P3P, that shift data protection responsibility from data collectors to data subjects, fall short of the privacy protections prescribed by the E.U.

Microsoft's beta patch is also a good step toward educating consumers. Many consumers are just learning about cookies and this technology not only helps explain where they come from and what they do, but also gives consumers an easy way to check cookies installed on their computers and be notified of who planted them. Consumers are also given the option to refuse third party cookies. However, as Microsoft's director of corporate privacy, Richard Purcell, has stated, cookie management "alone is not the answer to consumer privacy" ... but it will help "facilitat[e] online privacy."

This distinction between first and third parties raises concern all its own. When does an entity become a third party? Is a parent a third party if data is collected by a subsidiary? What about longstanding affiliations and symbiotic relationships, where both parties exist for mutual cooperation? Consider the

---

154. The beta patch is a means of "cookie-management" for Internet Explorer 5.5. "The new features will automatically provide consumers with a clearer understanding of different types of cookies and where they originate—as well as an easy way to manage and delete them." See http://www.microsoft.com/presspass/features/2000/jul00/07-20cookies.asp.


156. See World Wide Web Consortium, PLATFORM FOR PRIVACY PREFERENCES (P3P) PROJECT at http://www.w3.org/P3P.


158. See http://www.microsoft.com/presspass/features/2000/jul00/07-20cookies.asp.

159. Id.
case of Toys ‘R’ Us.com and Coremetrics, data analysis services. A class action suit was brought against Toys ‘R’ Us because Coremetrics was obtaining personal information including “customer names, addresses, and other sensitive data” from Toys ‘R’ Us shoppers.160 This “sharing” of information was discovered by “Internet security expert Matt Curtin.”161 Although Toys ‘R’ Us has ended this relationship, the issue illustrates why a safety net like the one created through the SHP is an important step, yet is strengthened by technologies and services made available to consumers.

Alone, consumer privacy technology creates a “bottom-up” method of protection, and regulations alone create a “top-down” method. The SHP, when viewed in light of emerging technologies and services, offer a middle of the road approach. The establishment of adequate privacy and data protection to consumers alone will not ensure high standards162, but enabling consumers to take an active role in privacy protection facilitates the development of a consumer-friendly e-marketplace.

Although the individual should be part of the privacy and data protection process, “it can no longer reasonably be considered the only part.”163 The SHP promote consumer involvement in the data collection process. However, they also impose responsibilities on the data collectors and government, thus balancing the competing interests in the e-marketplace.164

In addition to developments in technology, developments in consumer services also protect the consumer. These services have some advantages over the technology. As we will see, they create a system where those with knowledge and experience assist those without.

162. Professor Schwartz uses the term “autonomy trap” to illustrate that “a critical mass of sophisticated privacy consumers is not yet emerging” and “the rest of us cannot free-ride on the efforts of those who are more savvy about data privacy on the Internet.” Paul M. Schwartz, Internet Privacy and the State, 32 CONN. L. REV. 815, 822 (2000). However, Professor Schwartz uses this “autonomy trap” situation as a spring board for advocating regulatory standards. These standards would establish a safety net much like the Safe Harbor Principles which require care and responsibility of data collectors.
164. Id. at 880. Professor Cate points out that “United States has historically balanced competing interests” and “identifying the constitutional standard by which those balances are achieved has been one of the major tasks of the Supreme Court in the latter half of the twentieth century.”
VII. THIRD PARTIES TO THE RESCUE: PROVIDING KNOWLEDGE AND KNOW-HOW TO CONSUMERS

As discussed above, the majority of consumers may not be knowledgeable enough to program their own operating system or develop monitoring technology. Fortunately, we are living in a time of entrepreneurial productivity and the internet has spurred considerable entrepreneurial activity. Where software developments have left off, third parties have taken the initiative to create non-governmental consumers' assistance and protection companies. These companies are often referred to as "trusted third parties" or "info-mediaries." The concept is not complicated. Essentially, they act as middle-men and monitor the e-marketplace for the consumer. Because it may be impractical for consumers to investigate privacy policies themselves, these third parties can be hired to do the legwork and report the results.

Examples of these third parties include: TRUSTe\(^{165}\), BBBOnline\(^{166}\), and The Personalization Consortium.\(^{167}\) There are others which are easily accessible through the internet.\(^{168}\) Each of these organizations approach privacy and data protection from a different perspective which are reflected in their services and goals. However, they all educate and assist in the development of privacy policies. Professor Schwartz has noted that these third parties can also provide value to the e-marketplace by providing "a venue for seeking redress after violations of privacy agreements."\(^{169}\) Although it is clear that these services alone provide inadequate protections to consumers, they can become effective

\(^{165}\) See http://www.truste.com. "TRUSTe is an independent, non-profit privacy initiative dedicated to building users' trust and confidence on the Internet." They have developed a privacy seal program that alerts consumers to the protections provided while also assisting data collectors in the management of consumer personal data.

\(^{166}\) See http://www.bbbonline.org. BBBOnline is a subsidiary of the Council of Better Business Bureaus that also offers services to both business and consumers. It has created a seal that identifies "companies that stand behind their privacy policies and have met the program requirements of notice, choice, access and security in the use of personally identifiable information." BBBOnline also provides means for consumers to file complaints.

\(^{167}\) See http://www.personalization.org. Developed by and for marketing companies, including Doubleclick, PricewaterhouseCoopers, KPMG, and American Airlines "to promote the development and use of responsible one-to-one marketing technology and practices on the World Wide Web ... by expanding the scope and use of personalization technology that respects consumer privacy." Although clearly the effort of marketing firms, this consortium provides services and a forum that seeks to develop the e-marketplace in light of consumer concerns over privacy and data protection.


\(^{169}\) Schwartz, supra note 29, at 1681 (1999).
catalysts for upholding the standards imposed by privacy directives such as the SHP.

There are limits to the effectiveness of these third parties, though. A chain is created that distances the consumer from the e-marketplace. This distance is potentially a weakness. Without direct participation, consumer values and conveniences to consumers might be sacrificed. The consumer’s fate is also being trusted to a third party. Although that third party would hopefully be looking out for the best interests of the consumer, the consumer would not be playing any role in the monitoring of privacy policies and accuracy of information collected. This is contradicts the SHP and the spirit of openness that they embrace. An open marketplace will benefit from diversity of input. Third party services can play the valuable role of informing, educating and otherwise serving consumers, thereby enhancing the sophistication of the marketplace.

Alone, neither technology nor services will solve privacy and data protection concerns, but taken together with the standards created through the SHP consumer privacy concerns are greatly reduced. The SHP create a safety net that facilitates exchanges in a global e-marketplace.

VIII. CONCLUSION

Just as the E.U. Data Directive was not "a radical departure from existing privacy laws" in European countries and was therefore easily adopted in "effort to harmonize commerce and privacy rights," the SHP are not a radical departure from current U.S. approaches to the protection of consumer privacy and use of personal data. The SHP were designed to "fill in [...] gaps in United States privacy statutes" and therefore do not conflict with previous U.S. developments.

Commerce has been a tremendous avenue for growth and both consumers and service providers have legitimate concerns in the e-marketplace. The SHP are sensitive to such concerns and benefit everyone in the e-marketplace:

170. Lawrence Lessig, The Limits in Open Code: Regulatory Standards and the Future of the Net, 14 BERKELEY TECH. L. J. 759, 768 (1999). "The only enemy is in the extremes." Although Professor Lessig was commenting on the difference between open and closed source software, the principle applies well to the case at hand. Consumer privacy and data protection is best served through the use of complementing systems.


172. Fromholz, supra note 125, at 476.

173. The trade of personal information itself has considerable value in the marketplace. The U.S. FTC, in a case concerning the "sale of target marketing lists, with consumer information" found that "The total gross annual revenue of companies supplying consumer direct marketing lists and file enhancement data may be $1.5 billion." In re Trans Union, FTC Docket No. 9255, at 53 (July 31, 1998) available at http://www.ftc.gov/os/1998/9808/d9255pub.id.pdf.
consumers, because the SHP lay the groundwork required for active consumer involvement in the data collection process; commercial business, because the SHP allow continued collection of consumer data with minimal practical restraints; and governments, because the SHP provide groundwork for effective and meaningful legislation adaptable to a globalized era.

Legislative action is a prudent step to ensure the future of the SHP. Comprehensive consumer privacy protection legislation would “improve the functioning of a privacy market and play a positive role in the development of privacy norms.” 174 Professor Schwartz outlined two steps that Government could take. The first step is to “discourage a default of maximum information disclosure” and two “encourage a market for privacy enhancing technology.” 175 As discussed above of these is addressed by the SHP.

The purpose of this article has been to illustrate that adopting the SHP will level the playing field on which consumers and commercial interests coexist. A safety net is necessary, one that will require minimum standards and create an environment of openness. The Safe Harbor Principles do just that.

174. Schwartz, supra note 162, at 816-17.
175. Id. at 854.
AIDS, ANTHRAX, AND COMPULSORY LICENSING: HAS THE UNITED STATES LEARNED ANYTHING? A COMMENT ON RECENT DECISIONS ON THE INTERNATIONAL INTELLECTUAL PROPERTY RIGHTS OF PHARMACEUTICAL PATENTS.

Thomas F. Mullin*

I. INTRODUCTION ....................................... 185
II. THE CREATION OF THE WORLD TRADE ORGANIZATION (WTO) AND THE TRIPS AGREEMENT ............ 186
III. PATENT BREAKING AND COMPULSORY LICENSING .......... 190
IV. COUNTRIES RESPOND TO TRIPS AND COMPULSORY LICENSING ........................................... 192
V. CHALLENGING THE CIPRO PATENT ...................... 198
VI. UNITED STATES ANTHRAX SCARE FURTHER THREATENS BAYER AG ........................................ 200
VII. DOHA DECLARATION AND THE FUTURE .................. 203
VIII. CONCLUSION .......................................... 208

I. INTRODUCTION

The concern over protection of Intellectual Property has been an issue for over 500 years. The basis behind the issue is to promote innovation by restricting competition, thus, guaranteeing the return of investments into research and development. This represents a very delicate balance between the corporations and individuals discovering these new ideas and the people that might benefit from them. The inventor is rewarded for his innovation with an exclusive right to sell the product and collect profits. This issue becomes increasingly sensitive when dealing with rights to patents of medicines held by corporations, but needed by millions of people with serious diseases. The cost of development of the drugs is high, but the demand is even higher, although the most needy of the people are typically not the ones that can afford them.

The United States, along with the other developed countries of the world, stands for strict protection of intellectual property rights. With the creation of

* J.D. student at the Shepard Broad Law Center at Nova Southeastern University. Mr. Mullin has an environmental engineering degree from the University of Florida, and for the two years prior to starting law school, he worked as a civil engineer. He wishes to dedicate this article to his wife and parents for their support and understanding.
the World Trade Organization, developing countries facing health crises, such as HIV/AIDS, were given a forum to express their concerns and needs for cheaper alternatives to the costly drugs produced by mostly American corporations. Although agreements were signed that provided options for these developing nations, trade pressure and legal threats by the United States and other developed nations prevented these options from being fully utilized.

Then came September 11th and the anthrax outbreaks, and suddenly it seemed as though the United States was singing a different tune. The United States warned that it would use the same options against Cipro manufacturer, Bayer AG, that it had prevented developing and least-developed countries from relying on to receive cheap AIDS drugs. The rest of the world was in an uproar over the United States’ double standard and the full repercussions from this act have yet to be fully realized.

II. THE CREATION OF THE WORLD TRADE ORGANIZATION (WTO) AND THE TRIPS AGREEMENT

The Paris Convention, established in 1883, was the first important international treaty offering the protection of patents and other intellectual property. It was based upon a national treatment principle in which the patent owner was only granted rights in the patent granting country. As a result, an inventor who wanted to protect his invention in multiple countries had to file for patent protection in each country which he wanted protection.

The main weakness of the Convention was that it did not require standardized patent laws among the participating countries and it offered no enforcement remedies in cases of infringement.

Although the Paris Convention did go through several revisions, laws protecting intellectual property rights remained the same for nearly one hundred years. With the advent of many new technologies in the later parts of the twentieth century, public policy demanded greater intellectual property rights. The Uruguay Round, which represented seven and a half years of negotiations ending in 1994, is considered the largest series of trade negotiations that have
ever occurred. The first round of the negotiations occurred at a ministerial meeting of the General Agreements on Tariffs and Trade (GATT) members in Punta del Este, Uruguay. The importance of intellectual property rights to the United States' economy was just then being fully realized and the dominant countries were in agreement that more protection was better and that changes would always come in the direction of the intellectual property rights.

The conclusion of the Uruguay Round negotiations culminated with the signing of the Marrakesh Agreement in April 1994. The Agreement established the World Trade Organization (WTO) and on January 1, 1995, it took effect. One of the agreements, signed as part of the Marrakesh Agreement, was the Trade-Related Aspects of Intellectual Property Rights (TRIPs). The 1995 agreement globalized trade rules, including setting up universal intellectual property rights. The TRIPs agreement is considered the most comprehensive and influential agreement on international intellectual property rights and it establishes the minimum standards on copyrights and related rights, including computer programs and databases, trademarks, geographical indications, industrial designs, patents, integrated circuits, and trade secrets. Every WTO member or country wishing to join the Organization was required to set up patent offices and legislate patent laws, protect copyrights, and fight piracy. Article 8(1) of TRIPs stated that members could adopt measures necessary to public health, provided that such measures were consistent with the other articles of the agreement. The treaty allowed that compulsory licenses be granted to countries, which then permitted the making, using, or selling of a design against the patent owner's wishes.

7. Id.
8. Dreyfuss, supra note 5.
11. Id.
16. See TRIPs, supra note 13, at art. 8(1).
discretion was permitted by the agreement for determining when compulsory licenses would be afforded; it was up to the individual country to determine what situation required a compulsory license.\textsuperscript{18}

The agreement created new conflicts within developing countries because the protection of intellectual property rights was not a part of the culture of many countries.\textsuperscript{19} One hundred seventeen nations signed the TRIPs agreement allowing intellectual property rights to be enforced by trade sanctions, despite this lack of tradition.\textsuperscript{20} Although they had reservations about strengthening their intellectual property rights, many developing countries signed the TRIPs agreement because they were concerned about their own economic growth and participation in the WTO was essential for them to accomplish this.\textsuperscript{21}

The TRIPs agreement took effect January 1, 1995, but under the agreement, WTO members had a transition period in which to comply with the obligations required by the agreement.\textsuperscript{22} Developed countries had until January 1, 1996 to comply, whereas developing countries had until January 1, 2000, and the least-developed countries had until January 1, 2006 to come into full compliance.\textsuperscript{23} The goal of the agreement was the development of a framework for insuring the requirement of intellectual property protection was met, while allowing those countries facing a national health crisis to be able to provide adequate and cost effective treatments and medicines to combat the emergency.\textsuperscript{24}

The United States was reluctant to sign the agreement as it was against compulsory licensing, but did eventually sign.\textsuperscript{25} Many countries already had compulsory licensing laws, but were reluctant to use them for fear of upsetting the intellectual property community.\textsuperscript{26} The United States pharmaceutical industry lobbied against the TRIPs agreement, relying on the "slippery slope" argument, a legal fiction, believing that once one country was awarded a compulsory license, then all developing or least-developed countries would

\begin{itemize}
\item \textsuperscript{18} Id.
\item \textsuperscript{19} Harrelson, supra note 1, at 176.
\item \textsuperscript{20} Id.
\item \textsuperscript{21} Id.
\item \textsuperscript{22} Committee Report, Scope of the Committee: Intellectual Property as They Relate to International Trade Agreements such as the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), the North American Free Trade Agreement (NAFTA), and the World Trade Organization (WTO), 2000 A.B.A. SEC. INTELL. PROP. L. REP. 263.
\item \textsuperscript{23} Id.
\item \textsuperscript{24} Markus Nolff, Compulsory Patent Licensing in View of the WTO Ministerial Conference Declaration on the TRIPS Agreement and Public Health, 84 J. PAT. & TRADEMARK OFF. SOC’Y 133, 137 (2002).
\item \textsuperscript{25} Kolker, supra note 13.
\item \textsuperscript{26} Id.
\end{itemize}
request licensing. There are two main responses to this argument: first, that the HIV/AIDS crisis is at epidemic proportions with millions dying from the disease and its complications; and second, that the pharmaceutical industry lobbied intensely to prevent the TRIPs agreement from incorporating the rules on compulsory licensing and lost the fight; the law was approved and actions are legal.

The result of the agreement is that compulsory licenses may be granted to countries to protect public health so long as the measures adopted are necessary to protect public health and are consistent with the provision of TRIPs. The first provision, "necessary to protect public health," must be given effect before any adopted measures can be held to be consistent with the provisions of TRIPs. Consistent with the provisions of TRIPs" means consistent with all of the other applicable provisions of the Agreement; anything that affects availability, maintenance, and revocation or forfeiture of patents must be in agreement with the other relevant TRIPS articles. Exceptions to the exclusive rights of a patent holder without authorization by the owner must be in agreement with TRIPs articles 30 and 31. A basis for a potential infringement cannot be public health, if it merely has an incidental effect on public health, for the concern is to prevent anti-competitive behavior and abuse of patent rights.

There must be a balance between the measure taken, namely exclusion of patent protection, and public health. The AIDS/HIV crisis was the perfect, albeit most controversial, case for the restriction of patent protection, especially the anti-retroviral AIDS drugs. The concern for these drugs is that the regimen must be followed closely, eating food and drinking water at the correct times, and taking the drugs in the correct order and at the right times. Refusing to do so could result in the generation of more resistant strands of the virus, which creates a serious problem in underdeveloped countries where citizens lack the proper amounts of food and water. Some people even feel that it may be more

28. Id.
29. See TRIPs, supra note 12, at art. 8(1).
31. Id.
32. See TRIPs, supra note 12, at art. 30, 31. Comparison of Article 30 of the TRIPs agreement to Article XX of the GATT Agreement suggest that measures taken under the TRIPs agreement using the public health theory cannot arbitrarily or unjustly discriminate against countries that have the same conditions or are a "disguised restriction on international trade." See Nolff, supra note 24, at 136.
33. Nolff, supra note 24, at 137.
34. Id.
35. Id. at 138.
36. Id.
cost effective to improve sanitary conditions, basic public health care, and raising public and government awareness.  

One main weakness in the TRIPs agreement is an absence of adequate enforcement remedies in developing countries.  

Most likely, the court used to resolve a dispute will be in a developed country, but the country in which the infringement took place would be a less developed country. “Choice of law” rules in this area are underdeveloped themselves; jurisdictional issues may result in judgments that do not protect anyone’s interests. Countries that only have intellectual property laws because of their joining the WTO do not have a history of analysis of the law to allow the developed country to understand how its laws are intended to apply. Courts may even be inclined to harmonize the law between the developed and less developed countries, leading the court to apply precedents of the developed country to the less developed country.  

III. PATENT BREAKING AND COMPULSORY LICENSING  

According to Article 31 of the TRIPs agreement, compulsory licensing is the “use of subject matter without the authorization of the right holder.” Article 31 allows WTO members to use these patents, including use by governments or third parties authorized by a government. Subsection (b) mentions two uses: (i) “national emergency or other circumstances of extreme urgency;” and (ii) “public non-commercial use.” Public non-commercial use has been implicitly described as use by a government contractor, by or for the government, and is referred to as the “non-commercial use exception.” This exception is not one used for compulsory licensing of pharmaceuticals.  

Each WTO member has the right to grant compulsory licenses and the freedom to determine the grounds upon which to grant them; the country must still meet the general and specific requirements applicable for granting of a

37. Id.; See Treatment Action Campaign and Others v. Minister of Health and Others, 2001 SACLR LEXIS 95 (2001). The President of South Africa, Thabo Mbeki, concluded that HIV was not the primary cause of AIDS and determined that the distribution of Nevirapine, a drug given to HIV infected pregnant women to prevent the passing of the virus to their child, was not necessary. In the case, the High Court of South Africa ordered the government to provide the drug to the HIV-positive mothers, which was being donated to South Africa free of charge by the manufacturer.

38. Dreyfuss, supra note 5.

39. Id.

40. Id.

41. Id.

42. Id.

43. See TRIPs, supra note 12, at art. 31.

44. Id.

45. Nolff, supra note 24, at 140.
compulsory license. Subsection (b) of Article 31 requires that compulsory licensing can only be granted once “efforts to obtain authorization from the right holder on reasonable commercial terms and conditions have not been successful within a reasonable period of time.” This requirement can be waived in times of national emergency or other circumstances of extreme urgency. If the measure is needed in times necessary to public health, but not in an extreme emergency, then there must have need efforts to come to reasonable commercial terms and conditions and that such efforts have not been successful within a reasonable amount of time.

Although the term “compulsory license” is not used in the TRIPs agreement, Article 31 of the agreement, when read in conjunction with Article 2(1) and Article 5.A.2 of the Paris Convention, is understood to mean that WTO members may grant compulsory licenses. The provision created by the Paris Convention states that such measures should be taken to “prevent abuses which might result from the exercise of the exclusive rights conferred by the patent...” Governments, including the United States, have interpreted this requirement liberally to allow the authorizing and granting of compulsory licenses in a wide variety of contexts.

One of the arguments by developing countries against compulsory licensing is that the proceedings to be awarded a license are very costly and protracted, imposing substantial barriers that many countries seek to avoid. Even under administratively streamlined procedures, compulsory licenses are subject to pharmaceutical company opposition and can lead to trade pressure from the United States; these serve to deter humanitarian programs, which act merely to serve public health needs in distant countries. Also, imposing fees for compulsory licenses on countries that do not even have patent laws means that a pharmaceutical company that does not have a patent in a certain country is going to benefit from its use.

There are arguments for compulsory licenses that favor developing countries. The argument says that sales of the drugs will increase, offsetting the lower pricing of the drugs, so long as a reasonable fee is granted and

References:

46. Id.
47. Id.; See TRIPs art. 31(b).
48. Id. at 142.
49. Abott, supra note 27, at 74.
51. Id.
52. Pan-Africa; U.S. Post-Doha Conditions Can Kill, AFRICA NEWS, Mar. 4, 2002 [hereinafter Pan-Africa].
53. Id.
54. Id.
pharmaceutical manufacturers will not be significantly harmed.\textsuperscript{55} Developing countries only account for ten percent of pharmaceutical profits internationally, and Africa accounts for only 1.6 percent.\textsuperscript{56} Therefore, compulsory licensing could result in the promotion of additional sales without impacting the ability of pharmaceutical companies to make profits to support research and development.\textsuperscript{57}

One alternative to compulsory licensing is parallel importing. With parallel importing, a country can search the global market for the best deal on a patented product, as frequently, a drug manufacturer will sell a product at a drastically different price depending on location.\textsuperscript{58} A distributor in a higher priced location can obtain drugs from a country with lower prices and then compete with the manufacturer in the higher priced market.\textsuperscript{59} By parallel importing, a country can use free market forces to obtain the best price, thus, preventing the need for domestic manufacturing capabilities, currently a TRIPS requirement.\textsuperscript{60}

The mere threat of the generic production of patented drugs is often all that is needed to achieve discounted prices. Developed countries use compulsory licensing laws, which are complex and rarely used, as bargaining power for national governments against the drug producers.\textsuperscript{61} Developing countries can also use generic manufacturers as a negotiating tactic to reduce the price of brand-name drugs.\textsuperscript{62} Also, developing countries have contracted with pharmaceutical companies to build their own domestic production facilities to achieve technology transfer and increase their own technical capacity.\textsuperscript{63}

\textbf{IV. COUNTRIES RESPOND TO TRIPS AND COMPULSORY LICENSING}

Tens of millions of Africans have HIV/AIDS, but only 10,000 to 15,000 can afford medicines at their full price, even when treatment is partially subsidized by private medical plans.\textsuperscript{64} On June 12, 2001, Kenya passed a law making it only the second country in Africa to legalize generic versions of patented drugs against HIV/AIDS, just after President Moi declared the disease a national disaster.\textsuperscript{65} Parliament passed the Industrial Property Bill of 2001,  

\textsuperscript{55} Harrelson, \textit{supra} note 1, at 191.
\textsuperscript{56} \textit{Id.}
\textsuperscript{57} \textit{Id.}
\textsuperscript{58} \textit{Id.}, at 192.
\textsuperscript{59} \textit{Id.}
\textsuperscript{60} Harrelson, \textit{supra} note 1, at 192.
\textsuperscript{62} \textit{Id.}
\textsuperscript{63} \textit{Id.}
\textsuperscript{64} \textit{Pan-Africa, supra} note 52.
\textsuperscript{65} \textit{Kenya; Nairobi can manufacture, import HIV/Aids drugs, AFRICA NEWS, Nov. 26, 2001.}
allowing both parallel importing and production of generic anti-retroviral drugs; Kenya is a WTO member and this created much discord with the Organization.\(^6^6\) The Public Health Administer said that the anti-retroviral (ARV) drugs needed by patients could not be imported and distributed free of charge due to the extremely high prices.\(^6^7\) The purpose of the Bill was to replace a previous bill, and to allow Kenya to comply with the TRIPs agreement.\(^6^8\) Kenya is a member of the Paris Convention for the Protection of Intellectual Property and a member of the WTO, and according to the Kenya government, the new bill fully addressed the requirements under the agreement.\(^6^9\)

South Africa passed the Medicines and Related Substances Control Act of 1997, which permitted the government power to override patents.\(^7^0\) Thirty-nine drug companies filed a lawsuit against the government claiming that the new law was unconstitutional.\(^7^1\) In the litigation against the South African government, the pharmaceutical industry argued that the legislation authorizing the Health Minister to allow parallel importation of generic drugs was too broadly drafted and would allow the Minister to take action beyond that of parallel importation.\(^7^2\) To succeed at such a claim, the pharmaceutical industry would have to persuade the South African courts that the TRIPs agreement directly affects South African law, essentially saying that the industry can rely on the terms of the TRIPs agreement as the legislation in the national courts.\(^7^3\) The European Court of Justice previously ruled that TRIPs did not directly affect the law of the European Union and the United States Congress expressly precluded it from having a direct effect on the law of the United States.\(^7^4\) The South African constitution had undergone several recent revisions that have affected the way that international treaties influence the national law.\(^7^5\) South African Parliament approved the Uruguay Round Agreements of 1995 and did not stipulate specifically that the agreements would have direct effect.\(^7^6\) The lawsuit was settled when all thirty-nine drug manufacturers agreed to sell the drugs at significantly reduced prices.\(^7^7\)

South African and Brazilian officials met to discuss the purchase of generic ARV drugs by South Africa from Brazil at a price more than fifty percent less

\(^{66}\) Id.  
\(^{67}\) Id.  
\(^{68}\) Id.  
\(^{69}\) Id.  
\(^{70}\) Kevin Gopal, *Tectonic Shift*, PHARM. EXEC., Apr. 1, 2001 [hereinafter *Tectonic Shift*].  
\(^{71}\) Id.  
\(^{72}\) Abbott, *supra* note 27, at 82.  
\(^{73}\) Id.  
\(^{74}\) Id.  
\(^{75}\) Id.  
\(^{76}\) Id.  
\(^{77}\) Gollin, *supra* note 61.
than the brand name equivalent. The South African government acknowledged that it might be infringing on patent rights, but it felt that the patent holder’s rights should not outweigh the people’s access to life saving medicines; the government felt that this was inline with the governmental and international public policy. The medicines imported from Brazil have patents in South Africa, but the government felt that there is a constitutional right to life and dignity and that providing these drugs to its citizens falls within this right. The country’s concern is that since the drug companies hold monopolies on the drugs, the prices are too high. In response to this, the Medicine Control Council of South Africa immediately approved the use of these generics for the treatment of HIV/AIDS.

In the late 1990’s, Brazil had a problem providing government subsidized access to affordable AIDS drugs and the government responded by passing laws authorizing the domestic production of generic versions of the American drugs. United States trade representatives stated, “the United States would use its strength and international laws to modify the situation.” The United States approves the use of compulsory licensing in impoverished countries such as Senegal and Uganda, but in situations such as Brazil, which is considered a middle-income country, the United States believes that Brazil has an adequate gross domestic product and industrial support to afford the brand-name pharmaceuticals.

In 1996, Brazil passed legislation that guaranteed that all AIDS patients would receive state-of-the-art treatment, provided for by the government. In 1994, the World Bank estimated that by the year 2000, there would be 1.2 million people affected with AIDS; there were only 530,000. Brazil’s use of generic versions of HIV/AIDS drugs, coupled with a national program of education on the disease, directly contributed to this.

A second law passed in 1996 in Brazil declared that any product commercialized before May 14, 1997, would remain unpatented in the country,

79. Id.
80. Id.
81. Id.
82. Id.
84. Id.
85. Id.
86. Success Story, PHARM. EXECUTIVE, Mar. 1, 2001 [hereinafter Success Story].
87. Id.
88. Id.
of which most of the first generation anti-retroviral drugs lie. The prices of the brand-name drugs with Brazilian equivalents have dropped almost eighty percent, whereas drugs without Brazilian generic equivalents have only dropped nine percent. In 2000, the Brazilian government spent 444 million dollars on AIDS drugs for its citizens, but saved 422 million dollars between 1997-1999 because of the decline of hospitalizations resulting from AIDS-related illnesses.

Brazil has even announced that it would be spending considerably more money on research into an AIDS vaccine than it has ever before and plans to work with the nations of Africa to accomplish this. After receiving international acclaim for its anti-AIDS/HIV programs, Brazil’s new victories come from its contentions that drug patents can be waived in cases of public health emergencies. In Brazil, it is the government institutes that conduct all the research into the AIDS/HIV programs. The Far-Manguinhos Institute produces seven of the fifteen medicines now used in the anti-retroviral cocktail offered in Brazil, which has led to many new innovations, and three other drugs are currently being developed. Brazil’s stand is that if the molecules are found to be effective against resistant viruses, the patent will be public and drug industries of any country would be free to produce them. The institute’s situation puts itself in a unique bargaining position for the reduction in price of pharmaceuticals for Brazilian law provides for the granting of compulsory licenses of generic versions of drugs in cases of public health emergencies. According to the WTO and the TRIPs agreement, compulsory licenses are only permitted in countries that have the production ability, and the Far-Manguinhos Institute provides Brazil with this ability. The Health Minister of Brazil threatened to ignore several patents and this resulted in a forty to seventy percent reduction in price of two of the anti-AIDS drugs; a third is a new target.

89. Id.
90. Id.
91. Success Story, supra note 86.
93. Id.
94. Id.
95. Id.
96. Id. Ninety-five percent of the 16,500,800 patents granted in the United States between 1977 and 1996 were awarded to only ten different industrialized countries, while during this period, developing countries only accounted for two percent of the patents. Correa, supra note 14.
97. Osava, supra note 92.
98. Id.
99. Id. Brazil also provides education to other countries on how to produce their own versions of the drugs. Angola now has a production facility that was partly funded by Brazil. Brazil is also intensifying
The government now plans on concentrating on the areas that are especially impoverished, like the north and northeast sections of the country. Of the nearly 600,000 Brazilians infected with HIV/AIDS, most of them are not even aware that they have contracted the virus. Brazil recognizes the importance of early detection and plans on continuing to produce the cheap generic versions of drugs free of charge to its citizens, a cost that does not overstress the national budget.

In June 2001, China completed negotiations with the United States for its accession into the WTO, which would grant China permanent normal trade relation status. China will be expected to continually comply with its WTO obligations and this will be monitored by United States trade representatives. China is considered a priority foreign country, since it does not maintain proper intellectual property protection, and could have sanctions imposed against it for failing to meet specific standards, of specific importance is compliance with the TRIPs agreement. Before 1985, China awarded no patent protection, as the government awarded inventors of “useful” inventions with a certificate and a cash award; China then became the owner. With the threat of added trade duties on all Chinese imports, China agreed to improve its system of protecting intellectual property, passing laws that were approved on August 25, 2000, and effective on July 1, 2001.

China still has changes that it needs to make to come into full compliance with TRIPs. Currently, China does not permit patents on inventions that are prohibited by its country’s laws. Additionally, China needs to amend its laws to include the condition that compulsory licenses will be predominately for the domestic market and that adequate remuneration will be provided to the patent

cooperation with China and India, two countries that do not recognize patents and produce generic medicines and chemical substances at low costs. Id.

100. Id.
101. Id.
102. Osava, supra note 92.
104. Id.
105. Id.
106. Id.
107. Id. In 1993, consistent with article 27(1) of the TRIPs agreement, China agreed to the protection of patenting of chemical and pharmaceutical products, as well as food, beverages, and flavorings. The amendments also extended the period of protection from 15 to 20 years, complying with article 33 of TRIPs. They provided for offering for sale as an exclusive right of the patent holder, hence complying with Article 28 of the TRIPs agreement. Also amended was the section of their law that limited the situations where compulsory licenses could be granted, bringing it into compliance with Article 31 of the TRIPs agreement. China also amended its law to provide for injunctive relief against infringement and shifted the burden of proof to the defendant to prove that an infringement did not occur, complying with article 34(1) of TRIPs. Id.; See generally TRIPs, supra note 12.
108. Moga, supra note 103. This expressly violates article 27(2) of TRIPs.
holder in the case a compulsory license is issued. Article 41(1) of TRIPs requires a system of enforcement and remedies in the case of an infringement of a patent, and to conform to these requirements, China must increase criminal penalties and reduce the threshold for minimum damages. Considering that China's patent laws are less than twenty years old, the country has shown commitment to compliance with the TRIPs agreement and the desire to be a responsible member of the WTO.

India, through its Indian Patent Act of 1970, abolished all product patents and only recognizes process patents for pharmaceutical purposes. Indian manufacturers have an advantage because their manufacturing costs are forty-five percent lower than those in the United States, and the result is that sixty percent of the generics sold in the United States are imports. Additionally, in India, the government has control over maximum pricing of the drugs.

The United Kingdom, Canada and European Union members all have existing well-developed national patent laws giving maximum protection to their governments. The TRIPs provisions are not as far reaching as the existing laws in these developed countries. British law is governed by the Patent Act of 1977, which provides for United Kingdom government exemption from the exclusive rights held by patent owners and thus, need not apply for compulsory licenses. A patent holder could have its patent invalidated by the Crown. The United Kingdom provides tax incentives to companies researching medicines and vaccines for diseases of poverty that could total fifty percent relief in certain situations. Under Canadian law, the government may impose a compulsory license on the patent holder and have generic manufacturers produce the drug, but adequate remuneration must be paid to the patent holder to account for the economic loss.

109. Id. This would bring China into compliance with article 31(f) and (h).
110. Id.
111. Id.
113. Id.
114. Id. Additionally, India, Egypt and Pakistan are not required to adopt the medicine provisions of the TRIPs agreement until 2005. Medicines: Commission Seeks to Square Poor Country Circle, EUR. REP., June 15, 2002.
116. Id.
117. Id.
118. Id.
119. Id.
The United States, home to most of the research-based pharmaceutical companies, has tried to influence countries to adopt patent laws that exceed the minimum provisions of TRIPs and totally exclude compulsory licensing. Because the United States’ economy is increasingly moving away from basic manufacturing into high-technology industries, intellectual property protection has become much more of a concern. The United States has labored to discourage foreign governments from breaking pharmaceutical patents and buying unauthorized generics from such countries as China and India, recognized as the two major exporters of unauthorized generic drugs. As a deterrent, the United States has trade barriers and other various forms of political pressure on non-compliant governments. Critics state that the United States argument that the TRIPs agreement allows it to prevent developing countries from addressing national health emergencies through the use of parallel importing and compulsory licensing by the imposition of trade sanctions, undermines the political foundations of the WTO itself. They claim that such steps poison the environment in which negotiations are undertaken, agreements are carried out, and disputes are settled. A current House bill will permit generic companies to force a compulsory license from brand-name companies. Under the Affordable Prescription Drug Act, the brand-name drug manufacturer would be forced to license a generic equivalent. The generic drug company would be required to pay a reasonable royalty to the brand-name company and civil penalties would result from failure to do so.

V. CHALLENGING THE CIPRO PATENT

Bayer AG, a German corporation, owns the 4,670,444 patent (the 444 patent) on the main ingredient of Ciprofloxacin Hydrochloride (Cipro) until 2003, and the 5,286,754 patent (the 754 patent) covering the pharmaceutical formulation of the main ingredient until 2011. In 1997, Bayer settled a patent infringement case in which Barr Labs alleged that Bayer’s patents were no
longer valid over prior art. Part of the settlement included Bayer paying Barr fifty million dollars a year not to produce a generic equivalent to Cipro. Bayer instituted a reexamination of the patent and the United States Patent and Trademark Office (PTO) maintained the validity of the patent. Other generic companies sued under the same theory, but the District Court of New Jersey ruled in favor of Bayer and dismissed the invalidity actions. Many other generic manufacturers have filed for certification of each patent once the originals expire.

Cipro was the first drug approved by the Food and Drug Administration (FDA) for treatment of anthrax infections, but the last case of anthrax infection occurred in the 1970's. Cipro's major anthrax testing occurred more than ten years ago by the United States Army biowarfare researchers on rhesus monkeys. The Persian Gulf War proved beneficial to Bayer, as Cipro was rushed through the FDA approval amongst fears that Saddam Hussein might use anthrax as a biological weapon. This quick approval was due to Cipro's advantages over other antibiotics. It is not a part of the same family of drugs as penicillin or tetracycline, which means that it would remain an effective antidote against strains of anthrax resistant to penicillin or tetracycline. Cipro is the best selling antibiotic in the world and has been since 1991, and in 1999 Bayer's gross sales of Cipro totaled 1.04 billion dollars.

132. Id. See In Re Ciprofloxacin HydroChloride Antitrust Litig., 166 F. Supp. 2d 740 (E.D.N.Y. 2001). Barr first applied for a generic version of Cipro in 1991 and received tentative approval for the generic version in 1995. But by 1997, Barr, along with two other companies, Rugby and Hoechst-Marion Roussel, had come to an agreement whereby Bayer would pay the companies over $200 million in exchange for the company's promise not to produce generic versions of Cipro. Consumer Group Challenges Cipro Pact, 9 No. 6 ANDREWS ANTITRUST LITIG. REP. 9 (2001).

133. Id. It was a consumer advocacy group that sued to dislodge the agreement between Bayer and other drug manufacturers that prohibited any generic versions of Cipro to be made. The Prescription Access Litigation project is a group of more than sixty organizations from over twenty-nine states that challenged the agreement. Unlike other challenges in the court at that time, the suit was only seeking injunctive relief, whereas the others where seeking monetary damages. Nick Dutton, The Price You Pay for Their Patent Protection, GLASS AGE, Jan. 31, 2002.

134. Upadhye, supra note 121.


136. Upadhye, supra note 121.

137. Godwin, supra note 83.

138. Id.

139. Id.

140. Id.

141. Id.

The United States Code holds that the government has the authority to infringe on patents. Under this section, the government need not negotiate the patent’s use with the owner. The government, or its agents, would have to pay some compensation to the owner, and the government’s use cannot be enjoined. The royalty the government has used is based on an eminent domain theory of recovery and is measured by what the patentee has lost rather than what the government has gained.

VI. UNITED STATES ANTHRAX SCARE FURTHER THREATENS BAYER AG

Tommy Thompson was the United States Secretary of Health and Human Services at the time of the recent anthrax scare and as such, he was responsible for the health of every American. When problems arise he has the power to require immunizations and quarantines and order the distribution of medicine. Traditionally, the courts defer to the judgment of the Secretary. He also controls governmental spending in areas of scientific research, as well as having the duty to pass on information discovered by the government to the pharmaceutical companies. Above it all, his main objective is to protect the lives of American citizens.

Following the anthrax scares that occurred in October 2001, and in response to concerns over an inadequate supply of Cipro doses, Thompson’s first statement was that the government lacked the statutory authority to grant itself a compulsory license for the generic production of Cipro. It was James Love and Ralph Nader that co-authored a public letter to the Secretary declaring that Title 28, Section 1498, of the United States Code was more than sufficient

---

144. See also Crater Corp. v. Lucent Tech., 255 F.3d 1361 (Cir. 2001). Where it was held that 14 U.S.C. § 1498 provides for such authority.
145. Godwin, supra note 83.
146. Id. The government has even required compulsory licensing for the military on such things as satellite technology and night-vision glasses, using public interest as the main argument. Harrelson, supra note 1.
147. Id. This is refuted by the pharmaceutical industry as the correct reading of the law. The Pharmaceutical Researchers and Manufacturers Association of America (PhRMA) believes that section refers to “eminent domain” compensation, and that the United States has a greater obligation under the WTO and the TRIPs agreement to work with the drug manufacturer first. Id.
150. Fleischer-Black, supra note 148.
151. Id.
152. Godwin, supra note 83.
law to permit the production of generic drugs. In 1918, a law was passed that gave the government the ability to guarantee that its shipbuilding orders would not be hindered by patent litigation. This law was the authority for Senator Charles Schumer's suggestion that Secretary Thompson allow other drug manufacturers to produce Cipro during the anthrax crisis. Schumer said that the generic versions of Cipro would both reduce the reliance on a sole supplier and could significantly reduce costs. At first, Thompson was concerned about the delicate balance between patent protection and the concern for adequate Cipro supply. He made a statement with regard to this balance, knowing that a month later the WTO would be having a meeting to discuss whether nations have the right to disregard patents to address public health concerns.

But there is another law that controls FDA decisions concerning generic drugs, which would prevent the government from buying generic Cipro because it had not first passed final FDA approval. Under the 1984 Hatch-Waxman Act, companies cannot produce generic versions of drugs for thirty months if the patent is not expired and the patent holder opposes the production of generic versions of its drug. These conflicting laws created a very difficult position for Secretary Thompson to be in.

It was on October 18, 2001, that the Canadian Minister of Health signed a contract with other pharmaceutical manufacturers for the production of Cipro. His reasoning was for the sufficiency of Canada's stockpile and Bayer's ability to provide an adequate supply. Canada's position was that if Bayer could not produce, then Health Canada, the national health care system, would be forced to use its supply of generic equivalents. The next day,

155. Id. Simply put, the law said that the federal government could take license for itself, so long as the patent holder was provided with adequate compensation. Id.
158. Id.
159. Id.
162. Id.
163. Id.
164. Ebert, supra note 156. Canada's Health Minister commissioned a generic manufacturer to produce a million doses of Cipro even as Bayer assured that it could supply Canada's needs. Upadhye, supra note 121. As well, there had been no anthrax outbreaks in Canada. Id. It was questionable whether Canada's action was "necessary to protect public health," as required under Article 8(1) of the TRIPs agreement. Id. It seemed that the Health Canada official who ordered the generic Cipro did not get prior approval from the
Thompson started threatening Bayer by saying that he would have laws changed so that he could break the Cipro patent.\textsuperscript{165} Soon after, Canada brokered a deal with Bayer to purchase Cipro at a significantly reduced price; this allowed Thompson to do the same, effectively saving the country eighty-two million dollars, as well as preventing certain future litigation.\textsuperscript{166} Thompson later stated at a Congressional hearing that the issue was price and not the supply.\textsuperscript{167}

The pharmaceutical industry believed that even if Bayer was unable to meet the demand for Cipro at that time, the best decision was to still contract with Bayer.\textsuperscript{168} Bayer could then meet the new demand by licensing the Cipro to other manufacturers, allowing Bayer to maintain its long-term value.\textsuperscript{169} Bayer could set the prices of the private transactions and still meet the demands of the government during a public health crisis.\textsuperscript{170}

Politicians and the media were greatly concerned over the possibility of "busting" Bayer's patent on Cipro so that an alleged shortage of the drug could be supplied.\textsuperscript{171} In a traditional drug patent-busting lawsuit, a generic drug company will file with the FDA an abbreviated new drug application (ANDA) on the drug, claiming that its generic version is basically the same as the brand-name drug.\textsuperscript{172} This could have been a possibility for breaking the Cipro patent.\textsuperscript{173} Normally, if the generic version is the same, then the ANDA will be approved and a generic equivalent will enter the market.\textsuperscript{174} The most common type of application is a Paragraph IV ANDA certification, which says that the applicant seeks immediate permanent approval because either the generic will not infringe, or the patent is invalid.\textsuperscript{175} Under United States law,\textsuperscript{176} a brand-
name drug manufacturer can sue a generic drug company that files a Paragraph IV ANDA certification.\textsuperscript{177}

The Bayer chief executive stated that Bayer would not give Cipro away to the United States because if it had done so, then it would have to give it away to all the other countries sharing the United States ideals, because they would be threatened as well.\textsuperscript{178} Seven other antibiotics were offered for free from their manufacturers, including Bristol-Meyers Squibb’s Tequin and Johnson & Johnson’s Levaquin, which are in the same family as Cipro, but have yet to be approved for use against anthrax.\textsuperscript{179} The two companies stated that they each would donate 100 million tablets to the United States if they could receive automatic approval for use against anthrax.\textsuperscript{180}

When Secretary Thompson threatened to override the Cipro patent, he claimed that this was in compliance with the TRIPs agreement.\textsuperscript{181} If the United States government had used Article 31 of the TRIPs agreement to grant compulsory licenses for the eighteen cases of anthrax, then poorer countries would use that decision to extort compulsory licenses of the AIDS cocktail drugs to treat the millions of cases of AIDS.\textsuperscript{182} The economy of drug licensing would be disrupted, as research and development profits are returned to the companies through sales in developed countries.\textsuperscript{183} The developed countries help to offset lower prices in poorer countries, but profits are lost when compulsory licenses are used as a threat by developed countries seeking to reduce the prices of drugs to generic levels.\textsuperscript{184}

\section*{VII. Doha Declaration and the Future}

On November 14, 2001, the WTO members met in Doha, Qatar for a ministerial conference to discuss specifically international intellectual property rights under the TRIPs agreement. The Ministerial Declaration reaffirmed that each WTO member has the right to determine what constitutes a national emergency or other extreme urgency, as required under the TRIPs agreement before a compulsory license can be granted.\textsuperscript{185} Paragraph 1 of the Declaration

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{177} Upadhye, \textit{supra} note 121.
  \item \textsuperscript{178} \textit{Bayer’s Reasons for not Giving Cipro Away; USA Slammed for “Double Standards,”} \textit{MARKETLETTER}, Nov. 12, 2001 [hereinafter \textit{Bayer’s reasons}]. Bayer did donate eight million Cipro tablets to the front-line workers involved in the anthrax crisis.
  \item \textsuperscript{179} \textit{Id.}
  \item \textsuperscript{180} \textit{Id.}
  \item \textsuperscript{181} \textit{Id.}
  \item \textsuperscript{182} \textit{Bayer’s reasons, supra} note 178.
  \item \textsuperscript{183} \textit{Id.}
  \item \textsuperscript{184} \textit{Id.}
  \item \textsuperscript{185} See Ministerial Conference, Nov. 14, 2001, MINISTERIAL DECLARATION [hereinafter Ministerial Declaration].
\end{itemize}
\end{footnotesize}
specifically lists AIDS/HIV, tuberculosis and malaria.\textsuperscript{186} Although the Declaration does not define a public health crisis, the examples provided help to narrow the scope. Paragraph 4 states that the TRIPs agreement does not and should not prevent members from taking measures to protect public health.\textsuperscript{187} Paragraph 5(b) states that each member has the right to grant compulsory licenses and the freedom to determine the grounds upon which such licenses are granted.\textsuperscript{188} This provides a presumption of validity to a WTO member determining that a national health emergency exists.\textsuperscript{189} Additionally, this represents a shift of "balance of rights and obligations" away from the patent owner.\textsuperscript{190} Under threat of compulsory licensing, a patent holder will be persuaded easier by a WTO member to conclude a licensing agreement.\textsuperscript{191}

Both health activists and the pharmaceutical industry see the Declaration as a victory.\textsuperscript{192} The Declaration drew on drafts provided by two opposite sides of the issue: one from developed nations, and the other from sixty developing nations.\textsuperscript{193} The first side recognized that intellectual property protection is important for the development of new medicines.\textsuperscript{194} The second side relied more on the TRIPs agreement's effect on drug prices, saying that it should not prevent members from taking measures to protect public health.\textsuperscript{195} The final version stated that compulsory licensing need not be restricted to pandemics, as the United States-led draft suggested.\textsuperscript{196} The compromise reached recognized the problem that countries having little or no manufacturing ability would not be able to make effective use of compulsory licensing.\textsuperscript{197} Activists and

\begin{quote}
\textsuperscript{186} Id. at ¶ 1.
\textsuperscript{187} Id. at ¶ 4.
\textsuperscript{188} Id. at ¶ 5(b).
\textsuperscript{189} Id. at ¶ 5(b).
\textsuperscript{189} Nolff, supra note 24, at 144.
\textsuperscript{190} Id., at 145.
\textsuperscript{190} Id.
\textsuperscript{191} Id.
\textsuperscript{192} Kevin Gopal, New Accord: A WTO Declaration on the TRIPS Agreement Affirms Countries' Right to Protect Public Health Through Access to Medicines for All, PHARM EXEC., Jan. 1, 2002 [hereinafter New Accord].
\textsuperscript{193} Id.
\textsuperscript{194} Id.
\textsuperscript{195} Id.
\textsuperscript{196} Id.
\textsuperscript{197} Dubey Muchkund, Implications of Doha for India – II, THE HINDU, Dec. 25, 2001. India played a major role in creating a degree of unity and cohesion between the developing countries and had wanted to include in the declaration a provision allowing parallel importation of drugs from other developing countries, but this was not accepted. Id.; India's National Working Group on Patents felt that the Declaration had not diluted the TRIPs agreement in favor of the least-developed countries in any way. Currently, most of India's 22,000 drug companies are small local pharmaceutical manufacturers, and TRIPs compliance will force between 50-75 percent of them out of business by the year 2015. It is estimated that by 2025, only 200-250 will remain. Indian Pharma's Mixed Views on Doha Declaration on TRIPS and Public Health, MARKETLETTER, Dec. 10, 2001.
\end{quote}
developing nations said that the Declaration clarified the interpretations of the ambivalent agreement.198

Within the context of the Ministerial Declaration, in order to grant a compulsory license in times of public health emergencies, it is required that the license is necessary to protect public health and address a public health crisis, authorization of the license must be considered on its individual merits, and the right holder must be notified.199 The scope and duration must be limited to the purpose for which it was authorized, and must be liable to be terminated if and when the circumstances, which led to it, cease to exist and are unlikely to recur.200 Underdeveloped countries and private sector advocates see the new declaration as a way out of the AIDS crisis and other health emergencies, but they still realize that it is a battle of lives versus money.201

The Ministers did oppose a proposal recommended by the developing countries that countries without manufacturing ability could import medicines made under compulsory licenses in another country.202 This creates the situation where many developing countries cannot make use of compulsory licenses.203 They do not have manufacturing ability, which is a requirement for granting a compulsory license.204 It is estimated that only ten of the one hundred thirty developing members of the WTO can use compulsory licenses to manufacture their own drugs.205 Article 31(f) of the TRIPs agreement imposes the requirement that production under compulsory licenses must be predominately for the domestic market.206 One of the options proposed to deal with the developing countries with little or no domestic manufacturing ability is to remove the requirement completely from Article 31(f), but this was not done.207 Another option was to interpret Article 30 of the agreement to mean that products made under compulsory licenses can be exported to developing countries facing public health problems that lack the domestic production capacity.208

The World Health Organization (WHO) and the Commission of European Communities welcomed the Doha Declaration and the pro-public health
The WHO and the European Commission (EU) have agreed to work closely with the WTO and the World Intellectual Property Organization (WIPO) on technical assistance to developing countries implementing the TRIPs agreement, believing that global cooperation is required so that generic manufacturers can provide the lowest prices on a sustainable basis to the poorest countries. The European Commission is proposing an exception to the TRIPs agreement that allows WTO members to export generic drugs produced under compulsory licenses to developing countries without quantitative limits, so that countries without production capability can rely on other countries for its supply. The European Union even proposed an option amending the TRIPs agreement to include for the export of medicines to poorer countries. The EU is also proposing a global tiered pricing system for certain pharmaceutical products in the poorest countries. Tiered pricing is used in some countries, but the push is to use it for all developing countries.

The TRIPs agreement was not altered or amended, but the Declaration merely acted as a suggestion for how to interpret the agreement. Medicines are treated as any other commodity, but the declaration says that since they save lives, their patents should have different standards applied. Drug companies rely on the fact that the agreement was not amended and, therefore, the agreement still stands as it did before. Drug companies do hold the upper hand because they can stop the research into new drugs when they lose confidence on the payoffs.

The International Federation of Pharmaceutical Manufacturers Association (IFPMA) pointed out that the Declaration was political rather than a legal or binding instrument, but did agree that the final version reflected the balanced interest to encourage innovation in drug therapies and vaccines, while seeking to promote improved access to medicines. The European Federation of Pharmaceutical Industries and Associations (EFPIA) said that it welcomed the Declaration's confirmation that the TRIPs agreement was flexible enough to

210. *Id.*
211. *Id.*
212. *Id.*
214. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
take account of public health concerns and that intellectual property protection is vital for the development of new medicines.\textsuperscript{220}

The United States position opposing an easing of TRIPs had been undermined by Washington's threat, just before the meeting, to break Bayer's patent on Cipro, unless the drug company lowered the price.\textsuperscript{221} The international community felt that this represented a double standard by the United States.\textsuperscript{222} The United States had previously received criticism for calling on the WTO to rule that Brazil's legal requirement that patent holders must produce patented products in the country, rather than have them imported, was in violation of WTO.\textsuperscript{223} Brazil was in fact, given much credit for brokering the Declaration and this gave Brazil more assurance to confront the abusive pricing of brand-name drugs.\textsuperscript{224}

The United States is also trying to limit the countries that could benefit from the production-for-export exception.\textsuperscript{225} The United States wishes to limit the applicability of the rule to small market countries for fear that small rich countries will benefit.\textsuperscript{226} This will affect many small African countries that are considered small market because they have small populations and have a low number of people that can afford the drugs.\textsuperscript{227} In reference to AIDS and other diseases of poverty, the production-for-export exception may be the only way to get these countries affordable medicines, for they do not have their own production capacity.\textsuperscript{228} The United States is also trying to exclude the larger developing and middle-income countries because they are considered an area of future growth for the patent pharmaceutical industry.\textsuperscript{229} By limiting the conditions, which would warrant a compulsory license to only "serious" health conditions, the other much needed medicines, such as expensive antibiotics and diabetes medicines, are excluded.\textsuperscript{230} The main concern over the exception in the United States is that the "production-for-export" medicines will find their way back into the United States and be sold on the American market.\textsuperscript{231}

\textsuperscript{220} Id.
\textsuperscript{221} Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id.
\textsuperscript{224} Pharma Industry, supra note 219.
\textsuperscript{225} Pan-Africa, supra note 52.
\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} Id. Some even believe that the exception would even benefit the United States and EU countries in cases of orphan diseases. These diseases have small incidence and require orphan drugs at exorbitant prices. Additionally, this could be used for bioterrorism or epidemic outbreaks in developed countries to import the drugs needed. Id.
\textsuperscript{229} Id.
\textsuperscript{230} Pan-Africa, supra note 52.
\textsuperscript{231} Id.
It is important to provide access to affordable medicines both through the public and private sectors. First, existing workplace clinics of larger employers provide considerable capacity to the private sector through benefits to employees. Since ARV medicines have not been reduced in price in the private sector, employers are refusing to supply them to employees. Second, medical aid plans that extend to both the private and public sectors have benefit limits that make it impossible to pay for ARV medicines unless they have been heavily discounted. Third, non-governmental organizations (NGO) and mission hospitals, which are included in the private sector, have in place the ability to deliver high quality treatment and care, but only if the drugs are made more affordable.

The shift of balance of rights and obligations, created by the Declaration, away from the patent owner has already resulted in more favorable agreement for purchases of pharmaceuticals by governments than might have been possible. Possibly the biggest impact of the Ministerial Declaration is that the threat of a compulsory license will make it easier for a WTO member to persuade a patent holder to concede a licensing agreement.

VIII. CONCLUSION

The need for affordable drugs in developing countries due to the AIDS crisis has further defined the contrast between these countries and the developed nations such as the United States. Although the United States does have an AIDS problem, it does not see the same high percentage of infections as do the lower income less-developed countries. Developing countries that do have high infectious rates may see this as a lack of compassion by the United States for the crises affecting their countries.

The United States, through a concern for returned investments of large corporations, may have lost sight into what the founding fathers based the country on: the protection of life, liberty, and the pursuit of happiness. AIDS in America is still seen mostly as a disease among homosexuals and, therefore, the government may be more concerned with profits rather than human lives, but the countries in Africa and South America do not have the same ideals. They are using whatever means they have to get free medicines to the millions of their citizens afflicted with a disease that will surely end their life and any

232. Id.
233. Id.
234. Id.
235. Pan-Africa, supra note 52.
236. Id.
237. Nolff, supra note 24, at 145.
238. Id.
chance at happiness. The irony found behind the anthrax attacks and the United States’ reaction to them is that Americans now have a fear that they never had before; whereas developing countries facing the AIDS crises may have more hope for the future than ever before.
THOSE WHO COULD NOT WANDER AND THE CREATION OF A STATE: THE JEWS AND THE PALESTINIANS

Adam S. Klein*

I. INTRODUCTION ........................................... 211

II. HISTORICAL PERSECUTION .................................. 212
   A. From Nomads to Wanderers .......................... 212
   B. Middle History ..................................... 214
   C. The Turn of the Twentieth Century .................. 217

III. TREATMENT UNDER MODERN LEGISLATION ................. 218
   A. Immigration Policy: the Effect on the Jews ......... 218
   B. The Treaty of Versailles and the Great Depression .. 219
   C. The Nazis and the Holocaust .......................... 220
   D. The Jews Who Went Into Exile and Those That Could Not ... 222
   E. The Laws that Followed the War and the Definition of Refugee ... 222

IV. THE CREATION OF A JEWISH STATE ....................... 225

V. THE CRITERION FOR THE ESTABLISHMENT OF A STATE AND THE PALESTINIAN PROBLEM ......... 226
   A. Conflicts in the Region ............................ 226
   B. Remedy for the Palestinian Problem .................. 228
   C. The Present Conflict ................................ 232

VI. CONCLUSION ............................................. 236

“We must remind ourselves that the Holocaust was not six million. It was one, plus one, plus one…”

I. INTRODUCTION

When Jesus was in Jerusalem carrying his Cross to Cavalry, he took a moment to pause on a man’s doorstep. The man drove him away and cried aloud for Jesus to “Walk Faster!” As Jesus walked away bearing the Cross, he

* Adam S. Klein graduated from the University of New Mexico School of Law in May 2002 with a concentration in International Law and Alternative Dispute Resolution. Mr. Klein now works for the BCIS (INS) as an Adjudications Officer in Santa Ana, CA.

1. JUDITH MILLER, ONE BY ONE BY ONE: FACING THE HOLOCAUST 287 (Simon and Schuster 1990).
replied "I go, but you will walk until I come again!" Accordingly, the Jews were cast to walk eternally. However, the Jews had already begun to wander and they would continue to seek refuge until they were almost annihilated.

The purpose of this paper is to examine the pragmatism and possibility of creating a state as the necessary remedy for a large group of refugees, the Palestinians. Towards that end, the historical persecution, treatment under modern legislation, and the genocide during the Holocaust of the Jews will be considered as relevant to the formation of the State of Israel and used as a guide from which the Palestinian contention might be measured. This paper will explore the peril and plight of the Palestinians in the occupied territories of Israel in the attempt to answer the question as to whether their struggle should be alleviated by the creation of a state.

Accordingly, Part I of this paper will examine the historical persecution of the Jews. Part II will focus on the effect that legislation had on the Jews. Part III will profile the creation of the Jewish state. Finally, Part IV will explore the requirements and possibilities for the establishment of the Palestinian state.

II. HISTORICAL PERSECUTION

A. From Nomads to Wanderers

In and around the year 3000 Before the Common Era (B.C.E.), Egypt already had built the pyramids and Sumer and Akad were world empires. During the 1400s, Phoenicia was colonizing while the Jews were merely a tiny band of nomads wandering through the upper regions of the Arabian Desert. The Jews were for a time too inconspicuous and transient to be noticed. Reflecting on the words from the Torah, "Let them make Me a sanctuary; that I may dwell among them," the Jews settled in Palestine. Moreover concerning a foreigner, who is not of Your people Israel, but has come from a far country for Your name's sake. (for they will

5. Id. at 6-7.
hear of Your great name and Your strong hand and Your outstretched arm), when he comes and prays toward this temple, hear in heaven Your dwelling place, and do according to all for which the foreigner calls to You, that all peoples of the earth may know Your name and fear You, as do Your people Israel, and that they may know that this temple which I have built is called by Your name.6

For many years Solomon evidently wandered away from fellowship with His God, returning only much later, near the end of the life, to record in his book, Ecclesiastes, what he had learned about the emptiness of all of life apart from God. When Solomon died, his son Rehoboam became king of Israel. The nation, however, was on a spiritual decline and Rehoboam’s policies caused the kingdom to be divided into separate regimes of the north (Israel) and the south (Judah). The northern kingdom remained in idolatry until it was overrun and taken captive in 721 B.C.E. by the Assyrians. With the Jews falling from grace, the Temple would now continue to decline in wealth, splendor, and importance for the next 367 years. The first Temple was destroyed in 586 B.C.E. and the Jews were exiled and sent wandering throughout Babylon.

Israel’s exile for seventy years in Babylon marked a new era of government for God’s chosen people. They had entered what Jesus would later call “the times of the gentiles.”7 The majority of Jews living in Babylon were prosperous and had assimilated. They were unwilling to undertake the hardship and danger of moving back to their ruined homeland. For those who took it, the journey was “530 direct miles, but about 900 miles by road and took about four months.”8 After the Jews arrived in Jerusalem, they worked toward building the second Temple, which was then completed four years later in 516 B.C.E. According to Jesus, not one stone would be left upon another when the Temple was destroyed.9 When the Temple was set on fire, the Roman soldiers tore apart the stone to get the melted gold. The Menorah and vessels were carried to Rome and the treasury was robbed. The destruction of the second Temple in the year 70 of the Common Era (C.E.), for the Jews, marked the period of the second exile. The Jewish people were soon to be scattered throughout the earth.

8. See 1 Esd as 7: 8-9 (NCE). See also Dolphin, supra note 7.
B. Middle History

The Jews were persecuted and displaced throughout the crusades. There were periods during the beginning of each Crusade where Jews were killed as they were "blamed that the Holy Land was not in Christian hands." While the Jews wandered, many headed North and West into Europe. They attempted to settle in various places in Europe prior to the Crusades, however, the Jews could not own land because the feudal system made it impossible. They were barred from the guilds of artisans and were left without the avenues of farming and handicrafts. Due to the feelings of filth associated with handling money, commerce and money lending were areas left open to the Jews. During the Crusades, the large number of Christians that were in contact with foreign lands increased the trade in foreign commodities. Not interested in competing with the Jews, the Christian tradesmen secured the enactment of laws that effectively took the Jews out of trade.

During the crusades, many Jews faced the ultimatum of Baptism or death. In England, the Jews received a modicum of refuge from the cruelty beset on their brethren in the rest of the world. Henry I had granted the Jews a charter of rights and privileges as traders, and although their status was not to increase beyond a modest living as ensured by the levying of special taxes for Jews, there was not a rampant hatred of the Jews in England. However, this changed a century later in 1290 C.E. when Edward I ordered an edict to the effect that all Jews must leave England or die.

Many of the exiles from England found refuge in France. However, this was a very short stop for the Jews. In 1306 C.E., Philip IV ordered not only the Jews who recently relocated to France to leave, but he ordered the expulsion of all Jews including those native Jews whose ancestors had lived in France for a thousand years. Similar to the expulsion in England, the Jews were permitted

10. See G. L. Esterson, Ashkenazic, European Given Names, Judaism, And Jewish History at http://www.jewishgen.org/databases/GivenNames/midlages.htm (n.d.).
12. LEARSI, supra note 11, at 276.
13. Id. at 277.
15. See LEARSI, supra note 11, at 281-82. Compare with Speaking of Jews at http://www.rfcnet.org/newsletter/jan2002b.htm (January 2002) where it states that there has been a rising tide of anti-Semitism in Europe and particularly in France. Moreover, in France alone, there were 350 attacks against Jews since the beginning of the "infitada" in Israel in October, 2000.
to leave effectively with only the clothes that they wore, with the rest of the Jews’ accumulated wealth to replenish the royal coffers.\footnote{16}

On the bitter road of exile, many Jews had stopped and settled in Spain because in many ways, “Spain resembled Palestine.”\footnote{17} The climate of central and southern Spain was largely subtropical, “with hot rainless summers and mild winters.”\footnote{18} While in Spain, the Jews prospered despite the ill will of the clergy. The Jews in Spain favored well during the Black Death in 1348-49 C.E. while other Jews and non-Jews suffered throughout Europe. The Jews of Spain owed their safety to the Kings, who softened the laws that were passed against the Jews because of the service they had received from the Jews in their capacity as doctors during the plague.\footnote{19} Once again, this favor was short lived and in 1371 C.E. a decree was ordered that the Jews must identify themselves by wearing a yellow patch.\footnote{20} The clergy felt that they had gained a victory in further prohibiting the Jews to live among Christians or to employ Christians.\footnote{21}

The treatment by the Church of the Jews culminated in disaster for the Jews of Spain in 1391 C.E. It started in Seville, which was famous for its beautiful synagogues and scholars, when the citizenry stormed the ghetto from all sides to burn and loot the houses and killing more than 4,000 of the inhabitants.\footnote{22} The situation worsened in one community after another. Settlement and ghettos throughout Spain were devastated and the number of forced converts went well into the thousands. Only in Granada, which was controlled by the Muslims, were the Jews safe. The flame of the Spanish Jewry was nearly extinguished, and the persecution created a group that would soon be ripe for more persecution. These people were the New Christians, and they were forced by the sword to accept Jesus Christ. These New Christians were called “Marranos,” which means “the damned,” and they were seemingly more hated by the clergy than the Jews before them.\footnote{23}

In 1412 C.E., a law passed in Spain that prohibited Jews from trimming their hair or beards, to own nice fabrics, to engage in handicrafts, or to carry arms.\footnote{24} Most of the Jews that remained tended to practice in secret, as did many of the so-called New Christians, since they did not willfully denounce their

\footnote{16} Brecher, supra note 14.
\footnote{17} LEARSI, supra note 11, at 243.
\footnote{18} Id.
\footnote{19} Id. at 302. \textit{See also} Esterson, supra note 10.
\footnote{21} LEARSI, supra note 11, at 307.
\footnote{23} LEARSI, supra note 11, at 308.
\footnote{24} Id. at 309.
religion. Subsequently, the New Christians were not under the jurisdiction of the new prescriptions against the Jews. Thus, these New Christians began to prosper and they aroused bitter resentment. In 1440 C.E., and again in 1467 C.E., mobs unleashed their anger in Toledo and many New Christians were slain and their homes set ablaze. In 1479 C.E., the rulers Ferdinand and Isabella united the Castile and Aragon thrones and adopted the policy of absolutism at home and expansionism abroad for their Catholic way. On 30 March 1492 C.E., the edict of expulsion was issued from the Alhambra in the newly conquered Granada. The ultimatum given to the Jews, as well as to the Muslims, was to surrender their faith or surrender their life or leave. Some Jews stayed under the terms of the Crown, but most of the Jews had heard such promises before and once again, the Jews set off to wander.

Over the next several centuries and throughout Europe, the walls of the ghettos were strong as to separate the Jews who lived within from the world outside and there was ostensibly no place for the Jews to go. In many cities, Jews were altogether excluded from the daily ways of life and they were considered to be a people without natural rights, and any freedom they paid for came to an end at any of the many borders. The procreation of Jews was kept in check by an elaborate system of restrictions that taxed marriages and births and prohibited more than one son to remain with his family. After the expulsion of all the Jews from Austria in 1670 C.E., Fredrick William, the Elector of Brandenburg, permitted some of the exiles to settle in Berlin. By 1712 C.E., in spite of several restrictions including the separation of Jews in categories of “protected” Jews and “tolerated” Jews, the Jews had built their first synagogue in Berlin and their numbers began to grow.

As people and their ideas were on the forefront of enlightenment, the French Assembly proclaimed the Declaration of the Rights of Man on 26 August 1789 C.E. Eventually, these rights were even thought to extend to the Jews, almost as an admonition that a Jew was indeed a “Man.” In November of 1799 C.E., Napoleon Bonaparte became the master of France and through his skill and leadership, the Jews were emancipated as a matter of course throughout France’s victories. With the fall of Napoleon after losses in Russia in 1812 C.E. and in Germany in 1813 C.E., the rights that the Jews had barely realized were in the hands of the Congress of Vienna. Hope turned into nightmare as German cities became the scene of anti-Jewish pogroms, and

---

25. Id. at 312-13.
27. LEARSI, supra note 11, at 370.
28. Id. at 372.
29. Id. at 404-5.
citizens proclaimed the superiority of their blood while they murdered Jews who were thought of as inferior. And there were other pogroms in Europe against the Jews in the Common Era: three waves of pogroms occurred in Russia, each worse and broader than the last, in 1881-1884, 1903-1906, and in 1917-1921; and also in Poland in 1919, in Hungary in 1919, in Romania in 1926, and more as the Nazi ideology permeated and gained acceptance. It was this patchwork of instability in the name of hatred for the Jews that left the Jews searching for a home and continuing to wander.

C. The Turn of the Twentieth Century

Ever since there was passage to the "New World," if for no better place to go, the Jews have immigrated to America. Many Jews escaped not only the Spanish Inquisition but also the pogroms by finding passage to America. Before 1825, fewer than 10,000 immigrants entered the United States annually. "By the early twentieth century America was receiving an annual average of more than one million immigrants," while two-thirds arrived from Eastern and Southern Europe.30

Those who arrived in the United States during the years after 1820 brought with them discontent with their status at home as well as the desire to improve their conditions and quality of life. Some entered the United States under the pressure of great disasters in their native homeland, while others entered under the threat of more gradual economic and social change. The unifying principle for America's last great migratory wave, which began in the middle of the nineteenth century, was America's need for labor combined with the widespread belief that the United States was a land of opportunity and a refuge for the oppressed. The Jewish community that had preceded them welcomed the Jews who came to America during this period and they continued to grow and prosper. The number of Jews that were new arrivals seemed to mimic the plight of the Jews abroad and the ghettos of New York, Philadelphia, Chicago and other large cities continued to increase. It was a time where there was a demand for labor and an ample supply of immigrant workers. During this time, the Jews who wanted to wander had a place to take refuge and work. However, attitudes and market forces changed and United States immigration law changed with them. The next section looks at the impact of this evolving legislation on the new immigrants, the wandering Jews.

III. TREATMENT UNDER MODERN LEGISLATION

A. Immigration Policy: the Effect on the Jews

In the 19th century, when immigration consisted of admitting enough immigrants to fill the capitalist needs for the proletariat, a more open immigration policy was beneficial to meet those exploitive needs. However, American economic policy changed at the beginning of the 20th century as the United States was a changed nation before and after World War I. Organizations formed and spoke out at Congressional hearings to voice their opinions on immigration and the relative effects. Although often concerned that Jewish immigration could provoke anti-Semitism in America, Jewish leaders fought a long and largely successful delaying action against restrictions on immigration during the period from 1891-1924, “particularly as they affected the ability of Jews to immigrate.” While other religious groups such as Catholics and ethnic groups such as the Irish remained divided and ambivalent on their attitudes toward immigration and were poorly organized and ineffective in influencing immigration policy, and while labor unions opposed immigration in their attempt to diminish the supply of cheap labor, “Jewish groups engaged in an intensive and sustained effort against attempts to restrict immigration.” Despite the efforts to keep a more open immigration policy, Congress passed a literacy test that required all immigrants to be literate in order to pass through at Ellis Island. Immigration in the United States was substantially lower, but this was also due to the interruption to life caused by the Great War.

After World War I, feelings of nationalism and protectionism ran rampant. The heightened distrust of foreigners, the fear of labor unions and the influx of cheap labor, provoked hostility from the earlier Americans toward the newer, more-hyphenated foreign-Americans. The Ku Klux Klan revived to antagonize the immigrants when the War ended and Henry Ford’s newspaper warned that there was a Jewish conspiracy to take over the world.

In 1921, over 800,000 immigrants arrived with most able to pass the literacy requirements. Rumors spread that all 3,000,000 Jews in Poland would escape to America if there were a boat big enough to take them. Accordingly, the issue of immigration policy in the United States during the 1920s was not

33. Id.
34. David M. Reimers, Unwelcome Strangers 18 (Columbia University Press 1998). President Wilson vetoed this bill but the Congress overrode the President and it became law.
35. Id at 20.
36. Id.
37. Id.
whether to radically restrict the immigrants from entering but how to effectively legislate such restrictions. In 1920, the House and Senate split on a bill to suspend all immigration.\textsuperscript{38}

The Quota Act of 1921 established the first numerical restrictions on European immigration. The Quota set the level of immigrants permitted to enter the United States at three percent of the number of foreign born from each European nationality residing in the United States according to the 1910 census.\textsuperscript{39} The 1910 census was favored over the 1920 census because it minimized the proportion of southern and eastern Europeans in the population.\textsuperscript{40} The Immigration Act of 1924 further restricted the entry of immigrants, while in 1929 a maximum quota of 153,774 was adopted from which 83,575 of those immigrants were designated from Great Britain and Ireland. The Jews were finding that there was less and less room to wander.

B. The Treaty of Versailles and the Great Depression

The enforcement of the Treaty of Versailles in Germany, which called for Germany to accept the blame for the war and pay heftily in reparations, created hardship in Germany and fostered general and targeted feelings of resentment. In 1921-22, the German mark fell in value from four to the United States dollar to seventy-five. Since Germany was unable to keep up with the repayment schedule from the Versailles Treaty and since the Treaty blocked Germany from many export markets, the mark then plummeted to four-hundred marks to the dollar.\textsuperscript{41} By 1923, German economic life was grinding to a standstill, and while some reverted to the practice of bartering, many of the farmers stopped putting their crops up for sale and people throughout Germany were going hungry. During the rest of the 1920s in Germany, there became increasing needs for individuals to emigrate from Germany.

The Wall Street stock-market crash of 1929 precipitated the Great Depression, the worst economic downturn in the history of the United States. The depression had devastating effects on this country as well as others. The bottom fell out of the stock market, many banks could not continue to operate, farmers went into bankruptcy, and many were unemployed. With hundreds of thousands of Americans losing their jobs, businesses failing, and financial institutions collapsing, the immigrants were not wanted.

In September of 1930, President Hoover addressed the plight of the nation and instructed that immigrants “likely to become a public charge” were not to

\textsuperscript{38} ARTHUR D MORSE, WHILE SIX MILLION DIED 134 (Random House 1967).
\textsuperscript{39} Id.
\textsuperscript{40} Id.
\textsuperscript{41} Id. at 37-39.
be admitted into the United States. There was another major obstacle for the Jews who would try to escape tense times in Europe: the recent enforcement of Section 7(c) of the 1924 Act. Section 7(c) required that applicants furnish police certificates of good character for the past five years and other such documents. Accordingly, the Jews were put in a position that required them to request certificates of good character from their persecutors in order to escape persecution. Thus, the 1920s were becoming the 1930s and after the prosperity of the 1920s, which was enjoyed throughout much of the world, there were many factors that made this time very difficult for the Jews. This combination of factors included but was not limited to the Depression in the United States and in Europe along with the manner in which the Treaty of Versailles had affected those in Germany. Accordingly, power was shifting, ideologies were changing, and darkness was approaching for the Jews.

C. The Nazis and the Holocaust

During World War I, Adolph Hitler was twice recognized for valor in his service with the German Army. Although he only reached the rank of Corporal, he remained in the full-time employment of the Army after the War. One September night in 1919, Hitler received orders to attend a German’s Worker Party meeting and report back on the “well intentioned” group. The gathering of fifty was the first public forum that heard Hitler speak about his ideas of nationalism. As the party gained support and influence, the name was changed to the National Socialist German Workers’ Party (the Nazis). The Nazi ideology was born from the belief that most of the Communist leaders were Jews, that it was the Jews who were responsible for the Revolution in Russia and Germany’s defeat, and that the Jews “sold the nation into the slavery with the Versailles Treaty.” In December 1920, the Nazis bought their first newspaper and from this platform they announced to Germany that the Nazis were present as a “weapon for Germanism.” The Nazis through the newspaper went on to make many other statements.

As Germany suffered throughout the 1920s, the Nazis advanced their ideology, gained support, and became powerful by making the Jews vulnerable. The Nazis had found in anti-Semitism a consolation and a program. The Nazi

42. Id. at 135.
43. Id. at 137.
44. See Modern World History: The Treaty of Versailles at http://www.bbc.co.uk/education/modern/versaill/versahtm.htm#q3 (n.d.) where it describes the terms of the Treaty and the particularly costly and devastating effect on the Germans.
45. JAMES POOL, WHO FINANCED HITLER 5-6 (Pocket Books 1978).
46. Id. at 24.
47. Id. at 32.
program consisted on the power of hatred and a plan toward the extermination of the Jews for the betterment of mankind and the glory of Germany. The words of Joseph Goebbels, who served as the Nazi Minister of Propaganda, help illustrate the contempt that was felt for the Jews. Certainly the Jew is a human being. "[But then] the flea is a living thing too; only not a pleasant one. Since the flea is not a pleasant thing, we are not obliged to keep it and let it prosper...but our duty is rather to exterminate it. Likewise with the Jews."48

On 30 January 1933, Franklin D. Roosevelt's fifty-first birthday, Adolf Hitler was appointed Chancellor of Germany. It was not long after the appointment that Hitler was able to put his plan for the extermination of the Jews into effect. There were more Christians than Jews among the initial victims of the Nazi terrorism, but as they were Socialists and Communists, Hitler thought of them as Jews.49 As the Nazis launched their campaign against Jews through laws and brutal physical attacks, American diplomats and foreign correspondents began to report of the onslaught.50 It started with public book burnings. Then, with much persecution in between, the Nuremberg Laws were passed in September 1935. These laws deprived all Jews of their citizenship, subjected the Jews to forced labor, deprived them of property and their possessions, and horded them into ghettos.51

The pre-war persecution culminated on 10 November 1938 on the Night of Broken Glass, Kristallnacht. It was that night that the vision of hell was unleashed on the Jews. Throughout hundreds of cities and towns, Jewish homes and shops were systematically looted and destroyed, over five hundred synagogues were burned, thousands of men, women, and children were beaten, maimed and murdered. While there was a genuine feeling of uneasiness throughout democratic governments, there was no planned intervention as this event was a matter of German "internal policy."52 Many Jews fled both legally and illegally, while many Jews stayed.53 In Germany, there was no secret about the Nazis plan, only disbelief that it could be real. The Jews would bitterly joke that when the Nazis came to power, there were two sorts of Jews living in Germany: the optimists and the pessimists. The pessimists went into exile; the optimists went to the gas chambers.54

49. MORSE, supra note 38, at 104.
50. Id. at 105.
52. LEARSI, supra note 11, at 597.
53. See the article by W. Michael Blumenthal at http://www.unhcr.org/ (n.d.) where he talks about the "Shanghai Jews." It says: "A large part of Shanghai's Jews, estimated at 20,000, escaped from Germany, Austria and Poland between 1938 and 1941. It was the last haven for those who had no visas."
54. RABBI JOSEPH TELUSHKIN, JEWISH WISDOM 561 (William Morrow and Co. 1994).
D. The Jews Who Went Into Exile and Those That Could Not

While the Nazis spread throughout Germany and into Europe, many Jews and other potential refugees looked to the United States for a safe haven. The number of refugees that fled Germany during the 1930s was about 25,000 a year. These numbers were significant enough to raise the question of whether the United States would provide refuge for these persecuted people. The immigration laws had been erected high as a hurdle with only a little room to crawl underneath during the 1920s. Therefore, the laws obfuscated the asylum ideal that had made America what it had become.

The pre-war era was not a time where diversity was celebrated, merely exploited. During that period, the refugees were not distinguished from other immigrants in the existing legislation but for one exception. The one exception was the literacy test and “it could be waived for persons fleeing political or religious oppression.” Thus, refugees had the same hurdles to jump as all other immigrants and that included quotas, moral character qualifications that required paperwork, and the public charge clause. It was not until after World War II that for the first time the United States engaged “in the massive resettlement of refugees.” As a result, there were relatively few wandering Jews because many Jews went to the camps when Hitler unveiled his final solution to the world.

E. The Laws that Followed the War and the Definition of Refugee

The Nazi war machine required labor. Accordingly, the Nazi policy was that of importing forced laborers from conquered territories. When the Allies surveyed the liberated enemy territory in 1945, they ascertained that there were about eight million people in Germany, Austria, and Italy who had been displaced from their homes in other parts of Europe. The Jews that survived the camps and the exterminations were a part of this group of displaced persons. On 13 February 1945 at the Yalta Conference, the Allied governments agreed on procedures for the repatriation of displaced persons. Close to seven million people returned to their homes per this agreement while over one million refused to return to their countries of origin because they

55. DIVINE, supra note 31, at 93.
56. Id.
57. Id.
59. DIVINE, supra note 31, at 110.
60. Id.
feared persecution from the newly instituted Communist governments. However, over three million people where gathered and forcibly resettled. In the United States, the 1948 Displaced Persons Act was the first policy for admitting persons fleeing persecution and the quota under the Act was 205,000 persons over two years.

The escalating refugee crisis after World War II prompted the world community to develop certain norms and protections. The 1951 United Nations Convention relating to the Status of Refugees, which was drafted as a result of a recommendation by the newly established United Nations Commission on Human Rights, was a landmark in setting standards for the treatment of refugees. The Convention, in its article 1, provides a general definition of the term "refugee." The term applies to any person who

...as a result of events occurring before 1 January 1951 and owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable, or owing to such fear, is unwilling, to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it.

Many universally recognized human rights are directly applicable to refugees. These include the right to life, protection from torture and ill-

61. Id. See also http://www.ess.uwe.ac.uk/genocide/yugoslav-hist1.htm for allegations that many of the repatriations were forced.

62. See Punished peoples: the mass deportations of the 1940s at http://www.unhcr.org/ (n.d.) where it says that from ...1936 and 1952, more than 3 million people were rounded up, for the most part along the Soviet Union's western borders, strictly on the basis of their 'foreign' origins or culture, and dumped thousands of kilometers away in eastern and central Siberia or in the Central Asian republics. In all, more than 20 major groups suffered in this way.... [These included] ...non-Orthodox Christian (the Volga Germans), ...Buddhist (the Kalmyks), and ...Muslim (Chechens, Ingush, Karachai, Balkars, Crimean Tatars and Meskhetians). The Soviet Union's 2.5 million Jews were only saved from a similar fate by Stalin's death in March 1953.

63. TEITELBAUM, supra note 58, at 47. In 1950, the quota was increased to 415,744 persons and then complemented in 1953 by the Refugee Relief Act. In 1957, the Refugee-Escapee Act removed all quotas and allowed for refugees to be admitted without the limits of immigration law.


treatment,66 the right to a nationality,67 the right to freedom of movement as well as the right to leave any country including one’s own and to return to one’s country,68 and the right not to be forcibly returned to persecution.69

The most essential component of refugee status is protection against return to a country where a person has reason to fear persecution. This protection has found expression in the principle of non-refoulement. The principle of non-refoulement is articulated in Art. 33(1) of the 1951 Convention which provides that: “No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.” This provision constitutes one of the basic Articles of the 1951 Convention, to which no reservations are permitted.70 Unlike various other provisions in the Convention, its application is not dependent on the lawful residence of a refugee in the territory of a Contracting State.71 While non-refoulement is not an entitlement to asylum, it does forbid forcible return.72 Moreover, the principle of non-refoulement applies not only in respect to the country of origin but to any country where a person has reason to fear persecution.

The logic inherent in the non-derogable norm of non-refoulement, as it stood in Article 33 of the 1951 Convention and Article 12 of the International Covenant on Civil and Political Rights, was indicative of the logic set forth in the creation of the State of Israel as a place for the wandering Jews to go.73 Many of these rights echoed the cries of the Jews in their treatment before, during and after the Holocaust. While the world number of Jews was considerably lower after World War II and the Holocaust, there were more Jews

---

69. See 1951 Convention, supra note 64, art. 33(1).
70. See Note on Non-Refoulement (Submitted by the High Commissioner) (EC/SCP/2) at para. 4 at http://www.unhcr.org/ (n.d.).
71. Id.
72. GUY GOODWIN-GILL, THE REFUGEE IN INTERNATIONAL LAW 122-23 (Clarendon Press 1983), where it states:

[f]reedom to grant or to refuse permanent asylum remains, but save in exceptional circumstances, states do not enjoy the right to return refugees to persecution or any situation of personal danger. Protection against the immediate eventualty is the responsibility of the country of first refuge. In so far as a state is required to grant that protection, the minimum content of which is non-refoulement through time, it is required also to treat the refugee in accordance with such standards as will permit an appropriated solution, whether voluntary repatriation, local integration, or resettlement in another country.

73. See 1951 Convention, supra note 64, art. 33(1). See also the International Covenant on Civil and Political Rights (adopted 19 Dec. 1966) art. 12, 999 U.N.T.S. 171 [hereinafter ICCPR].
that legitimately sought refuge than there were places for them. This was because the Jews were not wanted in many of the places of would-be asylum, as made obvious by the attempt to exterminate them. The right to not be forcibly returned, or non-refoulement, while different than an affirmative right to be resettled, left the nations of the world without the option of [forcibly] returning the Jews to their former homes and nightmares. Consequently, the pervasive and ongoing phenomenon of Jewish persecution cried out for the creation of a Jewish state.

IV. THE CREATION OF A JEWISH STATE

Following World War II, escalating hostilities between Arabs and Jews over the fate of Palestine and between the Zionist militias and the British army compelled Britain to relinquish its mandate over Palestine. The Zionists believed that all Jews constitute one nation and that the only solution for anti-Semitism was the creation of a Jewish state. The British requested that the recently established United Nations determine the future of Palestine. On 29 November 1947, the UN General Assembly voted to partition Palestine into two states, one Jewish and the other Arab. The UN partition plan divided the country in such a way that each state would have a majority of its own population, although some Jewish settlements would fall within the proposed Palestinian state and many Palestinians would become part of the proposed Jewish state. The territory designated to the Jewish state would be slightly larger than the Palestinian state (56 percent and 43 percent of Palestine, respectively) on the assumption that increasing numbers of Jews would immigrate there.

According to the UN partition plan, the area of Jerusalem and Bethlehem was to become an international zone. While this was the plan for the geographic boundary of Israel, it was not the boundary for long as the neighboring Arab

74. See The British Mandate at http://www.arab.net/palestine/history/pe_britishmandate.html (n.d.).
75. See http://www.merip.org/palestine-israel_primer/zionism-pal-isr-primer.html (n.d.) where it defines Zionism: Zionism, or Jewish nationalism, is a modern political movement. Its core beliefs are that all Jews constitute one nation (not simply a religious or ethnic community) and that the only solution to anti-Semitism is the concentration of as many Jews as possible in Palestine/Israel and the establishment of a Jewish state there.
76. See Question of Palestine at http://www.un.org/Depts/dpa/ngo/history.html (n.d.) where it speaks to the years of the Palestine Mandate. From 1922 to 1947, large-scale Jewish immigration from abroad, mainly from Eastern Europe took place, the numbers swelling in the 1930s with the notorious Nazi persecution of Jewish populations. Palestinian demands for independence and resistance to Jewish immigration led to a rebellion in 1937, followed by continuing terrorism and violence from both sides during and immediately after World War II. Great Britain tried to implement various formulas to bring independence to a land ravaged by violence. In 1947, Great Britain in frustration turned the problem over to the United Nations.
countries attacked the one-day old state on 15 May 1948.77 In 1949, the war between Israel and the Arab states ended with the signing of armistice agreements. The country once known as Palestine was now divided into three parts, each under separate political control. The State of Israel encompassed over 77 percent of the territory. Jordan occupied East Jerusalem and the hill country of central Palestine (the West Bank). Egypt took control of the coastal plain around the city of Gaza (the Gaza Strip). The Palestinian Arab state envisioned by the UN partition plan was never established. The creation of the Jewish state largely alleviated the Jewish refugee problem, as it was a place that any Jew could go. However, the creation of the Jewish state and the subsequent attack by the Arab neighbors displaced many Palestinians and created a whole new problem.

V. THE CRITERION FOR THE ESTABLISHMENT OF A STATE AND THE PALESTINIAN PROBLEM

A. Conflicts in the Region

There was a good deal of power brokering, political influence, and design in relation to the establishment of Israel as the Jewish state. The historical persecution, treatment under modern legislation, and the genocide during the Holocaust of the Jews was certainly relevant to the formation of the State of Israel. All of these factors contributed to the creation of a significant number of stateless people with religion as a unifying feature. These same criterions would seem to be an appropriate starting point from which the Palestinian claim to the formation of a separate state should be examined. However, what follows in this inquiry will illustrate why such a comparison is not appropriate and why the factors that contributed to the formation of the State of Israel will not be the same factors that have been brought out in the Palestinian struggle.

The Palestinians had lived in the country in question since the dawn of history.78 Both Muslim and Christian people comprised the Palestinian people and they constituted the main element of the population until the reintroduction of the Jews displaced the majority of this population in and around 1948.79 In the period since World War II, the Middle East has been the scene of one
conflict after another. Tensions both between nations and within nations have erupted into wars, revolutions, and terrorist plots that have had widespread diplomatic, military, and economic ramifications throughout the region and the rest of the world. The victory for the Jews in the War of 1948 helped them to acquire more land for settlements, but at the expense of the Palestinians who lived there before. The United Nations Relief Works Agency for Palestine Refugees (UNRWA) faced the staggering task of caring for more than 750,000 refugees from this first exodus of 1948-1949, which put a considerable burden on the available UNRWA resources. In 1967 the Arab countries, Egypt, Syria, and Jordan, upset at the confiscation of land that went to form Israel, increased pressure on Israel by mobilizing their armies and threatening to attack the new country in order to reclaim the land. Israel was overwhelmed at the prospect of this seemingly imminent attack, and quickly launched a preemptive strike that pierced nearly to Cairo, Egypt. The Six-Day War, as it came to be known, led to an additional half-million new refugees who comprised 1967’s “second exodus” from Palestine. “More than one-fifth of the inhabitants had fled when Israeli soldiers seized East Jerusalem and the West Bank during the six-days of fighting.”

The Jews were viewed by the Palestinians to have come into Israel as invaders historically and once again in the Zionist movement after World War II. The defense of Israel seemed to have the effect of expanding its territory. As a result, many Palestinians were displaced, but unlike the Jews, they were without religion as a unifying factor. Nevertheless, does the displacement of Palestinians or the creation of Palestinian refugees rise to the level of persecution, or the type of persecution that the world witnessed with respect to the Jews prior to the recognition of the State of Israel? Is this level of persecution necessary? Does the non-derogable norm of non-refoulement entitle the Palestinian refugees a way out of the camps and a way into either the lands of their Arab neighbors or into their own state? Moreover, should the treatment of the Palestinians in the camps and the consequential standard of living by the Palestinians that resulted from their displacement be included in part of the analysis?

This paper is now at the point where one could say that any such comparison between the Jews and the Palestinians for the purpose of establishing a Palestinian state is absurd. This is because pain is pain and suffering is suffering, and it is the distinguishing of degrees that is absurd. It is

83. See Palestinian Society and Meaning of “Palestinians”, supra note 79.
certain and unfortunate that Palestinians have suffered. Accordingly, it is more relevant to ask how the persecution of the Palestinians might cease and how their suffering might be remedied. This inquiry in turn will pose the question of whether the Jews and Palestinians can coexist.

B. Remedy for the Palestinian Problem

There seem to be three pragmatic solutions to refugee situations: repatriation to the country of origin, integration or settlement in the country of first asylum, and resettlement in a third country having the capacity and willingness to absorb the refugees. In the case of the Palestinians, one of the largest refugee groups, none of these options have been available. Given Israel's refusal to comply with UN Resolution 194 of 1948, which established the principles of repatriation and compensation, and the Arab states' unwillingness to accept or permanently integrate and resettle the hundreds of thousands of refugees on their soil, the Palestinian refugees have been left in limbo for the last fifty years.

The Palestine Liberation Organization (PLO), formed in 1964, adopted a new covenant in 1968 committing all Palestinians to continue the fight for their rights, claiming that the international community had so far proved unable to discharge the responsibility it had borne for almost half a century. The covenant termed Israel an illegal state, which led to Israel's refusal to deal with the PLO. In 1969, the General Assembly specifically and formally recognized the inalienable rights of the Palestinian people, declaring that the Assembly:

Recogniz[ed] that the problem of the Palestine Arab refugees has arisen from the denial of their inalienable rights under the Charter of the United Nations and the Universal Declaration of Human Rights,

---


85. See Palestinian Refugees at http://www.incite-national.org/issues/refugees.html (n.d.), where it states that the Palestinians have the unfortunate status of being both the largest single group of refugees in the world, and one of the oldest, having been refugees for some five decades.


[through all those 25 years of confrontation and in the 28 troubled years since, the Arab regimes, except for Jordan, refused to allow Palestinians to immigrate in significant numbers, or extend to those they did admit the rights of citizenship, or even to commit serious resources to relieving the misery in the refugee camps.]
Gravely concerned that the denial of their rights has been aggravated by the reported acts of collective punishment, arbitrary detention, curfews, destruction of homes and property, deportation and other repressive acts against the refugees and other inhabitants of the occupied territories...\(^{87}\)

As a result of the position of the United Nations, it would seem that the only direction to go is forward and toward the creation of a Palestinian state. Moreover, the United Nations has been vocal in questioning Israeli measures against Palestinian terrorist activity, but the United Nations has not once questioned the Palestinian terrorist activities.\(^{88}\) However, there lies a problem with the creation of a Palestinian state that is bent on the destruction of the Jews and of Israel. There are factions with power and the will to destroy all of the Jews in the Middle East and either eliminate them systematically from the region or provoke them into inviting on their own destruction.\(^{89}\) Furthermore, the holy book of Islam has been interpreted by these factions to justify both their means and their ends: the use of suicide bombers to rid Palestine of the Jews.\(^{90}\) Thus, there is the problem of justly dealing with the plight of the Palestinian refugees, which may prove to be mutually exclusive with maintaining any Jews in Israel.

Unfortunately, the goal for peace in the region was not historically facilitated when the Palestinians embarked upon a new three-stage strategy for Israel’s destruction, embodied in the PLO’s 1974 decision commonly known as the “Phased Plan.” The plan called for the “armed struggle” to establish an “independent combatant national authority” over any territory that is “liberated” from Israeli rule. It then called upon the Palestinians to continue the struggle against Israel, using the territory of the national authority as a base of operations

\(87\) See Origins, supra note 86.


\(89\) See Interviews With Three Palestinian Militant Leaders at http://www.pbs.org/wgbh/pages/frontline/shows/holy/onground/pales.html (March 27, 2002) where the Islamic Jihad leader Ali Safuri stated: [i]f Israel were to annihilate all the Palestinian population here with atomic weapons, Israel itself would be automatically destroyed because of the scope of the atomic destruction. So we are proud to be martyrs and that our sons from outside come and continue our journey and live in this land.

\(90\) Two Views: Can the Koran Condone Terror? N.Y. TIMES, October 13, 2001 at http://www.globalpolicy.org/wtc/fundamentalism/1013koran2.htm where it quotes the Koran as follows: “And fight in Allah’s cause against those who wage war against you, but do not commit aggression — for verily Allah does not love aggressors” (2:190). “And slay them wherever you may come upon them, and drive them away from wherever they drove you away — for oppression is even worse than killing” (2:191). “Hence, fight against them until there is no more oppression and all worship is devoted to Allah alone” (2:193).
to provoke an all-out war in which Israel's Arab neighbors would then "liberate all Palestinian territory." This Palestinian attitude has produced an oversensitive and sometimes over-reactive Israel, which then must consider the safety of the Jews in regard to any and all aspects of a proposed peaceful settlement.

There are two deal-breaking issues that have prohibited progress with regard to a peaceful settlement between the Israelis and the Palestinians. The first issue is the Palestinian "right of return." This issue has been at the center of the Palestinian position on the refugee issue since 1948. Asserted and implied in this right to return is that all displaced Palestinians have the right to return to Palestine. Palestinian claims in this regard are rooted in the principles of natural justice and the historical experience of Palestinian dispossession. The prohibition against the Palestinian right of return seems to violate both the International Covenant on Economic, Social, and Cultural Rights as well as the International Covenant on Civil and Political Rights by depriving the Palestinian people the right of self-determination.

The right of self-determination is of particular importance because its realization is an essential condition for the effective guarantee and observance of individual human rights and for the promotion and strengthening of those rights. However, the Israelis are not entirely at fault for the Palestinian refugee problem. While the Palestinians were encouraged to leave Israel by the neighboring Arab invaders, even though they were invited to stay and live in Israel, and while many Jews fled these neighboring Arab countries and were absorbed into Israel, "Jordan was the only Arab country to welcome the Palestinians and grant them citizenship." Accordingly, those other Arab countries that denied asylum and refuge to the Palestinians acted in violation of the right to asylum and nationality as stated in the United Nations Declaration of Human Rights, as well as the right to self determination as stated in the International Covenant on Economic, Social and Cultural Rights and the

---

92. See The Palestinian Diaspora at http://www.en.monde-diplomatique.fr/focus/mideast/question-3-3-1-en (n.d.), where it states that the right of return was recognized for the first time in UN General Assembly Resolution 194 on 11 December 1948. Moreover, Resolution 3236 (22 November 1974) asserted that the right to return became an "inalienable right."
94. See The Right To Self-Determination of Peoples (Article 1), supra note 93.
International Covenant on Civil and Political Rights.\textsuperscript{96} Moreover, the problem for the Jews with allowing the Palestinians the full realization of the right of return is that the return and replacement of such large numbers of Palestinians would certainly make the Jews a minority population in their state and have an effect on the Jews in Israel with regards to security.

The second deal-breaking issue is the withdrawal of Israel from territories occupied beyond its 1967 border. Unfortunately, the attitude that Israel has failed to return to living within its pre-1967 border does not accurately portray the movement of the Jews on this issue. There have been numerous occasions that "Israel has withdrawn from certain parts of these areas.\textsuperscript{97} These withdrawals include but are not limited to: As part of the 1974 disengagement agreement, Israel returned territories captured in the 1967 and 1973 wars to Syria. Under the terms of the 1979 Israeli-Egyptian peace treaty, Israel withdrew from the Sinai Peninsula for the third time and Israel had already withdrawn from large parts of the desert area it captured in its War of Independence. After capturing the entire Sinai in the 1956 Suez conflict, Israel relinquished the peninsula to Egypt a year later. In September 1983, Israel withdrew from large areas of Lebanon to positions south of the Awali River. In 1985, Israel completed its withdrawal from Lebanon, except for a narrow security zone just north of the Israeli border. After signing peace agreements with the Palestinians on 4 May 1994,\textsuperscript{98} and a treaty with Jordan on 26 October 1994,\textsuperscript{99} Israel agreed to withdraw from most of the territory in the West Bank captured from Jordan in 1967, a small area was returned to Jordan, and the rest was ceded to the Palestinian authority. The agreement with the Palestinians also involved Israel's withdrawal in 1994 from most of the Gaza Strip, which had been captured from Egypt in 1973.

The possible elements of a resolution to the unfortunate Palestinian refugee situation may call for a plan of Palestinian repatriation achieved through Palestinian statehood, the ability of refugees to gain Palestinian citizenship and return to national soil in the land seized from the 1967 War in the West Bank and Gaza, as well as the return of a limited or targeted number of 1948 refugees to their homes within Israel under the rubric of family reunification. However, these plans must respect the national security of Israel and guarantee security in

\textsuperscript{96} See U.D.H.R., supra note 65, arts. 14 and 15. See also ICESCR, supra note 93, art. 1(1). See also ICCPR, supra note 73, art. 1(1).

\textsuperscript{97} Mitchell Bard, Defensible Boundaries at http://www.us-israel.org/jsource/Peace/Boundaries.html (n.d.).


consideration because the Jews in Israel seem to always be on defense from the constant aggressive activity of neighbors that harbor intrinsic hatred.

While the recent recognition of Israel as a state by Palestinian leader Yasser Arafat helps illustrate that Palestinians and Arabs alike value Jews as human beings, wave after wave of terrorist activity has kept Israeli land-for-peace deal-brokers apprehensive to give away too much too soon. "The right to life and security of the person allows for no derogation, and must be applied with no exception in all circumstances. Israeli and Palestinian civilians are not presently enjoying this right..." Accordingly, there is a clear and present need for action. The establishment of a viable and independent Palestinian state is a sufficient remedy to resolve the refugee issue as far as the moderate Palestinians are concerned. However, as the creation of the Palestinian state would permit Palestinian repatriation and security for their own people, any remedy must fully address the legitimate security concern of the Israelis.

Although these concerns may not be the same today as they were in 1967, with the present state of the world and the state of technology these security concerns may be much greater.

C. The Present Conflict

Peace talks slowed after the assassination of Israeli Prime Minister Yitzhak Rabin by an Israeli radical in 1995. Following several interim agreements and lengthy discussions about Israeli withdrawals from occupied territories, there was a shift of control from the Israeli government to the Palestinian authority. The United States brokered an agreement between Israeli Prime Minister Binyamin Netanyahu and Palestinian leader Yasser Arafat to reopen peace talks in October of 1998. The Wye River Accord set the parameters for an Israeli withdrawal from more territory in exchange for promises that

100. All Things Considered (NPR September 9, 1993), when it was reported that the PLO has finally recognized Israel's right to exist. See also Interviews With Three Palestinian Militant Leaders at http://www.pbs.org/wgbh/pages/frontline/shows/holy/onground/pales.html (March 27, 2002) where the Islamic Jihad leader Ali Safuri stated that the Jews have no right to live anywhere in Palestine and that the Islamic Jihad will not cease terrorist activity until Israel leaves the occupied territory, i.e. the entire region.


102. See Bard, supra note 97, where it states that Israel cannot withdraw from all the territories it captured. As the United States Joint Chiefs of Staff concluded in a 29 June 1967 memorandum for the Secretary of Defense: "From a strictly military point of view," the Joint Chiefs wrote, "Israel would require the retention of some captured Arab territory in order to provide militarily defensible borders."

103. The assassination illustrates the fact that there exists extremism on both sides. However, there is no Israeli mandate to destroy or kill all Palestinians.
Palestinian officials would work to ensure the security of Israel. The Wye River Accord also laid the groundwork for discussions about the formal creation of a Palestinian state and other so-called “final status” issues, such as who controls Jerusalem.

After the election of Labour Party leader Ehud Barak in May 1999, the peace talks moved into high gear. Barak quickly moved to expedite a new accord, and his government accepted the idea of a Palestinian state with a strategy generally known as “land for peace.” The idea of “land for peace” required that the Israeli government surrender more territory to the Palestinian Authority in exchange for sustained security. Barak also opened negotiations with Syria and finished the Israeli withdrawal from southern Lebanon.

In March of 2000, a series of negotiations opened outside Washington with a framework for peace talks on the “final status” issues as the goal. These “final status” issues include agreement on borders, the refugee situation, and control over Jerusalem. The meetings culminated in another meeting at Camp David in July 2000 between Arafat and Barak, while a self-imposed deadline of 13 September 2000 loomed over the discussions. At the talks, Barak offered the most sweeping peace plan ever put forward by the Israeli government. However, United States efforts to broker a deal finally failed when Arafat refused Barak’s offer and failed to make any counter-offer.

Soon after the talks failed, the visit by Ariel Sharon to the Temple Mount in Jerusalem sparked days of protests. The violence spread and intensified as Palestinians vented anger at the continued presence of Israel in the occupied territories. As the Palestinian protests continued and daily clashes intensified, Prime Minister Barak was defeated by conservative Ariel Sharon in February of 2001. In May 2001, Senator George Mitchell issued his report saying the actions of both Israel and Palestinian authorities sparked the violence that had

107. See http://www.templemount.org/allah.html (n.d.) where it states that the significance of the Temple Mount for the Palestinians is that the shrine was deliberately built as a political, economic, and religious counter attraction to Mecca because Medina and Mecca, the two cities holy to Islam, were under the control of a rival Caliph. Moreover, the holy spot of Judaism was now to be identified with the spot where Mohammed’s horse ascended to heaven. Compare with http://ds.dial.pipex.com/ritmeyer/temple.ark.html where it proposes that the Temple Mount is the resting place of the Ark of the Covenant, and http://www.templemount.org/bitterend.html where it underscores the importance of the site to the Jews as the place where it connects the Jews to God. See also Israeli Troops, Palestinians Clash After Sharon Visits Jerusalem Sacred Site at http://www.cnn.com/2000/WORLD/meast/09/28/jerusalem.violence.02/index.html (September 28, 2000).
raged for eight months, and that neither party was specifically to blame. The report also outlined a multi-step process for the violence to end and talks to reopen. Both Israel and the Palestinians have been slow to endorse the report, each side saying it does not trust the other side to uphold its part of the deal. Nevertheless, the United States accepted Mitchell's recommendations.

After the failure of the talks, and the non-implemention of the Mitchell proposal, the Al-Aqsa brigade launched an intifada and began to conduct suicide bombings against the Israeli military and civilians alike. The Al-Aqsa Martyrs brigade is the military wing of Yasser Arafat's Fatah organization, which includes both secular and Islamic ideologies and militias. Also, there have been several armed incursions by the Israelis into the occupied territories. These Israeli transgressions include but are not limited to the systematic assassinations and arrests of individuals believed to have been involved in terrorism, the deployment of troops, and the destruction of Palestinian property such as the Palestinian Radio station and Arafat's own compound. Both the radio station and Arafat's compound were thought to be used for terrorist planning and terrorist propaganda.

Between suicide bombings and Israeli military action, it is not known which is the chicken and which is the egg, or if they are even rationally connected. The Palestinians refer to it as the "balance of terror," and some of them do not differentiate Israeli or American military action from suicide bombings. In any event, the terrorist attacks by the Palestinians and the armed incursions by the Israelis have spiraled out of control and this has invited intellectuals to debate the "moral equivalence" of the acts.


110. See The Cycle of Violence at http://www.pbs.org/wgbh/pages/frontline/shows/holy/cron/ (n.d.) for a chronology to the escalation of violence. See also Interviews With Three Palestinian Militant Leaders at http://www.pbs.org/wgbh/pages/frontline/shows/holy/onground/pales.html (March 27, 2002) where the leader of the Al Aqsa Martyrs Brigade Ibrahim Abayat stated that the group, which the United States designated a terrorist organization, was a national liberation movement that "...derives the legitimate right to resist the occupation of the Israelis from the United Nations Geneva Convention." Moreover, he stated that: "...the United States has proven it is not the shepherd of peace but the shepherd of the Israelis." See also Intifada Has United All Palestinians at http://www.arabnews.com/Article.asp?ID=9601 (Apr. 5, 2002).

111. Id.

112. See Interviews With Three Palestinian Militant Leaders at http://www.pbs.org/wgbh/pages/frontline/shows/holy/onground/pales.html (March 27, 2002) where the Islamic Jihad leader Ali Safuri stated that the fear needs to be instilled on the Jewish people.

does not adequately try. It is charged that he talks with two tongues, speaking English and condemning an act while also speaking Arabic and encouraging the same act. Others allege that he encourages the acts by financing the terrorists. Moreover, neither the United Nations nor individual nations can influence Israel to stop its offensive campaigns, because it is widely believed in Israel that these campaigns are the only means of preventing future terrorist acts.

A United States-sponsored resolution adopted on 12 March 2002 endorsed the creation of a Palestinian state, demanded an immediate cease-fire, and called for renewed efforts by both parties to resume negotiations on a political settlement. Also, there has recently been a proposal from the Arab community championed by Saudi Crown Prince Abdullah for a resolution to the conflict. What is significant about the Arab proposal is that the Arab community offered an implied recognition of the right of Israel to exist. While the Israelis would no doubt insist upon normal diplomatic relations in light of some of the concessions they are asked to make, it is important that the Arab community recognize that they will have an important role in resolving this conflict.

Compounding the problem, the United States has debated military intervention to remove the Iraqi leader Sadaam Hussein, who has allegedly awarded the families of terrorist martyrs twenty-five thousand dollars for the completion of each terrorist attack. Thus, it does not appear that the entire Arab community recognizes Israel’s right to exist, which stems from ancient problems in the region. Arab intransigence and militancy are obstacles to peace and stability in the region, and also threaten the call for the creation of a Palestinian state. Moreover, given the extreme hatred of some Arabs for not only the Jews, but the United States as well, there seems little hope for a cease fire by Palestinian militants either before or after any agreement. Thus, the cycle of violence will continue.

114. See Interviews With Three Palestinian Militant Leaders at http://www.pbs.org/wgbh/pages/frontline/shows/holy/onground/pales.html (March 27, 2002) where the leader of Islamic Jihad said that he would not follow any order from Arafat for a ceasefire, however, the leader of Al Aqsa would follow any command from Arafat. See also Israelis Say Documents link Arafat to Terrorists at http://www.cnn.com/2002/WORLD/meast/04/04/arafat.documents/index.html (April 4, 2002).


117. See Put the Blame On ... at http://www.foxnews.com/story/0,2933,49563,00.html (April, 4 2002).

118. See Interviews With Three Palestinian Militant Leaders at http://www.pbs.org/wgbh/pages/frontline/shows/holy/onground/pales.html (Mar. 27, 2002) where the Islamic Jihad leader Ali Safuri stated that the Jews and the Americans are terrorists and that by God’s hand America will fall. Moreover, that “[i]n the Palestinian lexicon, Israel has no place on the map.”
VI. CONCLUSION

The creation of the State of Israel gave the wandering Jews a place to take refuge, but in doing so a new group of wanderers were created. It took a long time for the Jews to have the place that they call Israel; a place where they are permitted to be Jews; a place where the internal government is not trying to remove them or persecute them.

First they came for the socialists, and I did not speak out—because I was not a socialist. Then they came for the trade unionists, and I did not speak out—because I am not a trade unionist. Then they came for the Jews, and I did not speak out—because I was not a Jew. Then they came for me—and there was no one left to speak for me.119

It is unfortunate that history can be cruel, as it seems that the Jews to a certain extent have not spoken out for the Palestinians. If the Palestinians cannot take refuge in Israel, their situation calls for an affirmative duty by the Israelis and the Arab community to assist in their resettlement elsewhere. This is because the Palestinian refugees, like the Jews before them, have no place to wander. Accordingly, they are stateless, they are refugees, and they have rights.120

The establishment of a Palestinian state is a possible remedy for the refugee problem, and it is arguably necessary to prevent the Palestinians from becoming marginalized and hated as the Jews have been historically. However, the creation of a Palestinian state seems to be as problematic as peace between the Jews and the Palestinians, or between the Jews and the larger Arab community. The failure to affect a meaningful and lasting solution between the peoples of two of the most ancient cultures is disheartening in the hope for peace in other parts of the world. Moreover, the continuation of the conflict between the Arabs and the Jews effectively treats the three million Palestinian refugees as nothing more than a group, rather than the one plus one plus one that should represent each and every individual among them.

119. TELUSHKIN, supra note 54, at 536, quoting the Reverend Martin Niemöller, leader of the Confessional Church.
120. See 1951 Convention, supra note 65.
"BLESSED ARE THE PEACEMAKERS": FAITH-BASED APPROACHES TO DISPUTE RESOLUTION

R. Seth Shippee*

SUMMARY .................................................. 237

I. INTRODUCTION ........................................ 237

II. MAINSTREAM FORMS OF DISPUTE RESOLUTION ............ 238
A. Negotiation ........................................... 238
B. Mediation ............................................. 239
C. Arbitration ........................................... 239
D. Adjudication .......................................... 240

III. FAITH-BASED ALTERNATIVE DISPUTE RESOLUTION IN CHRISTIANITY, ISLAM AND JUDAISM .......... 240
A. Christianity ......................................... 240
   1. Peacemaker Ministries .......................... 242
   2. Christian Dispute Resolution Professionals, Inc. ... 244
B. Islam ................................................. 245
   1. Muslim Mediation ................................. 246
   2. Muslim Arbitration ............................... 248
C. Judaism ................................................ 249
   1. Jewish Mediation and Arbitration .............. 250
   2. Jewish Adjudication - The Beth Din .............. 252
   3. Jewish Law and the Secular Legal System ......... 254

IV. CONCLUSION .......................................... 255

SUMMARY

This article explores and compares the faith-based dispute resolution philosophies and techniques of Christianity, Islam, and Judaism and examines their interaction with the secular legal system.

I. INTRODUCTION

Whether or not lawyers like to admit it, human beings with scores to settle did not go straight from clubbing each other with rocks and bones to serving each other with summons. Since time immemorial, third parties have peacefully

* R. Seth Shippee is a law student at Chicago-Kent College of Law.
intervened in every manner of dispute, and much of this intervention has been rooted the world's countless religious traditions. Before there were courts, there were temples; before there were judges, there were elders and priests, and before there were lawyers, there were clergymen, relatives, and neighbors.

These time-honored institutions did not whither away and die with the founding of the American Arbitration Association. On the contrary, in the United States, traditional, faith-based alternatives to the mainstream legal system are alive and well, and, in many ways, busier and more influential than ever. This article will explore the modern, faith-based dispute resolution philosophies and techniques of the three religions with the strongest presence in the United States: Christianity, Islam, and Judaism. In doing so, each religion's approach will be viewed through the lens of alternate dispute resolution (ADR) as it is commonly practiced and studied in this country. More specifically, the ADR approaches of Christianity, Islam, and Judaism will be compared to the four, basic forms of dispute resolution in the United States: negotiation, mediation, arbitration, and adjudication. Since these forms of dispute resolution are the key to this article's focus, the basic principles and characteristics of each is discussed briefly below, in order from least to most formal.

II. MAINSTREAM FORMS OF DISPUTE RESOLUTION

A. Negotiation

Negotiation is the most basic and least formal means of resolving a dispute. Essentially, a negotiation is a direct, back-and-forth dialog between the parties with the goal of trying to resolve the conflict. Generally, negotiations are quick, inexpensive, private, and controlled completely by the parties. Because the emphasis of a negotiation is on informality, there are no specific procedures that must be followed. Each party may bring an attorney, however negotiations do not involve the intervention of a third party facilitator or decision maker. Moreover, because of the direct involvement of the parties in reaching a mutually acceptable agreement, negotiations can often result in a
win-win solution.\textsuperscript{7} As discussed below, negotiation is a central element of Christian dispute resolution.

\textbf{B. Mediation}

Mediation is a voluntary, non-binding process in which a neutral third party (the mediator) helps the parties communicate with each other and reach a mutually acceptable agreement.\textsuperscript{8} Typically, mediations are characterized by being voluntary and informal, as well as private and confidential, and are aimed at reducing hostility and preserving on-going relationships.\textsuperscript{9} Likewise, the parties in conflict generally choose their own mediator.\textsuperscript{10} The mediator does not render a decision nor does he or she force the parties to reach an agreement.\textsuperscript{11} As in a negotiation, the parties directly participate in the mediation and are responsible for reaching their own, mutually acceptable settlement or agreement.\textsuperscript{12} As discussed in greater detail below, mediations are most common in Christian and Islamic ADR, but are an important part of the Jewish tradition as well.

\textbf{C. Arbitration}

Arbitration is a formal, more trial-like process in which a dispute is submitted to a neutral third party (the arbitrator) for a decision.\textsuperscript{13} Typically, arbitrations are more formal than negotiations or mediations, but may be less formal than going to court.\textsuperscript{14} Although more complicated than other forms of ADR, arbitrations are usually faster and cheaper than going to court.\textsuperscript{15} Generally, arbitrations take place out of a courtroom setting, but in an environment where the arbitrator, like a judge, controls the process.\textsuperscript{16} The arbitrator will listen to testimony from both sides, examine exhibits, and make a decision in which only one side will prevail.\textsuperscript{17} The arbitrator's decision can be binding, if, prior to the arbitration, both parties agreed to be bound by it.\textsuperscript{18} As discussed below, the Jewish ADR tradition has the strongest focus on

\begin{itemize}
\item \textsuperscript{7} Methods for Resolving Conflicts and Disputes, supra note 2.
\item \textsuperscript{8} Id.
\item \textsuperscript{9} Id.
\item \textsuperscript{10} Id.
\item \textsuperscript{11} Id.
\item \textsuperscript{12} Methods for Resolving Conflicts and Disputes, supra note 2.
\item \textsuperscript{13} Id.
\item \textsuperscript{14} Id.
\item \textsuperscript{15} Id.
\item \textsuperscript{16} Id.
\item \textsuperscript{17} Methods for Resolving Conflicts and Disputes, supra note 2.
\item \textsuperscript{18} Id.
\end{itemize}
arbitration, but arbitrations are also utilized in Christian and Islamic dispute resolution.

D. Adjudication

In a nutshell, adjudication involves parties going to court for a formal judicial proceeding in which all the issues are examined by applying the facts of the case to the applicable law, and a binding decision is rendered either by a judge or jury in which only one side prevails. Adjudications are involuntary, in that a defendant has no choice whether or not to participate, very formal, open to the public, lengthy, and usually quite expensive. As discussed in greater detail below, the Jewish dispute resolution tradition is the most adjudicative, while in the Islamic and (especially) the Christian traditions, adjudication of disputes should be avoided if at all possible.

III. FAITH-BASED ALTERNATIVE DISPUTE RESOLUTION IN CHRISTIANITY, ISLAM AND JUDAISM

A. Christianity

Historically, Christian culture has a strong, rich tradition of faith-based dispute resolution. Since the middle ages, Christian clergymen have been called upon to act as mediators in disputes ranging from minor family squabbles to international diplomatic clashes between nations on the brink of war. As anyone who has ever read or seen "The Hunchback of Notre Dame" knows, Christian churches have always been respected as places of "sanctuary" from the disputes of the secular world. However, most people probably do not know that, while fugitives were protected by the sanctity of the church, Christian clergy often acted as mediators between criminals and the authorities.

Today, Christianity is, by far, the most practiced religion in the United States. Approximately 80% of Americans come from Christian backgrounds, and 154 million consider themselves practicing Christians. However,
“Christians” are by no means a homogenous group. Roughly 60 million American Christians are Roman Catholic (the largest single group)\textsuperscript{27}, and 94 million comprise the 220 different protestant denominations, ranging from Mormons to Mennonites and from Presbyterians to Pentecostals.\textsuperscript{28}

Within the spectrum of faith-based ADR, Christian forms of dispute resolution are the least formal, and generally range somewhere between negotiation and mediation. The informality of Christian dispute resolution technique is no accident. As discussed below, it is deeply rooted in basic Christian doctrine.

Naturally, Christians draw their traditions of faith-based dispute resolution from the Bible, particularly the teachings of Jesus Christ. Basically, Jesus taught that all people had to work out their differences in order to receive salvation, saying, "Love your enemies, do good to those who hate you, bless those who curse you, pray for those who ill treat you. If someone strikes you on one cheek, turn to him also the other."\textsuperscript{29} Likewise, "Whatever you bind on earth shall be bound in heaven; and whatever you loose on earth shall be loosed in heaven."\textsuperscript{30} This is a common theme not only in the teachings of Jesus himself, but also throughout the New Testament. For example, in his letter to the Romans, the Apostle Paul wrote, "Do not repay anyone evil for evil . . . If it is possible, as far as it depends on you, live at peace with everyone."\textsuperscript{31}

Arguably, there is no stronger command for Christians to resolve their disputes peacefully than in the Sermon on the Mount, when Jesus told his followers, "Blessed are the peacemakers, for they shall be called the children of God."\textsuperscript{32} Just as Jesus compelled his followers to forgive one another and reconcile their differences, he also taught them how to go about accomplishing those goals. In the Book of Matthew, Jesus taught, "If your brother sins against you, show him his sin in private; if he listens, you have won your brother."\textsuperscript{33} "If a dispute cannot be resolved privately between the parties, Jesus taught that one of the grieving parties should take one or two others along with [him or her] so that every fact may be established on the testimony of those witnesses."\textsuperscript{34} Finally, if the parties were still unable to reach a solution after talking with the neutral third parties, Jesus taught that they should then "take [their dispute] to the church."\textsuperscript{35}

\begin{itemize}
  \item \textsuperscript{27} Id.
  \item \textsuperscript{28} Id.
  \item \textsuperscript{29} Luke 6:27-28; Matthew 5:38-39.
  \item \textsuperscript{30} Matthew 18:18.
  \item \textsuperscript{31} Romans 12:17-18.
  \item \textsuperscript{32} Matthew 5:9.
  \item \textsuperscript{33} Id. at 18:15.
  \item \textsuperscript{34} Id. at 18:16.
  \item \textsuperscript{35} Id. at 18:17.
\end{itemize}
Many Christians interpret Jesus' teachings, as well as various other passages from the New Testament, as strongly discouraging, if not outright prohibiting, Christ's followers from taking their disputes to the secular courts. This aversion to the mainstream legal system felt by some Christians has its roots in many passages from the New Testament. For example, in the book of Matthew, Jesus said, "Woe to you, teachers of the law... you have neglected the more important matters of the law—justice, mercy, and faithfulness." Likewise, Jesus also taught his followers that it is best to avoid litigation altogether by going beyond the letter of the law, saying, "[I]f someone wants to sue you and take your tunic, let him have your cloak as well." Moreover, Jesus taught that even when legal disputes cannot be avoided, every Christian should "[s]ettle matters quickly with [the] adversary who is taking [him or her] to court," even if that means reaching a settlement on the way to the courthouse. Similarly, in his First Letter to the Corinthians, the Apostle Paul wrote that those who resort to taking their neighbors to court never win in the eyes of God, regardless of the verdict, because "[t]he very fact that [Christians] have lawsuits among [one another] means [both parties] have been completely defeated already." Thus, because the teachings of Jesus and the various authors of the New Testament passionately urge Christians to forgive one another, stay out of court, and personally resolve their disputes in the least formal way possible, the Christian approach to dispute resolution has traditionally focused on negotiation or mediation, rather than arbitration or adjudication. Such is the case in the modern practice of Christian dispute resolution in the United States.

While hundreds of Christian denominations and organizations offer some sort of conflict resolution service, several have stood out as leaders in the process of Christian dispute resolution. Some of these are discussed below.

1. Peacemaker Ministries

In 1982, a group of nonprofit Christian ministries offering dispute resolution services throughout the United States joined together to form the Christian Legal Society. Five years later, many of these ministries formed the

38. Id. at 5:40.
39. Id. at 5:25.
40. 1 Corinthians 6:7.
Association of Christian Conciliation Services, and by 1993, these services had merged into Peacemaker Ministries ("Peacemakers").43 Today, over three hundred churches, ministries, and organizations are a part of Peacemakers, making it the largest, multi-denominational Christian dispute resolution service in the country.44

One of the core beliefs of the Peacemakers is that Christians should not see conflict as necessarily bad or destructive.45 Rather, the Peacemakers believes that “[b]y God’s grace, [Christians] can use conflict to glorify God, serve other people, and grow to be like Christ.”46 When conflicts do arise, the Peacemakers follows Jesus’ teaching that the parties should try to work out their differences between themselves through negotiation.47 In doing so, the Peacemakers’ approach is for each party to first look inward and ask whether he or she has had a “critical, negative, or overly sensitive attitude that has led to unnecessary conflict.”48 This call to introspection stems from Jesus’ teaching that one must “first take the plank out of [his or her] own eye, and then [he or she] will see clearly to remove the speck from [his or her] brother’s eye.”49 Next, Peacemakers’ approach requires the parties to “negotiate in a Biblical manner,” following the Apostle Paul’s teaching that each individual should “[d]o nothing out of selfish ambition or vain conceit, but in humility, consider others better than [one’s self],” and not merely look out for [one’s] own personal interests, but also for the interests of others.50 If negotiations fail to resolve the conflict, the Peacemakers suggest that the parties turn to a “spiritually mature” person within the church to “coach” them and get them back on track to resolving their differences in private.51 Moreover, in keeping with Jesus’ teachings, if the “spiritually mature” person fails to help the parties reach a resolution, they should then seek the advice of one or two mutually respected individuals to help settle their differences through mediation and, if necessary, arbitration.52

If, after making every attempt to resolve a conflict either privately or within a small, community- or church-based group, the parties are still unable to reach a solution, they can request that a trained peacemaker from the Institute

---

43. Id.
44. Id.
45. Id.
46. Id.
47. Our Ministry, supra note 42.
48. Id.
49. Matthew 7:5.
50. Philippians 2:3-4.
52. Id.
for Christian Conciliation take an active role in the process. These peacemakers do not act as advocates or provide counseling, but rather help to facilitate the process of resolving the dispute by serving the interests of all parties impartially. Moreover, these professional peacemakers charge a “professional fee” (about $125-150 per hour, plus expenses), providing an additional incentive for the parties to reach a private solution in a Christ-like manner.

2. Christian Dispute Resolution Professionals, Inc.

Like the Peacemakers, Christian Dispute Resolution Professionals, Inc. (“CDRP”) offers “alternative dispute resolution with a biblical twist.” However, CDRP is not a nonprofit organization. Rather, it is a money-making business based in California, comprised of “retired judges, experienced business attorneys, and other qualified professionals trained as mediators and arbitrators” who hear cases and attempt to settle them by applying “biblical principles of justice and reconciliation to effect a mutually beneficial solution.” While CDRP’s mediators and arbitrators are compensated for their time, the corporation notes that the average cost of one of its full mediations or arbitrations averages only about $5,000, split between the parties, and, naturally, all proceedings are private and confidential.

CDRP offers faith-based services in virtually every practice area one might find in a secular “big firm,” including real estate, contract, marital disputes, child custody, employer/employee disputes, insurance disputes, workplace harassment, employment discrimination, and personal injury—all with a focus on biblical principles. Primarily, CDRP handles marriage and family mediations. As Christians, CDRP mediators and arbitrators “do not encourage divorce, but seek to help families find agreement where possible.”

54. Id.
55. Id.
57. Id.
couple, after consulting with their support professionals and church leaders, decide to divorce, the CDRP mediators try to reduce the damages to the relationship that may occur.62 Where couples can find agreement, the CDRP encourages full family reconciliation.63

B. Islam

Islam is now the fastest growing religion in the United States.64 Currently, between 3.5 and 3.8 million Muslims call America home.65 While many American Muslims are immigrants, the majority are now born here,66 due mainly to the fact that the American Muslim birthrate is about 4.5 children per couple, versus a nationwide average of 1.9.67 As the American Islamic community has grown, it has faced the challenge of maintaining its cultural distinctiveness and adhering to its core beliefs while many Muslims are becoming increasingly secular and "Americanized."68 One approach American Muslims have used to preserve their traditions is Islam-based dispute resolution.

Within the spectrum of ADR, Islamic dispute resolution techniques and traditions are more formal than those characteristic of Christianity. Generally, Islamic faith-based dispute resolution falls somewhere between mediation and arbitration. Like the Christian tradition, Islamic ARD has its foundation in the tenants of religious doctrine.

Historically, Islamic culture has had a strong tradition of encouraging the peaceful resolution of disputes between Muslims. In Islam’s holiest book, the Quran, Muslims are taught that "Allah guides all who seek his good pleasure to ways of peace."69 The Quran also teaches that Muslims should always take the initiative for peace, reconciliation, and dialog,70 describing true Muslims as people "who hastens in every good work, and those who are foremost in them."71 Likewise the Quran gives Muslims numerous, explicit instructions as to how they should resolve their disputes. For example, one verse commands, "All who believe, stand out firmly for Allah as witnesses to fair dealing, and let
not the hatred of others to you make you swerve to wrong and depart from justice. Be just, for that is next to piety . . . "72 More specifically, in the context of marital disputes, the Quran teaches that "[i]f [Muslims] fear a breach between two people, [they should] appoint an arbitrator from his people and an arbitrator from her people. If they both want to set things right, Allah will bring about reconciliation between them."73 In light of this emphasis on peaceful dispute resolution, the Islamic tradition has developed specialized intermediaries known as quadis who interpret and apply Islamic law (shari'a), often in an attempt to preserve social harmony by reaching a negotiated solution to a dispute.74

An interesting facet of the Islamic approach to dispute resolution is that, arguably unlike Christianity, Islam gives its followers specific guidance as to handle disputes between themselves and people of other faiths.75 In the Quran, Allah teaches Muslims to "invite [non-Muslims] to the way of the Lord with wisdom and beautiful preaching; and argue with [non-Muslims] in ways that are best."76 Likewise, Muslims are also taught to "walk on the earth in humility, and when [those ignorant of Islam] address [Muslims], they say peace."77 Islam's emphasis on peaceful resolution of disputes between all persons, including non-Muslims, has its roots in the Islamic view of the unique role of Muslims as shahadat, an Arabic word meaning "witness over other nations."78 Islam teaches that, for Muslims to deserve the position of shahadat, they must first understand peace and initiate it among themselves.79 Next, Muslims must extend the call for peace to include their non-Muslim neighbors.80 Finally, Muslims must be as committed to spreading peace within other communities as they are within their own.81 "Only then will Muslims deserve to witness over other nations."82

1. Muslim Mediation

Both mediation and conciliation are the preferred dispute resolution approaches of the Prophet Mohammed.83 In disputes between American

72. Id. at 5:8.
73. Id. at 4:34.
74. History and Theory Papers of Mediation I, supra note 1.
75. Bayoumi, supra note 70.
76. Quran 16:125.
77. Id. at 25:63.
78. Bayoumi, supra note 70.
79. Id.
80. Id.
81. Id.
82. Id.
83. History and Theory Papers of Mediation I, supra note 1.
Muslims, mediation is most often used to address marital disputes. In keeping with the procedures discussed in the Quran, when a Muslim husband and a wife are in conflict, each spouse will either name a different person he or she is comfortable with, and the two will help resolve the conflict, or they both will agree on one person to be the sole mediator. In most cases, if two people are chosen, they are older family members, and if one person is chosen, he will be the couple’s local Imam (religious leader and teacher). As in secular mediation, the Muslim mediator is more of a facilitator than a judge. According to Shahina Siddiqui, executive director of the Islamic Social Services Association of the United States and Canada (ISSA), “The job of the [Muslim] mediator is to listen to both sides, to help [the parties] identify what the problem is, where the conflict is, and then allow each client to listen to each other.”

Dr. Muzammil Siddiqi, a long time mediator to the Muslim community in California, observes that the most common conflict between Muslim couples is “culture clash;” the prime example being “a Muslim woman brought up in America married to a Muslim man from India.” Although culture clash is the most common Muslim marital dispute, it is also among the conflicts most amenable to mediation. “Sometimes,” Dr. Siddiqi notes, “couples have said, ‘I wish we had come before. I wish we had gone to someone earlier; we might have saved out marriage.’”

Besides being more successful at resolving conflicts between Muslim couples, mediation also tends to result more often in agreements that secular courts will enforce. Zafar Hasan, a Chicago-based attorney, has noted that courts view a signed, notarized contract made after couples have gone through voluntary mediation as being more legally binding “because both the husband and the wife have agreed to the conditions mutually.” In contrast, Hasan notes, courts are more likely to ignore or not enforce arbitration agreements because of incompatibility with local laws.

85. Id.
86. Id.
87. Id.
88. Id.
89. Mediation: solving marital disputes mutually, supra note 84
90. Id.
91. Id.
92. Id.
93. Id.
2. Muslim Arbitration

Arbitration has received mixed reviews within the Muslim community. According to Shahina Siddiqui, "In the North American [Islamic] community, arbitration is rarely used."94 "It is more likely to be a last resort . . . for couples on the verge of divorce."95 "Arbitration," she notes, might "come into how the property is divided, who will take the children, that kind of stuff, [but] you cannot really arbitrate a relationship."96 Zafar Hasan, the Chicago attorney, has observed that "[p]art of the problem is that the contract that results from the arbitration is not respected." "Couples can . . . draft a contract stipulating terms and conditions that each partner will respect. They can even get it notarized. However, it is usually either appealed or broken."97 Another Muslim attorney, Faisal Kutty, notes that, "[a]t the end of the day, unless there is some kind of social pressure forcing the parties to abide by [the arbitrated agreement], what ends up happening is one of the parties will take it to court."98

However, Abdalla Idris Ali, a former Toronto Imam, supports the use of arbitration as "a way for warring couples to avoid divorce."99 "If they arbitrate [their] issues and accept the arbitration . . ., they might back down from the decision to divorce." Ali is not the only Muslim who believes in the value of arbitration. Dr. M. Qadeer Baig has long campaigned for Muslims to resolve their disputes through arbitration rather than mediation.100 According to Dr. Baig, through arbitration, Muslims will be able to decide [their] family law matters according to Islamic law.101 Moreover, he says, "many [a]rbitration decisions are final in that they do not need formal court approval in the same way as required in mediation cases."102 To accomplish this, Dr. Baig recommends the creation of Islamic arbitration boards to deal with family problems, marital separations, inheritance, child support, and spousal maintenance in accordance with the shari‘a.103

---

95. Id.
96. Id.
97. Id.
98. Id.
99. How arbitration can help Muslim couples solve conflicts, supra at note 94
100. Id.
102. Id.
103. Id.
104. Id.
C. Judaism

Today, approximately 3.8 million Americans practice Judaism, and another 2 million consider themselves "culturally" or "ethnically" Jewish. Perhaps because people of the Jewish faith represent a relatively small percentage of the American population (approximately 2%), many Jewish communities throughout the United States have generally worked to preserve Jewish culture and religious law through Judaism-based dispute resolution. Primarily, Jewish communities have worked to settle their disputes in accordance with their faith through highly specialized religious courts. As will be illustrated below, the Jewish approach to the resolution of conflicts is significantly more formal and adjudicative than either the Christian or Islamic traditions.

Compared to the ADR traditions of Christianity and Islam, the Jewish approach to faith-based dispute resolution is the most formal and can often be conducted very much like a secular trial, firmly rooted in process and law. Along the ADR spectrum, Jewish dispute resolution falls somewhere between arbitration and full adjudication.

The long, rich history of the Jewish people, as reflected in the Bible, Talmud, and in the writings of Jewish scholars, as well as in the practice of halacha (Jewish law), provide the basis for the Jewish approach to conflict resolution. Central to the Jewish approach is the concept of shalom (peace). The Bible commands religious and community leaders to seek and pursue peace and accept that which is undesirable in order to avoid conflict within the community. Shouldering the special burden of preserving peace and avoiding conflict within the Jewish community are the rabbis. As community leaders and religious authorities, rabbis are responsible for interpreting and enforcing the halacha. At the same time, rabbis also have the obligation to prevent divisions and conflict from arising in the first place.

In Jewish tradition, compromise, based on mediation and arbitration, is seen as an important method of settling civil disputes (bayn adam l'ichavero) and preventing community conflict. One of Judaism's holiest books, the Talmud (a compilation of the Jewish oral law with rabbinical commentaries), highlights the advantages of mediation and compromise over a legal decision.
finding for one party or the other. Likewise, Jewish sages have noted that when the demands of pure justice are met, there is no peace. In fact, the Shulchan Aruch, the authoritative code of Jewish Law, states that judges of the halacha are required to open all civil proceedings by proposing a compromise for the litigants to consider. The Shulchan Aruch also states that a judge or an independent mediator may also offer to mediate a solution, even after the evidence has been heard, in order to encourage a peaceful resolution to the conflict. Moreover, the Jewish scholar and philosopher Maimonides urged judges to promote voluntary mediation, praising any judge who does not have to make a legal ruling in his lifetime, and is able to mediate a compromise between rival litigants.

Jewish law states that civil disputes do not necessarily have to be settled by professional judges, but rather, any three individuals accepted by the litigants and familiar with the law can sit in judgment. Nevertheless, most disputes under Jewish law are heard by rabbis, since they are most familiar with Jewish law. However, despite its emphasis on mediation and compromise, the Jewish tradition does not provide much direction regarding the process of mediation. Essentially, judges are simply told to seek a compromise. In furtherance of this command to seek compromise, judges, rabbis and other persons presiding over disputes between Jewish parties often employ the familiar techniques of mediation and arbitration.

1. Jewish Mediation and Arbitration

Everyone knows the Old Testament story of King Solomon and the baby with two mothers, but most people probably have not thought about it in terms of alternate dispute resolution technique. In this context, it is worth repeating. The Bible teaches that, by the grace of God, King Solomon was the wisest man who ever lived. Soon after God bestowed this great wisdom upon him, Solomon went to the Temple in Jerusalem and threw a big party to give thanks

115. Id. at fn 13.
116. Id.
117. Id. at fn 41.
119. Id.
120. Id.
121. 1 Kings 3:12.
for the gift he had received.\textsuperscript{122} In the middle of this party, two women (the Bible calls them "harlots") approached Solomon with a dispute about a baby.\textsuperscript{123} Apparently, both women had recently given birth, but one woman had rolled over on her baby during the night, and now the child was dead.\textsuperscript{124} Consequently, the two women were battling over whose baby was dead and whose was still alive. So, King Solomon, taking his newly acquired wisdom out for a spin, said, "Get me a sword."\textsuperscript{125} "Then the King said, 'Divide the living child in two, and give half to the one and half to the other.'"\textsuperscript{126} "Then the King said, 'Cut the living child in two, and give half to the one and half to the other.'"\textsuperscript{127} The first woman was horrified and said, "Oh, my lord, give her the living child, and by no means kill him."\textsuperscript{128} However, the second woman sneered, "He shall be neither mine nor yours; divide him!"\textsuperscript{129} Of course, King Solomon did not get to be revered as the wisest man who ever lived by carving up a lot of babies. Instead, he coolly gave the baby to the first woman, the real mother, and all the people of Israel said, "Wow! That Solomon is one heck of an Alternate Dispute Resolution guy." (paraphrased).\textsuperscript{130}

Today, probably very few disputes within the Jewish community are resolved by threatening to chop the parties' children in half, but the theme set by King Solomon all those centuries ago still holds true: Jewish tradition encourages creative solutions to dispute resolution. Because of this history of creative, not necessarily "legalistic" solutions to conflict, Judaism has developed a strong tradition of mediation and arbitration.

In the Talmud, the Hebrew terms \textit{p'sharah} and \textit{bitzua} are used interchangeably to refer both to mediation and arbitration.\textsuperscript{131} Which term is appropriate depends on the number of people presiding over the dispute. A \textit{p'sharah} may be conducted by a single individual.\textsuperscript{132} Thus, it is less formal, and lends itself more to the process of mediation. In contrast, a \textit{bitzua} is more formal and requires three individuals, which is also the number required for a strict legal proceeding or \textit{din} (discussed in greater detail in the next section).\textsuperscript{133}

\begin{itemize}
\item \textsuperscript{122} Id. at 3:15.
\item \textsuperscript{123} Id. at 3:16.
\item \textsuperscript{124} Id. at 3:17-22.
\item \textsuperscript{125} 1 Kings 3:24.
\item \textsuperscript{126} Id. at 3:24.
\item \textsuperscript{127} 1 Kings 3:25.
\item \textsuperscript{128} Id. at 3:26.
\item \textsuperscript{129} Id.
\item \textsuperscript{130} Id. at 3:27-28.
\item \textsuperscript{132} Id. (citing Sulchan Aruch, Chosen Mishpat 12:7).
\item \textsuperscript{133} \textit{Proposal for P'sharah}, supra note 131.
\end{itemize}
Three individuals are required when a potentially binding decision is sought because, under Jewish law, the enforceability of such judgments requires *kinyan* ("exchange"). Consequently, a *bitzua* is more likely to refer to arbitration.

As with secular mediation, Jewish mediators do not render decisions, and any suggestions the mediator makes for resolving the dispute are not binding on the parties. A mediator may preside over a face-to-face meeting between the parties, caucus with each side separately, or, most likely, combine the two. In practice, a Jewish mediator basically acts like any other mediator. He or she serves as an objective "sounding board" to offer an impartial evaluation of the merits of the case, and any information he or she receives is strictly confidential unless the parties agree otherwise.

Like mediation, Jewish arbitration essentially follows the same procedures as secular arbitration. The parties voluntarily take their disagreement to a panel of typically three impartial *dayanim* ("arbitrators") from the Jewish community who hear the evidence and arguments and render either a binding or non-binding decision, depending on what the parties want. At times, the procedures used during the arbitration are designed and agreed upon by the parties, and, more often, Jewish arbitration panels follow the rules of an organization like the American Arbitration Association. The latter is particularly true when the parties are seeking a binding decision. While arbitration awards can be appealed under various state and federal statutes, generally, courts will not vacate an arbitration panel’s decision unless the proceedings were "tainted by fraud or bias" or the arbitrators "exceeded their powers in a manner [that] results in a manifest disregard of the law." While these less formal approaches certainly have their place in the Jewish tradition, most Judaism-based dispute resolution is done by official, adjudicative bodies of trained professionals. These Jewish courts and the roles they perform are discussed in greater detail below.

2. Jewish Adjudication - The *Beth Din*

*Din* is the Hebrew word for a formal court proceeding. A *Beth Din* (or *Beit Din*) is an official Rabbinical Court, the authoritative forum of Jewish
law. Some of its many responsibilities include the preservation of procedures and decisions based on the Torah, Talmud, and the vast body of halachic law. While there is no single “Beth Din” in the United States (virtually every state is served by at least one), Jewish courts are typically affiliated with the Rabbinical Council of America (“RCA”) or the Union of Orthodox Jewish Congregations of America.

Beth Dins serve the Jewish community by providing a forum for obtaining Jewish divorces, confirming personal status, and adjudicating commercial disputes stemming from divorce, business, and community issues. When it comes to financial conflicts, Beth Dins usually hear cases involving disputes between business partners, employers and employees, congregations and rabbis, and family members. While Beth Dins rely primarily on Jewish law in reaching their decisions, most pride themselves on offering “erudite rabbinic judges . . . capable of addressing halachic issues in areas of financial and family law through the prism of contemporary commercial practice and secular law.” When appropriate, many Beth Dins include lay professionals and experts; including secular lawyers, businesspeople, physicians, and psychologists; on its panel of judges. Finally, most Beth Dins will hear cases regardless of the amount of money being disputed, because their jurisdiction hinges on the parties’ desire to be governed by Jewish law, not on the amount in controversy.

One of the most important functions of a Beth Din is the certification of one’s status within the Jewish community. When issues arise as to whether or not a person is Jewish or whether a couple is recognized as “married” in accordance with Jewish law, a Beth Din will hear the evidence, apply the halacha, and issue a ruling, either denying or confirming the disputed status. Likewise, a Jewish divorce is properly accomplished by a Beth Din through a get, the official document required by Jewish law for either party to remarry. The document makes no reference to responsibility or settlement details, nor

---
143. Id.
145. Beth Din of America, Our Services and What You Can Expect from the Beth Din o America, available at http://www.bethdin.org/services.htm (last visited Oct. 12, 2002) [Hereinafter Our Services].
146. Id.
147. Id.
149. Our Services, supra note 145.
does it offer any religious blessing or prayer. Thus, a *get* is strictly a legal document that breaks the existing bond of marriage and acknowledges that the parties are free to remarry under Jewish law.

In addition to confirming personal and marital status, Beth Dins also assist in conversion to Judaism by providing education and counseling, along with the actual procedure and appropriate documentation are provided to eligible, interested parties. Great care is taken to ensure that a convert to Judaism’s legitimacy in legal and family matters is guaranteed by strict adherence to Jewish law (*guir ke’halacha*). Once properly performed, conversion by a Beth Din is recognized by every Jewish legal authority, domestically and abroad. Likewise, once settled, certificates of personal religious or marital status properly issued by a Beth Din are recognized by rabbinical courts in Israel and worldwide.

### 3. Jewish Law and the Secular Legal System

Because Beth Dins make an effort to conduct their proceedings in a manner consistent with secular arbitration law, their rulings are usually binding and enforceable in the secular court system. For example, in *Cabinet v. Shapiro*, the Superior Court of New Jersey held that decisions of Jewish tribunals on religious matters must be accepted by legal tribunals as final and binding. Similarly, in *Blitz v. Beth Isaac Adas Israel Congregation*, the Court of Appeals of Maryland recognized the validity of arbitration proceedings before a Beth Din, even when the proceedings are not in strict compliance with the Maryland Uniform Arbitration Act, so long as the parties knowingly and voluntarily agree to the arbitration procedures. Moreover, when controversies include substantially religious issues, courts have declined to make their own judgments until a rabbinical court has had the opportunity to rule on the issues. For instance, in *Congregation B’nei Sholom v. Martin*, the defendant reneged on a $25,000 pledge towards building a synagogue. When the congregation sued in a Michigan court to collect on the pledge, the defendant claimed the court lacked jurisdiction, because the enforceability of the pledge was an issue of Jewish law, and, as such, it must be taken first to a Beth Din. After hearing

---

151. *Id.*
152. *Id.*
153. *Beth Din, supra* note 142.
154. *Id.*
155. *Our Services, supra* note 145.
156. *Id.*
160. *Id.* at 507.
expert testimony from rabbinical scholars of Jewish law, the Supreme Court of Michigan agreed, and remanded the case to the Beth Din.\textsuperscript{161}

IV. CONCLUSION

While the dispute resolution traditions of Christianity, Islam, and Judaism may differ in the scope of issues they hear and the formality of the procedures they employ, all three certainly share one unifying theme: peacefulness is next to Godliness. In a time when faith seems to be a subject brought up more to spur conflict than to resolve it, it is both ironic and reassuring to read the holiest texts of these three great religions and reflect on their common commands: get along with one another; compromise; work things out. Suffice it to say that, when it comes to religion's true role in human conflict, blessed are the negotiators, the mediators, and the arbitrators, for they shall be called the children of God. And Allah. And Yahweh.

\textsuperscript{161} Id. at 510.
2002 PHILIP C. JESSUP
INTERNATIONAL MOOT COURT COMPETITION

IN THE
INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE
THE HAGUE, NETHERLANDS

Case Concerning Regulation of Access to the Internet

REPUBLIC OF TURINGIA
Applicant

v.

REPUBLIC OF BABBAGE
Respondent

SPRING TERM 2002

MEMORIAL FOR THE APPLICANT

School:
University of Otago, New Zealand

Team Members:
Chris Curran, Hamish Forsyth, Philippa Jones,
Alexandra Smithyman, and Reuven Young
CASE CONCERNING REGULATION OF ACCESS TO THE INTERNET

I. STATEMENT OF JURISDICTION ............................................. 260
II. STATEMENT OF FACTS ....................................................... 260
III. QUESTIONS PRESENTED .................................................. 262
IV. SUMMARY OF THE PLEADINGS .......................................... 262
   A. Babbage’s Broad Restrictions on the Internet Violate
      International Law ....................................................... 264
      1. Turingia Has Jus Standi Before the International
         Court of Justice to Challenge Babbage’s
         Breach of an Internationally Recognized Right to
         Freedom of Speech .................................................. 264
   B. Babbage’s Extension of its Legislation to the Internet
      Exceeds its Jurisdiction .............................................. 264
      1. The Internet is a common space that is not
         amenable to jurisdiction .......................................... 264
      2. In any case, Babbage cannot fulfill any
         conventional jurisdictional requirements .................... 265
   C. Babbage’s Legislation is in Violation of Article 18 of the
      Vienna Convention on the Law of Treaties ...................... 265
      1. Article 18 of the Vienna Convention on the Law of
         Treaties binds Babbage ............................................. 265
   D. Freedom of Expression is a Recognized Human Right .......... 266
   E. Babbage’s Legislation Falls Outside the Reasonable
      Limits Imposed by Customary International Law ............... 267
      1. A restriction must be necessary in order to achieve
         a legitimate purpose .............................................. 267
      2. A restriction must be proportionate to its legitimate
         objective ............................................................ 267
      3. The Internet’s impact justifies minimal restrictions ....... 268
V. BABBAGE IS RESPONSIBLE FOR THE LOSS SUFFERED BY TOL .... 269
   A. The Claim Brought by Turingia for the Damage to
      TOL is Admissible ..................................................... 269
      1. Turingia may exercise its right of diplomatic
         protection of TOL because at the time of the hacking
         TOL was (and still is) a national of Turingia ............... 269
      2. There are no available and effective remedies open
         to TOL in Babbage .................................................. 269
   B. The Actions of the IBCP Are Attributable to Babbage ....... 270
1. The cumulative effect of Babbage's conduct amounts to an adoption of the hacking for which Babbage is responsible ........................................ 270
2. An act may be adopted after it has been executed .................. 270
3. If a continuing act is required, Babbage's amnesty will apply to IBCP hacking in the future, thereby facilitating such conduct. Thus Babbage has effectively adopted this hacking ex ante ........................................ 271

C. The IBCP's Attack on TOL was an Internationally Wrongful Act ........................................ 271
   1. Babbage has breached the customary international law prohibition against cybercrime .......... 271
   2. The hacking attributed to Babbage was an act of expropriation ............................................ 272

D. Turingia is Entitled to $50M Damages to Compensate it for the TOL Loss ............................................. 274

VI. TURINGIA IS NOT RESPONSIBLE FOR THE DAMAGE CAUSED TO BABBAGE RAIL TRANSIT AUTHORITY (BRTA), NOR FOR ANY HARM RESULTING FROM SUCH DAMAGE ............................................. 274
   A. The Acts of David Gabrius are Not Attributable to Babbage ............................................. 274
      1. Turingia did not authorize Gabrius' acts ............................................. 275
      2. Turingia did not adopt Gabrius' conduct ............................................. 275
   B. Gabrius' Conduct did not Constitute a Breach of a Relevant International Obligation ............................................. 275
      1. There is no customary international prohibition on terrorism ............................................. 275
      2. The actions of Gabrius were not an unlawful intervention ............................................. 276
      3. The actions of Gabrius were not a use of force ............................................. 276
      4. However, if the Court were to find the existence of an internationally wrongful act, the wrongfulness is precluded in the circumstances ............................................. 276
   C. Injuries Not Caused By Unlawful Act ............................................. 277

VII. THE LURING OF GABRIUS VIOLATED THE SOVEREIGNTY OF TURINGIA ............................................. 278
   A. The Luring of Gabrius to Babbage Violated the Territorial Sovereignty of Turingia ............................................. 278
      1. Extraterritorial criminal enforcement ............................................. 278
      2. Male captus bene detentus does not undermine the prohibition ............................................. 278
      3. Breach of Turingian territorial sovereignty - aeroplane and aircrew ............................................. 279
4. Turingia did not consent to the transborder criminal enforcement .................................. 279
5. Babbage’s unilateral execution of criminal enforcement measures violates the principle of non-intervention ................................................................. 279

B. **The Luring of Gabrius Violated His Human Rights** ......... 280
   1. Babbage was prohibited from arbitrarily arresting Gabrius at international law .................... 280
   2. The high court of Babbage breached a further aspect of the right .................................... 281

C. **Babbage Was Estopped From Prosecuting Gabrius** ........ 282
   1. Babbage may not resile from its legal undertaking ....... 282

D. **Babbage is Obliged to Restore Gabrius to Turingia** .... 283
   1. Babbage is obliged at international law to return Gabrius to Turingia ............................. 283

VIII. **CONCLUSION AND PRAYER FOR RELIEF** ............ 283
IX. **TABLE OF AUTHORITIES** .................................. 284

I. **STATEMENT OF JURISDICTION**

The Republic of Turingia and the Republic of Babbage have brought their case before this Court by notification of the Special Agreement as provided for by Article 40(1) of the Statute of the International Court of Justice. The Court has jurisdiction over the case pursuant to Article 36(2) of the said Statute.

II. **STATEMENT OF FACTS**

Turingia is a large, developed state with a highly educated and technologically literate population. Babbage is a smaller developing state, with little infrastructure, although the availability of Internet access for Babbagian citizens has increased markedly in recent years. In 1994, the Babbagian government promulgated a new Criminal Code. Section 117 of the Code prohibited the publication of indecent material, which was defined to include material targeted at and designed to offend members of a particular ethnic group, and material offensive to the public morality of Babbage. On September 25 1999, the head of Babbage’s government, President Revuluri, issued a Presidential Declaration extending the legal scope of section 117 to embrace material published or distributed on the Internet, and ordering all Internet Service Providers (ISPs) operating in Babbage to eliminate any user access to material which would violate section 117. Within two weeks of the Declaration, all but one of the ISPs operating in Babbage employed restrictive blocking software to comply with the legal prohibition in section 117. Such software also
prohibited users from accessing sites of historical and medical interest, and blocked other sites which were neither pornographic nor defamatory in intent.

Babbage OnLine (BOL), the dominant ISP in the Babbagian market and a subsidiary of a Turingian-based company, Turingia OnLine (TOL), refused to comply with the Presidential Declaration on grounds articulated by TOL’s Chief Executive Officer, namely its inconsistency with the international right to freedom of expression. Charges were laid and proceedings successfully brought against BOL and TOL. In order to protect its property against forfeiture, BOL closed down its operations in Babbage and removed its assets. President Revuluri warned that Babbage would not permit TOL to escape responsibility for its actions.

On December 24, 1999, a computer programmer illegally hacked into TOL’s computer system, erased the data which comprised TOL’s publically available websites and deleted the system programmes that controlled TOL’s worldwide network. The effect was to deny TOL’s subscribers access to the Internet for three days, for which TOL was later required to reimburse its customers in the amount of 50 million dollars.

On December 27, 1999, once the TOL website had been restored, a hidden computer virus was activated. The virus disrupted normal computer operations, resulting in the loss of unsaved data. Certain files containing words commonly used in hate speech were deleted. In addition, an e-mail indicating the political motivations of the group was sent to all subscribers. The International Babbagian Cyber-Patrol (IBCP) later claimed responsibility for the attack.

On December 29, 1999, President Revuluri issued a proclamation in which he conferred orders of merit on the members of the IBCP, thanked and praised the group, and also promised them a full amnesty from prosecution in the Babbagian courts.

Following the IBCP attack, Josephine Shidle, the Minister of Justice of Turingia, confirmed that no action was planned by the Turingian government by way of response. She did, however, publicly state her opinion that should a Turingian citizen inconvenience the government of Babbage through non-violent means, Turingia would have no jurisdiction to prosecute. Subsequently, David Gabrius, a Turingian citizen, hacked into the Babbage Rail Transit Authority (BRTA) and deleted its operating system. The effect of this was to eliminate all automated rail traffic control functions for two days, reducing traffic control to radio contact. In the immediate confusion following in the wake of the hacking, two trains traveling in opposite directions on a heavily-used mountain pass crashed into each other, causing fatalities. Turingia reiterated its decision not to prosecute Gabrius.

Following a joint request by the BRTA Administrator and the Minister of Justice of Babbage, Tara Elís, that Gabrius come to Babbage to assist with the repair of the BRTA, and on the express assurance that he would not face
prosecution if he did so, Gabrius agreed to go to Babbage. A plane was chartered by the Government of Babbage to transport Gabrius from Turingia. However, the request for help was in fact a deliberate ruse constructed for the purpose of luring Gabrius to Babbage, and on arrival at Babbage International Airport, the Babbagian national police were waiting to arrest Gabrius. Despite objections by Turingia as to the manner of the arrest and to the absence of any right of Babbage to assert jurisdiction over Gabrius, Gabrius was charged, put on trial and convicted for the murder of the 200 victims of the train collision and sentenced to 20 years imprisonment.

Under mounting international pressure, Babbage and Turingia have agreed to submit this dispute to the International Court of Justice.

III. QUESTIONS PRESENTED

1. Whether Babbage’s legislation exceeds its jurisdiction at international law?

2. Whether Babbage’s legislation violates the right to freedom of expression at international law?

3. Whether Babbage is responsible for an internationally wrongful act in respect of the IBCP’s hacking?

4. Whether Babbage is obliged to provide compensation for the IBCP’s interference with TOL’s contractual rights under the law of expropriation?

5. Whether the luring of Gabrius to Babbage violates Turingia’s sovereignty?

6. Whether the luring of Gabrius to Babbage violates his human rights?

IV. SUMMARY OF THE PLEADINGS

1. Babbage’s legislation is inconsistent with the right to freedom of expression found in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which Babbage has signed but not yet ratified. Babbage is bound by Article 18 of the Vienna Convention on the Law of Treaties not to act so as to defeat the purpose and object of the ICCPR, which it has done by imposing broad restrictive provisions on the publication of indecent materials, thereby impinging on a fundamental human right. Alternatively, Babbage’s legislation has breached a right to free speech that exists independently at customary international law. Whilst the right, whether founded in treaty or custom, is not absolute and may be subject to reasonable limitations assessed on the criteria of necessity and proportionality, the Babbagian legislation fails on these criteria, principally because it is overly broad in its reach and is not the
least intrusive means of achieving the legitimate objective. Hence, it exceeds what is an acceptable restriction of the right at international law.

2. Babbage is responsible for the loss suffered by TOL because the IBCP’s “cyberactivities” are both attributable to Babbage and in breach of international obligations owed by Babbage. A state may become responsible for acts *ex post facto* where the conduct of the state is such that it may be seen to have adopted and acknowledged the acts as its own. The contents of the Presidential proclamation constituted an adoption and acknowledgement of the activities of the IBCP for the purposes of attribution. The IBCP attack on TOL, specifically the actions of hacking into TOL and destroying data, violated the customary prohibition on cybercrimes. The same actions can also be conceptualized as an expropriation of TOL’s capacity to fulfill its contractual obligations, necessitating TOL’s US$50 million reimbursement of subscribers. Babbage must make reparations for the loss accordingly.

3. Turingia is not responsible for the damage sustained by the BRTA, as it is not responsible for the private actions of Gabrius against the BRTA. While a state may be held responsible for the acts of individuals in various circumstances, none is applicable to the present case. The statement of the Minister cannot amount to prior authorization for the purposes of attribution, as it does not evidence the requisite degree of association. Nor can the failure to prosecute Gabrius constitute an implicit acknowledgment or adoption so as to make Turingia subsequently liable for his acts. Moreover, the actions of Gabrius do not violate any relevant legal obligation. There is no international prohibition on terrorism, and Gabrius’ acts cannot fall within established prohibitions on the use of force or unlawful intervention. In any event, the actions may be viewed as legitimate countermeasures. Furthermore, even if Turingia were responsible for the actions against the BRTA, this would not extend to liability for the damage sustained in the train collision, such an injury being insufficiently causally related to the initial act.

4. The subsequent luring of Gabrius to Babbage was in clear breach of the territorial sovereignty of Turingia and as such was contrary to international customary law. Additionally, the luring contravened the customary prohibition on non-intervention in that it constituted a direct interference with Turingia’s regulation of its sovereign legal and political affairs. Moreover, the luring was an arbitrary arrest which was in clear violation of Gabrius’ human rights. The manner of the arrest qualified as arbitrary because of the unpredictable, coercive nature of the arrest and its
equivalence to forcible abduction. Babbage is also estopped from prosecuting Gabrius because it is bound by its prior assurance that it would refrain from doing so, that assurance having the requisite characteristics of a legally binding undertaking. In view of Babbage’s wrongful conduct, Babbage is obliged to return Gabrius to Turingia.

A. Babbage’s Broad Restrictions on the Internet Violate International Law

1. Turingia Has Jus Standi Before the International Court of Justice to Challenge Babbage’s Breach of an Internationally Recognized Right to Freedom of Speech
   
   a. TOL has a right to impart information

   Turingia can claim standing on the grounds that TOL, which we must infer is a national of Turingia, has a right to impart the types of information that have been restricted. The TOL server in Turingia provides original content as well as transmitting non-original information.

   b. The principles and rules regarding basic human rights are obligations erga omnes, thereby giving Turingia standing to intervene

   This Court has held principles and rules concerning basic human rights to be obligations erga omnes, binding on all states and opposable against any state. The entire international community is obliged to observe and protect human rights and all states have “a legal interest in their protection.” Turingia thus has standing to intervene on behalf of a non-national to preserve human rights.

B. Babbage’s Extension of its Legislation to the Internet Exceeds its Jurisdiction

1. The Internet is a common space that is not amenable to jurisdiction

   Babbage’s exercise of jurisdiction over the medium of the Internet is unreasonable given that it is undefined territory at international law. It is similar to outer space prior to its regulation. Until a specific regime is formulated,

---

Babbage should not act contrary to accepted jurisdictional principles. If this Court were to extend prescriptive jurisdiction into cyberspace, it would be formulating rather than declaring law, contrary to its Statute.\(^4\)

2. In any case, Babbage cannot fulfill any conventional jurisdictional requirements

Any enforcement of Babbage’s legislation entails a necessary breach of law, because it is inconsistent with all five conventional principles of prescriptive jurisdiction.\(^5\)

Neither the nationality principle nor the subjective territoriality principles applies to publishers in foreign countries. While some effects of the proscribed acts occurred within Babbage, any territorial connection is too oblique for the purposes of the objective territoriality principle. The passive nationality principle is far from accepted at international law and, even if established, the exercise of jurisdiction on this basis would be disproportionate to the gravity of the crime. Such acceptance as it has gained has been largely confined to terrorism and other internationally condemned crimes.\(^6\) The security principle could not be extended to protect “public morals” without broadening the principle so as to assert jurisdiction over an indeterminate range of offences, especially in the context of the Internet. This would undermine state sovereignty.

C. Babbage’s Legislation is in Violation of Article 18 of the Vienna Convention on the Law of Treaties

1. Article 18 of the Vienna Convention on the Law of Treaties binds Babbage

Article 19 of the ICCPR protects freedom of expression. Babbage has signed but not ratified the ICCPR. Pursuant to Article 18 of the Vienna Convention, which Babbage has ratified, it may not curtail free expression so as to defeat the object and purpose of the ICCPR.

Violating a seminal right, such as freedom of expression, strikes at the object and purpose of any international human rights instrument. The fundamental character of this right has been affirmed in domestic constitutions and by various institutions in the international community, including the United


Nations General Assembly (UNGA) which declared it to be "the touchstone of all freedoms to which the United Nations is consecrated." It has been further recognized as underpinning democracy itself.

Here, the breach of Article 19 is so broad as to breach several other rights, including the rights to cultural participation, scientific advancement, and arbitrary interference with correspondence. Such a wide-ranging breach threatens the object and purpose of the ICCPR.

Further, the obligations at customary law corresponding to Article 18 require parties to do nothing which may diminish the significance of a treaty’s provisions before its entry into force. In restricting Article 19 in such a broad manner, Babbage has done this.

D. Freedom of Expression is a Recognized Human Right

Customary international law requires the co-existence of settled state practice and opinio juris. The right to freedom of expression, including the rights to receive and impart information "regardless of frontiers," is embodied in both the Universal Declaration of Human Rights and the ICCPR.

The willingness of states to submit to reports by the United Nations Special Rapporteur and the fact that a diverse majority of states provide constitutional protection for freedom of expression evidences strong opinio juris. In addition to its recognition in international human rights instruments, a formidable corpus of regional instruments evidences broad state acceptance of the right to freedom of expression.

---


12. See U.S. CONST. amend. 1, art. 1; Canadian Charter of Rights and Freedoms, supra note 7, at art.29; EST. Const. ch. VI, art. 100.

E. Babbage’s Legislation Falls Outside the Reasonable Limits Imposed by Customary International Law

The right to freedom of expression is not absolute, as recognized by the international instruments which restrict it. Both national and transnational judicial bodies recognize that it is subject to the requirements of necessity and proportionality.14

1. A restriction must be necessary in order to achieve a legitimate purpose

Babbage restricts material it deems “offensive” and “contrary to public morals.” The European Court of Human Rights (ECtHR) has included information that may “offend, shock or disturb the state or any sector of its population” within the category of protected free speech. 15 In dealing with protected speech, Babbage cannot meet the necessity test unless the restrictions are proportionate to some compelling interest. Notwithstanding Babbage’s local conditions, the ECtHR has preferred objective judicial assessment of necessity over subjective state assessment.16

2. A restriction must be proportionate to its legitimate objective

To be proportionate, the objective must be achieved by the least intrusive means possible. Babbage’s code is unacceptably broad. First, the legislation and the ISPs’ “provider-end” filtering software remove user choice, and in doing so fail to distinguish between adults and children, which they must do.17 Secondly, they do not make exceptions for material of scientific or artistic value, access to which is a right.18

Less intrusive means of restricting hate-speech and pornography were open to Babbage, such as providing a defense of reasonable compliance. As there can be no justification for avoidably restricting scientific material, literature and other non-defamatory material, Babbage must fail the proportionality test.

---


The vagueness of “offensive in nature to the public morals” leads to potentially indeterminate liability. In Babbage, this criminal prohibition has had a chilling effect, resulting in private ISPs imposing overly broad filtering restrictions. Both parties agree that sites that are neither pornographic nor defamatory in intent have been blocked. The measures taken by the ISPs are thus a direct consequence of the legislation, and are hence open to this Court’s scrutiny.

The restrictions must also be effective in achieving the desired purpose in order to be justified. The very nature of the Internet means that blocking software can be circumvented, and the information accessed and then disseminated by alternative means. Babbage’s law is insufficiently effective to justify the restrictions on valuable material.

For Babbage’s limitations to be “prescribed by law,” the law must be clear enough for citizens to know with reasonable certainty the likely consequences of a particular action. The vagueness of “offensive in nature to the public morals” prevents this. This law’s vagueness chills free expression.

3. The Internet’s impact justifies minimal restrictions

The ECtHR has recognized that what is an acceptable restriction on free expression varies with different media, and that the medium’s “potential impact” is an important factor. The Internet is a new and unique medium deserving of special protection. Its interactive and pro-democratic character means that it should be subject to fewer restrictions than other media.

Further, state practice favors minimal state regulation of the Internet. This is appropriate as users largely elect the material they view. With the exception of child pornography, many states do not prohibit adult access to pornography in their Internet and media legislation. Babbage has acted paternalistically in failing to give its citizens choice where the medium allows it.

25. Id. at 873, 883.
V. BABBAGE IS RESPONSIBLE FOR THE LOSS SUFFERED BY TOL

Babbage is responsible for an internationally wrongful act, and has a duty to make reparations because the IBCP's hacking is (a) attributable to Babbage and (b) a breach of an international obligation owed by Babbage.\(^{26}\)

A. The Claim Brought by Turingia for the Damage to TOL is Admissible

1. Turingia may exercise its right of diplomatic protection of TOL because at the time of the hacking TOL was (and still is) a national of Turingia

   Companies may be nationals for the purpose of diplomatic protection.\(^{27}\) There is a genuine and substantial connection between TOL and Turingia.\(^{28}\) As a private company based in Turingia, it is likely that its place of incorporation and residency for taxation purposes, its head office and administrative organs are in Turingia.\(^{29}\) This close and permanent connection is not weakened by TOL's commercial activities overseas.\(^{30}\)

2. There are no available and effective remedies open to TOL in Babbage

   The requirement that local remedies must be exhausted may come within the jurisdictional waiver. Alternatively, as litigants need only exhaust such remedies as are available and effective,\(^{31}\) TOL has discharged its duty under the rule. There are no laws in force in Babbage dealing specifically with cybercrime. Although a remedy may exist in the general law, the transnational nature of the hacking and harm make any such remedy inappropriate.

   Further, the Babbagian proclamation on the IBCP and the readiness of President Revuluri to use his law-making powers regarding the Internet are evidence that the Babbagian courts are, in effect, subordinate to the Babbagian executive on this issue. When the prevailing conditions make the courts


\(^{27}\) IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 425 (5th ed. 1998).


\(^{29}\) Barcelona Traction, Light and Power Co. Ltd., 1970 I.C.J at 42.

\(^{30}\) Id.; Special Agreement between the Republic of Turingia (Applicant) and the Republic of Babbage (Respondent) on the differences between them concerning regulation of access to the internet (Compromis), § 5.

subordinate to the executive, any domestic remedies are considered to be ineffective.32

B. The Actions of the IBCP Are Attributable to Babbage

The IBCP’s hacking into TOL should be attributed to Babbage as Babbage acknowledged, exploited and adopted the IBCP’s acts.

1. The cumulative effect of Babbage’s conduct amounts to an adoption of the hacking for which Babbage is responsible

States may become responsible at customary international law for acts ex post facto.33 Article 11 of the International Law Commission’s Draft Articles on State Responsibility (Draft Articles) recognizes that acts of private persons shall be attributed to the state “to the extent that the State acknowledges and adopts the conduct in question as its own.” In this respect there must be more than a mere endorsement or acknowledgement.34 Babbage expressed its support for the hacking in several ways. After the ICBP had publicly acknowledged responsibility for the hacking, President Revuluri granted them “full amnesty,” and expressed Babbage’s gratitude to the IBCP. In another unqualified and unequivocal act, the IBCP members were rewarded with Babbagian national honors. These acts, taken in sum, constituted an acknowledgement and adoption of the acts of the IBCP, if not a policy of adoption. The President’s statement on December 19, 1999 may have encouraged the commission of acts against TOL. While states may publicly endorse acts without attracting responsibility for them, Babbage went beyond mere support by capitalizing on and exploiting the hacking for its national benefit. Exploitation, if not a necessary condition, is certainly sufficient.35

2. An act may be adopted after it has been executed

As recognized in Article 11 of the Draft Articles, a state is deemed responsible for an act adopted ex post facto as if it was involved from the act’s

32. See Amerasinghe, Local Remedies in International Law (1990) 196-7 and 242-4; Browns Claim (1923) RIAA, vi, 120.


inception. Article 11 is not qualified expressly or implicitly by any reference to a "continuous act."

The adoption doctrine must be both legally and logically distinct from authorization. Article 11 would be rendered redundant if only continuing acts could be adopted, as the rules of authorization cover such acts from the point of state involvement. It is therefore consistent with the law on state responsibility to find that Babbage has adopted the hacking of the IBCP notwithstanding that the hacking had ended before its adoption.

3. If a continuing act is required, Babbage's amnesty will apply to IBCP hacking in the future, thereby facilitating such conduct. Thus Babbage has effectively adopted this hacking ex ante.

On its face, the grant of full amnesty applied not only to the 1999 hacking but also to any future hacking committed by the ICBP. In effect, Babbage has thus adopted any such acts ex ante.

C. The IBCP's Attack on TOL was an Internationally Wrongful Act

1. Babbage has breached the customary international law prohibition against cybercrime

   a. There is a prohibition against cybercrime at customary international law

   Since the early 1990s, rapidly evolving state practice has established a customary prohibition on cybercrime. Prohibitions on unlawful access to and/or interference with computer data have now been enacted in at least thirty-eight states. The most recent multilateral development is the Convention on Cybercrime 2001, which has already attracted the signatures of thirty-two states since being opened for signature in November 2001. The evident willingness of states to rapidly assume international legal obligations in this field is compelling evidence of both the momentum and extent of state practice
and convergent opinio juris. Such opinio juris is also expressed by those transnational institutions that emphasise the need to fight cybercrime.41

Although state practice regarding cybercrime is less noticeable outside of developed Western states, the comparative technological ascendancy of the West has simply generated a greater incidence of cybercrime warranting regulation. In this regard, evidence of customary law is properly to be ascertained by reference to those states "specially affected" by cybercrime. 42

b. Babbage breached the prohibition against cybercrime

The two activities consistently proscribed in both domestic and international legal provisions on cybercrime are unlawful access to, and interference with, data. These prohibitions therefore represent the irreducible core of customary law.43 The IBCP breached international law twice by both illegally accessing and deleting TOL’s data.44

2. The hacking attributed to Babbage was an act of expropriation

Subject to limitations, states have the right to expropriate foreign-owned property at international law.45 Expropriation encompasses acts that fall short of transferred ownership or possession.46 Babbage has deprived TOL of its capacity to fulfill its subscription contracts by interfering with its informational assets.

a. The concept of property for expropriation purposes includes contractual rights

Expropriation has been recognized as extending to "any right which can be the object of a commercial transaction, ie, freely bought and sold, and thus has a monetary value."47 This definition from Amoco, the culmination of the Iran-US Claims Tribunal’s jurisprudence on contractual expropriation, is widely

42. N. Sea Continental Shelf, 1969 I.C.J. at 42-43.
43. See Convention on Cybercrime-Budapest, supra note 39; Art. 3211-3321 of the French Penal Code; German Penal Code §§ 203, 303(a), (b); Electronic Commerce Act, ch. 426 (2002) (Malta); Republic Act No. 8792, sec. 33 (2000) (Phil.).
44. Compromis, supra 30, at 14.
supported. Babbage has expropriated TOL’s contractual rights by interfering with its capacity to fulfill these contracts.

Alternatively, if the Court considers that contractual expropriation must be contingent on some physical interference, Babbage’s deletion of TOL’s data was such an interference. TOL was thereby deprived of the ability to honor its contractual obligations.

b. Measures falling short of direct divestiture qualify as “expropriations”

“Constructive expropriation” is widely recognized in case law and state practice. This occurs when the “events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that deprivation was not merely ephemeral.” Here TOL was deprived of its informational assets, an interference constituting a taking for the purposes of expropriation because TOL was prevented from enjoying its property. TOL’s ability to rebuild its assets from backed-up data does not diminish the interference in any way. The “reality of [the] impact” of the interference and its “effects” on TOL are more important than the government’s intent and the form of the interference.

While Babbage expropriated TOL’s property in Turingia, the territorial location of expropriation is not determinative. Although expropriation is typically associated with the nationalization context, the same principles must apply to other interferences causing a deprivation of property. By its nature cyberspace knows no territorial limitations and international law must adapt to this new medium.

48. Mobile Oil Iran Inc. v. Iran, 16 Iran-U.S. CTR 3, at 25 (1987); Anglo-Iranian Oil (U.K. v. Iran), 1951 I.C.J. 89 (July 1951), as per the United Kingdom’s government pleadings; Starrett Housing Corp. v. Iran, 23 I.L.M. 1090, 1115 (Sept. 1984); Shufeldt Claim (U.S. v. Guat.) 2 R.I.A.A. 1083, at 1097 (1930).
49. Starrett Housing Corp., 23 I.L.M. at 1115.
51. 1964 BPIL 200.
54. Tippett's, 6 Iran-U.S. CTR at 226.
55. For example, Starrett Housing Corp., 23 I.L.M. at 1116-117; Tippett's, 6 Iran-U.S. CTR at 226; Amoco, 15 Iran-U.S. CTR at ¶ 108.
c. Babbage must compensate Turingia for the full market value of TOL’s failure to provide consumer services

Expropriation has always required full market value compensation.\(^5^6\) Although several UNGA resolutions in the 1960s and 1970s refer to a more flexible standard of “appropriate compensation,”\(^5^7\) consideration of the “content and conditions of [their] adoption”\(^5^8\) reveal their inadequacy as evidence of new customary international law. These resolutions received insufficiently widespread support, especially amongst capital-exporting states, to indicate the emergence of a new standard.\(^5^9\) Moreover, the act of expropriation in the present case falls outside the ambit of these resolutions, which were intended to apply to the nationalization of natural resources.\(^6^0\) On this basis, Babbage must compensate Turingia fifty million dollars, the full market value of the lost subscription services.

D. Turingia is Entitled to $50M Damages to Compensate it for the TOL Loss

Having breached an international obligation, Babbage has a duty to make reparations which “wipe out all the consequences of the illegal act” and restore the status quo ante.\(^6^1\) But for the hacking, TOL would not have been required to pay out fifty million dollars to its customers.

VI. TURINGIA IS NOT RESPONSIBLE FOR THE DAMAGE CAUSED TO BABBAGE RAIL TRANSIT AUTHORITY (BRTA), NOR FOR ANY HARM RESULTING FROM SUCH DAMAGE

A. The Acts of David Gabrius are Not Attributable to Babbage

Gabrius is not formally affiliated with the Turingian government. Prima facie, the acts of a private individual are not attributable to the state under international law.\(^6^2\) Further, Gabrius’ conduct cannot be imputed to Turingia.


\(^5^8\) Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 826 (July 1996).


\(^6^0\) Sedco Inc., 9 Iran-U.S. CTR at 634.


\(^6^2\) Commentary to Draft Articles, supra note 26, at 103.
1. Turingia did not authorize Gabrius' acts

Authorization requires acts to be done under the instruction, direction or control of the state. The Turingian Minister of Justice's statement on December 29, 1999 did not authorize Gabrius' hacking. It was simply an expression of opinion as to a lack of jurisdiction to prosecute, a point reiterated after the attack. A high degree of association between the state and a private action is required to engage state responsibility. If the heavy US involvement in Nicaragua was insufficient in this regard, the general and ambiguous statement of the Minister surely cannot qualify as an authorization. Where a variable degree of control has been recognized, "overall control going beyond the mere financing and equipping of...forces" is still required.

Even if the statement is construed as a promise of amnesty, this was limited to acts causing an inconvenience to the government of Babbage of a kind similar to that caused by the IBCP. The deletion of an entire railroad network's operating system fell outside the scope of any authorization.

2. Turingia did not adopt Gabrius’ conduct

Turingia's failure to prosecute Gabrius does not amount to acknowledgement and adoption of his conduct as its own. Even if this could be seen as endorsing Gabrius' conduct, it is insufficient to constitute an adoption. Accordingly, Turingia cannot be held responsible for the actions of Gabrius.

B. Gabrius' Conduct did not Constitute a Breach of a Relevant International Obligation

1. There is no customary international prohibition on terrorism

While certain categories of terrorist activities are the subject of specific conventions, there is neither a comprehensive convention on terrorism per se

64. Compromis, supra note 30, at ¶ 22.
66. Id. at 60-62.
67. Id.
nor even an agreed definition of the term. Significantly, the Statute of the International Criminal Court, which purports to be declaratory of customary international law, does not include terrorism as a discrete international crime.

2. The actions of Gabrius were not an unlawful intervention

According to the principle of non-intervention, no state has the right "to intervene...in the internal or external affairs of any other state." States are prohibited from intervening in matters in which states are deemed to have free choice by virtue of their sovereignty.

The acts directed against the BRTA were aimed neither at "the subordination of the exercise of [Babbage's] sovereign rights" nor the "undermining of its socio-political system." Gabrius' acts do not fall within this prohibition.

3. The actions of Gabrius were not a use of force

Hacking into the BRTA computer network and deleting the operating system cannot be considered a use of force contrary to the prohibition in Article 2(4) of the UN Charter. That prohibition only embraces the use of armed force against another state. Non-armed acts, such as those of Gabrius, are outside the scope of the rule. The international community equates the use of armed force with acts of aggression, which is hardly the situation here.

4. However, if the Court were to find the existence of an internationally wrongful act, the wrongfulness is precluded in the circumstances

a. Gabrius' acts constituted a lawful countermeasure

In certain circumstances, a state may take countermeasures against a state that would be unlawful were they not in response to a prior violation by that

71. Libyan Arab Republic 726 F2d 774, 785 (DC Cir 1984).
While the Draft Articles recognize only non-forcible measures, the ICJ in Nicaragua "suggested" that proportionate forcible countermeasures would be available in response to acts involving the use of force. Thus, even if Gabrius' hacking is deemed a "use of force," it is consistent with international law. Alternatively, if lawful countermeasures must be non-forcible, Gabrius' acts do not involve the use of force, in that they fall well short of the terms of Article 2(4) of the UN Charter.

Since Babbage has breached several international obligations owed to Turingia, including the obligation to make reparations for a wrong, the preconditions for a lawful countermeasure are satisfied.

To be justified, countermeasures must meet the requirement of proportionality. It has been recognized that countermeasures taken in a similar field to the original act meet the proportionality requirement, even if these have a severe impact. Similar reasoning may be applied to Gabrius' "hacking" which mirrored that of the IBCP. Importantly, the scope of the countermeasure extends only to the loss of automated rail traffic control. As the train collision and casualties were not "caused" by the acts against the BRTA, they are excluded from any assessment of proportionality.

C. Injuries Not Caused By Unlawful Act

Even if it has committed an international wrong, Turingia is only responsible for the injuries caused by that violation. Causation may be satisfied in respect of damage to the BRTA computer system. In relation to the train collision and loss of life, however, there is no sufficiently direct, foreseeable or proximate relationship between Gabrius' acts and the injury to satisfy the requirements of causation at international law. The crash was the culmination of a number of improbable circumstances. The route was a mountain pass, reducing visual contact between trains and emergency stopping time. Being a

---

81. Id. at 19.
84. Air Serv. Agreement, 18 R.I.A.A. at 443-46.
85. Infra p.17, point III C.
86. Venable Claim, 4 R.I.A.A. 219, at 225 (1927); Nauililaa, 2 R.I.A.A. at 1031.
87. Nauililaa, 2 R.I.A.A. at 1031.
heavily used route there was less time to put into proper effect the default radio control system. The absence of any effective fallback mechanism was itself improbable.

The damage and fatalities are sufficiently divorced from the initial "hacking" into the BRTA network so as to be categorized as "too indirect, remote and uncertain" for Turingia to be held causally responsible.

VII. THE LURING OF GABRIUS VIOLATED THE SOVEREIGNTY OF TURINGIA

A. The Luring of Gabrius to Babbage Violated the Territorial Sovereignty of Turingia

1. Extraterritorial criminal enforcement

The exercise of sovereign powers by one state in the territory of another is prohibited at customary international law. In the absence of consent by the asylum state, pursuing criminal enforcement measures such as the abduction of a suspect from within the territory of that state clearly contravenes this prohibition.

2. Male captus bene detentus does not undermine the prohibition

While some states' domestic courts have continued to assert jurisdiction over suspects seized in breach of international law, states must "justify their conduct by reference to a new right" at international law in order to modify or create exceptions to established customary law. Domestic courts employing the male captus bene detentus doctrine have, however, tended to do so on the basis of domestic precedent rather than international law and have even acknowledged that conduct excused by the doctrine may be contrary to international law. Thus, the opinio juris underpinning the customary
prohibition on extraterritorial criminal enforcement remains undisturbed by this practice.

3. Breach of Turingian territorial sovereignty - aeroplane and aircrew

The Ministerial signing of the assurance to Gabrius, the presence of the Babbagian law enforcement officers at the airport, and the hiring of the aircraft and crew by the government implicate senior Babbagian officials in the luring of Gabrius, thus engaging state responsibility for the luring itself. From the moment of the deceptive assurance, the criminal enforcement operation against Gabrius was effectively a continuous act. The participation of the Babbagian-funded aircrew in this continuous operation ensured that a key element of Babbage’s sovereign act was performed both in Turingian airspace and on Turingian soil, thus violating Turingian territorial sovereignty.

4. Turingia did not consent to the transborder criminal enforcement

There is no breach of territorial sovereignty if the asylum state consents to the relevant transborder criminal enforcement action. However, Turingian officials were unaware of the purpose of the Babbagian chartered flight and immediately protested on discovering the deception. As such, Turingia cannot be said to have waived its sovereign rights.

5. Babbage’s unilateral execution of criminal enforcement measures violates the principle of non-intervention

a. Babbage has interfered with Turingia’s prosecutorial and political integrity

The principle of non-intervention protects the authority of states to make free choices about matters within their sovereign jurisdiction. The pursuit of criminal enforcement measures is a sovereign act. Political integrity is also to be respected at international law. Turingia decided at the highest level of government that it had neither the jurisdiction nor the inclination to prosecute Gabrius. Babbage’s luring of Gabrius thus constituted a direct interference with Turingia’s regulation of its sovereign legal and political affairs.

97. See Prosecutor v. Slavko Dokmanovic, Decision on the Motion for Release by the Accused Slavko Dokmanovic, No. IT-95-13a-PT, T Ch. 11, 22 (Oct. 1997).
98. Michell, supra note 92, at 420.
99. Id. at 15.
100. Id. at 18.
102. Compromis, supra note 30, at ¶ 19, 22.
b. The equivalence of deception and coercion

Although the ICJ in Nicaragua referred to an element of coercion within the prohibition against non-intervention, it confined its exposition of principle to those elements necessary to the case before it. The sovereign freedom of state decision-making, the core principle protected by the prohibition, may be imperiled equally by the use of force or fraud. Moreover, unlike consensual extradition processes, unilateral extraterritorial criminal enforcement measures such as abduction or luring inherently interfere in the internal affairs of other states. In fraudulently undermining high-level Turingian legal and political decisions, Babbage subordinated Turingia's sovereign will in a manner inconsistent with the sovereign equality of states.

B. The Luring of Gabrius Violated His Human Rights

1. Babbage was prohibited from arbitrarily arresting Gabrius at international law

Like freedom of expression, the prohibition against arbitrary arrest has crystallized into customary international law, as evidenced by an equally formidable body of domestic and transnational human rights instruments. Alternatively, even if the prohibition is not a part of international custom, it is sufficiently fundamental to the ICCPR that its breach will necessarily entail a violation of Article 18 of the Vienna Convention on the Law of Treaties. Without such a prohibition, freedom of expression, the rule of law and other incidents of a democracy are substantially undermined.

a. Babbage's arrest of Gabrius was "arbitrary"

Babbage's arrest of Gabrius was arbitrary, and hence contrary to international law, on four separate grounds. First, the arbitrariness criterion

104. Id.
105. United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, supra note 73.
106. See Id. at 3-4.
107. See UDHR, art. 9, supra note 10, ICCPR, supra note 11, at art. 9(1); African [Banjul] Charter on Human and Peoples' Rights, supra note 13; Convention, supra note 13, at art. 5(1); American Convention on Human Rights "Pact of San Jose, Costa Rica," supra note 13, at art. 7; Canadian Charter of Rights and Freedoms, supra note 12, at art. 9 See N.Z. Bill of Rights, art. 9, available at http://www.uniwuerzburg.de/law/nz01000_.html (last visited Oct. 6, 2002).
108. See supra at 2 and 3.
encompasses any legal deprivation that is unjust, unpredictable, manifestly disproportionate, discriminatory, or inappropriate to the circumstances of the case.\textsuperscript{109} It is difficult to imagine an arrest more unpredictable than one following an explicit governmental assurance of immunity.

Secondly, forcible abduction has been deemed manifestly arbitrary in the case law.\textsuperscript{110} Nothing in principle distinguishes luring, as fraudulent inducement "robs the victim of the power of autonomous decision and action as surely as does physical coercion."\textsuperscript{111} If viewed in the positive terms of the right to liberty, both luring and abduction deprive an arrested fugitive of the power to exercise that right in autonomous fashion. Thus luring is "arbitrary."

Thirdly, a continuum of coercion has been recognized as informing the prohibition on arbitrary arrest.\textsuperscript{112} Unlike situations where police have been given leeway to exploit a criminal's own greed,\textsuperscript{113} the Babbagian assurance was coercive in preying on Gabrìus' goodwill and feeling of responsibility for the unfortunate events in Babbage. If the use of such "moral" coercion is deemed consistent with international human rights norms, in the future hackers will only be deterred from providing potentially valuable assistance to governments. The deterrence of international co-operation is particularly unfortunate in the case of developing nations with simplistic technological infrastructures, like Babbage, which could well benefit from assistance provided by those responsible for any such damage.

Fourthly, arrests circumventing established procedures for obtaining custody, such as extradition treaties, have also been deemed manifestly arbitrary.\textsuperscript{114} Extradition processes contain significant due process safeguards for the accused, and hence have an important human rights dimension.\textsuperscript{115} By contrast, unilateral measures such as abduction or luring are completely unconstrained, the very definition of "arbitrary."\textsuperscript{116} The absence of an extradition treaty between Babbage and Turingia cannot excuse the employment of unilateral, arbitrary measures.

2. The high court of Babbage breached a further aspect of the right

A necessary corollary of the right to liberty, recognized in Article 9(4) of the ICCPR, is the right of an accused to obtain an order for release in the event of

\begin{itemize}
\item \textsuperscript{109} Prosecutor, No. IT-95-13A-PT, T Ch. 11 at 484; M. Nowak, \textit{UN Covenant on Civil and Political Rights: ICCPR Commentary}, at 173 (1993).
\item \textsuperscript{110} Prosecutor, No. IT-95-13A-PT, T Ch. 11 at 487.
\item \textsuperscript{111} \textit{In re Schmidt} 1 AC at 359 per Sedley J (1995).
\item \textsuperscript{112} Prosecutor, No. IT-95-13A-PT, T Ch. 11 at 483; Michell, \textit{supra} note 92, at 490-91.
\item \textsuperscript{113} \textit{Liangstirprasert v. United States}, 1 AC 225, at 243 (PC) (1991).
\item \textsuperscript{114} Prosecutor, No. IT-95-13A-PT, T Ch. 11 at 487; Nowak, \textit{supra} note 109, at 173.
\item \textsuperscript{115} Michell, \textit{supra} note 92, at 437-38.
\item \textsuperscript{116} Miriam-Webster's Collegiate Dictionary, \textit{available at} www.n-w.com/cgi-bin/dictionary.
an arbitrary arrest. The refusal of the Babbagian high court on appeal to make such an order, despite the prior conduct of the criminal enforcement authorities, thus constitutes an independent breach of customary international law.

C. Babbage Was Estopped From Prosecuting Gabrius

1. Babbage may not resile from its legal undertaking

The ICJ has recognized that states may bind themselves to a course of conduct via unilateral undertakings. To be legally effective, the undertaking must be given publicly, with an intention to be bound. The intent behind an alleged undertaking must be assessed in the context of the principle of good faith, with the trust and confidence inherent in international co-operation implying that interested states may place confidence in unilateral declarations. Ultimately, the substance and context of such statements determines their legal effect.

a. Babbage was bound by its undertaking not to prosecute or harm Gabrius

The statement was publicly made by a Minister competent to speak for the Babbagian government on prosecutorial matters. Even if Babbage never intended to be bound by its assurance, the unambiguous content of the statement is determinative. There was no reason for Gabrius to doubt the sincerity of the plea for assistance. In accordance with the principle of good faith, Babbage must be held to its public undertaking.

Although deemed unnecessary in the Nuclear Tests case, any requirement of a valid offer and acceptance would be satisfied on the facts. Gabrius clearly offered his services by way of consideration for the promise of immunity.

---

119. Id. at 334.
120. Id. at 336.
121. Compromis, supra note 30, at ¶ 23; See also Nuclear Tests, 1974 I.C.J. at 332-33.
D. Babbage is Obliged to Restore Gabrius to Turingia

1. Babbage is obliged at international law to return Gabrius to Turingia

International law stipulates that the injured state should be returned to the status quo ante following a breach so as to "re-establish the situation which would...have existed if that act had not been committed." An application of the preference expressed in Chorzow Factory for "[r]estitution in kind" requires that Babbage return Gabrius, who was arrested in breach of Turingian sovereignty and Gabrius' human rights, to Turingia. The return of Gabrius would also be consistent with state practice in cases of illegal rendition. Turingia's immediate protest also rebuts any question of waiver of a claim to restitution.

VIII. CONCLUSION AND PRAYER FOR RELIEF

Turingia respectfully asks this Court to declare and adjudge that:

1. Babbage's broad restrictions on access to Internet-available resources, its extension of its criminal code to the Internet, and its application of the code to Turingia OnLine and Babbage Online, violate international law.

2. Babbage is responsible for the loss suffered by Turingia Online and is liable to pay damages in the sum of fifty million dollars.

3. Turingia is not responsible for the damage caused to the Babbage Rail Transit Authority or for any harm resulting from such damage, in particular the train crash resulting in loss of life.


5. David Gabrius must immediately be released and repatriated.

Respectfully submitted,

Agents for Turingia.

126. Michell, supra note 92, at 424-27 and accompanying footnotes.
127. See BROWNLIE, supra note 27, at 31; Michell, supra note 92, at 420-27; Compromis, supra note 30, at ¶ 25.
IX. TABLE OF AUTHORITIES

A. Conventions

2. Convention on Cybercrime, ETS No 185 (opened for signature November 25, 2001)
5. International Covenant on Civil and Political Rights, 1966
   International Cases
8. Air Services Agreement of 27 March 1946 (1979) 18 RIAA 416
11. Anglo-Iranian Oil Co. Case (United Kingdom v. Iran) (1951) ICJ 83
12. Autronic AG against Switzerland, COE-EC HR, Appn No 12726/87, reported March 8 1989
14. Chorzow Factory (Indemnity) (Germany v. Poland) (1928) PCIJ, Ser A No 17
16. Finnish Shipowners Arbitration (Finland v. United Kingdom) (1934) 3 RIAA 1479
18. Handyside v. United Kingdom Ser A, No 24, 1 EHRR 737 (1979)
21. Lighthouses Arbitration (1956) RIAA, xii 155
22. Lingens v. Austria EHRU (1990)
23. Megalidis v. Turkey 8 Recueil des Decisions des Tribunaux Mixtes 386 (1928)
25. Mobil Oil Iran Inc v. Iran (1987) 16 Iran-US CTR 3
26. Nautila Case (Portugal v. Germany) (1928) 2 UNRIAA 1011
27. Norwegian Loans Case (France v. Norway) (1957) ICJ 9
28. Norwegian Shipowners’ Claims Case (1922) 1 RIAA 307
29. Nottebohm Case (Second Phase) (Liechtenstein v. Guatamala) (1955) ICJ 4
31. Phosphates in Morocco, Preliminary Objections, (1938), PCIJ, Ser A/B, No 74
32. Prosecutor v. Slavko Dokmanovic, Decision on the Motion for Release by the Accused Slavko Dokmanovic, No IT-95-13a-PT, T Ch II, October 1997
34. Sedco Inc v. National Iranian Oil Company Award (1986) 25 ILM 629
35. Shufeldt Claim (United States v. Guatemala) (1930) 2 RIAA 1083
36. Spanish Zone in Morocco Claims (1925) RIAA, ii, 615
37. S.S. Lotus (France v. Turkey) (1927) PCIJ, Ser A, No 10
38. Starrett Housing Co.v. Iran (1984) 23 ILM 1090
39. The Sunday Times v. United Kingdom (No 2) 14 EHRR 229 (1992)
40. Texaco v. Libya (1977) 53 ILR 389
41. Tippetts v. TAMS-ATTA (1985) 6 Iran-US CTR 219
42. Trail Smelter Arbitration (1938, 1941) 3 RIAA 1095
44. United States Diplomatic and Consular Staff in Tehran (United States v. Iran) (1980) ICJ 3
45. Venable Claim (1927) 4 RIAA 219 United Nations Documents
46. Declaration on Friendly Relations, GA Res 2625 (1970)
47. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, GA Res 2131(1965)

Other Cases and Statutes

52. Babbage Criminal Code
53. Canadian Charter of Rights and Freedoms
55. Electronic Commerce Act (Malta)
56. French Penal Code
57. German Penal Code
58. In re Hartnett 1 OR 2d 206 (1973)
60. Liangsrirprasert v. United States [1991] 1 AC 225 (PC)
62. Republic Act 8792 (Philippines)
63. Statute of the International Court of Justice, June 26, 1945, 59 Stat 1055, TS993
64. Tel Or en v. Libyan Arab Republic 726 F2d 774 (1984)
66. United States Constitution

B. Texts

67. Amerasinghe, C, Local Remedies in International Law (1990)
69. Brownlie, I, Principles of Public International Law, (5th ed. 1999)
71. Lauterpacht, H, Oppenheim's International Law, (8th ed. 1955)
74. Shearer, I, Stark's International Law, (11th ed. 1994)

C. Journals and Yearbooks

75. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons 35 TLU
76. Legal Opinion on the Decision of the US Supreme Court in the Alvarez-Machain Case, Inter-American Judicial Committee (1992) 13 HRLJ 395

D. Miscellaneous

78. (1964) BPIL 200
81. OECD Expert Committee Recommendation, 1973
84. European Ministers of Justice, Resolution 3, June 2000
86. Compulsory Membership Case, Inter-American Court of Human Rights, Advisory Opinion OC-5/85, November 1985
88. New Zealand Bill of Rights Act 1990
2002 PHILIP C. JESSUP
INTERNATIONAL MOOT COURT COMPETITION

IN THE
INTERNATIONAL COURT OF JUSTICE
AT THE PEACE PALACE
THE HAGUE, NETHERLANDS

Case Concerning Regulation of Access to the Internet

REPUBLIC OF TURINGIA
Applicant

v.

REPUBLIC OF BABBAGE
Respondent

SPRING TERM 2002

MEMORIAL FOR THE RESPONDENT

School:
Harvard University, United States of America

Team Members:
William Burker-White, David Mascari, Jin-Long Pao, and Natalie Reid
CASE CONCERNING REGULATION OF ACCESS TO THE INTERNET

I. STATEMENT OF JURISDICTION ........................................ 292
II. STATEMENT OF FACTS .................................................. 292
III. QUESTIONS PRESENTED ............................................... 294
IV. SUMMARY OF THE PLEADINGS ....................................... 294

A. Babbage’s Broad Restrictions on the Internet
   Violate International Law ............................................. 296
   1. Turingia Has Jus Standi Before the International
      Court of Justice to Challenge Babbage’s
      Breach of an Internationally Recognized Right to
      Freedom of Speech .............................................. 296
B. Babbage’s Extension of its Legislation to the Internet
   Exceeds its Jurisdiction ............................................. 296
   1. The Internet is a common space that is not
      amenable to jurisdiction ....................................... 296
   2. In any case, Babbage cannot fulfill any
      conventional jurisdictional requirements .................... 297
C. Babbage’s Legislation is in Violation of Article 18
   1. Article 18 of the Vienna Convention on the Law
      of Treaties binds Babbage .................................... 297
D. Freedom of Expression is a Recognized Human Right .... 298
E. Babbage’s Legislation Falls Outside the Reasonable
   Limits Imposed by Customary International Law ............ 299
   1. A restriction must be necessary in order to
      achieve a legitimate purpose .................................. 299
   2. A restriction must be proportionate to its legitimate
      objective ......................................................... 299
   3. The Internet’s impact justifies minimal restrictions .... 300
V. BABBAGE IS RESPONSIBLE FOR THE LOSS SUFFERED BY TOL .. 301
A. The Claim Brought by Turingia for the Damage to
   TOL is Admissible .................................................. 301
   1. Turingia may exercise its right of diplomatic
      protection of TOL because at the time of the
      hacking TOL was (and still is) a national of Turingia .... 301
   2. There are no available and effective remedies
      open to TOL in Babbage ....................................... 301
B. The Actions of the IBCP Are Attributable to Babbage .... 302
1. The cumulative effect of Babbage's conduct amounts to an adoption of the hacking for which Babbage is responsible ........................................ 302
2. An act may be adopted after it has been executed .......... 303
3. If a continuing act is required, Babbage's amnesty will apply to IBCP hacking in the future, thereby facilitating such conduct. Thus Babbage has effectively adopted this hacking ex ante ........................................ 303

C. The IBCP's Attack on TOL was an Internationally Wrongful Act ........................................ 303
   1. Babbage has breached the customary international law prohibition against cybercrime .......... 303
   2. The hacking attributed to Babbage was an act of expropriation ........................................ 304

D. Turingia is Entitled to $50M Damages to Compensate it for the TOL Loss ........................................ 306

VI. Turingia is Not Responsible For the Damage Caused to Babbage Rail Transit Authority (BRTA), Nor for Any Harm Resulting From Such Damage ........................................ 306
   A. The Acts of David Gabrius are Not Attributable to Babbage ........................................ 306
      1. Turingia did not authorize Gabrius' acts ........................................ 307
      2. Turingia did not adopt Gabrius' conduct ........................................ 307
   B. Gabrius' Conduct did not Constitute a Breach of a Relevant International Obligation ........................................ 307
      1. There is no customary international prohibition on terrorism ........................................ 307
      2. The actions of Gabrius were not an unlawful intervention ........................................ 308
      3. The actions of Gabrius were not a use of force ........................................ 308
      4. However, if the Court were to find the existence of an internationally wrongful act, the wrongfulness is precluded in the circumstances ........................................ 308
   C. Injuries Not Caused By Unlawful Act ........................................ 309

VII. The Luring of Gabrius Violated the Sovereignty of Turingia ........................................ 310
   A. The Luring of Gabrius to Babbage Violated the Territorial Sovereignty of Turingia ........................................ 310
      1. Extraterritorial criminal enforcement ........................................ 310
      2. Male captus bene detentus does not undermine the prohibition ........................................ 310
      3. Breach of Turingian territorial sovereignty - aeroplane and aircrew ........................................ 311
4. Turingia did not consent to the transborder criminal enforcement ........................................ 311
5. Babbage's unilateral execution of criminal enforcement measures violates the principle of non-intervention ......................................................... 311

B. The Luring of Gabrius Violated His Human Rights .......... 312
   1. Babbage was prohibited from arbitrarily arresting Gabrius at international law ........................ 312
   2. The high court of Babbage breached a further aspect of the right ........................................ 314

C. Babbage Was Estopped From Prosecuting Gabrius .......... 314
   1. Babbage may not resile from its legal undertaking .............................................................. 314

D. Babbage is Obligated to Restore Gabrius to Turingia .......... 315
   1. Babbage is obliged at international law to return Gabrius to Turingia .................................... 315

VIII. CONCLUSION AND PRAYER FOR RELIEF ........................................ 315
IX. TABLE OF AUTHORITIES ............................................................... 316

I. STATEMENT OF JURISDICTION

The Republic of Turingia and the Republic of Babbage have brought their case before this Court by notification of the Special Agreement as provided for by Article 40(1) of the Statute of the International Court of Justice. The Court has jurisdiction over the case pursuant to Article 36(2) of the said Statute.

II. STATEMENT OF FACTS

Turingia is a large, developed state with a highly educated and technologically literate population. Babbage is a smaller developing state, with little infrastructure, although the availability of Internet access for Babbagian citizens has increased markedly in recent years. In 1994, the Babbagian government promulgated a new Criminal Code. Section 117 of the Code prohibited the publication of indecent material, which was defined to include material targeted at and designed to offend members of a particular ethnic group, and material offensive to the public morality of Babbage. On September 25, 1999, the head of Babbage's government, President Revuluri, issued a Presidential Declaration extending the legal scope of section 117 to embrace material published or distributed on the Internet, and ordering all Internet Service Providers (ISPs) operating in Babbage to eliminate any user access to material which would violate section 117. Within two weeks of the Declaration, all but one of the ISPs operating in Babbage employed restrictive blocking software to comply with the legal prohibition in section 117. Such software also
prohibited users from accessing sites of historical and medical interest, and blocked other sites which were neither pornographic nor defamatory in intent. Babbage OnLine (BOL), the dominant ISP in the Babbagian market and a subsidiary of a Turingian-based company, Turingia OnLine (TOL), refused to comply with the Presidential Declaration on grounds articulated by TOL’s Chief Executive Officer, namely its inconsistency with the international right to freedom of expression. Charges were laid and proceedings successfully brought against BOL and TOL. In order to protect its property against forfeiture, BOL closed down its operations in Babbage and removed its assets. President Revuluri warned that Babbage would not permit TOL to escape responsibility for its actions.

On December 24 1999, a computer programmer illegally hacked into TOL’s computer system, erased the data which comprised TOL’s publicly available websites and deleted the system programmes that controlled TOL’s worldwide network. The effect was to deny TOL’s subscribers access to the Internet for three days, for which TOL was later required to reimburse its customers in the amount of 50 million dollars.

On December 27, 1999, once the TOL website had been restored, a hidden computer virus was activated. The virus disrupted normal computer operations, resulting in the loss of unsaved data. Certain files containing words commonly used in hate speech were deleted. In addition, an e-mail indicating the political motivations of the group was sent to all subscribers. The International Babbagian Cyber-Patrol (IBCP) later claimed responsibility for the attack.

On December 29 1999, President Revuluri issued a proclamation in which he conferred orders of merit on the members of the IBCP, thanked and praised the group, and also promised them a full amnesty from prosecution in the Babbagian courts.

Following the IBCP attack, Josephine Shidle, the Minister of Justice of Turingia, confirmed that no action was planned by the Turingian government by way of response. She did, however, publicly state her opinion that should a Turingian citizen inconvenience the government of Babbage through non-violent means, Turingia would have no jurisdiction to prosecute. Subsequently, David Gabrius, a Turingian citizen, hacked into the Babbage Rail Transit Authority (BRTA) and deleted its operating system. The effect of this was to eliminate all automated rail traffic control functions for two days, reducing traffic control to radio contact. In the immediate confusion following in the wake of the hacking, two trains traveling in opposite directions on a heavily-used mountain pass crashed into each other, causing fatalities. Turingia reiterated its decision not to prosecute Gabrius.

Following a joint request by the BRTA Administrator and the Minister of Justice of Babbage, Tara Elis, that Gabrius come to Babbage to assist with the repair of the BRTA, and on the express assurance that he would not face
prosecution if he did so, Gabrius agreed to go to Babbage. A plane was chartered by the Government of Babbage to transport Gabrius from Turingia. However, the request for help was in fact a deliberate ruse constructed for the purpose of luring Gabrius to Babbage, and on arrival at Babbage International Airport, the Babbagian national police were waiting to arrest Gabrius. Despite objections by Turingia as to the manner of the arrest and to the absence of any right of Babbage to assert jurisdiction over Gabrius, Gabrius was charged, put on trial and convicted for the murder of the 200 victims of the train collision and sentenced to 20 years imprisonment.

Under mounting international pressure, Babbage and Turingia have agreed to submit this dispute to the International Court of Justice.

III. QUESTIONS PRESENTED

1. Whether Babbage’s legislation exceeds its jurisdiction at international law?

2. Whether Babbage’s legislation violates the right to freedom of expression at international law?

3. Whether Babbage is responsible for an internationally wrongful act in respect of the IBCP’s hacking?

4. Whether Babbage is obliged to provide compensation for the IBCP’s interference with TOL’s contractual rights under the law of expropriation?

5. Whether the luring of Gabrius to Babbage violates Turingia’s sovereignty?

6. Whether the luring of Gabrius to Babbage violates his human rights?

IV. SUMMARY OF THE PLEADINGS

1. Babbage’s legislation is inconsistent with the right to freedom of expression found in Article 19 of the International Covenant on Civil and Political Rights (ICCPR), which Babbage has signed but not yet ratified. Babbage is bound by Article 18 of the Vienna Convention on the Law of Treaties not to act so as to defeat the purpose and object of the ICCPR, which it has done by imposing broad restrictive provisions on the publication of indecent materials, thereby impinging on a fundamental human right. Alternatively, Babbage’s legislation has breached a right to free speech that exists independently at customary international law. Whilst the right, whether founded in treaty or custom, is not absolute and may be subject to reasonable limitations assessed on the criteria of necessity and proportionality, the Babbagian legislation fails on these
Distinguished Brief criteria, principally because it is overly broad in its reach and is not the least intrusive means of achieving the legitimate objective. Hence, it exceeds what is an acceptable restriction of the right at international law.

2. Babbage is responsible for the loss suffered by TOL because the IBCP’s “cyberactivities” are both attributable to Babbage and in breach of international obligations owed by Babbage. A state may become responsible for acts *ex post facto* where the conduct of the state is such that it may be seen to have adopted and acknowledged the acts as its own. The contents of the Presidential proclamation constituted an adoption and acknowledgement of the activities of the IBCP for the purposes of attribution. The IBCP attack on TOL, specifically the actions of hacking into TOL and destroying data, violated the customary prohibition on cybercrimes. The same actions can also be conceptualized as an expropriation of TOL’s capacity to fulfill its contractual obligations, necessitating TOL’s US$50 million reimbursement of subscribers. Babbage must make reparations for the loss accordingly.

3. Turingia is not responsible for the damage sustained by the BRTA, as it is not responsible for the private actions of Gabrius against the BRTA. While a state may be held responsible for the acts of individuals in various circumstances, none is applicable to the present case. The statement of the Minister cannot amount to prior authorization for the purposes of attribution, as it does not evidence the requisite degree of association. Nor can the failure to prosecute Gabrius constitute an implicit acknowledgment or adoption so as to make Turingia subsequently liable for his acts. Moreover, the actions of Gabrius do not violate any relevant legal obligation. There is no international prohibition on terrorism, and Gabrius’ acts cannot fall within established prohibitions on the use of force or unlawful intervention. In any event, the actions may be viewed as legitimate countermeasures. Furthermore, even if Turingia were responsible for the actions against the BRTA, this would not extend to liability for the damage sustained in the train collision, such an injury being insufficiently causally related to the initial act.

4. The subsequent luring of Gabrius to Babbage was in clear breach of the territorial sovereignty of Turingia and as such was contrary to international customary law. Additionally, the luring contravened the customary prohibition on non-intervention in that it constituted a direct interference with Turingia’s regulation of its sovereign legal and political affairs. Moreover, the luring was an arbitrary arrest which was in clear violation of Gabrius’ human rights. The manner of the arrest qualified as arbitrary
because of the unpredictable, coercive nature of the arrest and its equivalence to forcible abduction. Babbage is also estopped from prosecuting Gabrius because it is bound by its prior assurance that it would refrain from doing so, that assurance having the requisite characteristics of a legally binding undertaking. In view of Babbage’s wrongful conduct, Babbage is obliged to return Gabrius to Turingia.

A. Babbage’s Broad Restrictions on the Internet Violate International Law

1. Turingia Has Jus Standi Before the International Court of Justice to Challenge Babbage’s Breach of an Internationally Recognized Right to Freedom of Speech

   a. TOL has a right to impart information

   Turingia can claim standing on the grounds that TOL, which we must infer is a national of Turingia, has a right to impart the types of information that have been restricted.¹ The TOL server in Turingia provides original content as well as transmitting non-original information.

   b. The principles and rules regarding basic human rights are obligations erga omnes, thereby giving Turingia standing to intervene

   This Court has held principles and rules concerning basic human rights to be obligations erga omnes, binding on all states and opposable against any state.² The entire international community is obliged to observe and protect human rights and all states have “a legal interest in their protection.” Turingia thus has standing to intervene on behalf of a non-national to preserve human rights.

B. Babbage’s Extension of its Legislation to the Internet Exceeds its Jurisdiction

1. The Internet is a common space that is not amenable to jurisdiction

   Babbage’s exercise of jurisdiction over the medium of the Internet is unreasonable given that it is undefined territory at international law. It is similar

---

to outer space prior to its regulation. Until a specific regime is formulated, Babbage should not act contrary to accepted jurisdictional principles. If this Court were to extend prescriptive jurisdiction into cyberspace, it would be formulating rather than declaring law, contrary to its Statute.

2. In any case, Babbage cannot fulfill any conventional jurisdictional requirements.

Any enforcement of Babbage’s legislation entails a necessary breach of law, because it is inconsistent with all five conventional principles of prescriptive jurisdiction.

Neither the nationality principle nor the subjective territoriality principles applies to publishers in foreign countries. While some effects of the proscribed acts occurred within Babbage, any territorial connection is too oblique for the purposes of the objective territoriality principle. The passive nationality principle is far from accepted at international law and, even if established, the exercise of jurisdiction on this basis would be disproportionate to the gravity of the crime. Such acceptance as it has gained has been largely confined to terrorism and other internationally condemned crimes. The security principle could not be extended to protect “public morals” without broadening the principle so as to assert jurisdiction over an indeterminate range of offences, especially in the context of the Internet. This would undermine state sovereignty.

C. Babbage’s Legislation is in Violation of Article 18 of the Vienna Convention on the Law of Treaties

1. Article 18 of the Vienna Convention on the Law of Treaties binds Babbage

Article 19 of the ICCPR protects freedom of expression. Babbage has signed but not ratified the ICCPR. Pursuant to Article 18 of the Vienna


Convention, which Babbage has ratified, it may not curtail free expression so as to defeat the object and purpose of the ICCPR.

Violating a seminal right, such as freedom of expression, strikes at the object and purpose of any international human rights instrument. The fundamental character of this right has been affirmed in domestic constitutions and by various institutions in the international community, including the United Nations General Assembly (UNGA) which declared it to be "the touchstone of all freedoms to which the United Nations is consecrated." It has been further recognized as underpinning democracy itself.

Here, the breach of Article 19 is so broad as to breach several other rights, including the rights to cultural participation, scientific advancement, and arbitrary interference with correspondence. Such a wide-ranging breach threatens the object and purpose of the ICCPR.

Further, the obligations at customary law corresponding to Article 18 require parties to do nothing which may diminish the significance of a treaty's provisions before its entry into force. In restricting Article 19 in such a broad manner, Babbage has done this.

**D. Freedom of Expression is a Recognized Human Right**

Customary international law requires the co-existence of settled state practice and opinio juris. The right to freedom of expression, including the rights to receive and impart information "regardless of frontiers," is embodied in both the Universal Declaration of Human Rights and the ICCPR.

The willingness of states to submit to reports by the United Nations Special Rapporteur and the fact that a diverse majority of states provide constitutional protection for freedom of expression evidences strong opinio juris. In addition

---


12. See U.S. CONST. amend. I, art. 1; Canadian Charter of Rights and Freedoms, supra note 7, at art.29; EST. Const. ch. VI, art. 100.
to its recognition in international human rights instruments, a formidable corpus of regional instruments evidences broad state acceptance of the right to freedom of expression. 13

E. Babbage’s Legislation Falls Outside the Reasonable Limits Imposed by Customary International Law

The right to freedom of expression is not absolute, as recognized by the international instruments which restrict it. Both national and transnational judicial bodies recognize that it is subject to the requirements of necessity and proportionality. 14

1. A restriction must be necessary in order to achieve a legitimate purpose

Babbage restricts material it deems “offensive” and “contrary to public morals.” The European Court of Human Rights (ECtHR) has included information that may “offend, shock or disturb the state or any sector of its population” within the category of protected free speech. 15 In dealing with protected speech, Babbage cannot meet the necessity test unless the restrictions are proportionate to some compelling interest. Notwithstanding Babbage’s local conditions, the ECtHR has preferred objective judicial assessment of necessity over subjective state assessment. 16

2. A restriction must be proportionate to its legitimate objective

To be proportionate, the objective must be achieved by the least intrusive means possible. Babbage’s code is unacceptably broad. First, the legislation and the ISPs’ “provider-end” filtering software remove user choice, and in doing so fail to distinguish between adults and children, which they must do. 17


Secondly, they do not make exceptions for material of scientific or artistic value, access to which is a right.\textsuperscript{18}

Less intrusive means of restricting hate-speech and pornography were open to Babbage, such as providing a defense of reasonable compliance. As there can be no justification for avoidably restricting scientific material, literature and other non-defamatory material, Babbage must fail the proportionality test.

The vagueness of “offensive in nature to the public morals” leads to potentially indeterminate liability. In Babbage, this criminal prohibition has had a chilling effect,\textsuperscript{19} resulting in private ISPs imposing overly broad filtering restrictions.\textsuperscript{20} Both parties agree that sites that are neither pornographic nor defamatory in intent have been blocked. The measures taken by the ISPs are thus a direct consequence of the legislation, and are hence open to this Court’s scrutiny.

The restrictions must also be effective in achieving the desired purpose in order to be justified. The very nature of the Internet means that blocking software can be circumvented, and the information accessed and then disseminated by alternative means. Babbage’s law is insufficiently effective to justify the restrictions on valuable material.

For Babbage’s limitations to be “prescribed by law,” the law must be clear enough for citizens to know with reasonable certainty the likely consequences of a particular action.\textsuperscript{21} The vagueness of “offensive in nature to the public morals” prevents this.\textsuperscript{22} This law’s vagueness chills free expression.

3. The Internet’s impact justifies minimal restrictions

The ECtHR has recognized that what is an acceptable restriction on free expression varies with different media, and that the medium’s “potential impact” is an important factor.\textsuperscript{23} The Internet is a new and unique medium deserving of special protection.\textsuperscript{24} Its interactive and pro-democratic character means that it should be subject to fewer restrictions than other media.\textsuperscript{25}

Further, state practice favors minimal state regulation of the Internet. This is appropriate as users largely elect the material they view. With the exception of child pornography, many states do not prohibit adult access to pornography.

\begin{itemize}
  \item \textsuperscript{18} ICCPR, supra note 11.
  \item \textsuperscript{19} Babbage Criminal Code, § 117(a).
  \item \textsuperscript{22} ACLU v. Reno, 929 F. Supp. at 854.
  \item \textsuperscript{24} ACLU v. Reno, 929 F. Supp. at 854.
  \item \textsuperscript{25} Id. at 873, 883.
\end{itemize}
in their Internet and media legislation. Babbage has acted paternalistically in failing to give its citizens choice where the medium allows it.

V. BABBAGE IS RESPONSIBLE FOR THE LOSS SUFFERED BY TOL

Babbage is responsible for an internationally wrongful act, and has a duty to make reparations because the IBCP’s hacking is (a) attributable to Babbage and (b) a breach of an international obligation owed by Babbage.  

A. The Claim Brought by Turingia for the Damage to TOL is Admissible

1. Turingia may exercise its right of diplomatic protection of TOL because at the time of the hacking TOL was (and still is) a national of Turingia

Companies may be nationals for the purpose of diplomatic protection. There is a genuine and substantial connection between TOL and Turingia. As a private company based in Turingia, it is likely that its place of incorporation and residency for taxation purposes, its head office and administrative organs are in Turingia. This close and permanent connection is not weakened by TOL’s commercial activities overseas.

2. There are no available and effective remedies open to TOL in Babbage

The requirement that local remedies must be exhausted may come within the jurisdictional waiver. Alternatively, as litigants need only exhaust such remedies as are available and effective, TOL has discharged its duty under the rule. There are no laws in force in Babbage dealing specifically with cybercrime. Although a remedy may exist in the general law, the transnational nature of the hacking and harm make any such remedy inappropriate.

Further, the Babbagian proclamation on the IBCP and the readiness of President Revuluri to use his law-making powers regarding the Internet are


30. Id.; Special Agreement between the Republic of Turingia (Applicant) and the Republic of Babbage (Respondent) on the differences between them concerning regulation of access to the internet (Compromis), ¶ 5.

evidence that the Babbagian courts are, in effect, subordinate to the Babbagian executive on this issue. When the prevailing conditions make the courts subordinate to the executive, any domestic remedies are considered to be ineffective.\textsuperscript{32}

\textbf{B. The Actions of the IBCP Are Attributable to Babbage}

The IBCP's hacking into TOL should be attributed to Babbage as Babbage acknowledged, exploited and adopted the IBCP's acts.

1. The cumulative effect of Babbage's conduct amounts to an adoption of the hacking for which Babbage is responsible

States may become responsible at customary international law for acts \textit{ex post facto}.\textsuperscript{33} Article 11 of the International Law Commission's Draft Articles on State Responsibility (Draft Articles) recognizes that acts of private persons shall be attributed to the state "to the extent that the State acknowledges and adopts the conduct in question as its own." In this respect there must be more than a mere endorsement or acknowledgement.\textsuperscript{34} Babbage expressed its support for the hacking in several ways. After the ICBP had publicly acknowledged responsibility for the hacking, President Revuluri granted them "full amnesty," and expressed Babbage's gratitude to the IBCP. In another unqualified and unequivocal act, the IBCP members were rewarded with Babbagian national honors. These acts, taken in sum, constituted an acknowledgement and adoption of the acts of the IBCP, if not a policy of adoption. The President's statement on December 19, 1999 may have encouraged the commission of acts against TOL. While states may publicly endorse acts without attracting responsibility for them, Babbage went beyond mere support by capitalizing on and exploiting the hacking for its national benefit. Exploitation, if not a necessary condition, is certainly sufficient.\textsuperscript{35}

\textsuperscript{32} See Amerasinghe, \textit{Local Remedies in International Law} (1990) 196-7 and 242-4; Browns Claim (1923) RIAA, vi, 120.


\textsuperscript{35} United States Diplomatic and Consular Staff in Tehran, 1980 I.C.J. 3. \textit{See also} United States Diplomatic and Consular Staff in Tehran, \textit{supra} note 26
2. An act may be adopted after it has been executed

As recognized in Article 11 of the Draft Articles, a state is deemed responsible for an act adopted ex post facto as if it was involved from the act’s inception. Article 11 is not qualified expressly or implicitly by any reference to a “continuous act.”

The adoption doctrine must be both legally and logically distinct from authorization. Article 11 would be rendered redundant if only continuing acts could be adopted, as the rules of authorization cover such acts from the point of state involvement. It is therefore consistent with the law on state responsibility to find that Babbage has adopted the hacking of the IBCP notwithstanding that the hacking had ended before its adoption.

3. If a continuing act is required, Babbage’s amnesty will apply to IBCP hacking in the future, thereby facilitating such conduct. Thus Babbage has effectively adopted this hacking ex ante

On its face, the grant of full amnesty applied not only to the 1999 hacking but also to any future hacking committed by the ICBP. In effect, Babbage has thus adopted any such acts ex ante.

C. The IBCP’s Attack on TOL was an Internationally Wrongful Act

1. Babbage has breached the customary international law prohibition against cybercrime

   a. There is a prohibition against cybercrime at customary international law

Since the early 1990s, rapidly evolving state practice has established a customary prohibition on cybercrime. Prohibitions on unlawful access to and/or interference with computer data have now been enacted in at least thirty-eight states. The most recent multilateral development is the Convention on Cybercrime 2001, which has already attracted the signatures of thirty-two states since being opened for signature in November 2001. The evident willingness of states to rapidly assume international legal obligations in this

field is compelling evidence of both the momentum and extent of state practice and convergent *opinio juris*. Such *opinio juris* is also expressed by those transnational institutions that emphasise the need to fight cybercrime.\(^{41}\)

Although state practice regarding cybercrime is less noticeable outside of developed Western states, the comparative technological ascendancy of the West has simply generated a greater incidence of cybercrime warranting regulation. In this regard, evidence of customary law is properly to be ascertained by reference to those states "specially affected" by cybercrime.\(^{42}\)

b. **Babbage breached the prohibition against cybercrime**

The two activities consistently proscribed in both domestic and international legal provisions on cybercrime are unlawful access to, and interference with, data. These prohibitions therefore represent the irreducible core of customary law.\(^{43}\) The IBCP breached international law twice by both illegally accessing and deleting TOL's data.\(^{44}\)

2. The hacking attributed to Babbage was an act of expropriation

Subject to limitations, states have the right to expropriate foreign-owned property at international law.\(^{45}\) Expropriation encompasses acts that fall short of transferred ownership or possession.\(^{46}\) Babbage has deprived TOL of its capacity to fulfill its subscription contracts by interfering with its informational assets.

a. **The concept of property for expropriation purposes includes contractual rights**

Expropriation has been recognized as extending to "any right which can be the object of a commercial transaction, ie, freely bought and sold, and thus has a monetary value."\(^{47}\) This definition from *Amoco*, the culmination of the

---


\(^{42}\) N. Sea Continental Shelf, 1969 I.C.J. at 42-43.


\(^{44}\) Compromis, supra 30, at 14.


Iran-US Claims Tribunal’s jurisprudence on contractual expropriation, is widely supported. Babbage has expropriated TOL’s contractual rights by interfering with its capacity to fulfill these contracts.

Alternatively, if the Court considers that contractual expropriation must be contingent on some physical interference, Babbage’s deletion of TOL’s data was such an interference. TOL was thereby deprived of the ability to honor its contractual obligations.

b. Measures falling short of direct divestiture qualify as “expropriations”

“Constructive expropriation” is widely recognized in case law and state practice. This occurs when the “events demonstrate that the owner was deprived of fundamental rights of ownership and it appears that deprivation was not merely ephemeral.” Here TOL was deprived of its informational assets, an interference constituting a taking for the purposes of expropriation because TOL was prevented from enjoying its property. TOL’s ability to rebuild its assets from backed-up data does not diminish the interference in any way. The “reality of [the] impact” of the interference and its “effects” on TOL are more important than the government’s intent and the form of the interference.

While Babbage expropriated TOL’s property in Turingia, the territorial location of expropriation is not determinative. Although expropriation is typically associated with the nationalization context, the same principles must apply to other interferences causing a deprivation of property. By its nature cyberspace knows no territorial limitations and international law must adapt to this new medium.

48. Mobile Oil Iran Inc. v. Iran, 16 Iran-U.S. CTR 3, at 25 (1987); Anglo-Iranian Oil (U.K. v. Iran), 1951 I.C.J. 89 (July 1951), as per the United Kingdom’s government pleadings; Starrett Housing Corp. v. Iran, 23 I.L.M. 1090, 1115 (Sept. 1984); Shufeldt Claim (U.S. v. Guat.) 2 R.I.A.A. 1083, at 1097 (1930).
49. Starrett Housing Corp., 23 I.L.M. at 1115.
51. 1964 BPIL 200.
54. Tippetts, 6 Iran-U.S. CTR at 226.
55. For example, Starrett Housing Corp., 23 I.L.M. at 1116-117; Tippetts, 6 Iran-U.S. CTR at 226; Amoco, 15 Iran-U.S. CTR at ¶ 108.
c. Babbage must compensate Turingia for the full market value of TOL's failure to provide consumer services

Expropriation has always required full market value compensation.\textsuperscript{56} Although several UNGA resolutions in the 1960s and 1970s refer to a more flexible standard of "appropriate compensation,"\textsuperscript{57} consideration of the "content and conditions of [their] adoption"\textsuperscript{58} reveal their inadequacy as evidence of new customary international law. These resolutions received insufficiently widespread support, especially amongst capital-exporting states, to indicate the emergence of a new standard.\textsuperscript{59} Moreover, the act of expropriation in the present case falls outside the ambit of these resolutions, which were intended to apply to the nationalization of natural resources.\textsuperscript{60} On this basis, Babbage must compensate Turingia fifty million dollars, the full market value of the lost subscription services.

D. Turingia is Entitled to $50M Damages to Compensate it for the TOL Loss

Having breached an international obligation, Babbage has a duty to make reparations which "wipe out all the consequences of the illegal act" and restore the status quo ante.\textsuperscript{61} But for the hacking, TOL would not have been required to pay out fifty million dollars to its customers.

VI. TURINGIA IS NOT RESPONSIBLE FOR THE DAMAGE CAUSED TO BABBAGE RAIL TRANSIT AUTHORITY (BRTA), NOR FOR ANY HARM RESULTING FROM SUCH DAMAGE

A. The Acts of David Gabrrius are Not Attributable to Babbage

Gabrius is not formally affiliated with the Turingian government. Prima facie, the acts of a private individual are not attributable to the state under international law.\textsuperscript{62} Further, Gabrrius' conduct cannot be imputed to Turingia.

\textsuperscript{56} Chorzow Factory (Ger. v. Pol.), 1928 P.C.I.J. (ser. A) No. 17, at 46-48 (Sept. 1928); Sedco Inc., 9 Iran-U.S. CTR at 248; Amoco, 15 Iran-U.S. CTR at § 108.


\textsuperscript{58} Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, 35 I.L.M. 809, 826 (July 1996).


\textsuperscript{60} Sedco Inc., 9 Iran-U.S. CTR at 634.

\textsuperscript{61} Chorzow Factory, 1928 P.C.I.J. (ser. A) No. 17, at 46-48; Spanish Zone in Morocco Claims 2 R.I.A.A., ii, 615, at 641 (1925); SHAW, supra note 46, at 641.

\textsuperscript{62} Commentary to Draft Articles, supra note 26, at 103.
1. Turingia did not authorize Gabrius’ acts

Authorization requires acts to be done under the instruction, direction or control of the state.63 The Turingian Minister of Justice’s statement on December 29, 1999 did not authorize Gabrius’ hacking. It was simply an expression of opinion as to a lack of jurisdiction to prosecute, a point reiterated after the attack.64 A high degree of association between the state and a private action is required to engage state responsibility.65 If the heavy US involvement in Nicaragua was insufficient in this regard, the general and ambiguous statement of the Minister surely cannot qualify as an authorization.66 Where a variable degree of control has been recognized, “overall control going beyond the mere financing and equipping of...forces” is still required.67

Even if the statement is construed as a promise of amnesty, this was limited to acts causing an inconvenience to the government of Babbage of a kind similar to that caused by the IBCP. The deletion of an entire railroad network’s operating system fell outside the scope of any authorization.

2. Turingia did not adopt Gabrius’ conduct

Turingia’s failure to prosecute Gabrius does not amount to acknowledgement and adoption of his conduct as its own.68 Even if this could be seen as endorsing Gabrius’ conduct, it is insufficient to constitute an adoption.69 Accordingly, Turingia cannot be held responsible for the actions of Gabrius.

B. Gabrius’ Conduct did not Constitute a Breach of a Relevant International Obligation

1. There is no customary international prohibition on terrorism

While certain categories of terrorist activities are the subject of specific conventions,70 there is neither a comprehensive convention on terrorism per se

64. Compromis, supra note 30, at ¶ 22.
66. Id. at 60-62.
67. Id.
nor even an agreed definition of the term.\textsuperscript{71} Significantly, the Statute of the International Criminal Court, which purports to be declaratory of customary international law, does not include terrorism as a discrete international crime.\textsuperscript{72}

2. The actions of Gabrius were not an unlawful intervention

According to the principle of non-intervention, no state has the right "to intervene...in the internal or external affairs of any other state."\textsuperscript{73} States are prohibited from intervening in matters in which states are deemed to have free choice by virtue of their sovereignty.\textsuperscript{74}

The acts directed against the BRTA were aimed neither at "the subordination of the exercise of [Babbage's] sovereign rights" nor the "undermining of its socio-political system."\textsuperscript{75} Gabrius' acts do not fall within this prohibition.

3. The actions of Gabrius were not a use of force

Hacking into the BRTA computer network and deleting the operating system cannot be considered a use of force contrary to the prohibition in Article 2(4) of the UN Charter. That prohibition only embraces the use of armed force against another state.\textsuperscript{76} Non-armed acts, such as those of Gabrius, are outside the scope of the rule. The international community equates the use of armed force with acts of aggression, which is hardly the situation here.\textsuperscript{77}

4. However, if the Court were to find the existence of an internationally wrongful act, the wrongfulness is precluded in the circumstances

a. Gabrius' acts constituted a lawful countermeasure

In certain circumstances, a state may take countermeasures against a state that would be unlawful were they not in response to a prior violation by that

\textsuperscript{71} Libyan Arab Republic 726 F2d 774, 785 (DC Cir 1984).
\textsuperscript{74} Nicaragua, 1986 I.C.J. at 107.
\textsuperscript{76} GOODRICH, HAMBRO, & SIMONS, CHARTER OF THE UNITED NATIONS 49 (3rd ed. 1969).
state. While the Draft Articles recognize only non-forcible measures, the ICJ in *Nicaragua* "suggested" that proportionate forcible countermeasures would be available in response to acts involving the use of force. Thus, even if Gabrius' hacking is deemed a "use of force," it is consistent with international law. Alternatively, if lawful countermeasures must be non-forcible, Gabrius' acts do not involve the use of force, in that they fall well short of the terms of Article 2(4) of the UN Charter.

Since Babbage has breached several international obligations owed to Turingia, including the obligation to make reparations for a wrong, the preconditions for a lawful countermeasure are satisfied.

To be justified, countermeasures must meet the requirement of proportionality. It has been recognized that countermeasures taken in a similar field to the original act meet the proportionality requirement, even if these have a severe impact. Similar reasoning may be applied to Gabrius' "hacking" which mirrored that of the IBCP. Importantly, the scope of the countermeasure extends only to the loss of automated rail traffic control. As the train collision and casualties were not "caused" by the acts against the BRTA, they are excluded from any assessment of proportionality.

**C. Injuries Not Caused By Unlawful Act**

Even if it has committed an international wrong, Turingia is only responsible for the injuries caused by that violation. Causation may be satisfied in respect of damage to the BRTA computer system. In relation to the train collision and loss of life, however, there is no sufficiently direct, foreseeable or proximate relationship between Gabrius' acts and the injury to satisfy the requirements of causation at international law. The crash was the culmination of a number of improbable circumstances. The route was a mountain pass, reducing visual contact between trains and emergency stopping time. Being a

81. Id. at 19.
84. Air Serv. Agreement, 18 R.I.A.A. at 443-46.
85. *Infra* p.17, point III C.
86. Venable Claim, 4 R.I.A.A. 219, at 225 (1927); Nauililaa, 2 R.I.A.A. at 1031.
87. Nauililaa, 2 R.I.A.A. at 1031.
heavily used route there was less time to put into proper effect the default radio
control system.\textsuperscript{89} The absence of any effective fallback mechanism was itself
improbable.

The damage and fatalities are sufficiently divorced from the initial
"hacking" into the BRTA network so as to be categorized as "too indirect,
remote and uncertain"\textsuperscript{90} for Turingia to be held causally responsible.

VII. THE LURING OF GABRIUS VIOLATED THE SOVEREIGNTY OF TURINGIA

A. The Luring of Gabrius to Babbage Violated the Territorial Sovereignty of
Turingia

1. Extraterritorial criminal enforcement

The exercise of sovereign powers by one state in the territory of another is
prohibited at customary international law.\textsuperscript{91} In the absence of consent by the
asylum state, pursuing criminal enforcement measures such as the abduction of
a suspect from within the territory of that state clearly contravenes this
prohibition.\textsuperscript{92}

2. Male captus bene detentus does not undermine the prohibition

While some states' domestic courts have continued to assert jurisdiction
over suspects seized in breach of international law, states must "justify their
conduct by reference to a new right" at international law in order to modify or
create exceptions to established customary law.\textsuperscript{93} Domestic courts employing
the \textit{male captus bene detentus} doctrine have, however, tended to do so on the
basis of domestic precedent rather than international law\textsuperscript{94} and have even
acknowledged that conduct excused by the doctrine may be contrary to
international law.\textsuperscript{95} Thus, the \textit{opinio juris} underpinning the customary

\begin{footnotesize}
\begin{enumerate}
\item Id. at ¶20.
\item Trial Smelter Arbitration, 3 R.I.A.A. 1095, at 1931 (1938, 1941).
\item S.S. Lotus, 1927 P.C.I.J. (ser. A) No. 10, at 34-35; OPPENHEIM;S INTERNATIONAL LAW 295 (H
\item Paul Michell, Article, \textit{English-Speaking Justice: Evolving Responses to Transnational Forcible
of the U.S. Supreme Court in the Alvarez-Machain Case, Inter-American Judicial Committee 13 H.R.L.J. 395
(1992); Virginia Morris and M. -Christiane Bourloyannis-Vrailas, \textit{Current Development: The Work of the
Sixth Committee at the Forty-Eighth Session of the UN General Assembly}, 88 A.J.I.L. 343, 357-78 (1994).
\item Nicaragua, 1986 I.C. J. at 108-09.
\item See United States v. Alvarez-Machain, 505 U.S. 655 (1992); Levinge v. Dir. Of Custodial Serv.,
9 N.S.W.L.R. 546 (Ca. 1987).
\item Alvarez-Machain, 505 U.S. at 667; \textit{In re Harnett} 1 O.R. 2d 206, 209 (1973).
\end{enumerate}
\end{footnotesize}
prohibition on extraterritorial criminal enforcement remains undisturbed by this practice.

3. Breach of Turingian territorial sovereignty - aeroplane and aircrew

The Ministerial signing of the assurance to Gabrius, the presence of the Babbagian law enforcement officers at the airport, and the hiring of the aircraft and crew by the government implicate senior Babbagian officials in the luring of Gabrius, thus engaging state responsibility for the luring itself. From the moment of the deceptive assurance, the criminal enforcement operation against Gabrius was effectively a continuous act. The participation of the Babbagian-funded aircrew in this continuous operation ensured that a key element of Babbage's sovereign act was performed both in Turingian airspace and on Turingian soil, thus violating Turingian territorial sovereignty.

4. Turingia did not consent to the transborder criminal enforcement

There is no breach of territorial sovereignty if the asylum state consents to the relevant transborder criminal enforcement action. However, Turingian officials were unaware of the purpose of the Babbagian chartered flight and immediately protested on discovering the deception. As such, Turingia cannot be said to have waived its sovereign rights.

5. Babbage's unilateral execution of criminal enforcement measures violates the principle of non-intervention

a. Babbage has interfered with Turingia's prosecutorial and political integrity

The principle of non-intervention protects the authority of states to make free choices about matters within their sovereign jurisdiction. The pursuit of criminal enforcement measures is a sovereign act. Political integrity is also to be respected at international law. Turingia decided at the highest level of government that it had neither the jurisdiction nor the inclination to prosecute

97. See Prosecutor v. Slavko Dokmanovic, Decision on the Motion for Release by the Accused Slavko Dokmanovic, No. IT-95-13a-PT, T Ch. 11, 22 (Oct. 1997).
98. Michell, supra note 92, at 420.
99. Id. at 15.
100. Id. at 18.
Gabrius. Babbage’s luring of Gabrius thus constituted a direct interference with Turingia’s regulation of its sovereign legal and political affairs.

b. The equivalence of deception and coercion

Although the ICJ in Nicaragua referred to an element of coercion within the prohibition against non-intervention, it confined its exposition of principle to those elements necessary to the case before it.  

The sovereign freedom of state decision-making, the core principle protected by the prohibition, may be imperiled equally by the use of force or fraud. Moreover, unlike consensual extradition processes, unilateral extraterritorial criminal enforcement measures such as abduction or luring inherently interfere in the internal affairs of other states. In fraudulently undermining high-level Turingian legal and political decisions, Babbage subordinated Turingia’s sovereign will in a manner inconsistent with the sovereign equality of states.

B. The Luring of Gabrrius Violated His Human Rights

1. Babbage was prohibited from arbitrarily arresting Gabrius at international law

Like freedom of expression, the prohibition against arbitrary arrest has crystallized into customary international law, as evidenced by an equally formidable body of domestic and transnational human rights instruments. Alternatively, even if the prohibition is not a part of international custom, it is sufficiently fundamental to the ICCPR that its breach will necessarily entail a violation of Article 18 of the Vienna Convention on the Law of Treaties. Without such a prohibition, freedom of expression, the rule of law and other incidents of a democracy are substantially undermined.

---

102. Compromis, supra note 30, at ¶ 19, 22.
104. Id.
105. United Nations Declaration on Principles of International Law Concerning Friendly Relations and Cooperation Among States, supra note 73.
106. See Id. at 3-4.
107. See UDHR, art. 9, supra note 10, ICCPR, supra note 11, at art. 9(1); African [Banjul] Charter on Human and Peoples’ Rights, supra note 13; Convention, supra note 13, at art. 5(1); American Convention on Human Rights “Pact of San Jose, Costa Rica,” supra note 13, at art. 7; Canadian Charter of Rights and Freedoms, supra note 12, at art. 9 See N.Z. Bill of Rights, art. 9, available at http://www.uni-wuerzburg.de/law/nz01000_.html (last visited Oct. 6, 2002).
108. See supra at 2 and 3.
a. Babbage’s arrest of Gabrius was “arbitrary”

Babbage’s arrest of Gabrius was arbitrary, and hence contrary to international law, on four separate grounds. First, the arbitrariness criterion encompasses any legal deprivation that is unjust, unpredictable, manifestly disproportionate, discriminatory, or inappropriate to the circumstances of the case. It is difficult to imagine an arrest more unpredictable than one following an explicit governmental assurance of immunity.

Secondly, forcible abduction has been deemed manifestly arbitrary in the case law. Nothing in principle distinguishes luring, as fraudulent inducement “robs the victim of the power of autonomous decision and action as surely as does physical coercion.” If viewed in the positive terms of the right to liberty, both luring and abduction deprive an arrested fugitive of the power to exercise that right in autonomous fashion. Thus luring is “arbitrary.”

Thirdly, a continuum of coercion has been recognized as informing the prohibition on arbitrary arrest. Unlike situations where police have been given leeway to exploit a criminal’s own greed, the Babbagian assurance was coercive in preying on Gabrius’ goodwill and feeling of responsibility for the unfortunate events in Babbage. If the use of such “moral” coercion is deemed consistent with international human rights norms, in the future hackers will only be deterred from providing potentially valuable assistance to governments. The deterrence of international co-operation is particularly unfortunate in the case of developing nations with simplistic technological infrastructures, like Babbage, which could well benefit from assistance provided by those responsible for any such damage.

Fourthly, arrests circumventing established procedures for obtaining custody, such as extradition treaties, have also been deemed manifestly arbitrary. Extradition processes contain significant due process safeguards for the accused, and hence have an important human rights dimension. By contrast, unilateral measures such as abduction or luring are completely unconstrained, the very definition of “arbitrary.” The absence of an extradition treaty between Babbage and Turingia cannot excuse the employment of unilateral, arbitrary measures.

110. Prosecutor, No. IT-95-13A-PT, T Ch. 11 at 487.
111. In re Schmidt, 1 AC at 359 per Sedley J (1995).
112. Prosecutor, No. IT-95-13A-PT, T Ch. 11 at 483; Michell, supra note 92, at 490-91.
114. Prosecutor, No. IT-95-13A-PT, T Ch. 11 at 487; Nowak, supra note 109, at 173.
115. Michell, supra note 92, at 437-38.
2. The high court of Babbage breached a further aspect of the right

A necessary corollary of the right to liberty, recognized in Article 9(4) of the ICCPR, is the right of an accused to obtain an order for release in the event of an arbitrary arrest. The refusal of the Babbagian high court on appeal to make such an order, despite the prior conduct of the criminal enforcement authorities, thus constitutes an independent breach of customary international law.

C. Babbage Was Estopped From Prosecuting Gabrius

1. Babbage may not resile from its legal undertaking

The ICJ has recognized that states may bind themselves to a course of conduct via unilateral undertakings. To be legally effective, the undertaking must be given publicly, with an intention to be bound. The intent behind an alleged undertaking must be assessed in the context of the principle of good faith, with the trust and confidence inherent in international co-operation implying that interested states may place confidence in unilateral declarations. Ultimately, the substance and context of such statements determines their legal effect.

a. Babbage was bound by its undertaking not to prosecute or harm Gabrius

The statement was publicly made by a Minister competent to speak for the Babbagian government on prosecutorial matters. Even if Babbage never intended to be bound by its assurance, the unambiguous content of the statement is determinative. There was no reason for Gabrius to doubt the sincerity of the plea for assistance. In accordance with the principle of good faith, Babbage must be held to its public undertaking.

Although deemed unnecessary in the Nuclear Tests case, any requirement of a valid offer and acceptance would be satisfied on the facts. Gabrius clearly offered his services by way of consideration for the promise of immunity.

119. Id. at 334.
120. Id. at 336.
121. Compromis, supra note 30, at ¶ 23; See also Nuclear Tests, 1974 I.C.J. at 332-33.
D. Babbage is Obliged to Restore Gabrius to Turingia

1. Babbage is obliged at international law to return Gabrius to Turingia

   International law stipulates that the injured state should be returned to the status quo ante following a breach so as to "re-establish the situation which would...have existed if that act had not been committed." An application of the preference expressed in Chorzow Factory for "restitution in kind" requires that Babbage return Gabrius, who was arrested in breach of Turingian sovereignty and Gabrius' human rights, to Turingia. The return of Gabrius would also be consistent with state practice in cases of illegal rendition. Turingia's immediate protest also rebuts any question of waiver of a claim to restitution.

VIII. CONCLUSION AND PRAYER FOR RELIEF

Turingia respectfully asks this Court to declare and adjudge that:

1. Babbage's broad restrictions on access to Internet-available resources, its extension of its criminal code to the Internet, and its application of the code to Turingia OnLine and Babbage Online, violate international law.

2. Babbage is responsible for the loss suffered by Turingia Online and is liable to pay damages in the sum of fifty million dollars.

3. Turingia is not responsible for the damage caused to the Babbage Rail Transit Authority or for any harm resulting from such damage, in particular the train crash resulting in loss of life.


5. David Gabrius must immediately be released and repatriated.

Respectfully submitted,

Agents for Turingia.

126. Michell, supra note 92, at 424-27 and accompanying footnotes.
127. See BROWNLIE, supra note 27, at 31; Michell, supra note 92, at 420-27; Compromis, supra note 30, at ¶ 25.
A. Conventions

2. Convention on Cybercrime, ETS No 185 (opened for signature November 25, 2001)
5. International Covenant on Civil and Political Rights, 1966
8. International Cases

IX. TABLE OF AUTHORITIES

8. Air Services Agreement of 27 March 1946 (1979) 18 RIAA 416
11. Anglo-Iranian Oil Co Case (United Kingdom v. Iran) (1951) ICJ 83
12. Autronic AG against Switzerland, COE-EC HR, Appn No 12726/87, reported March 8, 1989
14. Chorzow Factory (Indemnity) (Germany v. Poland) (1928) PCIJ, Ser A No 17
16. Finnish Shipowners Arbitration (Finland v. United Kingdom) (1934) 3 RIAA 1479
18. Handyside v. United Kingdom Ser A, No 24, 1 EHRR 737 (1979)
21. Lighthouses Arbitration (1956) RIAA, xii 155
22. Lingens v. Austria EHRU (1990)
23. Megalidis v. Turkey 8 Recueil des Decisions des Tribunaux Mixtes 386 (1928)
25. Mobil Oil Iran Inc v. Iran (1987) 16 Iran-US CTR 3
26. Nauililaa Case (Portugal v. Germany) (1928) 2 UNRIAA 1011
27. Norwegian Loans Case (France v. Norway) (1957) ICJ 9
28. Norwegian Shipowners' Claims Case (1922) 1 RIAA 307
29. Nottebohm Case (Second Phase) (Liechtenstein v. Guatemala) (1955) ICJ 4
31. Phosphates in Morocco, Preliminary Objections, (1938), PCIJ, Ser A/B, No 74
32. Prosecutor v. Slavko Dokmanovic, Decision on the Motion for Release by the Accused Slavko Dokmanovic, No IT-95-13a-PT, T Ch II, October 1997
34. Sedco Inc v. National Iranian Oil Company Award (1986) 25 ILM 629
35. Shufeldt Claim (United States v. Guatemala) (1930) 2 RIAA 1083
36. Spanish Zone in Morocco Claims (1925) RIAA, ii, 615
37. S. S. Lotus (France v. Turkey) (1927) PCIJ, Ser A, No 10
39. The Sunday Times v. United Kingdom (No 2) 14 EHRR 229 (1992)
40. Texaco v. Libya (1977) 53 ILR 389
41. Tippetts v. TAMS-ATTA (1985) 6 Iran-US CTR 219
42. Trail Smelter Arbitration (1938, 1941) 3 RIAA 1095
44. United States Diplomatic and Consular Staff in Tehran (United States v. Iran) (1980) ICJ 3
45. Venable Claim (1927) 4 RIAA 219 United Nations Documents
46. Declaration on Friendly Relations, GA Res 2625 (1970)
47. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty, GA Res 2131(1965)
Other Cases and Statutes

52. Babbage Criminal Code
53. Canadian Charter of Rights and Freedoms
55. Electronic Commerce Act (Malta)
56. French Penal Code
57. German Penal Code
58. In re Hartnett 1 OR 2d 206 (1973)
60. Liangsiriprasert v. United States [1991] 1 AC 225 (PC)
62. Republic Act 8792 (Philippines)
64. Tel Or en v. Libyan Arab Republic 726 F2d 774 (1984)
66. United States Constitution

B. Texts

67. Amerasinghe, C., Local Remedies in International Law (1990)
69. Brownlie, I., Principles of Public International Law, (5th ed. 1999)
71. Lauterpacht, H., Oppenheim’s International Law, (8th ed. 1955)
74. Shearer, I., Stark’s International Law, (11th ed 1994)

C. Journals and Yearbooks

75. Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons 35 TLU
76. Legal Opinion on the Decision of the US Supreme Court in the Alvarez-Machain Case, Inter-American Judicial Committee (1992) 13 HRLJ 395
D. Miscellaneous

78. (1964) BPIL 200
81. OECD Expert Committee Recommendation, 1973
84. European Ministers of Justice, Resolution 3, June 2000
86. Compulsory Membership Case, Inter-American Court of Human Rights, Advisory Opinion OC-5/85, November 1985