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# RELATIVE SOVEREIGNTY AND PERMISSIBLE USE OF ARMED FORCE

*Jordan J. Paust*

Sovereignty is a term that does not appear in the United Nations Charter with respect to limitations on the use of armed force, but it is often part of claims and analyses regarding the difference between permissible and impermissible uses of force and intervention. Is sovereignty merely relevant with respect to claims of states to independent power or authority? Is it a construct or process that has been related also to other actors within the international legal process? How has the notion of sovereignty been used with respect to claims in favor of freedom from outside use of armed force and in favor of armed intervention?

First, when addressing such questions, it should be noted that there have been many formal actors and participants in the international legal process other than the state. Claims of rigid state-oriented positivists, especially at the beginning of the last century, that states were the only actors with competencies, rights, and duties under treaty-based and customary international law were patently false. Quite clearly, this recognition is relevant to the notion of sovereignty or retained authority since it would not be incorrect to note that sovereignty has not been held merely by states. Within the international legal process, other actors such as nations, tribal groups and peoples can be understood to have claims to relative sovereignty as well. Yet, the state remains a primary actor and one that claims a relative sovereignty or independence.

Interestingly, if you use Westlaw or Lexis to search for use of the term "sovereignty" in our federal courts, you will discover claims of the Founders and Framers that sovereignty is in the people of the United States, in all of us, and not in any particular political entity. That is because of our democratic revolution in the 1700's and shared expectations that authority exists with and can be delegated by the people, and it is not simplistically in any institutional arrangement that people create. For example, the preamble to the United States Constitution states that "[w]e the People of the United States . . . do ordain and establish" the Constitution and the federal government, not the states or some magnanimous elite. This notion of authority in the people has also found expression in international law. For example, the preamble to the United Nations Charter states similarly that "[w]e the Peoples of the United Nations" have created the Charter, not the states or other actors in the international legal process. The United Nations Charter also identifies the right of self-determination as a right of peoples, not states, and certain forms of human rights law require that the legitimacy of any state's government reflect the will of the people and not merely that

of state elites. An example of such a human right is reflected in Article 21(3) of the Universal Declaration of Human Rights.

A second aspect of sovereignty is worth stressing. Under international law, sovereignty is not absolute. This is especially so in an increasingly interdependent world. It was recognized, for example, by the Permanent Court of International Justice that sovereignty is relative. More generally, with respect to distinctions between permissible and impermissible intervention or what some term the norm of non-intervention, it is important to realize that one criterion often reiterated is contained in the delimiting phrase "external or internal affairs of" a particular state that is reflected, for example, in the normative statement that states have an "obligation not to intervene in the affairs of any other state." But general patterns of practice and legal expectation over time have shifted the focus slightly to save from intervention that which is the affair merely of one state as opposed to that of the international community. Adding to the complexity, the affair of merely one state as such may not be the same as the affair of other actors within that state, such as a relevant nation or peoples, and the latter may more adequately relate to the affairs of a regional or global community.

Violations of human rights are not simply the affair of a single state, nor are international crimes such as genocide in Rwanda or Darfur. In 2005, the international community also recognized what it terms the state's responsibility to protect—an obligation of all states. However, in 2005, the international community apparently would not go further than stating that a particular state has a responsibility to protect its own people from certain deprivations and that if it fails it can be subject to certain sanctions such as political, diplomatic, economic, and perhaps juridic sanctions if the state agrees to such; but the community did not declare that violators can be subject to military sanctions involving use of armed force and/or intervention. More generally, there has been a split within the international community concerning the propriety of humanitarian intervention involving the use of armed force without prior authorization from the United Nations Security Council or a relevant regional organization such as NATO, the Organization of American States (O.A.S.), or the Organization of African Unity (O.A.U.). Quite clearly, such forms of humanitarian intervention as a sanction response would be an inroad on state sovereignty, but state sovereignty is not absolute to begin with and international law clearly conditions what a state may do to its own people within its own territory.

Another inroad on state sovereignty that has been agreed to by the international community involves permissible use of force in self-defense. There is a rich history of use of such an inroad on sovereignty under customary international law, and today Article 51 of the United Nations Charter allows a member state to use self-defense "if an armed attack occurs." Additionally, as Colonel Wollschlaeger remarked, parties to the U.N. Charter have recognized the power and authority of the Security Council to authorize the use of armed force as an enforcement measure in

case of a threat to the peace, breach of the peace, or act of aggression—assuming that a majority makes a decision to that effect and that it is not obviated by a veto of one or more of the five permanent members of the Security Council (which must be exercised, as the Soviet Union learned when it walked out of the room during the Korean war and had thought that its mere abstention would operate as a veto). This form of Security Council enforcement action occurred recently in the case of Libya. Clearly, the authority of the Security Council represents an inroad on sovereignty that has been accepted by each member of the U.N. and the international community as a whole.

An interesting example of such an inroad occurred with respect to use of apartheid by the regime in South Africa during the last century. I remember the claim of the apartheid regime in the 1980s when the Security Council recognized that the system of apartheid constituted a threat to the peace. "What do you mean threat to the peace," they said, "just leave us alone and keep our neighbors out of our country and there will be no threat to the peace." The Security Council did not back down and issued various types of sanctions not amounting to the use of armed force. The U.N. General Assembly also responded in 1984 that the apartheid regime was illegal, that the people of South Africa have a right to overthrow the government and to receive outside assistance during their struggle for political self-determination—what we term self-determination assistance involving the use of military force. Such outside armed force by other members in support of the people of South Africa did not occur, but the regime fell in the face of other forms of sanction and internal revolution. It is another example of Security Council and General Assembly inroads of sovereignty—inroads that are lawful and preferred by the international community in given contexts.

Another permissible inroad on sovereignty that can result in the use of armed force involves what the United Nations Charter terms "regional action." Under Article 52 of the Charter, a regional organization concerned with peace and security can authorize "regional action," at least until the Security Council decides that such is not appropriate, which decision of the Council would be subject to a veto by one or more of the five permanent members of the Security Council. "Enforcement action" as such can only be authorized by the Security Council, but the Charter expressly recognizes the possibility of "regional action" by a relevant regional organization, and such action would clearly be a permissible inroad on state sovereignty.

Use of armed force in Kosovo in the 1990s under the authorization of NATO was an example, although, in my opinion, too many European states and text-writers have not agreed on the propriety of use of force in Kosovo. Recently in the case of Libya, the Arab League authorized use of force to create a no-fly zone over Libya before the Security Council acted to do the same and to further authorize use of armed force in Libya to protect civilians from armed attacks and threats of armed attack. The United States

was involved in the1960s in a regional action when interdicting Soviet missiles from coming into Cuba, under an authorization of the O.A.S. The U.S. did not say that it was engaged in a self-defense operation under Article 51 of the Charter. The U.S. stated that it was engaged in a regional action, according to an authorization from a regional organization; the U.S. was very careful not to mention the word "blockade," which is an act of war, but that it was interdicting Soviet vessels. The remainder of my remarks will focus on issues concerning sovereignty, human rights, and the laws of self-defense and war in connection with U.S. use of armed drones in Pakistan as well as in Yemen. While doing so, I will address points that have been made in far more detail (often with extensive footnotes) in my article in Florida State University's Journal of Transnational Law on *Self-Defense Targetings of Non-State Actors and Permissibility of U.S. Use of Drones in Pakistan*.

One of those points involves some disagreement with Colonel Wollschlaeger and others concerning the status of the ongoing armed conflict in Afghanistan and parts of Pakistan where the actual theatre of war has migrated. The Colonel was discussing issues concerning combatant status and combatant immunity of our military personnel that can pertain in case of an international armed conflict. Importantly, if the United States sends its armed forces abroad to engage in fighting and they engage in combat, we should recognize that such conduct has internationalized whatever armed conflict had been occurring, that our military personnel are participating in an international armed conflict so that they can have combatant and prisoner of war status as well as combatant immunity for lawful acts of war that pertains during an international armed conflict. What specifically does that give them? To lay this out a little bit more, any lawful military action during an international armed conflict is immune from criminal prosecution, and if you are not a combatant with combatant immunity, you are an unprivileged fighter, like various members of al Qaeda. Moreover, members of al Qaeda are not likely to be "combatants" as that term is used in the laws of war. Under the normal test, which requires that they be members of the regular armed forces of a party to an international armed conflict (such as the Taliban), most members of al Qaeda would not have combatant status. They would be unprivileged fighters that had engaged in actual fighting or unprivileged belligerents. I would not use the word "combatant" or the word "belligerent" because it gets confusing. Combatants are members of the regular armed forces of a party to an international armed conflict. They are subject to criminal prosecution for any unprivileged conduct, not as a war crime, but as the Colonel recognized, under relevant domestic law. Relevant domestic law might include that of Yemen, Pakistan, Afghanistan, or the United States. For example, members of al Qaeda who engage in unprivileged fighting or violence are subject to prosecution for murder for killing another person. The U.S. soldier fighting in Afghanistan would not be if the U.S. soldier has

combatant status and combatant immunity and kills in an otherwise lawful manner under the laws of war. That's why I think we should protect our military personnel by recognizing that they are participating in an international armed conflict whenever they are deployed abroad to engage in fighting.

Under 19th Century international law, if the U.S. aided a recognized government to fight insurgents, the U.S. would not be involved in an international armed conflict. Yet, if the U.S. aids the insurgents fighting the government, it is well recognized that the U.S. is engaged in an international armed conflict. And if you are directly involved in a belligerency, like the United States armed forces during the U.S. Civil War (when the Confederate States of America (CSA) controlled territory as its own, which al Qaeda never has; the CSA had the semblance of a government, which I don't think al Qaeda has had; the CSA could field military units in sustained hostilities, and I don't think al Qaeda has done that; and when the CSA had outside recognition as a belligerent by England and certain other countries and, therefore, met the test for a belligerent), you are directly involved in what is known as an international armed conflict to which all of the customary laws of war apply.

Moreover, under the laws of war, it is the fact of war that determines—that drives application of the laws of war and proper labeling of the conflict. So we should be looking at actual context, and it is not critical whether a particular state has recognized that it is involved in a war or international armed conflict. The critical issue is whether there is in fact an armed conflict—what is termed a *de facto* armed conflict. This criterion, the fact of war, is relevant to proper consideration of the fighting or armed conflict occurring in Pakistan, especially around fluid border areas near Afghanistan. Our soldiers are getting killed and wounded in and near those areas and we are killing and wounding an enemy, at least the Taliban. The armed conflict has migrated, as a *de facto* theatre of war, into Pakistan and the laws of war provide rights and duties as well as competencies in terms of who you can target and when you can target them. Application of the laws of war to this expanded international armed conflict should be part of one's use of the war and law of war paradigms and part of the recognition that they are applicable to parts of Pakistan even though one can disagree with the Bush Administration and the Obama Administration when they have stated that we are at war with al Qaeda (a non-state actor that has never achieved the level of an insurgent) because under international law the U.S. simply cannot be at war with al Qaeda as such.

Of course, we were at war with the Taliban, especially when we went into Afghanistan on October 7, 2001 and were immediately fighting their regular armed forces and, with some embarrassment, discovered military personnel from Pakistan who were helping the Taliban fight the Northern Alliance during an international armed conflict that had been at least a belligerency. Members of al Qaeda within that theatre of war were covered

under the laws of war. They had rights and duties as civilians and could be prosecuted under domestic law as unprivileged fighters, but they would not have been combatants or entitled to prisoner of war status like members of the regular armed forces of the Taliban. John Walker Lindh reportedly took an actual oath of allegiance with the Taliban military, and he might have been considered a combatant and entitled to combatant immunity for lawful acts of war, like shooting at enemy soldiers, but I suspect that his defense counsel did not adequately raise such claims before a relevant court. In any event, enemy combatants such as members of the armed forces of the Taliban and civilians who are taking a direct part in hostilities (DPH) are also lawfully targetable during an international armed conflict. Certainly each of these points about status, competencies, rights and duties under the laws of war are also potential inroads on state sovereignty, inroads that are applicable in the context of war.

One such inroad during war and within the war and laws of war paradigms involves who you can lawfully target in a foreign country when the *de facto* theatre of war has migrated to such a country. In the case of parts of Pakistan, for example, where the top Taliban leader in Pakistan is directly involved in operations and is directing attacks on U.S. soldiers in Afghanistan, the top Taliban leader in Pakistan can be lawfully targeted without Pakistani consent. This is because the theatre of war is partly there, over the head of the Taliban leader, as it was over the head of Osama bin Laden. If there was a breach of the neutrality of Pakistan and its sovereignty, it was a breach by al Qaeda and the Taliban. And it should be noted that private individuals and other non-state actors can breach neutrality under international law. For example, in 1793 the United States prosecuted Gideon Henfield, a private actor, for his conduct in breach of U.S. neutrality with respect to the war between England and France.

With respect to U.S. use of armed force in Pakistan to target those who are lawfully targetable under the laws of war and during a *de facto* war that has migrated into parts of Pakistan, some might claim that the United States would need the consent of Pakistan for each such targeting, that the targetings are violations of Pakistani sovereignty. As noted, however, such a claim would be incorrect. Such lawful inroads on sovereignty are permissible when viewing the use of force under war and law of war paradigms. But the alternative that one should use, some might say, is a law enforcement paradigm. Well, generally under international law, if one uses merely a law enforcement paradigm and the state is in a law enforcement mode, the state can only engage in law enforcement in a foreign state with the consent of the highest level officials of the government of that foreign state—therefore, with the consent of the government in the territory from which the attacks are emanating. With respect to armed attacks emanating from Pakistan, I would say that the situation is not simplistically one involving law enforcement or the law enforcement paradigm, especially when the U.S. is targeting the top Taliban leader who is involved in

ordering the killing of U.S. soldiers, or training people, directing operations from maybe a computer or cell phone, and so forth.

With respect to Yemen, when the United States targets a member of al Qaeda who is directly involved in armed attacks on the United States or even U.S. military in Afghanistan, is this a circumstance to be addressed simplistically as a mere law enforcement paradigm? If a member of al Qaeda is giving orders to kill U.S. soldiers in Afghanistan, has the theatre of war migrated to Yemen where he actually engages in such conduct? I would say yes, and it is not necessary to argue that we are at "war" with al Qaeda.

Are we stuck with two or three paradigms—a war and law of war paradigm on the one hand and a law enforcement paradigm on the other? My article on self-defense targetings demonstrates why the answer is no. There is another paradigm that we should be thinking about. It is the self-defense paradigm and it involves inquiry into the legality of conduct under Article 51 of the U.N. Charter. The article provides a great deal of detail concerning the propriety of targetings in a foreign state as a matter of permissible self-defense.

After 9/11, even some writers who were opposed to that kind of interpretation of Article 51 came on board. Article 51 states that use of force is permissible in the case of an armed attack. It does not limit permissibility of self-defense measures in terms of who engaged in an armed attack. Moreover, patterns of practice and patterns of expectation about such practice demonstrate, especially after 9/11, that a state can engage in self-defense against those who are attacking the country, its embassies abroad, and its military abroad. And it is fairly well recognized that an attack on a state's nationals is an attack on the state. Al Qaeda has been attacking our nationals, at least since its attacks on our embassies, the attack on the USS Cole, and the attack on 9/11, and they continue to attack our soldiers, at least our solders in Afghanistan.

In Yemen, do we have a U.S. national who is engaged in more than recruiting people and propagandizing for al Qaeda? Is this person involved in operations? Think about the underwear bomber who came from Yemen and the bags that were placed on a FedEx aircraft and you start to see an interesting picture: maybe he is also directly involved in operations. And if he is, as noted more generally in my article, and we are outside of the context of war, we would not be talking about a person who was DPH (a Direct Participant in Hostilities) and a targetable civilian. But he could be a DPAA (a Direct Participant in Armed Attacks). If an al Qaeda operative is directly participating in armed attacks against the United States, I point out that he is targetable under the law of self-defense in time of peace or in time of war wherever he is engaging in such conduct. There is no geographic limitation on exercise of the right of self-defense. Clearly, permissible self-defense targetings can be an inroad on sovereignty and any other geographic limits.

I would like to challenge you to think about this further, but my conclusions have been that a state can use military force to target non-state DPAA who engage in such conduct within a foreign state, using the general principles that are well recognized to condition military force, under use of force principles of reasonable necessity and proportionality, and borrowing somewhat from related principles of the laws of war. In terms of the principle of distinction under the laws of war, we distinguish between civilians and DPH civilians (who are targetable) and combatants (who are targetable); and under the self-defense paradigm, one can use the same background or basic principles of reasonable necessity and proportionality and apply them as part of inquiry concerning restraints on the use of force.

Moreover, the United States and any other state that is being attacked by a non-state actor does not need special consent of the territorial state from which those attacks emanate. This may be problematic for some of our neighbors to the south who have for a hundred years been leery of Big Brother intervening, under various pretexts, in their countries. We generalize that a lot of Central American, especially Mexico, and South American states are very restrictive in their interpretation of Article 2, paragraph 4, of the U.N. Charter as if it prohibits all armed force instead of merely the three categories of force expressed therein. And they are very restrictive more generally about permissibility of use of force in self-defense. I am much more open regarding the proper interpretation of Article 2(4), but I agree with many others that in cases of self-defense under Article 51, you need an armed attack. In any event, with respect to al Qaeda, there has been a process of armed attacks against the United States and its nationals and we do not need the consent of the territorial state from which those attacks emanate in order to engage in legitimate responsive measures of self-defense.

Of course, this may create some diplomatic problems, but there has often been acceptance of such forms of self-defense. For example, there was acceptance during the famous *Caroline* incident in 1837 when the U.S. was rather weak and the British oppressors in Canada were still controlling Canada. At that time, there was an insurgent group of about one thousand people that had marched to Toronto and had failed to take over Toronto, but they took over Navy Island, near Niagara Falls. The *Caroline* was a ship that, on the day that it was attacked, had traversed back and forth into Canadian waters and had delivered arms, ammunition, and personnel to support the insurgency. It was targetable under the law of self-defense, but the U.S. and Britain disagreed whether the actual targeting was necessary under the circumstances. The British sent two teams into the U.S. and destroyed the *Caroline*. They did it at night, and as it was burning, it went over Niagara Falls. There were two deaths—one dead for sure and one missing. We complained that the British were using military force in our country without our consent. We recognized that Britain (on behalf of Canada) had the right of self-defense. The whole debate was about the

propriety of actual measures of self-defense that the British used. Self-defense against non-state actors—the insurgents—was not a problem, but we claimed that the method and means used had to meet a test that we preferred, although the British disagreed with the test. Under our fairly restrictive test at the time, there had to be an instant, overwhelming necessity tied to the actual method that they chose and, in context, they could have waited in those days until that U.S. ship entered Canadian waters. It would have been rather easy to grab the ship at that point as opposed to entering U.S. territory.

During the debate, U.S. Secretary of State Daniel Webster addressed sovereignty. He stated that sovereignty is an important or major principle that is related to equality, but we recognized that another major principle also exists: the right of self-defense, and in context, the right to engage in self-defense against non-state actor attacks without the consent of the territorial state. Nonetheless, Webster claimed that the British method and means violated relevant principles of necessity and proportionality. Later, one of the British participants wrote that there was no doubt that if there had been an artillery emplacement in the United States and it was firing across the river, the British would have had the right to take out that artillery emplacement. It is my point that such a claim would be correct today, that you can target the artillery emplacement without the consent of the territorial state.

One point needs to be emphasized because some text-writers have claimed that if you are not under the law of war paradigm, you have to meet the standards for law enforcement measures and you have to get consent from the territorial state. There is a stricter test of necessity in a law enforcement setting as such, and such claimants sometimes point to a restrictive view expressed by the European Court of Human Rights. However, the European Court has also recognized, for example, that Russia, with respect to the Chechnya conflict, was not simplistically involved merely in a law enforcement paradigm and necessity gave way to the type of reasonable necessity that is tolerated in the law of war context. From my perspective, when the right of self-defense against non-state actor armed attacks is claimed, we do not need the consent of the territorial state and we do not have to be at war with the state from whose territory the non-state actor attacks emanate. The United States and Britain did not think they were at war during the *Caroline* incident, and they were not. When Bill Clinton sent 75 cruise missiles into Afghanistan to take out al Qaeda, we did not think we were at war with Afghanistan and the international community did not think that there was an armed conflict between the United States and Afghanistan. Yet, after 9/11 occurred we did participate in an international armed conflict—in part because we did not merely go after al Qaeda, we also went after the Taliban.

Some raise another paradigm—a human rights paradigm. When one considers actual trends in decision over time and the many evidences of

patterns of legal expectation, at least from the 1860s, it is obvious that human rights apply during war. The critical questions are: what human rights apply, to what person, and in what context? One such human right is the right to life. What is the human right to life? I have read claims that the use of drones to target people in Pakistan may be a violation of the victims' or the targets' human right to life. Is that true? The human right to life, as phrased in various documents, is recognized as a freedom from "arbitrary" deprivation of life. But what is an "arbitrary" deprivation of life in the context of permissible self-defense or war? Moreover, human rights law does not reach certain persons unless they are within a state's jurisdiction or effective control. Was the top Taliban leader in Pakistan who was targeted by a drone within the jurisdiction of the United States? Not under international law. Was that person in our effective control when the drone might have been at 10,000 feet? Not in my opinion, and I think not in terms of common sense. If so, human rights law did not provide relevant protection to such a person. Moreover, if it had applied, the freedom with respect to the right to life would have been a freedom from arbitrary deprivation of life. You are lawyers, or going to be lawyers. You know that that word is malleable. It is the kind of word that you can drive trucks through. It is not self-operative. It has to be applied in context. It's a lower standard than that under the laws of war or the law of self-defense—much looser than reasonable necessity and proportionality in terms of targeting. In a given case, it may not be necessary to target someone, but it also may not be arbitrary to do so.

So human rights law does apply, but who does it apply to, and where, and who is in your jurisdiction or effective control? What exactly are the human rights that are at stake? When a state controls a detainee, of course, the detainee is in the effective control of the state, even if the detainee is outside the jurisdiction of the state and, of course, the state cannot lawfully engage in torture, cruel treatment, inhuman treatment, or degrading treatment. As we now know, such was part of an admitted policy and program of George Bush. He stated in October 2006 that he had a program of secret detention (which involves admitted crimes against humanity) and enhanced interrogation which included waterboarding—which the world knows amounts to torture and, if not, at least to cruel and inhuman treatment. Mistreatment of a detainee violates human rights law in time of peace or war, as well as the laws of war during war.

Finally, there have been some interesting aspects about who is targetable during war that were raised by the Colonel, concerning who is a DPH and, therefore, who is targetable during war. I would like you to also think about persons who are DPAA when using the self-defense paradigm. What restraints on the use of force would you recommend, and why? If you think we should change the law, if we should change it in a certain direction, what would you recommend and why?

# THE COMING OF AGE OF THE GLOBAL TRADEMARK: THE EFFECT OF TRIPS ON THE WELL-KNOWN MARKS EXCEPTION TO THE PRINCIPLE OF TERRITORIALITY

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## INTRODUCTION

The last two decades have seen a tremendous increase in the growth and vigor of legal protection for intellectual property on a global scale. This is primarily due to the unprecedented inclusion of intellectual property protection in global trade negotiations and the resulting TRIPS Agreement.[2] As a result, through the World Trade Organization, intellectual property protection has transformed from a statutory rule that nations established at their discretion into an international legal regime that each country must adhere to if they wish to be accepted (or remain) as part of the global economy.

Some of the major beneficiaries of the TRIPS Agreement are the holders of global brands that are marketed throughout the world. Most local brand names are protected on a country-by-country basis through individual trademark registrations under a principle known as "territoriality," which provides that a trademark has a separate existence in each sovereign territory where it is registered (or otherwise legally recognized).[3] Under the territoriality principle, the use or registration of a mark in one country would have no bearing on the ability, or inability, of the trademark owner to protect the same trademark in another country. However, many global brand names are entitled to a much broader scope of protection under TRIPS, which expanded the international application and substance of an exception to the territoriality principle for marks that are considered well known. Under the well-known marks doctrine a trademark is protected in a country even if the mark is not used or registered in that country.[4] This doctrine was included in the TRIPS Agreement, with the result that all WTO members acknowledged that well-known marks are entitled to protection as an exception to the territoriality principle. Additionally, TRIPS included provisions for determining when a well-known mark exists and expanded the protection of well-known marks to help the trademark owner prevent the unauthorized use of the trademark on goods and services that are different from the goods and services provided by the owner of the well-known trademark.

This paper reviews the application of the well-known marks doctrine. First, it will present a hypothetical story to help frame the legal issues in real terms that are faced by consumers and trademark holders around the world when third parties sell products bearing famous brands without the

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2. Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, 1869 U.N.T.S. 299, 33 I.L.M. 1125 (1994) [hereinafter TRIPS].

3. *See* 5 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 29:1 (4th ed. 2011).

4. *Id.* § 29:61.

authorization of the owner of the well-known mark. Second, it will review two of the significant international agreements that deal with well-known marks. Finally, it will review cases in several jurisdictions that have applied the well-known marks doctrine.

## I. A CAUTIONARY TALE OF UNAUTHORIZED USE OF WELL-KNOWN TRADEMARKS

Imagine that you are finishing up an exhausting trip in a foreign country that we will call EestLandzing. You have a four hour drive back to the airport and need continuous jolts of caffeine to make sure you will stay awake during the drive. As you walk down the street to your car, you see a CATERPILLAR® outlet store, where they sell thermoses. You happen to have shopped at a CATERPILLAR store in the United States and noticed that the U.S. store sold a similar thermos. The EestLandzing store looks remarkably similar to the U.S. store. You buy a thermos and walk across the street to a STARBUCKS® coffee shop, fill the thermos up to the brim, and drink coffee all the way to the airport. There's a little bit of coffee left in the thermos, so you seal it up and throw it in your suitcase. About halfway through the flight home you start to feel sick. You manage to get home, but still feel quite ill. As you unpack, you find that thermos, and out of curiosity you send it to a friend at the local university food sciences lab and ask for it to be analyzed. A few days later, the friend calls back and tells you that they have bad news and worse news. The bad news is that the coating inside the thermos has trace elements of lead. The worse news is that there was Giardia in coffee, which is a parasite that must have been in the water used for the coffee. You need to go to the doctor and get treated right away.

As you are sitting in the doctor's office waiting area experiencing waves of stomach cramps, you recall meeting the trademark attorneys for Caterpillar and Starbucks at a recent International Trademark Association (INTA) conference.[5] You write them both nasty emails, describing in great detail your experience and your discomfort that has been caused by their products. A few days later and ten pounds lighter, but assured by blood tests that your lead levels are still within a safe range and the Giardia are no longer running amok in your intestinal tract, you get notes back from both attorneys. The Starbucks attorney expresses sorrow at your discomfort, but informs you that they do not have any stores in EestLandzing, and, in fact,

5. INTA is an association of trademark owners, trademark attorneys and academics dedicated to the support and advancement of trademarks and other intellectual property. INTA's membership consists of 5,700 trademark owners, professionals and academics from more than 190 countries. See the INTA website at http://www.inta.org. INTA has been described as the largest organization of trademark owners worldwide. *See* Xuan-Thao Nguyen, *The Other Famous Marks Doctrine*, 17 TRANSNAT'L L. & CONTEMP. PROBS. 757, 772 (2008).

that they do not own the STARBUCKS trademark in EestLandzing. The Caterpillar attorney writes back, indicating that although they own the CATERPILLAR trademark for the tractors and farm equipment they sell in the country, they do not operate or authorize outlet stores there and do not sell, or own a trademark for, thermoses in EestLandzing. Upon further inquiries that you make through your friends in EestLandzing, you discover that both the STARBUCKS store and the CATERPILLAR store are run by third parties who are not related to, or authorized by, the global corporations that you know as Starbucks and Caterpillar.[6] Both the Starbucks attorney and the Caterpillar attorney indicate that they aggressively protect their trademark rights around the world and try to protect consumers from the problems you experienced; however, a few countries still do not recognize the right of holders of well-known trademarks to prevent unauthorized local third parties from using these globally recognized brands in the manner that you just experienced. They each finally conclude their notes by informing you that the United States is one of those countries that has failed to amend its trademark law to recognize well-known trademarks (that foreign companies that have a globally recognized brand that is not used in the United States do not have a clear right under the federal statute know as the Lanham Act to protect against unauthorized third parties from using the global brand).

You have just painfully discovered why well-known trademarks need to be protected. Trademarks often serve as a measure of consumer protection. Because the CATERPILLAR and STARBUCKS trademark were not protected in EestLandzing, and were actually being used by a third party, you did not receive the quality you expected from the products bearing the trademark.

The historical policy reasons for protecting trademarks are quite different from most other types of intellectual property. Where patents and copyrights grew out of a desire to provide an economic incentive for creativity and innovation, trademarks originated from the need to protect consumers from goods that did not originate from the trademark owner. Patents and copyrights are intended to provide a direct economic benefit to the creator of a copyrightable work or invention. The policy basis for protection of trademarks, on the other hand, is focused on protecting the consumer. The purpose of a trademark is to indicate to the consumer the source or origin of the goods. It assures consumers that quality of goods are the same as they have come to expect from products and services bearing that mark.[7] This

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6. For a real life example of fake stores, see Louise Watt, *iFraud: Entire Apple Stores Being Faked in China*, ASSOCIATED PRESS, July 21, 2011, *available at* http://news.yahoo.com/ifraud-entire-apple-stores-being-faked-china-165243322.html.

7. *See* MCCARTHY, *supra* note 3, §§ 3:1-3:10. Trademarks also protect the goodwill that the owner of the mark has created in the brand. So, for example, goodwill allows Starbucks to charge US $4.00 for a cup of STARBUCKS brand coffee that might be less for a similar beverage at a different coffee shop. This concept of trademark protection being

policy is one of the reasons that well-known trademarks have, over the past several years, received an expanded scope of protection.

## II. THE GENERAL RULE OF TRADEMARK PROTECTION – LIMITED TO CLASS AND SPECIFIC COUNTRY

In order obtain trademark protection, the trademark owner must file an application to register the trademark with the trademark office in each particular country. In general, trademark protection is limited to each particular country where the trademark is registered and the particular class of goods for which the trademark has been registered.[8]

There are 45 classes of goods and services for which a trademark may be registered.[9] For a variety of reasons, trademark owners often are only able to register their trademark in the specific classes that match the goods and services on which the trademark is used. So, for example, the CATERPILLAR trademark may be registered and protected in Class 7 for machinery and farm implements, but the owner of the mark in that class may not have a registration for Class 21, which covers such goods as housewares and glass.[10]

Additionally, trademark rights are territorial – the protection of the trademark only applies in the particular country where the registration has been granted. So, normally when you file a trademark in a particular country, you are only getting territorial protection in that specific country in a specific class.

## III. THE ISSUES FOR WELL-KNOWN TRADEMARKS

Two problems exist with the territorial and class approach of protecting trademarks. First, a trademark might be famous around the world (such as COCA COLA®), but if it is not registered and/or used in a country, the

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based on the economic investment of the trademark owner has grown over the past few decades, but the original policy basis for trademarks was based on consumer protection and not on an economic policy to protect the investment of brand owners to create goodwill in the brand. *See id.* at § 2:4.

8. Many common law countries will also protect trademarks based on use without registration. However, the same limited protection applies for these "common law trademarks" – the scope of protection only applies to particular goods or services on which the trademark as been used and the protection is limited to the extent to which the trademark has been used in that particular country (no recognition in one country is given based on use in another country).

9. *See* WIPO, International Classification of Goods and Services for the Purposes of the Registration of Marks Under the Nice Agreement, v, vi (9th ed. 2006),) *available at* http://www.wipo.int/classifications/nice/en/classifications.html.

10. The result of separate class registrations is that two completely different entities may have registration for the same word. For example, Dove is a registered U.S. trademark of Mars, Incorporated for chocolates. DOVE, Registration No. 2,012,056. Dove is also a registered U.S. trademark of Unilever for soap. DOVE, Registration No. 2,534,236.

trademark owner may have no right to prevent third parties from using the trademark in that country despite the fact that local consumers are well aware of the mark and may expect the products bearing the mark to be authorized by the owner of the well-known-mark. This problem is illustrated in the hypothetical: STARBUCKS may have been well-known in EestLandzing by a certain sector of the public, but it was not protected there.

The second problem is that even if a well-known trademark is registered in a particular country, the trademark owner will have difficulty in preventing a third party from using the trademark on products in a different class of goods. In the hypothetical, Caterpillar had a registration for farm implements, but not for thermoses. How do we make sure that consumers are not misled?

## IV. THE DEVELOPMENT OF INTERNATIONAL LAW PROTECTING WELL-KNOWN TRADEMARKS

The answers to these questions first began to be addressed in the Paris Convention for the Protection of Industrial Property.[11] The original version of the Paris Convention set forth in Article 6 the general principle of territoriality for the protection of trademarks, which is that a trademark has a separate existence in each country. In essence, the territoriality principle is the idea that ownership of a trademark in one country does not confer to the owner the right to the use and protection of the mark in another country. Once the registration of a mark is obtained in a contracting state, it is independent of its possible registration in any other country, including the country of origin.[12]

In 1925, the members of the convention agreed to an exception to the territoriality principle for trademarks. The members agreed to add Article 6*bis* to the convention, which provided for member countries to cancel

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11. Paris Convention for the Protection of Industrial Property, March 20, 1883, 21 U.S.T. 1583 828 U.N.T.S. 305 (as revised at Stockholm on July 14, 1967) [hereinafter Paris Convention], http://www.wipo.int/treaties/en/ip/paris/. The first version of the Paris Convention became effective in July 7, 1884. By the end of the 19th century the Paris Convention only had 19 signatories, which included Belgium, Brazil, El Salvador, Ecuador, France, Great Britain, Guatemala, Italy, the Netherlands, Portugal, Tunisia, Serbia, Spain, Switzerland and the United States. After World War II membership in the Paris Convention increased significantly. A current list of members to the convention can be found at http://www.wipo.int/treaties/en/ShowResults.jsp?country_id=ALL&start_year=ANY&end_year=ANY.

12. *See* WIPO, *Summary of the Paris Convention for the Protection of Industrial Property (1883)*, http://www.wipo.int/treaties/en/ip/paris/summary_paris.html (last visited Sept. 30, 2011).

registrations and prohibit the use by third parties of marks that are already well-known in that country.[13] Article 6*bis* provides as follows:

> The countries of the Union undertake, ex officio if their legislation so permits, or at the request of an interested party, to refuse or to cancel the registration, and to prohibit the use, of a trademark which constitutes a reproduction, an imitation, or a translation, liable to create confusion, of a mark considered by the competent authority of the country of registration or use to be well-known in that country as being already the mark of a person entitled to the benefits of this Convention and used for identical or similar goods.[14]

Article 6*bis* provides an exception to the territoriality principle for well-known marks: if a trademark is well-known in a member country, it is entitled to protection even though the mark is not registered or used in that country. The protection of the well-known trademark results not from the registration or use in the country in question, but from the mere fact of its reputation.[15] The rationale for protection of well-known trademarks is based on the idea that the use of a trademark that is the same or similar to a well-known trademark would amount to an act of unfair competition and be prejudicial to the interests of the public, who would be misled by the use of a conflicting trademark.[16]

Under the Paris Convention, what constitutes a well-known mark, and the degree of proof required to show that the mark has achieved sufficient notoriety, is up to the trademark office and the courts of each member country according to their domestic laws and regulations. Additionally, the question of protecting a well-known mark outside its class of goods was not addressed in the Paris Convention.

Then came the TRIPS Agreement which imposed the rules of the Paris Convention on all WTO member states, established a principle for the determination of when a trademark has become well-known, and required members to provide further protection for well-known marks outside the class of goods for which the well-know mark is registered.

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13. *See* MCCARTHY, *supra* note 3, § 29:62 (referring to Article 6*bis* as "the cornerstone of on international protection of "well-known" marks").

14. *Id.*

15. WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE § 5.82 (2d ed. 2004), *available at* http://www.wipo.int/export/sites/www/about-ip/en/iprm/pdf/ch5.pdf#paris/ [hereinafter WIPO HANDBOOK].

16. *Id.* § 5.83.

## V. THE TRIPS AGREEMENT EXPANDED PROTECTION OF WELL-KNOWN MARKS

TRIPS created a set of global principles for the protection of well-known marks. Unlike previous international instruments for IP protection, TRIPS is linked to the global trading system. As a result, countries that might otherwise have chosen to continue with the general rule of territoriality for trademarks without the exception for well-known marks were coerced into accepting the rules for the protection of well-known marks or risked losing access to essential markets for goods and services that they export. Furthermore, the provisions of the TRIPS Agreement have real teeth: a Member that fails to comply will be subject to the enforcement provisions of the WTO agreement.[17]

So what did TRIPS do? First, it forced all WTO members to comply with the Paris Convention, including Article 6 for the protection of trademarks and Article 6*bis* for the protection of well-known trademarks.[18] TRIPS then went further and significantly expanded the protection of well-known trademarks under Article 16 of the Agreement, which reads as follows:

> Rights Conferred
>
> 1. The owner of a registered trademark shall have the exclusive right to prevent all third parties not having the owner's consent from using in the course of trade identical or similar signs for goods or services which are identical or similar to those in respect of which the trademark is registered where such use would result in a likelihood of confusion. In case of the use of an identical sign for identical goods or services, a likelihood of confusion shall be presumed. The rights described above shall not prejudice any existing prior rights, nor shall they affect the possibility of Members making rights available on the basis of use.
>
> 2. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to services. In determining whether a trademark is well-known, Members shall take account of the knowledge of the trademark in the relevant sector of the public, including knowledge in the Member concerned which has been obtained as a result of the promotion of the trademark.

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17. *See* Brian Manning &Srividhya Ragavan, *The Dispute Settlement Process Of The WTO: A Normative Structure To Achieve Utilitarian Objectives,* 79 UMKC L. REV. 1, 3 n.12 (2010) (citing J.H. Reichman, *Universal Minimum Standards of Intellectual Property Protection Under the TRIPs Component of the WTO Agreement*, 29 INT'L L.LAW 345 (1995) (discussing how, taken together, the enforcement and dispute-settlement provisions of the TRIPS Agreement put teeth into the pre-existing intellectual property conventions)).

18. TRIPS, *supra* note 2, art. 2.

> 3. Article 6*bis* of the Paris Convention (1967) shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services would indicate a connection between those goods or services and the owner of the registered trademark and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.[19]

Section 2 of Article 16 establishes a basic standard under which a Member States must determine a well-known mark. Importantly, the mark is not required to be known by all members of the public in the member state, but only by "the relevant sector of the public," and Member States must consider the extent to which the mark has been promoted to such members of the public.

Section 3 of Article 16 expanded the Paris Convention rules on well-known marks to dissimilar goods. Where the Paris convention protected well-known trademarks from other parties who wanted to use the mark on "the same or similar goods," TRIPs now protects well-known trademarks from a third party's use of the well-known mark on other classes of goods if (1) the third party's use of that trademark on dissimilar goods would indicate a connection between those goods or services, and (2) the interests of the owner of the well-known trademark are likely to be damaged by such use. Note, however, that section 3 of Article 16 refers to trademarks that are registered in the country in question. So, in our hypothetical, CATERPILLAR was a registered trademark for tractors in the country of EestLandzing. If the mark was deemed well-known by relevant consumers, the owner of the mark under TRIPS might be able to prevent a third party from using CATERPILLAR on thermoses since you, as a consumer, were confused and thought the thermos was made or authorized by the well-known mark owner, and the owner's interest in maintaining the well-known mark as a symbol of quality was damaged by the third party's use.

TRIPS had the effect of moving the protection of intellectual property, including the protection of well-known marks, out of the rarified atmosphere of normal treaty law and pushing it aggressively into the global trading system.[20] Countries that want to join, or remain, as members of the

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19. TRIPS, *supra* note 2, art. 16.

20. The Paris Convention is administered by WIPO, which had not been very successful in achieving a harmonized standard for intellectual property protection. *See* Edward Kwakwa, *Some Comments on Rulemaking at the World Intellectual Property Organization*, 12 DUKE J. COMP. & INT'L L. 179 (2002) (discussing the difficulty of creating harmonized rules for intellectual property through the WIPO process of negotiating international treaties). The author states that, "[i]nternational intellectual property regulation and oversight requires a system of norm-creation that is flexible enough to adapt to a dynamic, fast-paced, and technologically driven area of law. This fundamentally conflicts with the primary historical structure and means of rulemaking in international law – the multilateral treaty-making process. WIPO has traditionally used the multilateral treaty-

WTO are required to recognize the intellectual property rules established by TRIPS. As a result, significant case law has developed around the world that has established protection of well-known trademarks.

## VI. INTERNATIONAL CASE LAW PROTECTING WELL-KNOWN TRADEMARKS THAT ARE NOT REGISTERED

TRIPS has had a profound influence on the international trademark community. The principles set forth in TRIPS for the protection of well-known trademarks have steadily taken hold in the courts of many nations around the world.

### A. The MCDONALD'S Case – South Africa

One of the first major cases decided after TRIPS became effective was in South Africa for the MCDONALD'S trademark.[21] Beginning in 1968, the McDonald's corporation had obtained registrations for twenty seven trademarks that incorporated the word "McDonald" or "McDonald's." However, due to the international boycott of South Africa, they had not used the brand in South Africa.[22] As a result, under South African trademark law the marks were subject to possible cancellation for non-use. In 1992, a third party known as Joburgers Drive-Inn began using the name MCDONALD'S, BIG MAC, and the golden arches design on fast food outlets and restaurants.[23] Joburgers then applied to register these marks while also applying to expunge the McDonald's Corporation's trademarks from the register.[24] The parties brought suit against each other. The trial court ruled in favor of Joburgers based on a finding that McDonald's Corporation had failed to use its trademark and that the trademark was not eligible for protection as a well-known trademark because there was not sufficient knowledge of the mark through all levels of South African society.[25] On appeal, the Appellate Division of the South African Supreme

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making process to create rules under its auspices." *Id.* at 181. *See also* Christopher M. Gacek, *U.S. Goals for Patent Protection in the Gatt Trade Talks*, THE HERITAGE FOUNDATION, October 31, 1991, http://www.heritage.org/research/reports/1991/10/bg863-us-goals-for-patent-protection-in-the-gatt-trade-talks (criticizing the WIPO as "a feckless United Nations body" and stating that "WIPO's value is in settling technical issues such as the definition of what can be patented. It is not an instrument, however, for protecting intellectual property"). It was this type of ardent criticism in industrialized nations during the 1980s and early 1990s that pushed for the protection of intellectual property through the global trading system and the TRIPS Agreement.

21. McDonald's Corp. v. Joburgers Drive-Inn Restaurant (Pty.) Ltd. 1997 (1) SA 1 (SCA) (S. Afr.).

22. MCCARTHY, *supra* note 3, § 29:62.

23. *McDonald's Corp*., 1997 (1) SA 1 (SCA) at 4 (S. Afr.).

24. *Id.* at 4-5.

25. MCCARTHY, *supra* note 3, § 29:62.

Court disagreed with the trial court and, in so doing, extensively reviewed a new provision of the South African trademarks act, known as Section 35, that provided for the protection of well-known trademarks. Although the appellate court did not refer to Article 16(2) of the TRIPS agreement, it disagreed with the trial court that a well-known mark must be known throughout the general public.

> Section 35 of the new act was intended to provide a practical solution to the problems of foreign businessmen whose marks were known in South Africa but who did not have a business here. The South African population is a diverse one in many respects. There are wide differences in income, education, cultural values, interests, tastes, personal life styles, recreational activities, etc. This was obviously known to the legislature when it passed the new act. If protection is granted only to marks which are known (not to say well-known) to every segment of the population (or even to most segments of the population) there must be very few marks, if any, which could pass the test. The legislation would therefore not achieve its desired purpose. Moreover, there would not appear to be any point in imposing such a rigorous requirement. In argument we were referred as an example to a mark which might be very well-known to all persons interested in golf. Why should it be relevant, when deciding whether or not to protect such a mark, that non-golfers might never have heard of it? I consider therefore that a mark is well-known in the Republic if it is well-known to persons interested in the goods or services to which the mark relates.[26]

The court then reviewed the evidence that established MCDONALD'S as a well-known trademark to the relevant public.

> I turn now to the evidence concerning the extent to which the McDonald's trade marks are known in the Republic. As I have stated earlier, McDonald's is one of the largest, if not the largest, franchiser of fast food restaurants in the world. At the end of 1993 there were 13 993 McDonald's restaurants spread over 70 countries. The annual turnover of McDonald's restaurants amounts to some $23 587 million. McDonald's trade marks are used extensively in relation to its own restaurants as well as to those that are franchised. The level of advertising and promotion which has been carried out by McDonald's, its subsidiaries, affiliates and franchisees in relation to McDonald's restaurants exceeds the sum of $900 million annually. Their international marketing campaigns have included sponsorship of the 1984 Los Angeles and 1992 Barcelona Olympics. McDonald's has also been a sponsor of the 1990 soccer World Cup Tournament in Italy and the 1994 World Cup Soccer Tournament in the United States of America. Mr Paul R Duncan, the vice president and general counsel of McDonald's, stated on affidavit that, in view of the vast scale of his organisation's operations, the McDonald's trade marks are in all probability some of the best known trade marks in the world. This was

26. *McDonald's Corp*., 1997 (1) SA 1 (SCA) at 35-37 (S. Afr.) (emphasis added).

> not denied. Although there was no evidence on the extent to which the advertising outside South Africa spilled over into this country through printed publications and television, it must, in all probability, be quite extensive. In addition the McDonald's trade marks would be known to many South Africans who have travelled abroad. This again would not be an insignificant number. [ . . . The court then referred to survey evidence of the relevant public showing upwards of 77% of the relevant population were aware of the name MCDONALD'S, and/or the MCDONALD'S logos/trademarks]
>
> . . . .
>
> The evidence adduced by McDonald's leads, in my view, to the inference that its marks, and particularly the mark MCDONALD'S, are well-known amongst the more affluent people in the country. People who travel, watch television, and who read local and foreign publications, are likely to know about it. They would have seen McDonald's outlets in other countries, and seen or heard its advertisements there or its spillover here in foreign journals, television shows, etc.
>
> . . . .
>
> I consider therefore that at least a substantial portion of persons who would be interested in the goods or services provided by McDonald's know its name, which is also its principal trade mark. . . . [T]his mark is in my view well-known for the purposes of sec 35 of the new Act. [27]

As a result of this case, the South African courts not only implemented the new law protecting well-known marks that are not used in the country, but also embraced the standard of proof set forth in TRIPS for well-known marks based on the knowledge of the mark in the relevant sector of the public rather than the entire population of the country.

### B. The WHIRLPOOL Case – India

About the same time as the South African decision, the courts in India were reviewing a well-known trademark case in which the largest appliance manufacturer in the world, U.S. based Whirlpool Corporation, had filed suit against an Indian company that was using WHIRLPOOL for washing machines. Whirlpool Corporation had originally registered the WHIRLPOOL mark in India in the late 1950s but had not renewed the registration since 1977. In 1986, a company known as known as Chinar Trust filed an application to register the trademark WHIRLPOOL in India, and eventually such application was granted despite Whirlpool Corporation's opposition. Whirlpool Corporation then brought an action in

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27. *Id.* at 44-65.

the Delhi High Court, seeking an injunction to prevent Chinar Trust from using the WHIRLPOOL name. At that time, Whirlpool Corporation was selling its appliances in a large number of countries around the world but not directly in India.[28] However, Whirlpool Corporation was able to show extensive global sales and advertising of the WHIRLPOOL trademark. Whirlpool Corporation produced significant amounts of evidence to support its claim of a well-known trademark, including market share data for a large number of countries around the world, registration of the WHIRLPOOL trademark in 65 jurisdictions, successful enforcement actions in a number of countries of its WHIRLPOOL trademark, consumer surveys, advertisements going back decades, and sales data going back decades. In addition, the plaintiff was able to provide evidence that it had advertised its WHIRLPOOL brand appliances in magazines having international circulation, including in India. The Delhi High Court found for Whirlpool Corporation and gave the following statement as part of its rationale:

> It is not necessary in the context of present day circumstances the free exchange of information and advertising through newspapers, magazines, video television, movies, freedom of travel between various parts of the world to insist that a particular plaintiff must carry on business in a jurisdiction before improper use of its name or mark can be restrained by the court. . . . [T]he main consideration is the likelihood of confusion and consequential injury to the plaintiff and the need to protect the public from deception, where such confusion is prima facie shown to exist, protection should be given by courts to the name or mark.[29]

On appeal, the Indian Supreme Court upheld the ruling in favor of Whirlpool Corporation.[30] As a result, the courts in India have provided further support for the principle that well-known trademarks can be protected in countries where the mark has not been registered and goods bearing the mark have not been sold. The case is particularly known for establishing the concept that significant supporting evidence for a establishing a mark as well-known (and eligible for protection despite the lack of registration and non-use) can be established by showing that advertisements by the trademark owner have reached the relevant public in the country.

### C. WIPO Helps Establish Evidentiary Requirements

As the case law on well-known trademarks began to develop, the World Intellectual Property Organization (WIPO) in 1999 provided further

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28. Whirlpool Corporation was able to show some sales to the U.S. embassy and US AID in India.

29. Whirlpool Corp. v. N.R. Dongre (1994) 56DLT 304; 1995 (32) DRJ 318 (India).

30. N.R. Dongre v. Whirlpool Corp., 1996 PTC (16) 583 SC (India).

guidance on the evidentiary requirements for well-known marks in a Joint Recommendation concerning the Provisions on the Protection of Well-Known Marks.[31] The Provisions provided that the following factors should be considered in determining whether a trademark is well-known:

> 1. the degree of knowledge or recognition of the mark in the relevant sector of the public;
>
> 2. the duration, extent and geographical area of any use of the mark;
>
> 3. the duration, extent and geographical area of any promotion of the mark, including advertising or publicity and the presentation, at fairs or exhibitions, of the goods and/or services to which the mark applies;
>
> 4. the duration and geographical area of any registrations, and/or any applications for registration, of the mark, to the extent that they reflect use or recognition of the mark;
>
> 5. the record of successful enforcement of rights in the mark, in particular, the extent to which the mark was recognized as well known by competent authorities;
>
> 6. the value associated with the mark.[32]

### D. The STARBUCKS Case – Russia

One additional case of interest relating to the protection of well-known marks that are not used in a country involves the STARBUCKS mark in Russia. Russia is seeking admission to the WTO. As part of its efforts to join the international trading community, it has begun implementing laws to ensure TRIPS compliance. In 2002, the Russian Federation amended their trademark law to include protection for well-known trademarks.[33]

The Seattle-based Starbucks Corporation registered its STARBUCKS trademark in Russia in 1997.[34] However, because of the poor economy in Russia at that time, the company did not open any STARBUCKS coffee

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31. WIPO & Paris Union for the Protection of Industrial Property, *Joint Recommendation Concerning Provisions on the Protection of Well-Known Marks* WIPO Doc. 833(E) (Sept. 29, 1999), *available at* http://www.wipo.int/about-ip/en/development_iplaw/pub833.htm.

32. *Id.*

33. Law of Russian Federation # 3520-1 On Trademarks, Service Marks and Appellations of Origin of Goods of September 23, 1992 with changes and amendments introduced by Federal Law No. 166-FL on December 11, 2002, and entering into force on December 27, 2002, Sobr. Zakonod. RF, 2002, No.3520-1.

34. Andrew E. Kramer, *Starbucks Opens its First Shop in Russia*, INT'L HERALD TRIB., Sept. 7, 2007, at 10.

shops in Russia, and several years passed after the registration of the mark.[35] In 2002, a third party, Sergei A. Zuykov, filed for the cancellation of the Starbucks Corporation's trademark for non-use.[36] Upon successfully cancelling the marks, Mr. Zuykov then applied for the STARBUCKS trademark in the name of his company and announced plans to establish a chain of STARBUCKS coffee shops.[37] Mr. Zuykov's company then offered to sell his rights in the STARBUCKS mark to Starbucks Corporation for US$600,000.[38] Mr. Zuykov's approach was a common approach for trademark "pirates" in Russia. These pirates had a lucrative business model of registering famous trademarks that were not used in Russia and then selling the rights back to the multinational owner of the mark. However, Starbucks Corporation refused the offer and brought an action in the Russian trademark office to cancel Mr. Zuykov's registration. The trademark office ruled in favor of Starbucks Corporation.[39] The decision was upheld on appeal, which allowed Starbucks Corporation to register the STARBUCKS trademarks in its own name and begin opening genuine STARBUCKS coffee shops in Russia.[40]

As the Russian trademark office and the Russian courts have continued to enforce the rights of well-known trademarks, the trademark piracy business that was once flourishing in Russia has dwindled, and it appears to be more difficult for third parties to register well-known marks owned by multinationals.[41]

### E. The GRUPO GIGANTE and BUKHARA Cases – Split Circuits in the United States

Perhaps the most significant controversy over application of the well-known marks doctrine has occurred in the United States. The 9th Circuit has recognized the protection of well-known marks. However, the 2nd Circuit has refused to acknowledge well-known marks of foreign trademark holders because the TRIPS Agreement is not self-executing, and therefore,

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35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.*
39. MCCARTHY, *supra* note 3, § 29:61.
40. Kramer, *supra* note 34.
41. Telephone Interview with Eugene Arievich, Partner, Baker & McKenzie (Feb. 2011). Mr. Arievich is Co-Counsel to the Coalition for Intellectual Property Rights (CIPR) and co-author of CIPR monographs on Well-Known Marks in countries of the former Soviet Union. He is also the co-author of the Russian Federation section of a publication analyzing national and international laws protecting well-known trademarks published by the International trademark association. *See* Eugene A. Arievich & Janet L. Hoffman, *Russian Federation*, *in* FAMOUS AND WELL-KNOWN MARKS: AN INTERNATIONAL ANALYSIS 4-293, 4-293 n.* (Frederick W. Mostert ed., INTA 2d ed. Aug. 2009) (2004).

according to the 2nd Circuit, the well-known marks doctrine has not been incorporated into federal trademark law.

In the 9th Circuit case, a Mexican company, Grupo Gigante, operated a chain of grocery stores under the GIGANTE trademark.[42] Grupo Gigante registered the mark in Mexico in 1963.[43] By 1991, the chain had almost 100 stores in Mexico, including two in Tijuana, a city on the Mexican border only a few miles south of San Diego.[44] In the 1990s, two brothers, Michael and Chris Dallo, opened two stores in San Diego under the name "GIGANTE MARKET."[45] When Grupo Gigante expanded into the United States by opening GIGANTE stores in Los Angeles, the Dallo brothers sent Grupo Gigante a cease and desist letter, and litigation ensued.[46] A number of issues, including laches, affected the ultimate outcome of the case.[47] However, with respect to the issue of well-known marks, both the federal district court, and on appeal the 9th Circuit, recognized the well-known mark exception (which the court referred to as the "famous mark exception") to the territoriality principle.[48] The 9th Circuit decision included the following analysis:

> A fundamental principle of trademark law is first in time equals first in right. . . . .
>
> Under the principle of first in time equals first in right, priority ordinarily comes with earlier *use* of a mark in commerce. . . . . If the first-in-time principle were all that mattered, this case would end there. It is undisputed that Grupo Gigante used the mark in commerce for decades before the Dallos did. But the facts of this case implicate another well-established principle of trademark law, the "territoriality principle." The territoriality principle, as stated in a treatise, says that "[p]riority of trademark rights in the United States depends solely upon priority of use in the United States, not on priority of use anywhere in the world." Earlier use in another country usually just does not count. Although we have not had occasion to address this principle, it has been described by our sister circuits as "basic to trademark law," in large part because "trademark rights exist in each country solely according to that country's statutory scheme." While Grupo Gigante used the mark for decades before the Dallos used it, Grupo Gigante's use was in Mexico, not in the United States. Within the San Diego area, on the northern side of the border, the Dallos were the first users of the "Gigante" mark. Thus, according to the territoriality principle, the Dallos' rights to use the mark would trump Grupo Gigante's.

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42. Grupo Gigante v. Dallo & Co., 391 F.3d 1088, 1091 (9th Cir. 2004).
43. *Id.*
44. *Id.*
45. *Id.*
46. *Id.* at 1092.
47. *Id.*
48. *Grupo Gigante*, 391 F.3d at 1092.

> Grupo Gigante does not contest the existence of the territoriality principle. But like the first-in-time, first-in-right principle, it is not absolute. The exception, as Grupo Gigante presents it, is that when foreign use of a mark achieves a certain level of fame for that mark within the United States, the territoriality principle no longer serves to deny priority to the earlier foreign user.
>
> There is no circuit-court authority--from this or any other circuit--applying a famous-mark exception to the territoriality principle. We hold, however, that there is a famous mark exception to the territoriality principle. While the territoriality principle is a long-standing and important doctrine within trademark law, it cannot be absolute. An absolute territoriality rule without a famous-mark exception would promote consumer confusion and fraud. Commerce crosses borders. In this nation of immigrants, so do people. Trademark is, at its core, about protecting against consumer confusion and "palming off." There can be no justification for using trademark law to fool immigrants into thinking that they are buying from the store they liked back home.[49]

The 2nd Circuit reached the opposite decision in the 2007 case of *ITC Ltd. v. Punchgini, Inc.*[50] The plaintiff ITC owns and operates the five star ITC Maurya hotel in New Delhi, India.[51] The BUKHARA restaurant inside the hotel is claimed by ITC to be rated among the best 50 restaurants in the world.[52] ITC has operated the New Delhi restaurant since 1977 and at various times has operated other BUKHARA restaurants in cities such as Hong Kong, Singapore, Bangkok, Bahrain, Kathmandu, Ajman, Chicago, and New York.[53] However, the New York restaurant only remained open for five years from 1986-91, and the Chicago restaurant closed after ten years of operation from 1987-97.[54]

A few years after the Chicago restaurant closed, several previous employees of the BUKHARA restaurant in New Delhi formed Punchgini, Inc. for the purpose of opening restaurants in New York, which were named BUKHARA GRILL.[55] When asked how the name was chosen, one of the Punchgini shareholders admitted that there was at the time "no restaurant Bukhara in New York and we just thought we will take the name."[56] In addition to the name, the BUKHARA GRILL restaurants mimicked the ITC BUKHARA's logos, décor, staff uniforms, wood slab menus, and red

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49. *Id.* at 1093-94 (emphasis added).
50. ITC Ltd. v. Punchgini, Inc., 482 F.3d 135 (2d Cir. 2007).
51. *Id.* at 142-43.
52. *See* ITC Hotels web site, http://www.itcportal.com/itc-business/hotels.aspx (last visited Sept. 30, 2011).
53. *ITC Ltd.*, 482 F.3d at 143.
54. *Id.*
55. *Id.* at 144.
56. *Id.*

checkered customer bibs.[57] One Punchgini shareholder was quoted as saying that the BUKHARA GRILL "is quite like Delhi's Bukhara."[58]

When ITC sued Punchgini, the district court was not convinced that ITC could bring a claim under the well-known marks doctrine and dismissed the case on summary judgment.[59] On appeal, the 2nd Circuit considered this issue in depth and concluded that the well-known marks doctrine is not a part of federal law.[60] The court noted that Congress has amended federal trademark law, the Lanham Act, numerous times and has failed to incorporate the well-known marks doctrine into the statute.[61] The court also stated that, "TRIPS is plainly not a self executing treaty" and "the Paris Convention creates no substantive United States rights beyond those independently provided in the Lanham Act." [62] As a result, the 2nd Circuit held that the well-known marks doctrine is not an exception to the territoriality principle under current federal law, which the court stated in no uncertain terms, requires a trademark holder to use the mark in the United States.[63]

> The principle of territoriality is basic to American trademark law. . . . .
>
> Precisely because a trademark has a separate legal existence under each country's laws, ownership of a mark in one country does not automatically confer upon the owner the exclusive right to use that mark in another country. Rather, a mark owner must take the proper steps to ensure that its rights to that mark are recognized in any country in which it seeks to assert them. . . . .
>
> The territoriality principle requires the use to be in the United States for the owner to assert priority rights to the mark under the Lanham Act.[64]

The Second Circuit's blunt assertion that Congress has failed to incorporate the substantive aspect of the well-know marks doctrine into federal law has caused concern in the U.S. trademark community.

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57. *Id.*
58. *Id.*
59. *ITC Ltd.*, 482 F.3d at 145.
60. *Id.* at 159.
61. *Id.* at 162.
62. *Id.* at 161-62.
63. The court left open the issue of whether the plaintiff's could claim that New York state common law included a well-known marks doctrine. The 2nd Circuit certified this question to the New York Court of Appeals. The New York Court of Appeals held that there was no such specific doctrine under New York laws, but a well-known mark holder could make a claim of common law unfair competition. In considering this issue of unfair competition, the 2nd Circuit affirmed the district court's dismissal of ITC's claim on the grounds that the BUKHARA restaurant was not sufficiently well-known in New York to sustain such a claim. *See* Kenny A. Plevan & Anthony J. Dreyer, *State Common Law Overtakes Famous Marks Doctrine*, 241 N.Y. L.J. 4 (2009).
64. *ITC Ltd.*, 482 F.3d at 155.

Congress's failure to comply with the obligations of the TRIPS Agreement could be seen by officials in other countries as one of the great hypocrisies in international intellectual property law. For most of the 1980s and into the 1990s, the United States Trade Representative aggressively pushed the United States principles of intellectual property protection upon lesser developed countries.[65] The United States then used TRIPS and the global trading regime of the WTO to finally force lesser developed countries to incorporate the protection of well-known trademarks into their law and surrender their sovereign right to strictly follow the territoriality principle. Now, after all the cajoling and posturing by the United States to push through the adoption of TRIPS, it is U.S. federal law that fails to be TRIPS compliant. The leading scholar on U.S. trademark law, professor Thomas McCarthy, has referred to the BUKHARA decision "as a great embarrassment for the U.S." that may affect our future trade negotiations.[66] "This decision can be used as a club to beat our trade negotiators, with foreign governments saying, 'Who are you to criticize us? You are not living up to your treaty obligations.'"[67] In an attempt to resolve the issue, the International Trademark Association (INTA) formed a task force to review the state of federal law relating to well-known trademarks.[68] The task force has recommended to the INTA Executive Committee that U.S. trademark law should be amended in order to be "consistent with U.S. obligations under various treaties and international agreements."[69] INTA is now working with other U.S. intellectual property organizations to draft a proposed amendment to U.S. trademark law.[70]

## VII. PROTECTING WELL-KNOWN TRADEMARKS OUTSIDE THEIR CLASS OF REGISTRATION

As previously mentioned, Article 16(3) of the TRIPS Agreement provides for protection of well-known marks on dissimilar goods if the well-known mark has been registered. The owner of a registered well-known trademark that wishes to prevent its use on dissimilar goods must prove that use of that trademark in relation to such goods would indicate a connection between those goods or services and the owner of the registered

65. *See* Donald P. Harris, *TRIPS and Treaties of Adhesion Part II: Back to the Past or a Small Step Forward*, 2007 MICH. ST. L. REV. 185, 199-200 (2007) (describing the superior bargaining power of the industrialized nations and the economic coercion used to push for the acceptance of the TRIPS Agreement).

66. Steve Seidenberg, *Trademark Wars: Court's Failure to Uphold Famous Marks Doctrine Jeopardizes U.S. Interests Overseas*, INSIDECOUNSEL, July 2007, at 26.

67. *Id.*

68. *INTA Board Backs Proposal for U.S. Statute on Well-Known Trademarks*, INTA BULLETIN (May 1, 2011), http://www.inta.org/INTABulletin/Pages/INTABoardBacksProposalforUSStatuteonWell-KnownMarks.aspx.

69. *Id.*

70. *Id.*

trademark and that the interests of the owner of the registered trademark are likely to be damaged by such use. The implementation of Article 16(3) coincides with a number of principles that already exist in each individual countries' domestic trademark law that are intended to protect registered trademarks in one class from newcomers who may be attempting to trade off the goodwill of the established mark by applying for a registration for the same name in a different class of goods. These principles include likelihood of confusion, passing off, parasitism, and dilution. As a result, the implementation of Article 16(3), which deals with trademarks that are already registered in the country, has been less controversial than the implementation of Article 16(2), which had significant implications on the sovereignty of each country because it contained an exception to the sovereign principle of the territoriality of trademarks. Therefore, an in-depth review of cases involving Article 16(3) will not be undertaken in this paper. However, provided below are some brief examples of successful actions brought by the holders of well-known trademarks against third parties attempting to use or register the trademark in a different class of goods.

In Chile, Danjaq LLC, the owner of the trademark 007, related to the James Bond character, was able to prevent an operator of telephone services from registering the name 007 PUBLIGUIAS INFORMACION TELEFONICA.[71] The Chilean trademark office initially rejected Danjaq LLC's opposition.[72] However, the Chilean Industrial Property Court, and on appeal the Supreme Court, sided with Danjaq LLC.[73] The decision is reported as significant for trademark law in Chile "because the highest court has recognized that a very well-known trademark may prevent the registration of a similar trademark even for a different and unconnected scope of protection, provided that a risk of confusion may be provoked."[74]

In France, Louis Vuitton (LVM) owned a well-known trademark for a monogram canvas design that was used in connection with leather goods. Louis Vuitton brought an action against the music company EMI for using a similar design on compact disks.[75] Although the French trial court found infringement, the Court of Appeals overruled the judgment because it felt that compact disks were so different from leather goods that LVM's mark was not damaged.[76] On further appeal, the Supreme Court held in favor of LVM.[77] The Supreme Court's decision is seen as support for a line of French cases that provide a broad scope of protection for well-known

71. 101 TRADEMARK REP. 906 (2011).
72. *Id.*
73. *Id.*
74. *Id.* at 906-07.
75. 100 TRADEMARK REP. 503, 503 (2010).
76. *Id.* at 503-04.
77. *Id.* at 504.

marks, even in cases against third parties who attempt to use the mark on very different goods.[78]

In Syria, the Swiss watchmaker Rolex S.A. brought an action against a company that attempted to register the ROLEX trademark.[79] Rolex S.A. watches are used in the trademark class 14 (jewelry and watches) while the Syrian company attempted to register the ROLEX mark in class 29 (meats and processed food).[80] The Syrian court took judicial notice of the fame and well-known nature of the ROLEX trademark and found that Rolex S.A. was entitled to protection of the ROLEX trademark regardless of whether the products were the same or different from Rolex S.A.'s products.[81] The court ordered the cancellation of the Syrian company's registration.[82]

In Australia, the automobile company Saab was able to successfully oppose the attempted registration of the SAAB trademark by a third party for Christmas tree lights, electric fans, kettles, and toasters ("appliances").[83] The Trademark office hearings officer found that Saab Automobile AB had a well established reputation in Australia through the use of the SAAB trademark since the 1970s based on its volume of sales and extensive promotions in the country.[84] Because of the "substantial reputation" of the SAAB trademark for automobiles, the hearings officer ruled that there was a danger consumers would be confused or deceived by the use of the trademark on appliances. [85]

## CONCLUSION

Towards the end of the nineteenth century, a number of countries agreed upon the Paris Convention for the Protection of Industrial Property, which provided a certain basic level of protection for trademarks owned by citizens of Member States. The convention was revised several times, including a revision that introduced the concept of a well-known mark and provided for its protection as an exception to the normal territoriality principle.

In the 1980s and 1990s, the global trading system known as the GATT (the predecessor to the more formal structure of the WTO) turned its attention to intellectual property. Advocates of stronger intellectual property protection felt that the lack of reliable world-wide intellectual property

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78. *Id.* at 504.
79. 100 TRADEMARK REP. 641 (2010).
80. *Id.* at 641.
81. *Id.* at 642.
82. *Id.*
83. *Re: Opposition by Saab Automobile AB to Registration of Trade Mark Application 826676(11) – SAAB APPLIANCES*, Decision of Delegate of the Registrar of Trade Marks with Reasons (2005).
84. *Id.* at 2, 9.
85. *Id.*

protection was becoming an important issue as the growth of trade liberalization began causing intense competition among manufacturers and developers of goods that could be sold around the word. Multinational manufacturers needed to be sure that the goods they were selling would have adequate patent, trademark, and copyright protection and not be undercut in large parts of the world by patent and copyright infringement and copycat producers of counterfeit goods. As a result, the industrialized countries included intellectual property protection in the negotiations for the new global trading system that would create the WTO.[86] These negotiations produced the TRIPS Agreement.

The TRIPS Agreement became effective on January 1, 1995. It is considered the most comprehensive global agreement on intellectual property ever implemented and covers, among others, the areas of copyright, patent, industrial design, trade secret, and trademark law.[87] One small part of that agreement incorporated the Paris Convention rules on well-known trademarks and then expanded those rules to provided further protection for such marks. As a result, the protection of famous global brands is relatively assured.

Some criticism of the TRIPS Agreement may be warranted, particularly in the heavy handed way in which the industrialized nations used the global trading system to force developing countries to accept the loss of sovereignty over determining domestic intellectual property rights, such as the extent to which they would provide exceptions to the trademark territoriality principle.[88] However, the TRIPS Agreement has been a powerful force in protecting well-known trademarks and, as a result, in protecting consumers from the confusion and deceit of purchasing low quality goods bearing the unauthorized brand of a well-known trademark.

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86. *See* Harris, *supra* note 65.

87. *See* Donald P. Harris, *Trips' Rebound: An Historical Analysis Of How The Trips Agreement Can Ricochet Back Against The United States,* 25 NW. J. INT'L L. & BUS. 99, 104 (2004) (citing several sources hailing TRIPS as the most important and comprehensive international agreement ever concluded).

88. *See* Harris, *supra* note 65.

# CHALLENGES TO CARIBBEAN ECONOMIC SOVEREIGNTY IN A GLOBALIZING WORLD

*Karen E. Bravo*[*]



## INTRODUCTION

This Essay encapsulates and expands on my comments at the February 2011 Symposium *"Sovereignty in Today's World"* organized by the Michigan State International Law Review.

As explored by my fellow speakers, economic globalization is challenging for the large economies of the world. It is even more challenging for the smaller economies of the world, such as those in the Caribbean. I will discuss some illustrative challenges to economic sovereignty, how the Caribbean has responded to these challenges—what have been the effects—and offer some analysis of the implications to the economic sovereignty of Caribbean states and territories.

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My remarks will explore the following subjects:

1. The meaning of sovereignty in the context of small and micro states in the current iteration of globalization
2. Economic globalization presents strong challenges to the economic sovereignty of Caribbean states and territories.
3. The challenges, and their impact on the Caribbean, offer a narrative perspective and an analytical path that is relevant to larger states and economies.

My remarks are organized as follow: Part I offers a working definition of economic sovereignty; Part II consists of an illustrative list of challenges to Caribbean economic sovereignty, and descriptions of Caribbean states' and territories' responses to those challenges; Part III provides an analysis of implications for Caribbean economic sovereignty and contemporary economic sovereignty of states in general; and my concluding statements are in Part IV.

## I. WHAT IS ECONOMIC SOVEREIGNTY?

As so well articulated by Professor Dunoff earlier in the symposium, there is a great deal of discussion and debate regarding the definition and implications of sovereignty, and I am not going to create a *new* definition: The working definition that I have used for my remarks is: The power of an individual state to act independently—to choose and craft economic tools to serve the best interests of the state's domestic economy (as such interests are perceived by and/or pursuant to the vision and judgment of the people and government of that state).

I also thought that it would be meaningful to specify what I mean when I refer to "the Caribbean." Some potential for ambiguity is present since the Caribbean Sea is bordered by several countries located in mainland North, South, and Central America, including Mexico, Venezuela, and the United States. In my remarks I am referring to islands that are both independent states and overseas dependent territories in the Caribbean Basin.[1] The nation states include Jamaica, Barbados, Trinidad, and the Dominican Republic. The overseas dependent territories include entities affiliated with the United Kingdom (for example, the British Virgin Islands, Anguilla, the Turks and Caicos Islands, and the Cayman Islands); France (Martinique, Guadeloupe, and St. Barthelemy); The Netherlands (St. Eustatius and Saba); and the United States (Puerto Rico and the U.S. Virgin Islands).

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1. *See, e.g.*, Peter Clegg, *Governing the UK Caribbean Overseas Territories: A Two-Way Perspective*, *in* GOVERNANCE IN THE NON-INDEPENDENT CARIBBEAN: CHALLENGES AND OPPORTUNITIES IN THE TWENTY-FIRST CENTURY (Peter Clegg & Emilio Pantojas-Garcia eds., 2009).

Like other island chains colonized by European powers (the island chains of the Pacific offer another such example), the Caribbean provides a wonderful experimental and experiential laboratory of the different types or models of sovereignty and quasi-sovereignty extant in the contemporary world. Looking at a map of the Caribbean, one might see a depiction of the history of the New World as it was discovered and colonized by European powers. It is due to that history that, today, the Caribbean has these varied languages. For example, the United Kingdom has the British Virgin Islands, Montserrat, and Anguilla.[2] You also see French *departements*: That is, when you step on the shores of Martinique and Guadalupe, you are in France. The same is true in St. Barts because, according to the French conception of France, the *departements* are essential parts of France—they're all French. In another example, St. Maarten recently attained the status of an independent country within the Kingdom of The Netherlands; and Anguilla, the Turks and Caicos Islands, and the British Virgin Islands are overseas dependent territories of the United Kingdom, with particular levels of independence and autonomy. Then we have the Dutch Islands: St. Maartens, St. Eustasius, Curacao, Aruba. You will think of some Caribbean states and territories as vacation spots, great for Spring break which is coming up within the next month. And, of course, the United States also is present with Puerto Rico and the U.S. Virgin Islands.

As there are several varieties of sovereignty and different stages of self-determination in the overseas dependent territories, states, *departements*, in the Caribbean, no individual territory finds its situation replicated in another. Each has its own deal with its former colonizer—that is, former mother country. In addition, however, we have islands, such as Jamaica, such as Trinidad, such as Barbados, and so on, that are independent states and are attempting to make their way in this new era of globalization, of 193 countries, or 192 until Southern Sudan becomes independent. So, in the Caribbean, you will see that there are states, nation states—members of the UN—such as Jamaica, Barbados, Trinidad, Antigua, as well as other entities, overseas dependent territories.

What does it mean: "Overseas dependent territories?" In the context of the Caribbean, the descriptor includes the islands which are not sovereign states, as they have not secured independence from their colonizers. As

2. And I have an illustrative story with respect to Anguilla. That is, in the 1970s or 80s, the British wanted to get rid of Anguilla, so they put forward the proposition that Anguilla should be governed from St. Kitts and Nevis. Now, the Anguillans—and if you've been to Anguilla, it's a sandbar basically, beautiful colored beaches and all that—they revolted and asked to be put back under the jurisdiction of the United Kingdom. So they continued to be an overseas dependent territory of the United Kingdom, instead of joining St. Kitts and Nevis, a twin island nation state.

such, they "have surrendered aspects of their political, economic and cultural identities to external centres of power."[3]

Now, these jurisdictions, to the extent that they are independent, are members of the World Trade Organization. In addition, there is a primarily Anglophone community, a regional grouping called CARICOM: the community of Caribbean states. This was supposed to be a regional pooling of sovereignty to create a counterbalance to economic pressures coming from outside the region.[4]

I would like to take this opportunity to acknowledge the potential limits of my perspective and to admit that I am an Anglophone in the context of the Caribbean because, as you may know, in the Caribbean you will speak of the Anglophone, Francophone, Spanish and Dutch speaking islands and territories. My interests and analysis have focused mostly on the Anglophone Caribbean, with some references to the Francophone and Spanish speaking entities.

Within these definitional and affinity constraints, I will now address some particular examples of challenges to Caribbean economic sovereignty and my analysis of their broader implications.

## II. ILLUSTRATIVE CHALLENGES TO CARIBBEAN ECONOMIC SOVEREIGNTY

My remarks will focus on the recent illustrative challenges listed below:

A. The Organization for Economic Cooperation and Development (OECD) anti-tax haven initiative;
B. The OECD-Financial Action Task Force (FATF) anti-money laundering initiative;
C. The United States-European Union (EU) World Trade Organization (WTO) banana dispute;
D. The termination of European Union sugar subsidies pursuant to WTO rules;
E. The Antigua-United States WTO internet gambling dispute; and
F. The EU-CARIFORUM Economic Partnership Agreement

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3. Peter Clegg and Emilio Pantojas-Garcia, *Preface*, *in* GOVERNANCE IN THE NON-INDEPENDENT CARIBBEAN: CHALLENGES AND OPPORTUNITIES IN THE TWENTY-FIRST CENTURY *supra* note 3, at xvii. The authors describe the territories' dissatisfaction with the *status quo*, despite, or perhaps because, independence does not appear to be a viable option for these small islands and island chains. *Id.*

4. S*ee* Karen E. Bravo, *CARICOM, the Myth of Sovereignty, and Aspirational Economic Integration*, 31 N.C. J. INT'L. L. & COM. REG. 145, 155-60 (2005) [hereinafter Bravo, *CARICOM*].

A. OECD Anti-Tax Haven Initiative

Beginning in 2001, the OECD initiated negotiations with countries it considered to be tax havens, meaning that the tax regulations and structures of those economies were unfair and illegal according to the criteria introduced by the OECD.[5] The organization also began an initiative to list and target states, which it claimed, or which, according to its standards, were tax havens. The OECD used leverage and threats to try to get countries to make significant tax reforms and essentially bullied countries into making such changes.[6] The designation of a jurisdiction as a "tax haven" depended on the *OECD's* determination that the favorable tax treatment offered by the jurisdiction in question was luring money and taxpayers from other, "more honest" jurisdictions. It is noteworthy that the "other, more honest" jurisdictions that suffered the allegedly negative effects were Western-oriented, wealthier countries. That is, more favorable tax treatment was given to taxpayers leaving the United States, the European Union, and other jurisdictions to invest their money in the alleged tax havens.

In this regard, we must now scrutinize the OECD. Now what is the OECD? It is the Organization for Economic Cooperation and Development. Who are the member states of that organization? They are the states with the largest economies in the world.

The organization is an exclusive club, composed of the 34 states with the world's largest economies.[7] The membership is almost exclusively Western

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5. The OECD considers countries that, in their opinion, offer tax rates that are low enough to be considered nominal to be tax havens, which allow taxpayers to evade their domestic tax authorities. OECD, HARMFUL TAX COMPETITION: AN EMERGING GLOBAL ISSUE 32 (1998). In fact, the OECD labels a country a tax haven if: (1) it imposes no or only nominal taxes; (2) it offers a lack of transparency about the application of tax laws and about underlying documentation; (3) it has laws or administrative practices that prevent the effective exchange of information for tax purposes with other governments about taxpayers who benefit from zero or nominal taxation; (4) the absence of a requirement that the taxpayer's activity within the country's jurisdiction be substantial. Samantha H. Scavron, Note, *In Pursuit of Offshore Tax Evaders: The Increased Importance of International Cooperation in Tax Treaty Negotiations after* United States v. UBS AG, 9 CARDOZO PUB. L. POL'Y & ETHICS J. 157, 165-66 (2010).

6. Taylor Morgan Hoffman, Development*, The Future of Offshore Tax Havens*, 2 CHI. J. INT'L L. 511, 512 (2001). The actions taken by the OECD have been characterized as "economic imperialism" whereby large, powerful states exert their will over small offshore jurisdictions that threaten the financial dominance of the world powers. Richard K. Gordon, *On the Use and Abuse of Standards for Law: Global Governance and Offshore Financial Centers*, 88 N.C. L. REV. 501, 534-35 (2010). Gordon contends that there has been a shift from state actors directly implementing their global governance agendas to international bodies controlled by the world powers essentially serving as a proxy to direct and implement the agendas and restrict the growth of developing economies. *Id.* at 506-08.

7. For a complete list of the OECD's membership, see OECD, *List of OECD Member Countries-Ratification of the Convention on the OECD*, http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_1,00.html (last visited October 31, 2011).

and European, with the exception of Chile, Japan, Korea, Turkey, Mexico, and Israel. No African, Pacific, or Caribbean states are represented. The organization excludes the voices of the world's other 160 states. The composition and authority of the OECD is not representative. That is, it is not a universal membership body; instead, its membership is limited to economies of a certain size. There was no democratic participation in standard-setting by the territories and countries listed as tax havens.[8] The OECD listed a number of Caribbean entities in its offshore tax haven report.[9] Among the Caribbean states and territories included in the list were: Antigua, Barbados, The Bahamas, The Cayman Islands, The Turks and Caicos Islands, and the twin island nation of St. Kitts and Nevis. The list included overseas dependent territories as well as nation states. Each of these entities had begun the process of successfully diversifying their economies from agriculture into financial and other service sectors.

There was great uproar. The response in the Caribbean was to characterize the listing and resulting economic pressures as discriminatory economic blackmail.[10] The effect of the blacklist was severe:[11] Immediate results were that multinationals—banking and financial entities—

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8. One author critiques the OECD for trying to impose its will on states that are not even OECD members and for encroaching on the sovereignty of nations. *See* Alexander Townsend Jr., *The Global Schoolyard Bully: The Organization for Economic Cooperation and Development's Coercive Efforts to Control Tax Competition*, 25 FORDHAM INT'L L.J. 215, 215 (2001). Townsend asserts that telling states how they must form and implement their tax policies is a serious threat to the sovereignty of nations. *Id*. at 220-21. He also notes that the OECD is telling these sovereign nations how they need to decide their fiscal needs, and how they are to decide their fiscal needs. *Id.* at 219-20.

9. *See* OECD, TOWARDS GLOBAL TAX CO-OPERATION: PROGRESS IN IDENTIFYING AND ELIMINATING HARMFUL TAX PRACTICE 17 (2000), *available at* http://www.oecd.org/dataoecd/9/61/2090192.pdf.

10. *See OECD Tax List Called "Economic Blackmail,"* ALLBUSINESS.COM, (Aug. 1, 2000), http://www.allbusiness.com/finance/581057-1.html [hereinafter *Economic Blackmail*].

11. The OECD has clearly impacted the financial sectors of Caribbean nations and territories. Diane Ring, *Who is Making International Tax Policy?: International Organizations as Power Players in a High Stakes World*, 22 FORDHAM INT'L L.J. 649, 710-11 (2010). In addition, the United States has unilaterally set its sights on Caribbean nations with growing financial sectors as well. The United States has strayed from the OECD's model for addressing such issues and employed a number of tactics to discourage the use of Caribbean banks, including subjecting people and organizations to audits for simply transacting with offshore Caribbean financial institutions. Bruce Zagaris, *The Procedural Aspects of U.S. Tax Policy Towards Developing Countries: Too Many Sticks and No Carrots?*, 35 GEO. WASH. INT'L L. REV. 331, 336 (2003). As the United States continues to see greater deficits in the budget, it is increasingly likely that it will put even more pressures on anyone that uses Caribbean banking facilities. *Id.* at 390. The events of September 11, 2001 is used as a justification for the necessity of preventing countries from having preferential taxing and banking practices. *See* Bruce Zagaris, *Revisiting Novel Approaches to Combating the Financing of Crime*, 50 VILL. L. REV. 509, 511 (2005). *See generally* Elwood Sanders Jr. & George Sanders, *The Effect of the USA Patriot Act on the Money Laundering and Currency Transaction Laws*, 4 RICH. J. GLOBAL L. & BUS. 47 (2004).

announced that they would exit these countries and territories and the targeted states and territories feared negative reputational effects would take place. In addition, there was uncertainty regarding the enforcement action that the member states of the OECD might take if their multinational corporations (MNC's) did not exit the Caribbean states.

So, as I said, that initiative began in 2000, and by 2009 most or actually all countries and territories were off the blacklist.[12] We still have now a gray list.[13] The gray list is a group of countries that said "yes, we will accede to your demands." But, the OECD says: "Well, you're not carrying it out in as quick a fashion, you're not implementing these commitments as we would like." So now several Caribbean countries are on the gray list of potential tax havens.[14]

### B. OECD/FATF: Anti-Money Laundering Initiative

In 2003, the Organization for Economic Cooperation and Development's (OECD) Financial Action Task Force (FATF) issued a new revision of its Forty Recommendations, which had been first issued in 1990 and which form the baseline standards for the international prevention of and fight against money laundering by banking and financial systems and institutions. That same year, the FATF issued a list of Non-Cooperating Territories and Countries (the NCCT list), naming countries whose banking and financial laws and regulations did not meet the standards set forth in the updated Forty Recommendations.

The purpose of the Financial Action Tax Force is anti-money laundering activities: that is, the perception that monies were being transferred around the world in a *sub rosa* fashion by drug traffickers, corrupt governments, and corrupt private parties, and were being facilitated by the banking system in particular countries.[15] Prior to the issuance of the NCCT list in 2003, in

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12. At the G-7 meeting in July of 2007, the world powers' Finance Ministers agreed that sanctions they called "defensive measures" would be placed upon uncooperative tax havens. Hoffman, *supra* note 5, at 512. The Caribbean countries were originally encouraged by the British in the 1960s to diversify their economies by creating financial sectors; the sectors have since grown to the point that they made up as much as a quarter of some countries' economies. *Id.* at 512-13. The United States' stance is that the offshore accounts were accounting for $70 billion a year in lost tax revenue. *Id.* at 513.

13. *See* Ulrich Eder, *The Caribbean, The OECD and The Empty Black List*, 31CARIBBEAN PROPERTY MAGAZINE (Aug. 2009), http://www.caribpro.com/Caribbean_Property_Magazine/index.php?pageid=717.

14. These include Anguilla, Antigua and Barbuda, and the Cayman Islands, among others. *Id.*

15. For a thorough discussion of the initiative, *see* Karen E. Bravo, *Follow the Money? Does the International Fight Against Money Laundering Provide A Model for International Anti-Human Trafficking Efforts?*, 6 ST. THOMAS L.J. 138, 160-66, 173-79 (2008). Those considered to be countries that support or allow money laundering are often depicted as countries run by greedy, selfish bureaucrats who simply want money and do not care whether they are giving terrorist organizations and criminals a place to carry out their

February 2000, the FATF had published the Report on Non-Cooperative Countries and Territories (the Initial 2000 NCCT Report) and, in three subsequent reports, identified countries and territories that it would investigate and review in order to determine NCCT designation. The list included 15 countries and territories. Similarly to the anti-tax haven initiative, several Caribbean states and territories were included on the list. By late 2007, when the FATF issued the 2006/2007 list of Non-Cooperating Territories and Countries, no jurisdictions remained on the list—all the formerly non-compliant states and territories are now compliant or their compliance was in the process of being confirmed. That is, within eight years, all the territories identified as an NCCT, or potential NCCT, had taken steps comply with the standards of the Forty Recommendations, had been investigated and/or monitored, and were de-listed.[16]

The non-cooperative countries and territories (NCCTs) initiative was created to ensure that *all* countries adopt anti-money laundering measures.[17] Once again, the non-representative nature of the membership of the international organization that is the source of the rule making, monitoring, and sanctioning is striking. The FATF is an independent inter-governmental organization created by the G-7/OECD in 1989. As with the tax haven initiative, the standards were formulated by a non-representative body—that is, no input from the countries that would be subject to those standards. The project was intended to force non-member states and jurisdictions with deficient anti-money laundering systems to create new legislation by adopting a "name-and-shame" device—in the form of the published list of non-compliant jurisdictions—and by encouraging FATF members to take actions to convince NCCTs of the importance of adopting such legislation.

The criteria for identifying NCCTs consist of a range of detrimental rules and practices in and by a country or territory that obstruct international cooperation against money laundering. These detrimental rules can be found in a NCCT's financial and other regulatory requirements (especially those related to identification), their rules regarding international administrative and judicial cooperation, and the resources the country has made available

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illegal activities on an international scale. *See* William F. Wechsler, *Follow the Money*, 80 FOREIGN AFF. 41, 41-43 (2001). Countries that choose to respect the privacy of their investors are seen as safe havens for those wishing to conduct illegal money laundering activities, despite the reality that such privacy is likely to be just as appreciated by those that do not have any illegal intentions. *Id.* at 42. The inherent assumption that the alleged money laundering havens merely intend to service criminals fails to take into account that many of the states with laws favorable to investors are created to give them some sort of a general competitive advantage in the financial sector that they would not otherwise have with uniform laws. Shawn Turner, *U.S. Anti-Money Laundering Regulations: An Economic Approach to Cyberlaundering*, 54 CASE W. RES. L. REV. 1389, 1399-1400 (2004).

16. *See* Bravo, *supra* note 15, at 160-66.

17. Jared Wessel, *The Financial Action Task Force: A Study in Balancing Sovereignty with Equality in Global Administrative Law*, 13 WIDENER L. REV. 169, 174 (2006).

for preventing, detecting, and repressing money laundering.[18] There is no specific criterion that can serve as a litmus test; rather, a jurisdiction should be judged based on the entirety of its efforts to combat money laundering.

Also noteworthy is the intrusive and very effective nature of the monitoring imposed, under threat of sanctions, on non-FATF and non-OECD states.[19] For the most part, Caribbean countries have complied with the regulations established regarding money laundering, but they have had to do so because if they did not, economic disaster would result—their economies simply are not strong enough to survive for long while under siege from the world powers.[20] What does it mean? Sovereign states are subject to intrusive monitoring by the FATF and have changed their internal regulations in order to comply with the standards issued from above, without their participation, that is, from the OECD.[21]

### C. WTO: United States-European Union Banana Dispute

Let us address now challenges with respect to the trade in goods. None of the Caribbean states or territories are members of the OECD or of the FATF. This non-membership contrasts with their status in the World Trade Organization. The Caribbean states *are* members of the WTO; in fact, they are founding members because they had been members of the GATT.[22]

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18. *Id.*

19. For example, the Caribbean Financial Action Task Force (CFATF) was established in 1996 and received a great deal of criticism from both sides of the issue. PETER REUTER & EDWIN M. TRUMAN, CHASING DIRTY MONEY: THE FIGHT AGAINST MONEY LAUNDERING 84 (2004). One of the primary problems with the CFATF is that it exercises peer review of members and does some global supervision, but has little to no power to require compliance with sanctions. *Id.* at 85. After 9/11, the United States has tried to correct these flaws in implementation. *Id.*

20. G. Scott Dowling, Comment, *Fatal Broadside: The Demise of Caribbean Offshore Financial Confidentiality Post USA PATRIOT Act*, 17 TRANSNAT'L L. 259, 292 (2004).The broad wording of the PATRIOT Act gives the U.S. a number of weapons in its arsenal to change the financial practices of Caribbean countries indefinitely. *Id.* at 292-93. The Bahamas and the Cayman Islands have been two of the more "cooperative" Caribbean jurisdictions, and foreign states often make requests for information regarding certain clients; more often than not, the requests are honored. Evan Metaxatos, *Thunder in Paradise: The Interplay of Broadening United States Anti-Money Laundering Legislation and Jurisprudence with the Caribbean Law Governing Offshore Asset Preservation Trusts*, 40 U. MIAMI INTER-AM. L. REV. 169, 188-89 (2008).

21. Critics have argued that the FATF's actions are a form of interference and an impingement on the sovereignty of the nations targeted by the FATF, and that sanctions, if imposed, would be a violation of the UN Charter because such measures are supposed to be addressed by the UN Security Council. Todd Doyle, Note, *Cleaning up Anti-Money Laundering Strategies: Current FATF Tactics Needlessly Violate International Law*, 24 HOUS. J. INT'L L. 279, 300-301 (2001-2002).

22. *See* WTO, *Understanding the WTO*: *Members and Observers*, http://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Oct. 31, 2011).

The long-running banana dispute between the United States and the European Union resulted in the loss of preferential access that the European Union had extended to banana exports from African, Caribbean, and Pacific countries that are former colonies of EU member states. Brought by the United States, and making claims with respect to bananas produced in South America, the dispute is one of the longest-running (spanning 1993 to 2010)[23] and most seemingly intractable in the history of the World Trade Organization.

The question was whether the preferential access given by EU member states to their former colonies violated the EU member states' GATT obligations. And I guess I should give some background: These English-speaking, Spanish-speaking, and French-speaking territories and countries were colonies of EU member states. Once they were given independence, part of the deal was: "we will continue to subsidize you, some might even argue compensate you or make reparations to you, by giving your agricultural products preferential access to our markets."

The preferential arrangement between EU member states and their former colonies, between the European Union and those decolonized states, was found to be illegal. With respect to compliance, the European Union dragged its feet for a considerable period of time and, in May 2010, finally consented to comply with the panel report and the compliance panel.

Some interesting facts with respect to the dispute include: (i) Bananas are a major agricultural crop in the Caribbean;[24] (ii) the United States does not produce bananas; instead, the United States' position represented the interests of large MNCs (i.e., Dole and Chiquita) who had interests in banana-producing South American countries (i.e., today's banana republics); (iii) pursuant to WTO procedural rules and as a result of the procedural posture of the dispute, the African, Caribbean, and Pacific states and territories, whose market access and economic futures would be determined by the dispute, were limited to the role of third party observers.

The case was brought by the United States against the European Union, not because the United States grows bananas, but because it was representing the interests of the multinational corporations—Dole and Chiquita for instance—which *do* have banana growing enterprises in Latin American countries. The problem, according to their point of view, was "our bananas are being disadvantaged in the European markets, they're getting discriminatory treatment because the Caribbean, Pacific and African bananas are getting in at a lower rate and so are more attractive to consumers."

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23. Appellate Body Report, *European Communities—Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (Sept. 9, 1997).

24. According to then-Prime Minister of Jamaica Percival J. Patterson, "Bananas are to us what cars are to Detroit." WARREN J. KEEGAN & MARK C. GREEN, GLOBAL MARKETING 125 (2d ed. 2000).

As I have stated, the Caribbean states are members of the WTO. However, with respect to this decision which has enormous impact on a substantial part of their economy, these Caribbean states were reduced to the role of third party observers. That is, they were able to submit documents and relevant information, but they were not parties, they were not participants, they were not there as primary actors with respect to their economic future. Fifty-six of the seventy-eight nations in the ACP that were to be impacted by the banana settlement are members of the WTO, but were given no ability to make an impact on the WTO proceedings.[25] The WTO dispute settlement procedures appear to present a threat to the sovereignty of member states—their ability to take necessary government actions on behalf of citizens.[26] The WTO system as it stands leaves developing countries in a position where their participation is marginalized and they are not often a part of proceedings.[27]

### D. WTO: European Union Sugar Subsidies Dispute

In 2003, Australia, Brazil, and Thailand requested the establishment of a WTO panel to examine the legality of subsidies applied to European Communities' (EC) sugar.[28] As had occurred, with respect to bananas, the European Union's sugar subsidies, challenged by Australia, Brazil, and Thailand, were found to be illegal. The Dispute Settlement Body's 2004 report, which found that the European Union's sugar regime breached the European Union's WTO obligations, had a detrimental impact on another major cash crop of African, Caribbean, and Pacific states and territories.[29]

As I stated earlier, the agricultural background of the islands means that sugar and bananas were crucial to their agricultural economy. I should also add, however, that the Caribbean sugar industry is extremely inefficient and

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25. *Id.*

26. Benjamin L. Brimeyer, *Bananas, Beef, and Compliance in the World Trade Organization: The Inability of the WTO Dispute Settlement Process to Achieve Compliance from Superpower Nations*, 10 MINN. J. GLOBAL TRADE 133, 167 (2001).

27. HAIDER A. KHAN & YIBEI LIU, GLOBALIZATION AND THE WTO DISPUTE SETTLEMENT MECHANISM: MAKING A RULES-BASED TRADING REGIME WORK, 23-24 (2008), http://mpra.ub.uni-muenchen.de/7613/1/WTO.PDF. The dispute was supposed to be just limited to bananas, but the European Union has insisted on expanding the package to encompass other concessions included in the Doha Round. GIOVANNI ANANIA, HOW WOULD THE WTO AGREEMENT ON BANANAS AFFECT EXPORTING AND IMPORTING COUNTRIES? 5 (International Centre for Trade and Sustainable Development Programme on Agricultural Trade and Sustainable Development June 2009), *available at* http://ictsd.org/downloads/2009/07/web_bananas.pdf.

28. Appellate Body Report, *European Communities—Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (Apr. 28, 2005), *available at* http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/283ABR.doc.

29. In those countries, sugar and bananas are huge agricultural products and in fact a substantial part of their economy.

unproductive and later in this Essay I will address issues of comparative advantage as well. The fact that Caribbean states and territories would no longer get access to this market had a huge impact on the day-to-day life and domestic economies of those countries and on their economic sovereignty. The changes to the EU sugar regime have been described as drastic changes that will affect developing and least developed countries that depend on the preferential treatment received from the European Union.[30]

The new agreement for tariff-free sugar imports into the EU market did not fully come into effect until 2009, and the European Union seems to suggest that it will be beneficial for LDCs and the European Union alike.[31] The new sugar regime stands to leave ACP countries as losers in the new market system if they are unable to compete with the comparative advantages other countries enjoy.[32] The new regime changes the positions of those that are the winners and those that are the losers and threatens the already fragile economies of the losers.[33] Although the new sugar regime has an impact on all ACP countries, the Caribbean countries stand out as greater losers in the newly competitive sugar market than other countries.[34]

### E. WTO: Antigua-United States Gambling Dispute

The internet gambling dispute between the United States and Antigua is historic in scope. It began with Antigua's[35] March 21, 2003 request for consultation under the WTO Dispute Settlement Understanding about United States barriers to the provision of transborder gambling services.[36]

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30. Piero Conforti & George Rapsomanikis, *The Impact of the European Union Sugar Policy Reform on Developing and Least Developed Countries*, *in* FOOD AND AGRICULTURE ORGANIZATION OF THE UN, COMMODITY MARKET REVIEW 89, 90-93 (2005), *available at* http://www.fao.org/docrep/008/a0334e/a0334e0f.htm. The author found through his research that it is not likely that the quantity of sugar exported from the Caribbean should decrease all that much but, rather, the revenues would be significantly different. The Caribbean has in fact decreased in both production and revenue from sugar. *Id.* at 103.

31. LEENA KERKELA & ELLEN HUAN-NIEMI, TRADE PREFERENCES IN THE EU SUGAR SECTOR: WINNERS AND LOSERS 8 (Purdue Univ. Seminar on Agric. 2005), *available at* http://www.etsg.org/ETSG2005/papers/kerkela.pdf.

32. ELLEN HUAN-NIEMI & LEENA KERKELA, REFORM IN THE EU SUGAR REGIME: IMPACT ON THE GLOBAL SUGAR MARKETS, 4-6 (2005), *available at* http://ageconsearch.umn.edu/bitstream/24733/1/cp05hu02.pdf.

33. *Id.* at 14.

34. Michael Bruntup, Discussion Paper, *Everything But Arms (EBA) and the EU-Sugar Market Reform—Development Gift or Trojan Horse?* 7 (German Development Institute Oct. 2006), *available at* http://www.isn.ethz.ch/isn/Digital-Library/Publications/Detail/?ots591=0c54e3b3-1e9c-be1e-2c24-a6a8c7060233&lng=en&id=27650.

35. And I challenge you to find Antigua on your map—Antigua, it's on the right hand side, it's a very tiny twin-island state—Antigua and Barbuda . . .

36. *See* Request for Consultations by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services—Request for Consultations by Antigua and Barbuda*, WT/DS285/1 (Mar. 27, 2003), *available at*

In light of the disparity in power in the WTO,[37] I was very, very surprised in 2003 to learn that Antigua had challenged the United States about its internet gambling laws. That is, the United States had forbidden internet gambling, but Antigua had become a huge offshore internet gambling center—a huge business, with lots of companies going there to invest and locate their internet gambling sites in that country.

In view of the conflict, Antigua challenged the United States, claiming that the prohibition violated the United States' WTO obligations under the General Agreement on Trade in Services (GATS) because it was possible to gamble in the United States in person via casinos, race tracks, and various other state and private entity sponsored gambling.

The dispute resulted in partial wins for Antigua under both the November 10, 2004 Panel Report and the April 7, 2005 Appellate Body report.[38] However, the United States' refusal to comply with the findings resulted in further proceedings to ensure compliance.[39] Although the WTO can impose "special and different treatment" provisions to protect the

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http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/S/L/110.doc.

37. Kristin Bohl, *Problems of Developing Country Access to WTO Dispute Settlement*, 9 CHI. KENT J. INT'L & COMP. L. 130, 131 (2009). The reasons smaller states, like those in the Caribbean, have trouble with access to the system often include a lack of resources, small trade volumes, a lack of institutional capacity or a lack of political will. *Id.* at 132.

38. Report of the Panel, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/R (Nov. 10, 2004), *available at* http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS285%FCR%2A+and+not+RW%2A%29&language=1; Report of the Appellate Body, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (Apr. 7, 2005), *available at* http://docsonline.wto.org/imrd/gen_searchResult.asp?RN=0&searchtype=browse&q1=%28%40meta%5FSymbol+WT%FCDS285%FCAB%FCR%2A+and+not+RW%2A%29&language=1. The Unlawful Internet Gambling Enforcement Act of 2006 (UIGEA) was passed as a result of the United States losing in its WTO dispute against Antigua and Barbuda. Peter Shaker, *America's Bad Bet: How the Unlawful Internet Gambling Enforcement Act of 2006 Will Hurt the House,* 12 FORDHAM J. CORP. & FIN. L. 1183, 1198 (2007).

39. Recourse to Article 21.5 of the DSU by Antigua and Barbuda, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services* WT/DS285/RW (Mar. 30, 2007), *available at* http://docsonline.wto.org/GEN_viewerwindow.asp?http://docsonline.wto.org:80/DDFDocuments/t/WT/DS/285RW-00.doc. The initial reaction by Antigua to the favorable ruling was that the win was a great victory, especially for such a little country. Daniel Pruzin, *Antigua-Barbuda Wins WTO Interim Ruling Against U.S. Internet Gambling Restrictions*, 21 Int'l. Trade Rep. (BNA) 13, 14 (Mar. 25, 2004). However, some scholars still feel that the victory was hollow because the case "highlights the ineffectiveness of the provisions intended to ensure that developing countries are able to use and prevail during the WTO dispute settlement process." *Id.* at 28. The fact of the matter is that the Antigua has very little it can do to impose sanctions against the United States Daniel B. Pimlott, *WTO Rules Against U.S. in Internet Gambling Case*, FIN. TIMES (London), Jan. 26, 2007, *available at* http://www.ft.com/intl/cms/s/0/317e9e48-ad61-11db-8709-0000779e2340.html#axzz1dBYdeTQQ.

interests of developing countries from developed countries, the measures have been critiqued for rarely being implemented and even more rarely being to the benefit of developing countries.[40] Even when measures are taken, the WTO does not have any teeth to make the United States adhere to rulings against developing countries: even after two adverse WTO rulings, the United States still refused to change its position on Antigua and internet gambling and continued to try to make internet gambling illegal.[41]

As a result of the compliance proceedings, on December 23, 2007 the WTO arbitrator authorized Antigua to assert $21 million nullification of benefits against U.S. intellectual property that was protected pursuant to the TRIPS Agreement.[42] That is, Antigua was given permission to violate the TRIPs with respect to U.S. intellectual property up to the amount of $21 million without violating its obligations under the WTO Agreement.[43] The United States' response was to announce that it was withdrawing from its GATS obligations as they pertained to internet gambling.[44]

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40. Amin Alavi, *On the (Non)-Effectiveness of the World Trade Organization's Special and Different Treatments in the Dispute Settlement Process*, 41 J. WORLD TRADE 319, 320 (Apr. 2007).

41. *See* Andrea Ewart, *Small Developing States in the WTO: A Procedural Approach to Special and Differential Treatment through Reforms to Dispute Settlement*, 35 SYRACUSE J. INT'L L. & COM. 27, 55 (2007).

42. The WTO ruling was a potentially significant move by the WTO in favor of small countries because Antigua was permitted to suspend $21 million annually in IP rights held by firms from the United States *See* Isaac Wohl, *The Antigua-United States Online Gambling Dispute*, 4 J. INT'L COMM. & ECON. 1, 2-3 (2009). This remedy was chosen by the WTO because a remedy allowing suspension of obligations to the US would have almost no effect in a developed country such as the United States Clint Bodien, *Cross-Retaliation in the WTO: Antigua and Barbuda's Proposed Remedy against the United States in an Online Gambling*, 14 L. & BUS. REV. AM. 847, 853 (2008). The ruling gives small countries the potential to create leverage in future disputes. Wohl, *supra,* at 16. The decision was especially notable because it was an instance where the 15th smallest country in the world went head to head with the world's economic superpower and left the WTO with a sound victory. Ewart, *supra* note 41*,* at 27.

43. The suspension of IP rights of U.S. firms was notable because the WTO DSB recognized that traditional remedies would not likely be enforceable because of the disparity in size of the countries. Bodien, *supra* note 42, at 855. However, Antigua could also lose its MFN status with the United States via the Caribbean Basin Initiative (CBI) because the CBI includes a requirement of recognition and enforcement of U.S. IP rights as one of the requirements for the MFN status. *Id.* at 855. The bottom line is that the DSB's decision could have ended up being more detrimental than beneficial for Antigua. *Id.*

44. Yevgeniya Roysen, *Taking Chances: The United States' Policy on Internet Gambling and Its International Implications*, 26 CARDOZO ARTS & ENT. L.J. 873, 875 (2008-2009). On April 15th, 2011, the FBI indicted 11 of the founders from the three largest online poker websites and shut down the websites. Michael McCarthy, *FBI Busts Three Biggest Online Poker Hhouses,* USA TODAY, (Apr. 16, 2011), *available at* http://content.usatoday.com/communities/gameon/post/2011/04/fbi-cracks-down-on-3-biggest-online-poker-houses-poker-stars-full-tilt-poker-absolute-poker/1. The indictees were charged with bank fraud, money laundering, and illegal gambling offenses. *Id.* The prosecutors cited the UIGEA as the grounds for the indictments. *Id.* Until the very recent indictments, the WTO decision had left the operators of the online gambling websites unsure

I would ask you to think about the effect or the benefit of this $21 million of IP nullification to Antigua. That is, I am able to violate your intellectual property rights up to the amount of $21 million versus having an economy or an industry that actually functions and employs Antiguan citizens and brings in tax revenue to the state. Furthermore, the fact that a small nation won against an economic superpower, yet ultimately still lost, only emphasizes the flaws in the WTO system: Developed countries essentially do what they like, regardless of their commitments to the WTO.[45]

### F. EU-CARIFORUM Economic Partnership Agreement

The Caribbean Community (CARICOM) is the premier Caribbean regional integration organization.[46] Founded in 1973, the organization first consisted of Anglophone former colonies of the United Kingdom. Membership has expanded to include Haiti. CARIFORUM is a broader organization that includes the Dominican Republic.

Following the WTO proceedings in the banana wars, in view of the need to re-arrange the economic and trade relationship between the EU member states and their former ACP colonies, the European Union entered into economic partnership agreements with different regional groupings of African, Caribbean, and Pacific former colonies. Broadly, pursuant to the terms of the CARIFORUM Economic Partnership Agreement (EPA), access to the EU markets is no longer unconditional: Products of the CARIFORUM states will receive duty-free and quota-free access to the markets of EU member states. In return, products from EU member states will face decreasing barriers to the markets of the Dominican Republic and CARICOM member states. CARIFORUM states have agreed to liberalize 80 percent of imports over 15 years and will liberalize the remaining 20 percent over 20 to 25 years.[47]

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of the legality of their activities. Tom Newnham, Note, *WTO Case Study: United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, 7 ASPER REV. INT'L BUS. & TRADE L. 77, 81 (2007). The constitutionality of UIGEA was challenged in 2008 by a non-profit advocacy group, but the case was dismissed in an unpublished opinion. Kristina L. Perry, Note, *Current State of the Unlawful Internet Gambling Enforcement Act and Recently Adopted Prohibition on Funding of Unlawful Internet Gambling*, 8 RICH. J. GLOBAL L. & BUS. 29, 31 (2008-2009). The court did not state whether the dismissal was based on a lack of standing or for failure to state a claim. *Id.*

45. Michael Grunfeld, Note, *Don't Bet on the United States's Internet Gambling Laws: The Tension between Internet Gambling Legislation and World Trade Organization Commitments,* 2007 COLUM. BUS. L. REV. 439, 501-03 (2007).

46. For a thorough discussion of CARICOM, *see* Bravo, *CARICOM, supra* note 4, at 167-89.

47. *See* Anthony Gomes, *Phasing of Tariff Liberalization on European Union Goods*, JAMAICA OBSERVER, Jan. 26, 2011, *available at* http://www.jamaicaobserver.com/columns/Phasing-of-tariff-liberalisation-on-European-Union-goods_8315707#ixzz1DrRgSCn3.

What does it mean? What are the terms of the deal? Access to the EU markets is no longer unconditional. So, the good deal that the former colonies had was that their preferential access to EU markets was not reciprocal. That is, the Caribbean states and territories got preferential access but could still keep their tariffs and get revenue from the European Union's products coming in. Now it's no longer unconditional, so the products of the CARIFORUM states will get duty free and quota free access to the EU markets but, in return, tariffs must be removed with respect to 80 percent of imports over 15 years and the remaining 20 percent over a 20 to 25 year period.

Arrived at following four years of negotiation, the treaty is controversial[48] and has stimulated much debate in the region regarding whether the economic effects will be beneficial for the Caribbean. For example, the loss of tariff revenues will be substantial: Based on data for the 2005/06 fiscal period, at the end of the liberalization period Jamaica is estimated to lose approximately $1.34 billion in both tariff and non-tariff revenues, or 96 percent of tariff revenues previously collected from EU imports.[49]

So, having finally acceded to the banana dispute resolution, the European Union negotiates with its former colonies to come into compliance with its WTO obligations. Through the CARIFORUM Economic Partnership Agreement, the European Union is attempting to rearrange its relationship with those colonies so that it comes into compliance. However, freed finally by its decision to comply with the banana decision, the European Union's negotiations are no longer premised on the idea of giving unconditional aid to its colonies. Now we can bargain hard because we have been told that this preferential access violates our WTO obligations, right?

Despite the agreement, the Caribbean continues to resist implementation. There's the promising and then the complying.[50] So, the agreement was

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48. I can't tell you how many editorials were published in the papers in the Caribbean Islands in which dire predictions have been made regarding what will be the effect of this agreement, or whether the CARICOM and Dominican Republic should have held out for a better deal or some other kind of deal with the European Union because this, they said, would be the end of the region. *See, e.g.,* Rickey Singh, '*EPA Nightmare*,' JAMAICA OBSERVER, Sept. 8, 2008, http://www.jamaicaobserver.com/news/139937_-EPA-nightmare-.

49. *See* Gomes, *supra* note 47.

50. In response to the lack of implementation of the EPA by Caribbean countries, CARIFORUM has agreed that it will establish an "EPA Implementation Unit" by July of 2011. Dixie-Ann Dickson, *EPA Implementation Unit Coming in July Says Cadiz*, TRINIDAD GUARDIAN (Trinidad & Tobago), Apr. 4, 2011, http://guardian.co.tt/business/2011/04/04/epa-implementation-unit-coming-july-says-cadiz. It seems like one of the biggest obstacles to implementing this for Caribbean countries has been getting local business to be comfortable with the changes. *Id.* Cariforum is using information seminars aimed at local business owners and the European Union's offer of aid for trade and the promise to offer technologies as an incentive for local businesses that are reluctant to get on board with the EPA. *Id.* The stresses from the outside to adjust their economies have caused stresses within. Although the countries within the region have many similarities, there are rivalries and social differences

signed at the end of 2008 and was supposed to come in effect on January 1, of this year—2011. As of late February 2011, only Guyana[51] had implemented the agreement. Further, it took two years before the regional body, CARICOM, set up an implementation body to ensure member state compliance with the treaty.

## III. IMPLICATIONS FOR CARIBBEAN ECONOMIC SOVEREIGNTY

What do these series of events reveal about the economic sovereignty of the states and territories of the Caribbean? Individually and collectively, they demonstrate that Caribbean states and territories lack economic sovereignty and are thus unable to chart their own economic destiny. I would say that their situation is very similar to the situation of other small and micro states that do not have economic heft. Their market is not that attractive, they do not have enough population or economic activity to bring in investors and investments from abroad, so they are left to react rather than to create their own initiatives. The effects of these challenges will be adverse impacts on their major agricultural industries, which as I noted before, are quite inefficient. As a result of the OECD's anti-tax haven and anti-money laundering initiatives, their provision of financial and recreational services has now been adversely impacted as well.

It is not hyperbole to state that the economic sovereignty challenges call into question the viability of fundamental tenets of international trade law. The challenges that I have described have adversely impacted the region's major agricultural industries. The region's rather successful turn toward the provision of financial and recreational services was negatively impacted by the OECD's anti-tax haven and anti-money laundering efforts. The provision of the more "innocuous" recreational services (gambling) by some states and territories has been stymied. The region must now continue its search for the next comparative advantage. But will that comparative advantage be deemed acceptable by the international community's regulatory organizations?

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which make integrating further more difficult. David Jessop, Op-Ed., *Caricom's Problems Create Doubts for Partners*, DOMINICAN TODAY (Dominican Republic), Apr. 8, 2011, http://www.dominicantoday.com/dr/opinion/2011/4/8/39188/Caricoms-problems-create-doubts-for-partners. The rivalries between islands may not be overcome quickly enough to implement effective coalitions for economic growth.

51. And I also meant to say I apologize because my map does not show Guyana. Guyana is actually on the South American continent but is considered to be in the Caribbean by Anglophones in the Caribbean based on historical ties. Caribbean countries are well behind in implementing their EPA obligations on tariff dismantlement; the deadline was the beginning of the year, and thus far only Guyana and St. Kitts Nevis have met their obligations. *Id.* The lack of uniformity and agreement between Caribbean countries seems likely to lead to greater questions being raised about the purpose of such regional organizations. *Id.*

In the context of evaluating the impact of these challenges, let's think about comparative advantage now. What is "comparative advantage?" Pursuant to the theory of comparative advantage, a state should produce and trade in the products and services in which it has a comparative advantage in comparison to the other products and services that it could produce. That is, you should do what you're best at, right? And trade what you're best at producing.

Comparative advantage is impermanent. Each trading partner must be endlessly flexible and must continuously engage in formulating and exploring new sources or formats of its comparative advantage. The Caribbean region's transition from the provision of agricultural products to the provision of varied services—tourism, financial, recreational (i.e., gambling)—demonstrates the impermanence of comparative advantage. At one point, they were the best, or at least good, at banana and sugar production; now they are very good at tourism services, right?[52] But also several are very good at financial services and banking. Think of transitioning from the purely agricultural model to the financial services and banking model and even to the more or less innocuous internet gambling model.

The transition to their next comparative advantage would be facilitated by their exercise of economic sovereignty by creating a regulatory regime attractive to those who want to park their money here, escape taxes there, or play and gamble on the internet. However, this process of transition has been foreclosed or substantially restricted by the top-down imposition of regulations by a non-representative—I would claim a non-representative—international body—the OECD. That is, the region's search for a new comparative advantage has been undermined to a great extent so that the movement away from agriculture to another kind of paradigm—searching for the services industry that these countries would be very suited for—has not been completed at this point, or is being stultified.

According to the theory of comparative advantage, the WTO trading partners or parties need to be very flexible in finding what their comparative advantage is going to be. The Caribbean may also demonstrate that sovereignty itself—the power to create regulatory regimes within a territory or state—may be a source of comparative advantage. They seem to have found a comparative advantage that consists of using sovereignty itself to create regulatory regimes that would facilitate economic activity and economic access for their citizens.

Yet sovereignty itself is an uncertain source of comparative advantage since it is constricted and shrinking in scope due to multilateral treaties, geopolitical realities, and other commitments.

What is the impact of large-country policies, which may stem from anti-competitive intent and have anti-competitive impact, in undermining the

52. Thus, the Caribbean as a favored destination for Spring Break.

search for comparative advantage by the less powerful? Will comparative advantage of weaker states only be explored at the discretion of and pursuant to the terms agreed to by larger economies?

Yet that reality—a top-down imposition of rules of indeterminate legitimacy—is detrimental to both the United States and the Caribbean. For example, the decrease in banana production in the region has led to an increase in production of marijuana and an increased role in provision of illicit transborder services. Drug trafficking is now the most viable and productive economic activity for the dislocated banana or sugar farmer and for others dependent on the banana industry.

What might be the region's comparative advantage—proximity to the United States or the possession of Anglophone populations in a world where English is predominant? Anything else? Do these small countries and territories actually have anything to offer in a globalized world? Anything other than white or golden powdery beaches, tropical climates, and endless sunshine?

Further analysis of the meaning of these challenges to Caribbean sovereignty can be organized under several banners: (1) the interaction of sovereignty and membership; (2) sovereignty and legitimacy; (3) sovereignty and illicit trade; and (4) sovereignty, size, and power imbalances.

### A. Sovereignty and Membership

Does membership in multilateral organizations confer sovereignty enhancing benefits? The circumstances of the affected Caribbean states and territories starkly demonstrate an inability to effectively participate in situations of both membership and non-membership: Contrast the challenges presented by the OECD anti-tax haven and anti-money laundering initiatives with the challenges arising from the results of the sugar, banana, and gambling disputes under the auspices of the WTO. That is, Caribbean state membership in the WTO does not appear to have conferred any significant benefit to the Caribbean states with respect to resolution of these disputes. The states and territories were subjected to the OECD anti-tax haven and anti-money laundering initiatives despite non-membership in either the OECD or the FATF. Yet, as members of the WTO, in the sugar and banana disputes, they were limited to 3rd party observer status despite the fundamental importance of the outcomes of both of those disputes to their economic health and futures. With respect to the gambling dispute, the small size and lack of economic and political power of Antigua was not overcome by its membership in the WTO. Instead, the United States was able to ignore and/or refuse compliance with the panel and Appellate Body reports, with no adverse economic or other effects on the United States. In contrast, the Antigua offshore gambling industry was virtually destroyed.

The result is the same. As a member with a voice in the WTO, a Caribbean state or territory is foreclosed with respect to the dispute central to its economy just as they were foreclosed from participation due to the membership requirements with respect to the OECD. Once the more powerful economies have identified a threat to their own regulatory regime—that is, here are our own tax dollars fleeing elsewhere or here are potential havens for money laundering—they determine that reform is needed. Their influence means that they are able to force these targeted countries to change their internal domestic regulations. So there was no difference. Whether there was membership or not, the outcome was the same: loss of market, loss of control, and demonstration of powerlessness against larger economic powers.

However, note that with respect to Caribbean states' membership in CARICOM, those states have manifested great skittishness with respect to their membership obligations, and a general reluctance to pool membership, leading to a largely ineffective organization.[53] Note, as well, other manifestation of sovereign prerogative: lack of implementation with respect to the CARIFORUM-EU Partnership Agreement.[54]

My question is, if there is no value, or little value, to sovereignty, what is the point of participation, of voice, of access, of whether you are a member or a nonmember in these international institutions? Contrasting the impact of the OECD anti-tax haven and anti-money laundering regime and the effects of the WTO bananas, sugar, and internet gambling dispute, it seems to me that having membership in those international organizations was virtually meaningless for these countries. What will sovereignty become for these little places, these micro places? These places, these micro states, may seem to be inconsequential, to be far away, or great for a Spring Break vacation, but we are globalized and interlinked; there is a deep interrelationship. Accessing drugs or accessing the drug market in the United States coming through the Caribbean is much more possible now when legitimate economic activity is foreclosed for the individual citizens in Jamaica.

### B. Sovereignty and Illicit Trade

I also want to think about the larger, detrimental impact when the search for comparative advantage is undermined in this way. I have thought a great deal about the comparative advantage of Caribbean countries; that is, the movement away from agriculture to tourism. I think it is clear that tourism is going to employ a certain number of people but not everyone or even a majority of the population. So, self-sustaining agriculture would seem to be

53. *See generally,* Bravo, *CARICOM*, *supra* note 4.
54. *See* discussion *supra*, Part II.6.

a good project. But now, bananas are no longer profitable; it makes no sense to grow bananas. It makes no sense to grow sugar.

Does anyone know what the number one cash crop is now in the Caribbean? Marijuana. That is, if I can't grow bananas and find a market for it, and I can't get a job at the resort, and I can't be involved in a licit economic industry, I may then explore the relationship between the legitimate trade links and the illicit or illegitimate trade links. The choice to that banana farmer is to find the next comparative advantage. Proximity to the United States is a source of comparative advantage, and the felicity of being English-speaking in a world where English is the dominant world language of business and economics is also another source of comparative advantage. The reality of being shut out from legitimate international markets—sugar, bananas—has resulted in a huge spike in the production of marijuana, and provision of illicit services—the transborder shipment is drugs—services that are not covered under the General Agreement on Trade in Services or other WTO agreements or instruments.

What is the effect of that move to illicit business on the sovereignty of these states? The last time that Jamaica actually hit the news in the United States in a big way was the embarrassing scenario last year where a certain drug don called Dudus faced an extradition request from the United States. Curiously enough, the drug don lived in the constituency of the Prime Minister of Jamaica. Curiously enough, someone in the government of Jamaica contacted a high flying and high priced law firm in Washington, D.C. to fight the extradition on the basis of sovereignty—the sovereignty of the Jamaican state, the nation state. When this news broke in Jamaica, there was outrage that Jamaican laws were being used to defend the alleged drug king pin, but there was also great denial on the part of the government: denial of involvement. The governmental systems appeared to be corrupted, with some participation of the Prime Minister, Bruce Golding.[55] In fact, as we meet and speak here in Lansing, Michigan, the Manatt Commission of Inquiry is underway in Kingston, Jamaica, attempting to identify the existence and source of corruption in the system and the reasons why Jamaica first refused to extradite Mr. Christopher Coke (or Dudus), the infamous drug lord.[56]

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55. *See* Paul Henry, *Golding Maintains that Manatt Did not work for Government,* JAMAICA OBSERVER, Mar. 2, 2011, http://www.jamaicaobserver.com/news/-Golding-maintains-that-Manatt-did-not-work-for-Gov-t; Marc Lacey, *U.S. Extradition Effort Strains Relationship with Jamaica*, N.Y. TIMES , Apr. 25, 2010, http://www.nytimes.com/2010/04/26/world/americas/26jamaica.html?ref=christophercoke.

56. *See* Tanesha Mundle*, Nelson Denies Saying Coke Extradition Could Topple Government*, JAMAICA OBSERVER, Feb. 18, 2011, http://www.jamaicaobserver.com/news/I-never-uttered-such-words_8388676. Joseph Goldstein, *Jamaican Kingpin Pleads Guilty in New York,* N.Y. TIMES, Aug. 31, 2011, http://www.nytimes.com/2011/09/01/nyregion/christopher-coke-pleads-guilty-in-new-york.html?_r=1&ref=christophercoke.

Sovereignty then was being used as a banner, as a protective shield, for an accused drug trafficker. That was the argument, we're not going to extradite because it violates our sovereignty that the United States wants us to extradite this person, used as a shield for illicit activities, right? So, Jamaica experienced an island-wide manhunt for this individual[57] at the same time that the government was trying to fight his extradition based on notions of the sovereignty of the Jamaican state.

C. Sovereignty and Legitimacy

I also want to think about sovereignty and legitimacy, to question the legitimacy of the top-down creation and implementation of standards by the OECD. The United Nations is like sausage making: everyone goes in and speaks, and no one can come to a decision. With the FATF, in contrast, you have a single purpose, exclusive membership organization. You can actually create rules. But to what extent are these rules then being used to facilitate the economic development of one set of countries versus the domination of smaller, less powerful states?

What is the source, if any, of the legitimacy of the anti-money laundering and anti-tax haven initiatives of the OECD and the FATF, both of which are limited—even exclusive—membership and limited-purpose economic institutions? That is, what is the source of the standards deployed? What is the nature of the participation of the "subjects" of these rules? Did the subjects—"sovereign states"—participate in crafting them? Despite the doubts regarding legitimacy of the power exercised by the organizations, there is no doubt regarding the effectiveness of their strategies supported, as they are, by the power of the largest trading economies.

D. Sovereignty, Size, and Power Imbalances: More about Legitimacy

Caribbean states and territories are small in size and lack resources. As a result, their ability to participate effectively in multilateral organizations is negatively impacted.[58]

In addition, the Caribbean states' and territories' responses to the economic challenges manifest an inability to withstand reputational pressures. Despite protestations about the legitimacy—both with respect to the source of the standards and the discriminatory application—and purposes of the OECD anti-tax haven and OECD/FATF anti-money laundering initiatives, all the Caribbean states and territories capitulated to

57. Kareem Fahim, *Gang Leader Still Eludes Police as Death Rate Rises*, N.Y. TIMES, May 27, 2010, http://www.nytimes.com/2010/05/28/world/americas/28jamaica.html?ref=christophercoke.

58. Note, however, that members of CARICOM have devised an institutional mechanism for pooling negotiation strategies—the CARICOM Regional Negotiation Machinery.

the pressures, as did all other targets of the FATF. Their capitulation must be contrasted to the reactions of the United States and the European Union to the outcomes of the beef hormones and gambling disputes.[59] Economic and other sources of power allowed both of these players to avoid effective implementation of ostensibly neutral rules.

And then there is the question of sovereignty and size. Should we have small states? Does it make sense? What does sovereignty entail if there will be an inability to actually carve a path in the increasingly interdependent world? What function does sovereignty provide for these entities? It is nice to have the flag and the athletes at the Olympic Games and various cultural things, but does it really provide for the economic benefit, the political benefit of the citizens of that territory or geographic space?

## CONCLUSIONS

The recent challenges to Caribbean economic sovereignty give rise to a number of questions. These are: Does membership in multilateral organizations confer benefits to small states? Or does the membership of such states help to facilitate paralysis in decision-making? For example, the WTO's Doha Round paralysis stems from the attempt to give voice to "too many" points of view, while at the same time illustrating the limits of participatory democracy. Does the contrast between the "effectiveness" of the FATF's standard-setting and implementation with the WTO's decision-making and standard-setting challenges demonstrate the need for the raw exercise of political power in international relations and law?

Secondly, the challenges demonstrate the effects of power disparities—both with respect to geographic and population size as well as to economic size and influence.

Thirdly, this examination of those challenges calls into question the legitimacy and impact of limited member international organizations. Do they merely manifest the existing power disparities such that they are tools and exemplars of the disparities in power? And what is the impact when power disparities and the exercise of power by the powerful shut out the smaller states from legitimate trade? Jamaica, and the Caribbean in general, appears to illustrate the assumption of the reins of state power by illicit transborder networks.

In those cases, the fiction of the juridical equality of states becomes, itself, a source of comparative advantage for the pursuit of illicit and illegal activities. That is, as the illegal and illicit take over the economy, the state's sovereign status becomes a shield against scrutiny and the implementation of an internationally-based rule of law.

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59. Appellate Body Report, *European Communities—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (Jan. 16, 1998).

A further question arises whether the pooling of sovereignty continues to be a good choice. Membership of multilateral organizations may hold out the benefits of access to previously negotiated bargains and voice within an organization, even if the strength and influence of that voice is hindered by the reality of limited resources. However, decentralization and a refusal to join and to pool sovereignty may facilitate heterogeneity—that is, by serving to limit the spread and implementation of economic theories and projects that enjoy core/fundamental support in the West, but which may not serve the interests of smaller, weaker, more peripheral regions and economies.

# THE EFFECTS OF HUMAN RIGHTS NORMS ON SOVEREIGNTY: THE NATIVE AMERICAN CONTEXT

*Michael Lawrence*[*]



## INTRODUCTION

It is a pleasure to be here; thanks to the Michigan State University Journal of International Law for the opportunity. It is timely for me to participate in this Symposium panel on "The Effects of Human Rights Norms on Sovereignty," since my book, *Radicals in Their Own Time: Four Hundred Years of Struggle for Liberty and Equal Justice,* was just published by Cambridge University Press.[1] *Radicals* looks at the lives of five individuals who exemplify 400 years of struggle for liberty and equal justice in America. These five individuals led the way in the struggle for human rights in America—for what is human rights if not liberty and equal justice, and individual autonomy and free will?

## I. RADICALS IN THEIR OWN TIME

The genesis for the book is epitomized by its epigraph, which quotes Albert Einstein in 1953: "In teaching history there should be extensive discussions of personalities who benefitted mankind through independence of character and judgment." It was in this spirit that I undertook the project—that is, I wanted to look at some of the personalities throughout American history who *did* benefit mankind through their independence of character and judgment.

Reading from *Radicals:*

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* Professor and Associate Dean for Graduate and International Programs, Michigan State University College of Law. I would like to thank Professor Matthew Fletcher, a colleague at Michigan State University College of Law and a leading scholar and expert on Native American law, for his insights on the topic of this panel.

1. MICHAEL LAWRENCE, RADICALS IN THEIR OWN TIME: FOUR HUNDRED YEARS OF STRUGGLE FOR LIBERTY AND EQUAL JUSTICE (2011).

> In the spirit of Einstein's words in the epigraph, *Radicals in Their Own Time* discusses the personalities of five Americans who led the way in bursting some of America's most inglorious chains of injustice and oppression. Progress toward greater freedom in America has never been direct or easy. Democracy is messy, and the nation has had its share of despotic leaders and oppressive majorities.
>
> But one constant throughout American history has been the recurring theme of individuals of superior character and judgment, who have courageously stood up to lead the fight for human rights, that is, freedom and justice, despite considerable hardships to themselves. Every generation has them, men and women who speak the truth to power, in the face of sometimes overwhelming official and unofficial resistance. People who rebel against stifling orthodoxy and demand governmental tolerance and equal treatment, even when it seems they alone are waging the fight. Individuals who crave freedom from arbitrary authority like the very air they breathe.

The five individuals the book looks at are, first, Roger Williams (for the proposition of religious freedom of conscience), who lived from 1603 to 1682. Williams, who founded the colony of Rhode Island and Providencetown, was ostracized and eventually banished from the Puritan communities of Massachusetts Bay Colony for his troublesome views on religious freedom.

It looks next at Thomas Paine (for the proposition of the natural "Rights of Man"), who lived from 1737 to 1809. Thomas Paine, of course, was the author of *Common Sense*, the bombshell pamphlet that predated by five months (and in part motivated) the Declaration of Independence and other massive works like *The Rights of Man* (which was instrumental in the French Revolution) and *The Age of Reason*.

Elizabeth Cady Stanton (for the proposition of women's rights), who lived during the nineteenth century from 1815 until 1902, is the next subject. Stanton was a fearless advocate for women's rights who wasn't content to settle for just the right to vote. She certainly did demand the vote and was the first to do so in the Seneca Falls Convention of 1848 in the Declaration of Rights and Sentiments that she and her colleagues put forth, but she wasn't willing to settle for the vote alone; rather, she demanded equality in all respects, long before that was a recognized and acceptable position to take.

Next is W.E.B. Du Bois (for the proposition of black rights), who lived from 1868 to 1963. Du Bois was a fearless advocate for African-American rights throughout the many decades of the late 19th century and the first half of the 20th century, consistently poking and prodding a mainstream culture that largely denigrated and dehumanized people of color.

And then, finally, the book profiles Vine Deloria Jr. (for the proposition of Native American rights and traditions), who is the character that I'd like to focus on today. Deloria was the intellectual voice for generations of

Native Americans past, present and future in calling the United States and state governments to task for their failures regarding Indian rights. Deloria burst on the scene in 1969 with his book, *Custer Died for Your Sins*, and many other publications in the following decades, until his death in 2005.

One of the things that all of these characters argued for, and the crucial point they made, was that every government must recognize, or must tolerate, individual liberty, equal justice, and human rights. That is worth saying again: Government must *tolerate*. And so it becomes a matter of the government not interfering with individual free will, which thereby allows diverse viewpoints and practices the necessary breathing space that they require in a free, pluralistic society. *Radicals* explains:

> Roger Williams believed government should stay separate from, that it should *tolerate*, all religious practices. Paine was committed to the common-sense principle that government must not abridge, that it must *tolerate* the individual rights of all people. Stanton demanded that government replace a legal regime imposing separate, inferior status on women with one that recognizes, that *tolerates,* the equal legal status of women. Du Bois tirelessly challenged government to repudiate laws and practices that institutionalized white supremacist principles, and thereby to accept, to *tolerate* black people as equals under the law. And Deloria spent his lifetime exposing the practices of the U.S. government that systematically reneged on its solemn promises to leave alone, or *tolerate*, Indian tribes with their native lands and traditions, and pointed the way forward for how that government should make amends for its egregious breaches of faith.

## II. VINE DELORIA JR. AND INDIAN SOVEREIGNTY

My take on this panel—the effects of human rights norms on sovereignty—is the Native American context, because Native American communities are sovereign. They were here first. These sovereign rights, however, have not been adequately recognized or respected over time by the United States government.

As noted above, Vine Deloria Jr. has been instrumental in discussing, among many other things, the topic of Indian sovereignty. Like the other four individuals profiled in *Radicals in Their Own Time*, Deloria detested oppressive authority, and he spoke up passionately for broad governmental recognition and tolerance of Indian sovereignty, self-determination, and traditions. He demanded, "what we [Indians] need is a cultural leave-us-alone agreement, in spirit and in fact."

Deloria sought to educate people that, under the terms of their historically unique political arrangement with the United States, Indian states are entirely separate (albeit dependent) sovereigns. As such they are entitled, under well-established principles of international law, to the respect given any other sovereign state. Early on, the U.S. Supreme Court (if not the

President and Congress) recognized these principles. Chief Justice John Marshall said in *Worcester v. Georgia* in the early 1830s:

> The settled doctrine of the law of nations is that a weaker power does not surrender its independence—its right to self-government—by associating with a stronger, and taking its protection . . . . A weak state, in order to provide for its safety, may place itself under the protection of one more powerful without stripping itself of the right of government and ceasing to be a state.

Marshall continued, quoting the Swiss scholar Emmerich de Vattel, perhaps the leading international law scholar of the day: "Tributary and feudatory states do not thereby cease to be sovereign and independent states." In short, Deloria explains, the dominant society is duty-bound to leave the tribes alone to exercise their sovereign rights of government.

Moreover, Deloria adds, "Indians stand apart (not more or less favored—just apart) from other minority groups in America." When a federal or state court, as opposed to a tribal court, asserts jurisdiction over people, whether Indian or non-Indian, on reservation land, for example, Deloria and other Indian law experts view the issue as involving tribal political rights as opposed to civil rights or racial justice. David Getches writes, for example, "The larger issue at stake in nearly all Indian law cases is the relationship of the tribe to the United States, a matter rooted in centuries-old policy created as part of the nation's constitutional framework."

Despite the self-serving Discovery Doctrine rationale regarding property rights in the earlier *Johnson v. MacIntosh* case (familiar to all first-year Property students), John Marshall and the early Supreme Court in *Worcester v. Georgia* and other cases nonetheless still did believe that broad-based tribal sovereignty was mandated under the nation's constitutional structure. In *Worcester*, Marshall emphatically announced that Indian communities are "distinct political communities, having territorial boundaries within which their authority is exclusive . . . . Because the Constitution exclusively reserves the power to interact with sovereign tribes to the federal government, it follows that it is entirely inappropriate for states to engage in Indian affairs." Marshall explained that international law principles apply to the United States' tribal relations because Indian tribes are sovereign nations that existed before the founding of the United States. And because they did not participate in the framing of the Constitution, they are outside the Constitution's scope. As with any other nation, the primary means to engage in nation-to-nation relations is through the treaty-making process.

Following from the contemporaneous *Cherokee Nation v. Georgia* case, which recognized Indian tribes as "domestic dependent nations," *Worcester* described the relationship between the federal government and tribes as a form as trust arrangement, analogous in some ways to that of a guardian to its ward. Deloria explains that the recognition of a degree of independence by the stronger to the weaker is implicit in the trust relationship.

Even during that first third of the 19th century, when Chief Justice Marshall was elucidating the Supreme Court's deferential tribal sovereignty posture in *Worcester*, the other branches of the federal government took a radically different approach. In the executive branch, President Andrew Jackson was an unmitigated disaster for the tribes, with his views that Indians' choices were either to assimilate and be subjected to state authority or to move west beyond the Mississippi River. What resulted, among other travesties, was the Trail of Tears where over 5,000 Cherokees died on the way west, with endless suffering along the way.

In response to *Worcester,* Jackson reportedly said, "John Marshall made his decision, now let him enforce it." Jackson disagreed with President George Washington's early assertion that the proper manner of dealing with tribes was through the treaty process, stating instead that "the proper guardian is the legislature of the Union." In this declaration were the seeds of the doctrine that survives to this day; that is, that Congress has plenary power over tribes.

Well, how *does* Congress assert its power over Indian tribes? Congress asserts its power under the reasoning that the Commerce Clause allows Congress to exercise its authority. The Commerce Clause says Congress has the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." So Congress has the power to regulate commerce *with* the Indian tribes. Note the implicit recognition in the Commerce Clause by the Constitution's framers that Indian tribes are themselves separate, sovereign nations: Congress has the power to regulate commerce not only among the states, but also with other separate sovereign entities, specifically foreign states and Indian tribes.

What happened over time, however, is that the U.S. Supreme Court (and Congress itself) broadly interpreted the Commerce Clause to dramatically expand Congress's power to not only control commerce *with* the Indian tribes but to control the commerce *of* the tribes. This effectively gave Congress the power to dominate and to control Indian tribes, not just merely to regulate commerce of the United States, as the text would suggest, but rather to control outright all aspects of the Indian tribes. This approach was reflected in the Court's 1886 *United States v. Kagama* decision, in which the Court endorsed the idea that Congress's Commerce Clause power gives it virtually unlimited plenary guardianship authority over Indian people and tribes. Ignoring Marshall's earlier international law analysis regarding the sovereignty of domestic dependent nations, the Court reasoned, "Indian tribes are the wards of the nation; they are communities dependent on the United States; dependent largely for their daily food; dependent for their political rights." It follows, the Court reasoned, that "[f]rom their very weakness and helplessness, largely due to the course of dealings of the federal government with them, and the treaties in which it had been promised, there arises the duty of protection and with it the power of Congress."

Congress's power was then held to extend to reneging on promises that had been made in earlier treaty obligations. In *Lone Wolf v. Hitchcock* in 1903, the Court held that Congress had always had the unilateral power to abrogate treaty obligations, an assertion Deloria characterizes as "fraudulent on its face." Phrasing the holding as necessary for Indians' own care and protection, the Court reasoned that to require Congress always to obtain Indians' consent to take land, for example, would deprive it, "in a possible emergency when the necessity might be urgent for a partition and disposal of the tribal lands, of all power to act, if the assent of the Indians could not be obtained."

Congress's guiding principles, Deloria explains, were "considerations of justice as would control a Christian people in their treatment of an ignorant and dependent race . . . . It was not only a shock but a breach of common decency when Congress decided it had absolute power over the once-powerful tribes," Deloria fumes. "When the Supreme Court also decided that such should be the policy in *Lone Wolf*, the silent conquest of unsuspecting tribes was complete. That decision slammed the door on the question of morality and justice. It was like appointing a fox to guard the chicken coop."

*Lone Wolf*'s outrageous effect was that "Indians had no chance whatsoever to acquire title or rights to land which had been theirs for centuries." Deloria further argues that Indian tribes never would have so willingly sacrificed their sovereignty, at least not without a struggle. He says,

> [f]ew tribes would have signed treaties with the United States had they felt that the U.S. would violate them. The promises of self-government found in a multitude of treaties, the promises of protection by the U.S. from wrongs committed by its citizens, the promises that the tribes would be respected as nations on whose behalf the U.S. acted as trustee before the eyes of the world, were all vital parts of the treaty rights which Indians believe they have received from the U.S.

Under longstanding international law principles, Deloria further explains, the fact that Indian tribes elected to become dependent upon the U.S. for some purposes in no way diminishes their sovereignty and rights of self-determination. "Indian tribes still have the right to be recognized among the nations of earth, even with domestic legal doctrines of the U.S. guaranteeing the validity of their titles as held under protected status by the U.S. against European nations."

## III. INDIAN SOVEREIGNTY AND HUMAN RIGHTS

So how does the issue of Indian Sovereignty play out in terms of human rights? Asked another way, to the extent that the Indian nations are part of the polity in the United States, does the Constitution—which protects

certain human rights—apply to Indian nations? This is an open question that Congress tried to settle in 1968. As Matthew Fletcher writes, "Congress codified the unsettled tension between American civil rights law and American Indian tribal law, customs, and traditions in the American Indian communities, by enacting the Indian Civil Rights Act, the ICRA." ICRA, in which "Congress chose to *impose* a modified form of the Bill of Rights on Indian governments in order to *protect* those under tribal jurisdiction," was enacted out of the concern that Indian "individual rights were receiving short shrift in tribal courts and by tribal governments." As it had done previously in other statutes (such as the Indian Reorganization Act), Congress "affirmatively sought to displace tribal law and all the attendant customs and traditions, as well as Indian values, with American law. Ironically, after the Supreme Court interpreted ICRA in 1978, this law could only be interpreted and enforced by tribal courts." This, at least, is acknowledgement of tribal sovereignty in the sense that courts and Congress were recognizing the authority of tribal courts to decide cases.

"Tribal law and American civil rights law have been at odds in many tribal communities ever since," Fletcher concludes, "as tribal voters, legislatures and courts have struggled with how and whether to apply American civil rights law in Indian country." Deloria suggests ICRA is a mixed bag: "In practice, ICRA radically changed the substance of tribal courts," forcing them to decide disputes in ways that newly "restricted the powers of Indian tribes with respect to their own membership." On the positive side, "it more clearly defined appeal procedures from tribal court to federal court," and it lessened the problem of other laws which had ceded tremendous authority to states to regulate Indian affairs. *Cohen's Handbook*, which is the authoritative source on federal Indian law, observes that ICRA has been an equal-opportunity target of criticism from both those "who believe it went too far, and those who believe it did not go far enough in constraining tribal actions."

"Although ICRA was understood by most people as a major step toward the fulfillment of Indian self-government," Deloria wondered whether it "was . . . what Indians really wanted." Especially after such events as the Indian takeover of Alcatraz and Wounded Knee in the 1970s, "when we compare a sacred pipe, traditional, and tribal court, modern, as two competing means of reconciliation and problem-solving, the two sides in the conflict become readily apparent."

Again, first principles beg the question of whether Congress even has the authority to enact such legislation as ICRA over sovereign, albeit dependent, Indian nations. Deloria notes the irony of a statute that would "confer upon the American Indians the fundamental Constitutional rights which belong by right to all Americans, when by its express terms, the Constitution does not apply to the American Indians and their tribal relations and does not protect Indian tribes."

So, in terms of resisting Congress (again from Matthew Fletcher):

> A key unanswered question is whether tribal decision-makers must comply with the Indian Civil Rights Act at all. As a normative matter, perhaps Indian nations should comply with the Congressional mandate, and most tribes have agreed to do so. However, at least one tribal court has explicitly kept the question open, and it is a valid question, given the American Constitution's ambiguous grant of authority to Congress over Indian affairs. Moreover, the fact that ICRA now means that—at least in civil cases—only tribal forums are available to interpret and enforce the substantive provisions in the statute.
>
> What if the tribal court, or tribal legislature, actively resists applying, interpreting and enforcing ICRA? What if the tribal court holds that Congress had no real authority to enact ICRA?
>
> Currently these questions are more or less irrelevant for two reasons. First, few if any tribes overtly resist the substantive rules that ICRA requires. Additionally, ICRA largely is redundant in many tribal communities. Tribal constitutional and statutory law, not to forget tribal common law, already mirror and even expand upon ICRA's due process and equal protection rules, generating rules equivalent to the protections offered in federal and state courts. Many tribal courts invoke "fundamental fairness" in deciding claims. And just as in federal and state courts the rules may be the same, but the protections offered individuals case by case may differ.
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> Second, since tribal decision makers can interpret rules required by ICRA and the courts with tribal law, customs and traditions [after 1978], ICRA itself borders on irrelevance as a substantive matter, while still retaining important symbolic meaning. As free speech cases demonstrate, tribal decision makers are free to directly apply federal and state law, apply modified versions of federal and state law, or even disregard federal and state law in favor of tribal common law.
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> That said, there are certain flashpoints where tribal law and ICRA may collide . . . . Assuming that ICRA protections could not be massaged by a tribal court to avoid serious conflict, the tribal decision maker (likely a tribal court) may simply assert that Congress had no authority to impose federal constitutional rules on internal tribal matters and utterly reject ICRA. There are claims perhaps not yet considered that may pit tribal law even more directly against ICRA and federal and state civil rights norms, potentially placing a tribal court in this position.

## IV. COMMUNITY

One of the big differences in tribal and Native American culture and white culture, or dominant culture if you will, is the emphasis on community. A very important point to understand in discussing human rights in a native context is that there is an all-encompassing emphasis on community in native traditions. The Indian, Harvey Cox suggested in the book Secular City, "does not so much live in a tribe; the tribe lives in him.

He is the tribe's subjective expressions." It follows that "it is virtually impossible to 'join' a tribal religion by agreeing to its doctrines. People couldn't care less whether an outsider believes in anything."

Deloria explains that

> [n]o separate religious standard of behavior is imposed on followers of the religious tradition outside of the requirements for the ceremony: who should do what, who is excluded, who is needed for other parts of the ceremony. The customs of the tribe and the religious responsibilities to the group, are practically identical.

The fact that tribal focus is on community is not to say that the individual is completely subsumed. "The fears that some express," Deloria says,

> as to the lack of personal self among tribal people is unwarranted. For example, one of the most notable features of Indian tribal cultures is the custom of naming individuals. Indian names stand for certain qualities, for exploits, for unusual abilities, unique physical characteristics, and for the individual's unusual religious experiences. Every person has a name, given in religious ceremonies, in which his uniqueness is recognized;

in contrast to the largely generic names given in dominant culture.

"Individual worth was also recognized in other ways in tribal religions," Deloria continues.

> The keepers of the sacred medicine bundles, for example, were people who had been carefully watched for their personal characteristics, and were chosen to share some of the tribal mysteries and responsibilities in a religious sense. The priesthoods of some of the tribes were filled with people who had been carefully trained after they had demonstrated their personal integrity. In almost every way, tribal religions supported the individual in his or her community context.

Tribal traditions of spirituality inform customary tribal approaches in the area of governance and law as well. Deloria says that "laws as such did not exist in tribal societies. Law was rejected as being force imposed from without, whereas peoplehood required fulfillment from within the individual. Insofar as there were external controls, Indians accepted only the traditions and customs which were rooted in the tribe's distant past." Most tribes had never defined power in authoritarian terms. Deloria explains:

> A man consistently successful at war or hunting was likely to attract a following in direct proportion to his continuing successes. Eventually, the man with the greatest followings composed an informal council which made important decisions for the group. Anyone was free to follow or not, depending upon his own best judgment. The people only followed a course of action if they were convinced it was best for them. This was as close as most tribes ever got to a formal government.

Further on the point of individual versus group rights, Fletcher adds,

> Tribal law prior to the Indian Civil Rights Act, generally speaking, was much more oriented towards the rights of the group, over the rights of the individual . . . . The kind of coercive, arbitrary and violent government actions generated by Euro-American governments—that is, imprisonment, execution, police brutality, denial of governmental benefits and services, eminent domain, interrogation, entrapment, surveillance, quartering of soldiers and so on—were rarely if ever perpetuated by Indian communities. A classic Supreme Court case analyzing the dark side of Anglo-American law is *Miranda v. Arizona*, in which the Court concluded that the long history and custom of police abuses of suspected criminals required a Constitution-based prophylactic rule prohibiting the interrogation of suspects, unless they were aware of their rights to silence and counsel. As the Navajo nation's Supreme Court recently noted, there is no such tradition of law enforcement at Navajo, and likely no such tradition in the vast majority of American Indian communities.

One area that we can look at in terms of how ICRA may differ among Indian tribes, and the protection of human rights as such, is the protection of speech. The Indian Bill of Rights incorporates aspects of the First Amendment, prohibiting Indian tribes that exercise powers of self-government from making or enforcing any law preventing the free exercise of religion, or abridging the freedom of speech or the press, or the right of the people peaceably to assemble and to petition for a redress of grievances. So "the freedom of speech (and of the press) is uniquely linked to participation of individuals in government and politics," Fletcher explains.

> In the American constitutional structure, these political rights help to form the core of American governance and liberty . . . . In American Indian politics the right to speak also is a core aspect of government, but in ways that sometimes differ from American politics. In general, tribal communities have always presumed the right to speech, whereas speech in American politics is a new creature, subject to continued and varied restrictions, in spite of the First Amendment. "Leaders are inherently powerless to deprive any family of its means of subsistence. As long as each family stays within its ancestral lands, and retains its economic autonomy, the right to dissent is a practical reality."

We may conclude, as Fletcher asserts, that "tribal law develops daily, and since federal courts generally, since 1978, no longer hear civil rights claims being brought under the ICRA, it is appropriate to focus on modern tribal law relating to free speech." Regarding speech, many tribal constitutions give free speech rights, some do not. And indeed, some of the tribal constitutions give *more* rights, in the sense that they are not limited only to "state action" (i.e., government action), but also prohibit abridgement of free speech rights by private individuals. And, "where no tribal custom or tradition has been argued or implicated, [tribal courts] will

look to general U.S. constitutional principles, as articulated by federal and [state] courts, for guidance."

Fletcher concludes:

> Tribal courts have no obligation to apply federal and state constitutional law as it relates to free speech. Sometime tribal courts will apply strict, intermediate or rational basis scrutiny to analyze government restrictions on speech in relevant contexts, while others do not. Some courts rely heavily on tribal customary or traditional law, while others rely less. However, depending on the strength or intensity of the customary or traditional interest in free speech restriction, tribal courts are more likely to invoke tribal, customary, or traditional law. If a legal dispute involving a uniquely tribal practice, tradition, art or custom arises, it is far more likely (and reasonable, if not desirable) for a tribal court to apply traditional or customary law.

# THE HUMAN RIGHT TO CULTURAL PROPERTY

*Kimberly L. Alderman*[*]



## INTRODUCTION

The Aquinnah and Mashpee Wampanoug peoples of Massachusetts watch as the graves of their ancestors are transformed into an offshore wind farm.[1] The Peruvian people watch as Spain and a commercial salvage operation battle in court over coins that were minted from Andean silver, using Andean labor, and at great cost to the Andean people.[2] And the world watches as the British Museum persistently refuses to return the Parthenon Marbles, even after Greece built a state of the art museum to prove they could care for the objects, and even though more than half of Englishmen think the Marbles should go back.[3]

What do the Wampanoug, the Peruvians, and the Greeks have in common? Each of them lacks a sufficient legal claim to protect, preserve, or reclaim their cultural heritage. Each of them has been marginalized by a cultural property protection model that has historically exalted property

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1. Katharine Q. Seelye, *Big Wind Farm Off Cape Cod Gets Approval*, N.Y. TIMES, April 29, 2010, http://www.nytimes.com/2010/04/29/science/earth/29wind.html.

2. Odyssey Marine Exploration v. Kingdom of Spain, No. 10-10269 (11 Cir. Filed Jan. 21, 2010); *See also* Kimberly Alderman, *High Seas Shipwreck Pits Treasure Hunters Against a Sovereign Nation: The Black Swan Case,* AM. SOC'Y OF INT'L L. CULTURAL HERITAGE & ARTS REV., Spring 2010, at 3.

3. Anthee Carassave, *In Athens, Museum is an Olympian Feat*, N.Y. TIMES, June 19, 2009, http://www.nytimes.com/2009/06/20/arts/design/20acropolis.html; *Poll Shows Support for Marbles Return*, BBC NEWS (Oct. 15, 2002), http://news.bbc.co.uk/2/hi/entertainment/2330015.stm.

interests over moral rights.[4] Each of them will benefit as that protection model continues its current course of evolution—away from a property framework and toward a human rights-based approach.

My work suggests that three indicators demonstrate this evolution: (1) the recognition of a human right to culture in international law, (2) the changing tenor of national repatriation efforts, and (3) the birth of intangible cultural property. This Article focuses on the first indicator, examining how changes in international law demonstrate the emergence of a human right to culture and, consequently, a right to cultural property.

Part II of this Article explores the origins of "cultural property" and shows how traditionally cultural property law has treated cultural property the same as any other property; moveable antiquities were personal property and archaeological sites were real property. Part III examines how recent shifts in international law demonstrate that the cultural property protection model is moving away from the traditional property framework and toward a human rights-based approach. The Article then considers the implication of this evolution on the sovereignty of nation states. Part IV concludes.

## I. THE ORIGIN OF CULTURAL PROPERTY

The common law cultural property protection model treated cultural objects and sites the same as non-cultural objects and sites. Moveable ancient objects were treated as personal property and immoveable ancient sites were treated as real property.[5] Objects and sites were generally traded in and disposed of without special regard for any subjective cultural value.[6] National common law emphasized individual property rights, and there was little to no debate over whether private individuals should be permitted to acquire and trade in cultural property.[7]

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4. *See* Kimberly Alderman, *Ethical Issues in Cultural Property Law Pertaining to Indigenous Peoples*, 45 IDAHO L. REV. 515 (2009) (discussing perceived moral rights) [hereinafter *Ethical Issues*].

5. *See* M. June Harris, *Who Owns the Pot of Gold at the End of the Rainbow? A Review of the Impact of Cultural Property on Finder and Salvage Laws*, 14 ARIZ. J. INT'L & COMP. L. 223, 227-33 (1997) (discussing the application of finder and salvage laws to antiquities at common law); *See also* Joseph L. Sax, *Heritage Preservation as a Public Duty: The Abbe Gregoire and the Origins of an Idea*, 88 MICH. L. REV. 1142, 1142-45 (1990) (explaining how, at common law, governments would not interfere with the decisions of the private owners of ancient sites).

6. Sax, *supra* note 5, at 1142.

7. *See generally* Patty Gerstenblith, *Protecting Cultural Heritage in Armed Conflict: Looking Back, Looking Forward*, 7 CARDOZO PUB. L. POL'Y & ETHICS J. 677 (2009). Similarly, theft of art and archaeological materials was treated the same as other forms of plunder. Perhaps the earliest public trial for the theft of archaeological materials was that of Gaius Verres, prosecuted by Cicero in 70 B.C. *See* FRANK HEWITT COWLES, GAIUS VERRES: AN HISTORICAL STUDY 98-102 (1917) (describing one such theft, wherein the chief complaint was that the Roman magistrate had given the art owner a paltry sum to create a fictional purchase).

Moving into the 20th century, a public property model emerged. National governments began to claim ownership of archaeological materials by virtue of their sovereignty. Turkey has the oldest confirmed patrimony law, dating to 1906.[8] Peru followed suit in 1929 and Italy in 1939.[9] Source nation governments scrambled to appropriate the inherent value of cultural objects to their national treasures.[10] Meanwhile, the idea had taken root that the common person was entitled to access cultural materials, whether in museums or by public access to sites.[11]

In 1954, UNESCO coined the term "cultural property" in the Hague Convention on the Protection of Cultural Property in the Event of Armed Conflict ("Hague Convention").[12] Article 1 of the Hague Convention defines cultural property as:

> (a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art or history, whether religious or secular; archaeological sites . . . ; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest . . . ;[13]

The Hague Convention was drafted in the wake of World War II, during which cultural property was targeted as a unique class of property and

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8. Decree of Antiquities (1906) (Turk.); *See* Amy E. Miller, *The Looting of Iraqi Art: Occupiers and Collectors Turn Away Leisurely from the Disaster*, 27 CASE W. RES. J. INT'L L. 49, 60 (2005) (as to Turkey's oldest patrimony law).Through patrimony statutes, national governments lay claim to archaeological materials unearthed within their borders. *See* NIEL BRODIE ET AL., STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL 8, 31-32 (2000) [hereinafter STEALING HISTORY].

9. Anuario de la Legislacion Peruana, Ley No. 6634 (1929) (Peru); Peru v. Johnson, 720 F. Supp. 810, 812-13 (C.D. Cal. 1989) (determining that Law No. 6634 was the oldest unambiguous patrimony law despite earlier laws in Peru pertaining to archaeological materials). L. Giu. 1939, n. 1089, Tutela delle cose di interesse artistico e storico [Protection of Artistic and Historic Sites] G.U. Aug. 8, 1939, n. 184 (Italy) (noting that there were export laws that applied specifically to archaeological materials in the late 19th century, but it was not until the early 20th century that countries began to enact statutes claiming government ownership of such materials).

10. *See generally* Lisa J. Borodkin, Note, *The Economics of Antiquities Looting and a Proposed Legal Alternative*, 95 COLUM. L. REV. 377, 385 (1995) (defining source nations as "countries in which artifacts are principally found").

11. *See* Robert Fulford, *In the Age of Museum Building*, NAT'L POST (Toronto), Dec. 4, 2001, *available at* http://www.robertfulford.com/MuseumArchitecture.html (public museums began opening during the enlightenment, with the Louvre becoming the international standard in 1793).

12. Naomi Mezey, *The Paradox of Cultural Property*, 107 COLUM. L. REV. 2004, 2009 n.11 (2007) (citing Lyndel V. Prott & Patrick J. O'Keefe, *'Cultural Heritage' or 'Cultural Property?'*, 1 INT'L J. CULTURAL PROP. 307, 312 (1992)), *available at* http://lawweb.usc.edu/centers/clhc/archives/workshops/documents/Mezey.pdf.

13. Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, art.1, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague Convention].

suffered grave damage because of its perceived vulnerability and value.[14] Signatories recognize that "damage to cultural property belonging to any people whatsoever means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world."[15] Given the impetus, the original narrow objective of international cultural property law was to prevent destruction of cultural objects and sites in times of war.[16]

Over the last five decades, the definition of "cultural property" has not changed significantly from that espoused by the 1954 Hague Convention. It has expanded somewhat to include some intangible non-objects, which, if not for their cultural features, would otherwise be considered intellectual property.[17] However, the near entire body of cultural property law has developed over this same period, certainly the entire body of international cultural property law and to a large extent domestic law on the same. With this development, the original narrow objective of international cultural property law has expanded beyond mere physical preservation. International cultural property law now seeks to reaffirm the relationships that creator cultures have with materials and sites with a subjective cultural value, and to ensure that information about and access to those materials and sites is protected.[18]

## II. EMERGENCE OF THE RIGHT TO CULTURE IN INTERNATIONAL LAW

In recent decades, the international community has become increasingly concerned with the subjective experience of groups from whom cultural materials and ideas originate. It has become willing to protect creator cultures by interpreting the text of old international agreements in a manner

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14. *See* Janet Blake, *On Defining the Cultural Heritage*, 49 INT'L & COMP. L.Q. 61, 61 (2000).

15. Hague Convention, *supra* note 13, pmbl.

16. *See* Blake, *supra* note 14, at 61.

17. Since the coining of "cultural property," the term has expanded to include intangible cultural materials as well, such as weaving patterns, traditional medicine, and forms of cultural expression. For those that distinguish between cultural property and cultural heritage, see O'Keefe, *supra* note 12, at 6. Intangible cultural materials would most often be categorized as the latter. Nonetheless, intangible cultural materials are historically and economically valuable, and just as important to a people's cultural development as are physical objects and sites. This reality is increasingly recognized in both international and, to a lesser extent, domestic cultural property law. *See also* Federico Lenzerini, *Intangible Cultural Heritage: The Living Culture of Peoples*, 22 EUR. J. INT'L L., 101, 103-08 (2011) (explaining the evolution of the "cultural property" definition to include intangible cultural heritage).

18. "Creator cultures" are those who created archaeological materials and sites. They are most often indigenous peoples who claim a moral right to benefit from or possess cultural materials by virtue of their ancestral origin. The term is used to distinguish the indigenous group from the national government within whose borders the group resides. *See generally* Alderman, *Ethical Issues*, *supra* note 4.

more favorable to moral claims, especially when the traditional property model provides no such protection. In doing so, the international community is supplementing the cultural property protection model by way of the human rights model.

### A. Expanding the Scope of Protection for Cultural Property

In the mid-20th century, the first connection between human rights and cultural heritage was drawn. The 1948 Universal Declaration of Human Rights ("Universal Declaration") recognized that cultural rights are "indispensable for [a person's] dignity and the free development of his personality."[19] This was an early recognition that culture is significant to the experience of humanity. Article 27 of the Universal Declaration provides:

> (1) Everyone has the right to freely participate in the cultural life of the community, to enjoy the arts . . . .
>
> (2) Everyone has the right to the protection of the moral and material interests resulting from any . . . artistic production of which he is the author.[20]

The concept articulated in Section (1) of Article 27 forms the basis for later notions that people have a human right to access cultural materials and sites, and that this access is necessary for meaningful participation in cultural life. Meanwhile, Section (2) of Article 27 suggests that authors, as individuals, should have the right to benefit from their artistic product. The concept of group authorship has recently emerged, raising the question of whether modern-day group members have a right to benefit from or possess the creations of their ancestors.[21]

In 1954, both the European Cultural Convention and the Hague Convention recognized that losing cultural heritage damages the collective culture of the world.[22] The European Cultural Convention was designed to safeguard and encourage the region's collective cultural development, recognizing each party's "national contribution to the common cultural heritage of Europe."[23] In Article 5, signing parties agree to "safeguard [objects of European cultural value] and ensure reasonable access thereto."[24]

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19. United Nations, Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/810, at 75 (Dec. 12, 1948) [hereinafter Universal Declaration], *available at* http://www.unhchr.ch/udhr/lang/eng.htm.

20. *Id.* at 76.

21. *See generally* Pammela Quin Saunders, *A Sea Change off the Coast of Maine: Common Pool Resources as Cultural Property*, 60 EMORY L.J. 1323 (2011).

22. European Cultural Convention, Dec. 19, 1954, 218 U.N.T.S. 139 [hereinafter ECC]; Hague Convention, *supra* note 13, pmbl.

23. ECC, *supra* note 22, art. 1.

24. *Id.* at art. 5.

Meanwhile, parties to the Hague Convention recognize "that the preservation of the cultural heritage is of great importance for all peoples of the world," and that cultural heritage therefore deserves international protection.[25] Even so, the Hague Convention focused on the physical preservation of cultural sites and did not ensure the continued relationship of people in occupied territories with those sites.[26] The international community began to recognize that local contributions were essential to the collective human culture. International law therefore provided for physical preservation of cultural materials and sites, foreshadowed a future protection of access to them, and acknowledged that the human right to participate in a cultural life implicated cultural property.

In 1970, the UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("UNESCO Convention") acknowledged that the interchange of cultural property among nations "increases the knowledge of the civilization of Man, enriches the cultural life of all peoples and inspires mutual respect and appreciation among nations."[27] Signing parties agree to enforce one another's patrimony laws and export restrictions.[28] The UNESCO Convention has been the most significant development toward international regulation of the trade in cultural property, but in order to become so it had to focus on the rights of national governments rather than people.[29] The UNESCO Convention not only facilitated international cooperation for the preservation of cultural materials; it also globalized the concept that cultural property is worth protection on moral, not just economic, grounds.

In a 1998 50-year follow-up to the Universal Declaration of Human Rights, the United Nations General Assembly recognized that the

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25. Hague Convention, *supra* note 13, pmbl.

26. *See generally* Kimberly Alderman, *The Designation of West Bank Mosques as Israeli National Heritage Sites: Using the 1954 Hague Convention to Protect Against In Situ Appropriation of Cultural Sites*, 44 CREIGHTON L. REV. (forthcoming 2011) [hereinafter *West Bank Mosques*].

27. UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, pmbl., Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter UNESCO Convention].

28. *Id.* About reciprocal enforcement of patrimony statutes, Neil Brodie succinctly explained:

> Some countries have taken certain categories of material, most notably antiquities and paleontological material, into state ownership. Illegal export of this state property is then considered theft. As theft is a generally recognized criminal offence it is in the interests of all countries to act against it, so the police of one country may take action to recover material stolen from another, and expect their efforts to be reciprocated in return.

BRODIE, *supra* note 8, at 31.

29. Consider, for instance, Article 13(d), which recognizes "the indefeasible right of each State Party to this Convention to classify and declare certain cultural property as inalienable . . . ." UNESCO Convention, *supra* note 27.

enjoyment of cultural rights is necessary to the full enjoyment of the right of self-determination.[30] In the following year, the Second Protocol to the 1954 Hague Convention expanded on what was considered respect and safeguarding of such sites, adding protection of the use of cultural sites by local people in occupied territories.[31] These developments reflect the shift in focus of the international community to the subjective experience of local cultures regarding cultural objects and sites.

The 2005 Council of Europe Framework Convention on the Value of Cultural Heritage for Society ("Faro Convention") expanded on the 1948 Universal Declaration's human right to a cultural life.[32] The first recognition of the Faro Convention is that "rights relating to cultural heritage are inherent in the right to participate in cultural life, as defined in the Universal Declaration of Human Rights."[33] Importantly, the Faro Convention then recognizes cultural heritage exists "independently of ownership" and acknowledges that cultural resources have a special character that depends on how people identify with them.[34] The Faro Convention goes beyond any earlier international agreement toward making the relationship between people and cultural materials and sites a human rights issue rather than a property issue.

Most recently, in 2007, the United Nations Declaration on the Rights of Indigenous Peoples provided that indigenous peoples should control their own cultural resources.[35] Article 12(1) provides indigenous peoples "have the right to . . . maintain, protect, and have access to privacy to their religious and cultural sites," the right to "use and control of their ceremonial objects," and the right to repatriation of their human remains.[36] In Article 12(2), signing parties agree to "seek to enable the access and/or repatriation

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30. Fiftieth Anniversary of the Universal Declaration of Human Rights, G.A. Res. 53/168, U.N. Doc. A/RES/53/168 (Feb. 11, 2009), http://www.un.org/depts/dhl/resguide/r53.htm (expressing concern that people are still "deprived of the full enjoyment of their [cultural] rights and that some peoples still lack the full enjoyment of their right of self-determination").

31. Occupying parties must work in "close-co-operation with the competent national authorities of the occupied territory" to make any change to use of cultural property in an occupied territory. Second Protocol to the Hague Convention of 1954 for the Protection of Cultural Property in the Event of Armed Conflict, art. 9(2), Mar. 26, 1999, UNESCO Doc. HC/1999/7.

32. Council of Europe Framework Convention on the Value of Cultural Heritage for Society, art. 2, Oct. 27, 2005, CETS no. 199 [hereinafter Faro Convention].

33. *Id.* at art. 1.

34. *Id.* at art. 2 ("Cultural heritage is a group of resources inherited from the past which people identify, independently of ownership, as a reflection and expression of their constantly evolving values, beliefs, knowledge and traditions. It includes all aspects of the environment resulting from the interaction between people and places through time.").

35. UN Declaration on the Rights of Indigenous Peoples, art. 31, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007), *available at* http://www.un.org/esa/socdev/unpfii/en/declaration.html [hereinafter UNDRIP].

36. *Id.* at art. 12(1).

of ceremonial objects and human remains in their possession. . .”[37] Article 31 more broadly provides, “Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage . . . .”[38] The spirit of this Declaration undermines the way in which national governments have traditionally controlled the cultural resources of indigenous peoples within their borders.[39] It emphasizes that cultural independence is imperative to the human right to self-determination and creates a new class of rights based on the relationship that indigenous peoples have with cultural objects and sites, recognizing this relationship exists independently of ownership concerns.

International law demonstrates that the treatment of cultural property has shifted from a focus on individual ownership, to a focus on government ownership, to recognition of the global value of cultural heritage, to the idea that a right to cultural heritage exists independently from ownership concerns and derives from the human right to culture.

### B. Implication for Sovereignty

Traditionally, nations have had sovereign authority over cultural property within their borders.[40] This principle was exemplified with the Bamiyan Buddhas in central Afghanistan. These enormous sculptures were carved into the sides of sandstone cliffs along the Silk Road and had survived since the 6th century.[41] They were considered eligible for listing on the UNESCO World Heritage List in 1983 due to their significance.[42]

In 2001, the Taliban announced the statues were idols and would be destroyed.[43] The Taliban denied allegations that the threatened destruction was retaliation for economic sanctions in connection with their sheltering of terrorists, or for the international community’s refusal to recognize it as the

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37. *Id.* at art. 12(2).

38. *Id.* at art. 31.

39. *See generally* Alderman*, Ethical Issues*, *supra* note 4.

40. *See* M. Catherine Vernon, Note, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT’L L. 435, 441 (1994) (“International laws and treaties do not prevent destruction by the host state [of cultural sites], or allow the other states the right to preserve the site.”).

41. Joshua Hammer, *Searching for Buddha in Afghanistan*, SMITHSONIAN MAGAZINE, Dec. 2010, *available at* http://www.smithsonianmag.com/people-places/Searching-for-Buddha-in-Afghanistan.html.

42. The listing was deferred due to issues with the protection plan. Conflict then broke out in the region and modification of the protection plan was no longer feasible. *Interview with Peter King, Chair of the World Heritage Committee*, WORLD HERITAGE NEWSLETTER (UNESCO World Heritage Centre), May-June 2001, at 2, *available at* http://whc.unesco.org/documents/publi_news_30_en.pdf.

43. *See* Amir Shah, *Taliban: Statues Must Be Destroyed*, ASSOCIATED PRESS, Feb. 26, 2001, *available at* http://stderr.org/pipermail/tariqas/2001-February/000317.html (noting there is no longer a Buddhist population in the region).

legitimate government of Afghanistan.[44] Foreign groups and governments pled for reconsideration; Japan, for instance, offered to remove the statues piece by piece and reassemble them abroad.[45]

Within weeks of their announcement, the Taliban used dynamite to demolish the sculptures.[46] When the face on one of the Buddhas stubbornly clung to the cliffside despite the explosions, they used a rocket launcher.[47]

The international response was severe, and the attack on the Bamiyan Buddhas was viewed as an attack on the international community.[48] Terms used to describe the destruction include "moral depravity," "cultural vandalism," and "crime against culture."[49] The tenor of the response indicated that the Taliban had done something worse than mere property destruction and, despite the sovereignty Afghanistan enjoyed with respect to their cultural property, the Taliban had done something inherently *wrong*.

In February 2010, Israel announced the designation of sites in the occupied Palestinian territories as national heritage sites.[50] Of particular relevance was their designation of the Ibrahimi Mosque as such a site.[51] The Ibrahimi Mosque is also known as the Cave of Machpelah, and it is where the Biblical and Koranic patriarchs Abraham, Isaac, and Jacob, and the matriarchs Sarah, Rebekah, and Leah, are buried.[52] Both Jews and Muslims

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44. Rohini Hensman, *Religious Sentiment and National Sovereignty*, 36 ECON. & POL. WKLY. 2031, Jun. 9-15, 2001 (quoting the Taliban Foreign Minister, Wakil Ahmed Mutawakel, as saying he would meet with a UN official in order to "tell him that what we are doing is an internal religious issue").

45. *Japan Made Bamiyan Buddhas Offer: Taliban Memoir,* BANGKOK POST, Feb. 26, 2010, http://www.bangkokpost.com/news/asia/169773/japan-mamoir.

46. Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 EUR. J. INT'L L. 619, 625-26 (Sept. 2003).

47. PETER BERGEN, THE OSAMA BIN LADEN I KNOW 271 (2006).

48. Francioni & Lenzerini, *supra* note 46, at 620 ( "To the knowledge of the authors, this episode is the first planned and deliberate destruction of cultural heritage of great importance as act of defiance of the United Nations and of the international community.").

49. *Id.* at 621 (referring to the international community's "great concern for the moral depravity shown by the perpetrators of such acts"). Peter Bergen, *Taliban-Destroyed Buddhas May Never be Restored*, CNN.COM (May 10, 2007), http://articles.cnn.com/2007-05-10/world/afghan.buddhas_1_giant-statues-kabul-museum-habiba-sarabi?_s=PM:WORLD (calling the destruction an "act of cultural vandalism"). *U.N. Confirms Destruction of Afghan Buddhas*, ABC NEWS, (Mar. 12, 2011), http://abcnews.go.com/International/story?id=81406&page=1 (quoting UNESCO's Director General as describing the destruction as a "crime against culture").

50. Gil Ronen, *More Hevron Riots Follow Cave of Machpelah Decision*, ARUTZ SHEVA (Israel) (Feb. 23, 2010, 6:11 PM), http://www.israelnationalnews.com/News/News.aspx/136163.

51. Anna Willard, *UNESCO Worried About Israel Heritage Plan in West Bank*, REUTERS, Feb. 26, 2010, *available at* http://in.reuters.com/article/2010/02/26/idINIndia-46510020100226.

52. *Id.* It is believed that the fourth Matriarch, Rachel, is buried in the Bilal Bin Rabah Mosque in Bethlehem (also called Rachel's Tomb), now on the Israeli side of the West Bank barrier. *See* Matthew Price*, The Changing Face of Jerusalem*, BBC NEWS (Apr.

have long-established historical ties to this site, although it has been used almost exclusively as a mosque since the 7th century.[53]

The Palestinians and Israeli left viewed the designation as an attempt by Israel to annex or appropriate the site, while Israel's prime minister explained that it was just a "line budget to maintain the places."[54] There was an immediate, concerted response from the international community.[55] The designation was called "provocative," a "hijacking" of a Palestinian cultural site, and an illegal "annexation."[56]

The international community viewed Israel's act as a violation of international law and the UNESCO Conventions, including those pertaining to human rights.[57] Few of the criticisms charged something was legally wrong with the designation, however. Instead, some argued the designation was tantamount to a cultural appropriation because it threatened to interrupt the Palestinians' cultural connection with the mosque.[58] Hanan Ashrawi of the Palestine Liberation Organization said that the designation was a step in

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28, 2005), http://news.bbc.co.uk/2/hi/middle_east/4490671.stm (describing what many have called an annexation of Rachel's Tomb).

53. The exceptions being from the 12th to 14th centuries and since the Six Day War in 1967. THE CATHOLIC ENCYCLOPEDIA: AN INTERNATIONAL WORK OF REFERENCE ON THE CONSTITUTION, DOCTRINE DISCIPLINE, AND HISTORY OF THE CATHOLIC CHURCH 184-86 (Herbermann, et al. eds., 1913).

54. *Tensions Escalate over West Bank Holy Sites*, VOICE OF AM. NEWS (Mar. 10, 2010), http://www.voanews.com/english/news/Tensions-Escalate-Over-West-Bank-Holy-Sites---87250932.html.

55. *See* Hensman, *supra* note 44 ("A UN General Assembly resolution sponsored by over 100 nations and approved by consensus on March 9 urged Taliban to take immediate action to prevent further destruction of these and other monuments.").

56. *US Slams Israel's 'Provocative' Holy Sites Plan*, AGENCE FRANCE-PRESSE (Feb. 25, 2010), *available at* http://hello.news352.lu/edito-24947-us-slams-israel-s-provocative-holy-sites-plan.html (reporting the Obama administration called the designations "provocative"). Omar Karmi, *Anger over Israeli Plan to Hijack Muslim Holy Sites*, THE NATIONAL (United Arab Emirates), Feb. 25, 2010, http://www.thenational.ae/news/worldwide/middle-east/anger-over-israeli-plan-to-hijack-muslim-holy-sites [hereinafter Karmi]. *Concerns over Israel heritage list*, AL JAZEERA (Feb. 27, 2010), http://english.aljazeera.net/news/middleeast/2010/02/201022620151299893 8.html (quoting Palestinian prime minister Salam Fayyad as saying Israel was "annexing" Ibrahimi mosque, US State Department spokesman Mark Toner as saying the designation was a "provocation," and the Organisation of the Islamic Conference representative as calling the designation illegal and illegitimate).

57. Press release, UNESCO, Executive Board Today Adopted Five Decisions Concerning UNESCO's Work in the Occupied Palestinian and Arab Territories, (Oct. 21, 2010), *available at* http://www.unesco.org/new/en/media-services/single-view/news/executive_board_adopts_five_decisions_concerning_unescos_work_in_the_occupied_palestinian_and_arab_territories/ ("[UNESCO'S Executive] Board voted 44 to one (12 abstentions) to reaffirm that the [Ibrahimi Mosque is] an integral part of the occupied Palestinian Territories and that any unilateral action by the Israeli authorities is to be considered a violation of international law, the UNESCO Conventions and the United Nations and Security Council resolutions"); *see generally* Alderman, *West Bank Mosques*, *supra* note 26.

58. *See generally id.*

the direction where Palestinian culture would be "distorted or obliterated by the force of occupation."[59]

The international community is increasingly willing to comment on and criticize legally valid decisions pertaining to cultural property when those decisions have a subjectively immoral component. Nations no longer have carte blanche to address cultural property concerns within their own borders. Instead, they are subject to the scrutiny of the international community.[60]

Similarly, the more that cultural property is treated as a human rights issue, as opposed to a property issue, the broader obligations that nations have with respect to it. There has already been an increase in the international monitoring of cultural property preservation and disposition.[61] Even mere monitoring could be considered an erosion of the sovereignty that nations have traditionally enjoyed with respect to cultural property.[62] Through UNESCO's World Heritage List system, nations submit periodic reports to an international committee of experts, the same way as they do for other human rights issues.[63]

Consistent with international monitoring, cultural property decisions by national governments are subject to increasing formal scrutiny. One such example is the manner in which UNESCO addressed in-session Israel's designation of the Ibrahimi Mosque as national cultural heritage.[64] Correspondingly, national governments increasingly perceive cultural property issues as those pertaining to foreign, rather than domestic, policy.[65]

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59. Karmi, *supra* note 56.

60. Hensman, *supra* note 44 ("Evidently the international community is very much concerned about what happens on Afghan soil, and the implicit message is that the Taliban clerics do not have the right to destroy these statues which happen to be located in their country.").

61. *See* Patty Gerstenblith, *International Art and Cultural Heritage*, 45 INT'L L. 395, 395-97 (2011).

62. Some argue that international monitoring of elections, for example, infringes on sovereignty. Arturo Santa-Cruz, *Redefining Sovereignty, Consolidating a Network: Monitoring the 1990 Nicaraguan Elections,* 24 REVISTA DE CIECIA POLÍTICA 189 (2004), *available at* http://www.scielo.cl/pdf/revcipol/v24n1/art08.pdf ("By inviting international monitoring missions the Nicaraguan government was 'crossing [the] Rubicon of sovereignty . . . . With the official invitations [to the OAS, the UN, and the Carter Center], the Nicaraguans transcended conventional definitions of sovereignty.'" (quoting Robert Pastor)).

63. *Periodic Reporting*, UNESCO WORLD HERITAGE CONVENTION, http://whc.unesco.org/en/periodicreporting/ (last visited Oct. 7, 2011).

64. UNESCO, Decisions Adopted by the Executive Board, 185th Sess., Oct. 5-21, 2010,185 EX/Decision 15 (Nov. 19, 2010), http://unesdoc.unesco.org/images/0018/001899/189993e.pdf (following up on UNESCO , Decision on the Two Palestinian Sites of Al-Haram Al-Ibrahimi/Tomb of the Patriarchs in Al-Khalil/Hebron and The Bilal bin Rabah Mosque/Rachel's Tomb in Bethlehem, 184th Sess., 184 EX/Decision 37 (Mar. 19, 2010), http://unesdoc.unesco.org/images/0018/001873/187356e.pdf).

65. The U.S. Department of State administers the 1970 UNESCO Convention via The Convention on Cultural Property Implementation Act, 19 U.S.C. §§ 2601-2613 (2006). The Department of State is responsible for making agreements with foreign nations for

The more interest the international community shows in cultural property preservation and disposition, the more nations must monitor and report on cultural property issues to one another. There has certainly been an increase in the information available internationally on domestic cultural property regulation and preservation.[66] The challenge stemming from this increase in available information is in turning the statistics and records into useful data, so that the effectiveness of varying cultural property regulatory schemes can be compared both among nations and, over the course of time, for the same nation.

As the notion gains support that cultural property is a human rights issue, not just a property issue, cultural rights advocacy efforts enjoy more support from the international community in terms of cooperation and financing. Recent decades have seen the birth of non-profits and non-governmental organizations dedicated exclusively to advocating for the preservation of cultural property.[67]

With the increase in the number and activity of heritage advocacy groups, there have been increasing calls for humanitarian intervention with respect to cultural property issues. Some have asked whether the international community could or should have prevented the destruction of the Bamiyan Buddhas.[68] Some have asked whether the international community should interfere with the alleged annexation of the Ibrahimi Mosque.[69] As cultural property is increasingly conceptualized as a human rights issue, these kinds of inquiries become more pressing. They also beg the question of whether international norms about cultural property are

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import restrictions on cultural materials. *But cf.* Brian Baxter, *As Assange Indictment Looms, WikiLeaks Cables Tie Two Treasure Cases Together*, AMLAW DAILY, Dec. 10, 2010, http://amlawdaily.typepad.com/amlawdaily/2010/12/wikileaks-treasure.html (alleging the U.S. Department of State offered support to Spain in pending U.S.-based litigation in exchange for assistance with retrieving a Camille Pissaro painting that had been stolen by Nazis during World War II, and that U.S. diplomats offered to illegally share confidential customs documents as part of this support).

66. Domestic laws pertaining to cultural property have become more widely available in no small part due to the internet. UNESCO's National Cultural Heritage Laws database contains national legislation from each member state pertaining to cultural heritage and contact information for each nation's cultural heritage authorities. Legislation comes in both original format and with an English translation. *See* UNESCO, Database of National Cultural Heritage Laws, http://www.unesco.org/culture/natlaws/ (last visited Oct. 13, 2011).

67. The International Council on Monuments and Sites (ICOMOS) was established early on in 1965 while the Lawyers' Committee for Cultural Heritage Preservation (LCCHP) and Saving Antiquities for Everyone (SAFE) were founded in 2003. ICOMOS International Charter for the Conservation and Restoration of Monuments and Sites, (Venice Charter), approved May 31, 1964, *available at* http://www.icomos.org/venice_charter.html; YEARBOOK OF CULTURAL PROPERTY LAW 8 (Sherry Hutt ed. 2006); Press release, Archaeological Institute of America, Saving Antiquities for Everyone (SAFE) Launches New Website (Apr. 30, 2004), *available at* http://www.archaeological.org/news/pressrelease/267.

68. *See generally* Hensman, *supra* note 44.

69. *See generally* Alderman*, West Bank Mosques*, *supra* note 26.

becoming more authoritative in nature, requiring certain behaviors and prohibiting others.

## CONCLUSION

International law indicates that a "right to culture" has developed as a fundamental human right and that control of cultural property is an inherent part of that right. Correspondingly, the cultural property protection model is evolving from a property framework toward a human rights framework. While implementation and enforcement of cultural property policies remain the responsibility of nation states, it is under the increasing scrutiny of the international community.

# AMERICA GIVETH, AND AMERICA TAKETH AWAY: THE FATE OF ARTICLE 9 AFTER THE FUTENMA BASE DISPUTE

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*RENUNCIATION OF WAR*

***Article 9.*** *Aspiring sincerely to an international peace based on justice and order, the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of settling international disputes. In order to accomplish the aim of the preceding paragraph, land, sea, and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized.*[1]

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1. NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 9 (Japan), *available at* http://www.kantei.go.jp/foreign/constitution_and_government_of_japan/constitution_e.html.

INTRODUCTION

On its face, the above declaration, Article 9 of the Constitution of Japan, seems quixotic and vague. How can a people "forever" renounce war? Were there not at least some Japanese people who refused to renounce war, who still believed in the validity of force as a means of settling international disputes? How can one generation speak for and bind future generations with such an extreme provision? Can a people truly believe that armed forces or war potential will *never* be maintained? In light of these questions, which imply their answers, Article 9 would seem to have been set up for failure. An ideal, however noble, is still an ideal: an imagined state of unrealizable perfection. But what to do with an ideal that is codified in law? And not just any law, but the constitution itself: a document that provides the skeleton for all other laws? What to do, in other words, with formative law that is impossible to sustain?

Politicians and other commentators have been chipping away at Article 9 for years.[2] In the wake of the American-led War in Iraq, however, Article 9 underwent heightened and unremitting challenge.[3] With the exception of current prime minister Naoto Kan, all of Japan's prime ministers since the Iraq War—Junichiro Koizumi,[4] Shinzo Abe,[5] Yasuo Fukuda,[6] Taro Aso,[7] and Yukio Hatoyama[8]—have at some time called for the revision, if not the

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2. See Kendrick F. Royer, *The Demise of the World's First Pacifist Constitution: Japanese Constitutional Interpretation and the Growth of Executive Power to Make War*, 26 VAND. J. TRANSNAT'L L. 749, 770-97 (1993); *see also* Akio Sugeno, *The Japanese Pacifist Constitution is in Danger*, 64 GUILD PRAC. 184 (2007).

3. *See generally* Tomohito Shinoda, *Japan's Top-Down Policy Process to Dispatch the SDF to Iraq*, 7 JAPANESE J. OF POL. SCI. 71, 71-91 (2006).

4. *Koizumi Calls for Article 9 Revision*, DAILY YOMIURI (Tokyo), Sept. 14, 2003, at 1; Peter Alford, *Koizumi Selects Allies to Back Military Push*, WEEKEND AUSTRALIAN, Oct. 9, 2004, at 16; Reiji Yoshida, *Koizumi Urges LDP-DPJ Effort to Revise Constitution*, JAPAN TIMES, Jan. 15, 2004, http://www.japantimes.co.jp/text/nn20040115a3.html.

5. *Abe Calls for a 'Bold Review' of Japanese Constitution*, N.Y. TIMES, May 3, 2007, http://www.nytimes.com/2007/05/03/world/asia/03iht-japan.1.5546774.html.

6. Shinichi Murao & Shozo Nakayama, *Debates on Constitution May Intensify*, DAILY YOMIURI (Tokyo), May 4, 2006, at 3.

7. *Japan Says it Could Build a Nuclear Bomb*, WASH. POST, Nov. 29, 2006, http://www.washingtonpost.com/wp-dyn/content/article/2006/11/29/AR2006112901641.html; *see also Officials Stay Calm over Aso's 'Collective Self Defense' Remark*, JAPAN TODAY, Oct. 3, 2008, http://www.japantoday.com/category/politics/view/officials-stay-calm-over-asos-collective-self-defense-remark; *see also* Craig Martin, *The Fatal Flaw in Trying to Impose a New Interpretation on Article 9*, JAPAN TIMES, Oct. 5, 2008, http://search.japantimes.co.jp/cgi-bin/eo20081005a2.html.

8. *Opposition Leader Says Constitution Should Include Right to Wage War*, BBC SUMMARY OF WORLD BROADCASTS (Oct. 17, 2000), at part 3; *see also Doing Battle over Article 9*, JAPAN TIMES, May 3, 2000, http://search.japantimes.co.jp/cgi-bin/ed20000503a1.html; *see also* Tetsushi Kajimoto, *Hatoyama's Proposed Amendment*

complete overhaul, of Article 9.[9] The Obama administration has fortified this trend in remilitarization by mounting pressure on recent Japanese administrations to step up the role of the Japanese military in Asian affairs.[10] At the same time, the Obama administration has remained mostly unyielding about the maintenance of the U.S. air station known as Futenma on the island of Okinawa.

This Article considers how the Obama administration's policies toward Japan implicate Article 9. More specifically, it argues that the Futenma base dispute (as it has come to be known) jeopardizes the very existence of Article 9 by threatening to render it moot and by expanding the already expansive interpretations of Article 9. Part I provides a brief history of the Futenma base dispute during the Obama years, and Part II explains the effects of the Futenma base dispute on Article 9. More specifically, Part II contextualizes the Futenma issue by way of the legislative and judicial history of Article 9 and suggests that the intermingling of Japanese people and resources with the U.S. military allows Japan to circumvent Article 9 without massive public outcry. The fact of the matter is that Japan is relying on American troops to perform actions (maintaining combat troops and weapons, conducting military exercises and operations, and establishing armed defensive zones) that Japan could not do on its own because of constitutional restraints. Japan is permitting and in some cases encouraging the U.S. military to carry out actions that Japan is forbidden by its constitution to carry out.

One thing this article does not do is suggest that Japan should or should not amend Article 9. Issues of internal Japanese politics are not the concern of this piece; the concern of this piece is the U.S. military presence that threatens to undermine the constitution of a sovereign nation. A secondary concern is for the people of Okinawa who want the U.S. troops off their island. The *obiter dictum* of this article suggests that not just the Futenma air station but all U.S. forces on Okinawa should be withdrawn from the island not only because the U.S. military jeopardizes the import and impact of Article 9, but also because the people of Okinawa generally oppose the presence of U.S. troops in their territory. The recent court decision in *Mori*

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*Acknowledges the SDF is a Military*, JAPAN TIMES, Feb. 4, 2005, http://www.japantimes.co.jp/text/nn20050204a4.html.

9. Some of these calls for revision were made before these men were prime minister, and even, in some cases, before the Iraq War.

10. *See* Allen Mendenhall, *Base Maneuvers*, LIBERTY, Aug. 2010, at 11-12; Allen Mendenhall, *Okinawa Occupied*, CHRONICLES: A MAGAZINE OF AMERICAN CULTURE, Sept. 2010, at 20-22, *available at* allenmendenhall.com/wp-content/uploads/Okinawa-Occupied.pdf; Allen Mendenhall, *Obama Out of Okinawa*, ANTIWAR.COM (Dec. 22, 2010), http://original.antiwar.com/mendenhall/2010/12/21/obama-out-of-okinawa/; Allen Mendenhall, *The Latest Happy Face of the Ruling Class*, COUNTERPUNCH (Dec. 27, 2010), http://www.counterpunch.org/mendenhall12272010.html; and Allen Mendenhall, *How Long Must Okinawans Wait*, TAKI'S MAGAZINE, (Jan. 11, 2011), http://takimag.com/article/how_long_must_okinawans_wait/print.

*v. Japan* provides Okinawans with a constitutional argument for challenging the presence of U.S. bases like Futenma. That decision established a concrete "right to live in peace" that, to be actionable, must bear a "legal relationship" to military activity that violates Article 9.

Despite the attention that the Futenma base dispute has generated in Japan, relatively little scholarship in English has addressed Futenma and its effects upon Article 9, perhaps because the issue remains unresolved. Without purporting to offer a definitive resolution to this longstanding conflict, this Article attempts to fill that lacuna in scholarship while synthesizing several English-language sources on Futenma and contextualizing these sources within the broader meaning and history of Article 9. The Futenma base dispute is far from over; it is probably just beginning. The irony (or paradox) of the Futenma base dispute is that America spearheaded the pacifist provisions of Article 9 after World War II, but because of Futenma and other American policies in Asia, America might bring about the apparent violation of the very clause that it made possible.

## I. A BRIEF HISTORY OF THE FUTENMA BASE DISPUTE

The Futenma base dispute springs out of a long and complex relationship between Japan and the U.S. The U.S. military officially occupied Okinawa from the end of World War II until 1972.[11] The decision to plant U.S. troops on Okinawa probably had to do with Japanese discrimination against Okinawans in addition to joint Japanese and American efforts to modernize Okinawa.[12] U.S. troops have remained on the island since 1972. As of 1998, Okinawa hosted over half of the U.S. forces in Japan.[13] At that time, U.S. forces took up 10% of all land on Okinawa.[14] In 1995, three U.S. serviceman gang-raped a 12 year old girl, sparking furious protests that caused President Bill Clinton to express national regret over the soldiers' actions.[15] This event brought about an enormous rift between local Okinawan officials and the Japanese government over the issue of U.S.

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11. U.S. GEN. ACCOUNTING OFFICE, GAO-98-66, OVERSEAS PRESENCE: ISSUES INVOLVED IN REDUCING THE IMPACT OF THE U.S. MILITARY PRESENCE ON OKINAWA 2 (1998) [hereinafter OVERSEAS PRESENCE].

12. On this score, see Masamichi S. Inoue, *We Are Okinawans But of a Different Kind*, 45 CURRENT ANTHROPOLOGY 85, 92 (2004).

13. *See* OVERSEAS PRESENCE, *supra* note 11, at 2.

14. *Id.*

15. Mary Jordan & Kevin Sullivan, *Americans Charged With Rape Turned Over to Police; Japanese Indictment of Three U.S. Servicemen in Okinawa Means Conviction Likely*, WASH. POST, Sept. 30, 1995, at A24; *see also* Op-Ed., *Questions of Justice in Okinawa*, N.Y. TIMES, Oct. 28, 1995, § 1, at 20, *available at* http://www.nytimes.com/1995/10/28/opinion/questions-of-justice-in-okinawa.html?src=pm; *see also* Kevin Sullivan, *3 Servicemen Admit Roles in Rape of Okinawan Girl*, WASH. POST, Nov. 8, 1995, at A1.

forces on the island.[16] This event also transformed the U.S. troops on Okinawa into "an element of the utmost importance in the formulation of the Joint Declaration on Security toward a [*sic*] new era."[17]

After the rape incident, the U.S. and Japan established the Special Action Committee on Okinawa, better known by its acronym SACO. The mission of SACO was to "reduce the burden on the people of Okinawa and thereby strengthen the Japan-U.S. alliance."[18] At the behest of SACO, the U.S. and Japan established the Futenma accord in 1996. This agreement maintained that the U.S. military would return base and communications properties to private landowners and the prefecture, relocate helicopter landing zones, release Marine training areas, consolidate U.S. housing districts, terminate artillery live-fire training, relocate parachute drop trainings, implement noise reduction initiatives, and transfer Navy and other military aircrafts, among other things.[19] The release of the agreement did not finalize specifics about the implementation of various provisions within the agreement because, as Hitoshi Tanaka, then Deputy Director-General of the North American Affairs Bureau (1996-98), explained,

> we have to formulate concrete ideas for the development and use of returned land, work out the costs involved and arrange for the required financial resources. Where facilities are to be relocated, we also need to get approval from local communities around relocation sites and then build the actual facilities.[20]

Tanaka stated quite presciently that "although we have taken the utmost care to select the least problematic relocation sites, criticism, particularly from residents around the sites, is still unavoidable."[21] Finally, he noted, "[i]t will be no easy task to persuade those people," by which he meant the Okinawans.[22] Tanaka was right to anticipate criticism. Shortly after the agreement was memorialized, a seemingly irritated Okinawa Governor Masahide Ota remarked, "[i]t's painful to ask some areas in and out of

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16. *Okinawa Rape Case Brings Rift in Government*, YOMIURI SHIMBUN (Japan), Oct. 16, 1995, at 2.

17. HITOSHI TANAKA, ET AL., JAPAN-U.S. SECURITY ALLIANCE FOR THE 21ST CENTURY: CORNERSTONE OF DEMOCRACY PEACE AND PROSPERITY FOR OUR FUTURE GENERATIONS 5 (1996).

18. Ministry of Foreign Affairs of Japan, *The Special Action Committee on Okinawa* (SACO) *Final Report* (Dec. 2, 1996), *available at* http://www.state.gov/www/regions/eap/japan/rpt-saco_final_961202.html.

19. *Id*. *See also* Ministry of Foreign Affairs of Japan, *The Japan-U.S. Special Action Committee (SACO) Interim Report* (Apr. 15, 1996), *available at* http://www.mofa.go.jp/region/n-america/us/security/seco.html; *see also The SACO Final Report on Futenma Air Station (an integral part of the SACO Final Report)* (Dec. 2, 1996), *available at* http://www.mofa.go.jp/region/n-america/us/security/96saco2.html.

20. Tanaka, *supra* note 17, at 8.

21. *Id*.

22. *Id*.

Okinawa to bear the burden" because "Okinawans hate to see their own pain and agony passed to others."[23]

After years of false starts, delays, and setbacks, the Futenma accord received renewed media attention in 2006 when the U.S. and Japanese governments agreed to relocate the Futenma air station to a less populated area near Camp Schwab in Nago (which is also on Okinawa) and gradually to redeploy 8,000 U.S. military personnel and their families to new facilities on Guam.[24] The relocation was a major issue in the 2006 Okinawa gubernatorial campaigns that resulted in Hirokazu Nakaima's victory.[25] Nakaima had argued that the best option for Futenma would be "relocation outside the Okinawa Prefecture," but he tempered that position over the course of his campaign by refocusing on economic and tourist initiatives rather than on the U.S. military.[26] By 2010, when he faced and won reelection, Nakaima took a harder stance against the Futenma base, and at that time he referred to base relocation out of Okinawa as the "fast" option.[27] The Futenma accord has since been called the "most problematic bilateral issue that has surfaced since the Hatoyama Cabinet was inaugurated."[28] Yukio Hatoyama was the Prime Minister of Japan from September 2009 to June 2010.

Notwithstanding the rape incident in 1995, several key factors motivated the 2006 accord that called for a reduction in U.S. troops and a change in base geography. Reporting to the U.S. Congress in June 2010, Emma Chanlett-Avery, William H. Cooper, and Mark E. Manyin suggested the following about the goals of the accord:

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23. Kiyotaka Shibasaki, *Shift in Okinawa Base Burden Causes Opposition to Mount*, DAILY YOMIURI (Japan), Apr. 16, 1996, at 2.

24. *See* Hidemichi Katsumata, *Futenma Issue Looms over Okinawa Poll*, DAILY YOMIURI (Japan), Oct.31, 2006, at 4; *see also* Tatsuya Fukumoto & Takashi Imai, *Document Seen as Alliance Road Map; Relocation Plan Hailed for Easing Hosting Burden on Okinawa Pref.*, DAILY YOMIURI (Japan), May 3, 2006, at 3; *see also Okinawa Gov. OK's Base Plan Inamine Expresses Broad Agreement with Futenma Shift*, DAILY YOMIURI (Japan), May 12, 2006, at 1; *see also Politics must not delay Futenma relocation*, DAILY YOMIURI 4 (September 4, 2006); *see also* Op-Ed., *Futenma Relocation Agreement*, JAPAN TIMES, May 18, 2006, http://search.japantimes.co.jp/cgi-bin/ed20060518a1.html; *see also* Kiroku Hanai, *U.S.-Dependent to What End?*, JAPAN TIMES, June 16, 2006, http://search.japantimes.co.jp/cgi-bin/eo20060626kh.html.

25. Takashi Oda, *Political Pulse; Voters Failed to Touch Base*, DAILY YOMIURI (Japan), Nov. 23, 2006, at 4.

26. *Id*.

27. *See Nakaima Calls Futenma Relocation Outside of Okinawa 'Fast' Option*, JAPAN TODAY, Dec. 28, 2010, http://www.japantoday.com/category/politics/view/nakaima-calls-futenma-relocation-out-of-okinawa-fast-option; *see also Okinawa Governor Re-elected in U.S. Base Dominated Poll*, BBC MONITORING ASIA-PAC.–POL (Nov. 19, 2010), http://www.bbc.co.uk/news/world-asia-pacific-11858992.

28. EMMA CHANLETT-AVERY ET. AL., CONG. RESEARCH SERV., RL 33436, JAPAN-U.S. RELATIONS: ISSUES FOR CONGRESS 1 (2010).

> The reduction of Marines on Okinawa seeks to quell the political controversy that has surrounded the presence of U.S. forces in the southernmost part of Japan for years. [ . . . ] Though constituting less than 1% of Japan's land mass, Okinawa currently hosts 65% of the total U.S. forces in Japan. The current controversy reflects a fundamental tension in the relationship between Okinawa and the central government in Tokyo: while the country reaps the benefit of the U.S. security guarantee, the Okinawans must bear the burden of hosting thousands of foreign troops. Although the host cities are economically dependent on the bases, residents' grievances include noise, petty and occasionally violent crime, and environmental degradation stemming from the U.S. presence.[29]

I quote at length because the authors make several important points. Part of what makes the Okinawa issue so complicated, the authors seem to suggest, is the Tokyo-Washington alliance. Elsewhere I have proposed that this Tokyo-Washington alliance is like governmental collusion that has effectively disenfranchised Okinawans, who do not have the political clout or muscle to challenge a single massive central government, let alone two such governments.[30] In saying this, I have echoed the criticisms of others. Glenn D. Hook and Richard Siddle explain, for example, that for Japan, "the 'Okinawa problem' is one to be solved through economic blackmail or heavy-handed political tactics."[31] These commentators point to "the continued use by the Japanese state of economic carrot-and-stick methods to placate Okinawans over the bases."[32] The use of these methods indicates "a profound lack of imagination among Japan's political leadership and an unwillingness to let localities practise any meaningful form of autonomy."[33]

Because the island of Okinawa is culturally, ethnically, and historically distinct from Japan proper, and because Okinawans continue to have their interests slighted or suppressed by the Japanese government in Tokyo, experts like Doug Bandow have remarked that the Tokyo-Washington alliance smacks of collusion and colonialism.[34] Others have likewise called

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29. *Id.* at 7.

30. *See* Mendenhall, *Okinawa Occupied*, *supra* note 10, at 20; *see also* Allen Mendenhall, *Don't Forget Okinawa*, THEMENDENHALL.COM (Mar. 4, 2011), http://themendenhall.com/2011/03/04/dont-forget-okinawa/. Asian historian and political activist Chalmers Johnston also refers to the Washington-Tokyo relationship as "collusion." CHALMERS JOHNSTON, BLOWBACK: THE COSTS AND CONSEQUENCES OF AMERICAN EMPIRE 57 (Henry Holt & Co. 2004) (2000).

31. JAPAN AND OKINAWA: STRUCTURE AND SUBJECTIVITY 244 (Glenn D. Hook & Richard Siddle eds., 2003).

32. *Id.*

33. *Id.*

34. *See* Doug Bandow, *Freeing Okinawa*, KOREA HERALD, May 18, 1999 *available at* http://www.cato.org/pub_display.php?pub_id=5127; *see also* Doug Bandow, *Okinawa and the Problem of Empire*, HUFFINGTON POST (March 25, 2010, 2:59 AM), http://www.huffingtonpost.com/doug-bandow/okinawa-and-the-problems_b_512610.html?bandow/okinawa-and-the-problems_b_512610.html? ("Today

Okinawa a "dumping ground"[35] for U.S. bases and have suggested that Okinawans are treated as "second class" citizens in Japan.[36]

The Tokyo-Washington alliance was temporarily unsettled when the leaders of the U.S. and Japan took on new faces and personalities, first in Obama, who was elected in 2008, and then in Hatoyama, who was elected in 2009. Under Hatoyama's leadership, the Democratic Party of Japan (DPJ) gained power over the Liberal Democratic Party (LDP), which had more or less enjoyed political supremacy for the last 60 years. The election results bothered Washington and the Obama administration because the

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both U.S. and Japanese government officials cheerfully conspire against Okinawans."); *see also* DOUG BANDOW, FOREIGN FOLLIES: AMERICA'S NEW GLOBAL EMPIRE 141 (2006) ("Washington and Tokyo continued to collude against the island."). For further reading on Okinawa and colonialism, see Darrell Y. Hamamoto, *'Soft Colonialism': A Nikkei Perspective on Contemporary Okinawa*, 3 OKINAWAN J. OF AM. STUD. 28 (2006) (describing the various incarnations of soft colonialism still present in Okinawa).

35. Andrew Daisuke Stewart, Kayano v. Hokkaido *Expropriation Committee Revisited: Recognition of Ryukyuans as a Cultural Minority Under the International Covenant on Civil and Political Rights, An Alternative Paradigm for Okinawan Demilitarization*, 4 ASIAN-PAC. L. & POL'Y J. 382, 384 (2003) ("Okinawa, Japan's poorest and one of its smallest prefectures, has been a dumping ground for American bases since the end of World War II.").

36. Post-war history reveals that Japan has consistently used Okinawa as a valuable bargaining chip in its dealings with the United States. Over the past fifty years, Japan has wagered the Okinawan people's lives, lands, and future, in negotiating the terms of surrender, independence, and reversion. This strategy has succeeded in minimizing the number of U.S. bases in Japan and has kept its main islands free of nuclear weapons. The popular perception—the scenario that the Japanese government would most likely desire to perpetuate—is that Okinawa's condition has been the result of a vanquished country being forced to acquiesce to the demands of a victorious foreign power. On the contrary, Japan has not been merely a passive bystander, but a willing participant in the process of designing Okinawa's fate. While the Allies provided Japan with a level of self-determination in shaping its future, neither the United States nor Japan has ever consulted the Okinawan people or given them a voice as to what should become of them and their homeland. Little or nothing has been done so far to address or alleviate Okinawa's numerous problems that stem from the excess proliferation of U.S. bases. Even the recent steps that have been taken through the formation of SACO have not brought about a difference in the everyday living conditions of the island's inhabitants.

It has been over a century since Okinawa was a Japanese colony and the Japanese government no longer officially designates Okinawa's inhabitants as second-class citizens. Today, the people of Okinawa are citizens of the Japanese nation-state, legally entitled to the same protection and privileges as all other Japanese. In reality, however, the hierarchical power structure that has defined the relationship between the *Wajin* and the Ryukuans is still firmly in place. Whether it was the feudal era policy to separate and distinguish Ryukuans from the *Wajin*, or the Meiji government's attempts to eliminate all traces of Ryukuan culture, Japan has always determined Okinawa's path. It is in this historical framework that people must view the current 'Okinawa Problem.' The fact that a disproportionate share of U.S. bases in Japan are located in Okinawa is due to the Japanese government's view of the Okinawan people as "different," and the current situation builds upon the historical treatment rooted in this perception. Notwithstanding the government's official position of impartiality and equality with regard to Okinawa, the base situation in Okinawa is nothing but partial and unequal. *Id*. at 428-29.

defiant Hatoyama seemed unwilling to toe the Washington policy line.[37] Obama officials met with Japanese leaders on December 4, 2009 to express concern about Hatoyama's policies, but the meeting was a failure.[38] Japanese and American officials used the meeting to wrangle over the 2006 accord.[39] The particularly divisive issue at that meeting was not the accord generally but more specifically the role of the Futenma air base[40] that had sparked recent protests by Okinawans, who preferred that the base be moved completely out of Okinawa, and possibly out of Japan.[41]

Comments by U.S. Ambassador John Roos, who claimed that the Obama administration expected Japan to resolve the base dispute "expeditiously,"[42] set the stage for an argumentative meeting, as did similar comments by Defense Secretary Robert Gates, who, in a visit to Japan in October of that year,[43] lectured his Japanese hosts.[44] Gates informed his hosts, for instance, that the U.S. would not transfer 8,000 troops from Okinawa to Guam and would not surrender parcels of land belonging to Okinawans if Japan refused to honor the 2006 accord.[45] Gates's aggressive attitude toward the Japanese earned him the nickname "Grumpy Gates."[46]

Meanwhile, Hatoyama triggered media attention for his response to Gates's call for expedition: "We are not discussing this on the premise that it has to be decided by the end of the year."[47] Hatoyama had other political difficulties brewing at this time, especially with his party struggling to

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37. *See* John Pomfret, *U.S. Concerned About New Japanese Premier* Hatoyama, WASH. POST, Dec. 29, 2009, http://www.washingtonpost.com/wp-dyn/content/article/2009/12/28/AR2009122802271.html?hpid=topnews; *see also* John Pomfret & Blaine Harden, *U.S. Struggles to Keep Step with Japan's Shifting Foreign Policy*, WASH. POST, Dec. 5, 2009 http://www.washingtonpost.com/wp-dyn/content/article/2009/12/04/AR2009120401033.html.

38. Pomfret & Harden, *supra* note 37 ("The meeting ended with no apparent agreement.").

39. *Id*.

40. *See* Eric Talmadge, *Futenma Dispute Strains Ties with Japan*, AIR FORCE TIMES, Dec. 29, 2009, http://www.airforcetimes.com/news/2009/12/ap_japan_futenma_122909/; *see also* Pomfret & Harden, *supra* note 37.

41. Isabel Reynolds, *Thousands of Japanese Protest U.S. Base Plan*, REUTERS, Nov. 8, 2009, *available at* http://www.reuters.com/article/idUSTRE5A70IG20091108.

42. *See* Pomfret & Harden, *supra* note 37.

43. Robert Lloyd Parry, *Robert Gates Moves to Keep US Troops on Japan Soil*, TIMES (London), Oct. 22, 2009, *available at* http://www.timesonline.co.uk/tol/news/world/asia/article6884982.ece.

44. Araminta Wordsworth, *Obama Faces Yet Another Military Problem, This Time with Japan*, NAT'L POST (Toronto), Nov. 12, 2009, http://network.nationalpost.com/NP/blogs/fullcomment/archive/2009/11/12/a-lesson-in-saving-face-in-the-inscrutable-east.aspx.

45. *See* Pomfret & Harden, *supra* note 37.

46. Peter J. Brown, *Gates Gets Grumpy in Tokyo*, ASIA TIMES ONLINE, Oct. 28, 2009, http://www.atimes.com/atimes/Japan/KJ28Dh01.html.

47. *See* Pomfret & Harden, *supra* note 37.

adjust to its new leadership responsibilities.[48] In fact, the problems facing Hatoyama were so intense that DPJ leaders worried about losing their majority in the upper house.[49] One Tokyo-based analyst announced with apparent sarcasm "Hatoyama thinks the United States should be kind enough to wait on the base issue until this political problem is solved."[50] The Japanese were not the only ones frustrated with the stalemate over the base issue or the Obama administration's heavy-handedness in dealing with Hatoyama. Former U.S. Assistant Secretary of Defense Joseph Nye took to the pages of *The New York Times* to complain that "we need a more patient and strategic approach to Japan. We are allowing a second-order issue to threaten our long-term strategy for East Asia."[51]

Despite this increasing attention to the Futenma base dispute, the Obama administration continued to pressure Hatoyama and the Japanese leadership even as Hillary Clinton met with Japanese leaders to try to defuse the tension.[52] The Obama administration, for its part, struggled to make sense of the messages that Hatoyama was sending about Futenma. Foreign Minister Katsuya Okada at one point told the Japanese media that the Hatoyama administration was suspending talks about the Futenma base relocation,[53] and then, a few weeks later, Hatoyama informed Obama that he (Hatoyama) had postponed his decision about Futenma until 2010.[54] Resolution of the Futenma base dispute was put off until 2011 (although at this writing resolution has yet to materialize).

Rather than moving towards Obama's stated interests in 2010, Hatoyama moved away from them, going so far as to announce that the Japanese navy would no longer support the U.S.-led Afghan War.[55] In discussions with Japanese Foreign Minister Katsuya Okada in Hawaii,[56] Hillary Clinton tried to alleviate the situation by talking about the longstanding "U.S.-Japanese

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48. *Id*.

49. *Id*.

50. *Id*.

51. Joseph S. Nye, *An Alliance Larger than One Issue*, N.Y. TIMES, Jan. 6, 2010, http://www.nytimes.com/2010/01/07/opinion/07nye.html.

52. Jacob M. Schlesinger, *U.S. Seeks to Defuse Sense of 'Crisi' in Japan Alliance*, WALL ST. J., Jan. 13, 2010, http://online.wsj.com/article/SB126325931200925649.html?mod=googlenews_wsj.

53. Blaine Harden, *Report: Japan Suspends Talks About U.S. Air Base*, WASH. POST, Dec. 9, 2009, at A17, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2009/12/08/AR2009120801050.html.

54. Pomfret, *supra*, note 37.

55. Martin Fackler, *Japan: Navy Ends Mission in Support of Afghan War*, N.Y. TIMES, Jan. 15, 2010, *available at* http://www.nytimes.com/2010/01/16/world/asia/16briefs-Japan.html.

56. *See* Andrew Quinn, *Clinton to Talk Bases, Security on Pacific Swing*, REUTERS, Jan. 11, 2010, *available at* http://www.reuters.com/article/idUSTRE60A0O320100111?type=politicsNews; *see also* John Brinsley, *Clinton Urges Japan's Okada to Resolve Air Base Issue*, BLOOMBERG (Jan. 12, 2010), http://www.bloomberg.com/apps/news?pid=20601101&sid=aauMVRsOZekc.

alliance"[57] and the need for "stability for the region."[58] Clinton's measured vocabulary and cautious rhetoric recast the Futenma base dispute to portray American interests as compatible with Japanese interests and as protective of Japan. "It is much bigger than any one particular issue," she announced.[59]

After U.S. Senators Daniel Inouye (D-Hawaii) and Thad Cochran (R-Mississippi) met with Hatoyama in January 2010, the two countries reasserted their commitment to one another and downplayed the gravity of the Futenma dispute.[60] If this event signaled progress, then Clinton's claims shortly thereafter that the U.S. would "exercise influence"[61] in Asia for the next 100 years—to say nothing of the strangeness of this prophesy—signaled a serious setback. Commenting on the ongoing feud between the Obama and Hatoyama administrations, Gavan McCormack, emeritus professor at Australian National University and coordinator of *The Asia-Pacific Journal*, used words like "paternalistic," "colonial," "anti-democratic," and "intolerant" to refer to U.S. policy.[62] He mocked Obama's campaign slogan by applying it to the situation in Okinawa: "Yes we can—but you can't."[63] Chalmers Johnson put it even more strongly:

> The U.S. has become obsessed with maintaining our empire of military bases, which we cannot afford and which an increasing number of so-called host countries no longer want. I would strongly suggest that the United States climb off its high horse, move the Futenma Marines back to a base in the United States (such as Camp Pendleton, near where I live) and thank the Okinawans for their 65 years of forbearance.[64]

In April 2010, Japanese public support for Hatoyama sank to below 30%;[65] the Futenma base dispute was a key factor in the poll. During the same month, a Tokunoshima-based group collected 24,000 signatures for a

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57. *See* Schlesinger, *supra* note 52; *see also Clinton, Okada begin talks on disputed US base in Japan*, FRANCE 24 (Jan. 12, 2010, 23:38), http://www.france24.com/en/20100112-clinton-okada-begin-talks-disputed-us-base-japan.

58. *See* Lachlan Carmichael, *Clinton Starts Asia Tour Amid Concerns Over Japan Ties*, ABS-CBN NEWS (Jan. 11, 2010, 2:16PM), http://www.abs-cbnnews.com/world/01/11/10/clinton-starts-pacific-tour-amid-concerns-over-japan-ties.

59. *Id.*

60. Chisa Fujioka, *Japan, U.S. Vow to Expand Ties Despite Base Feud*, REUTERS, Jan. 19, 2010, *available at* http://www.reuters.com/article/idUSTRE60I14C20100119?type=politicsNews.

61. Quinn, *supra* note 56.

62. Gavan McCormack, *The Battle of Okinawa 2009:* Obama vs. Hatoyama, ASIA-PAC. J., Nov, 16, 2009, at 5.

63. *Id.*

64. Chalmers Johnson, *Another Battle of Okinawa*, L.A. TIMES, May 6, 2010, http://articles.latimes.com/2010/may/06/opinion/la-oe-johnson-20100506/2.

65. Kyoko Hasegawa, *Support for Japan Sinks Below 30%*, AGENCE FRANCE PRESSE, Apr. 12, 2010, http://www.google.com/hostednews/afp/article/ALeqM5hHfoyr2FVZTYLwLGtpFdNgNFgJ0g.

petition opposed to the transfer of U.S. facilities to the island.[66] If those numbers can be considered representative, then 80% of Tokunoshima residents opposed hosting the U.S. base on their island.[67] It is not surprising, then, that Okinawans were upset by the DPJ stance on Futenma.

Three mayors on the island of Tokunoshima rejected the DPJ appeal to host the base, citing concerns about noise and security.[68] They drafted a letter to Obama in which they protested against the Futenma base relocation,[69] and they scheduled a rally to make abundantly clear the extent of their opposition to Futenma.[70] One mayor, Akira Okubo, said that he would send photos of the rally to the American president.[71] Another mayor, Susumu Inamine, staged a sit-in at the Diet in Tokyo.[72]

Hatoyama's stance did not translate into political success. He became more controversial among Japanese and Americans alike even as his resistance to Obama began to bring about results in the form of U.S. concessions, such as the returning of three significant sites to Japan: the bombing ranges on two nearby islands (Kumejima and Torishima) and the water area east of Okinawa.[73] At the same time, media outlets began challenging the widely accepted notion that U.S. Marines were indispensible to the safety of the region.[74] In the face of these seeming victories for Hatoyama, Obama undertook a publicity campaign of his own, questioning whether he could "trust" Hatoyama to "follow through," a comment that sounded more like a challenge than a regret.[75] One commentator called Obama's remarks "extraordinarily harsh."[76] At any rate,

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66. *80% of Tokunoshima Residents Oppose Hosting U.S. Base*, JAPAN TIMES, May 6, 2010, http://search.japantimes.co.jp/cgi-bin/nn20100506a2.html.

67. *Id*.

68. *Japan Islanders to Reject US Base in Okinawa*, AGENCE FRANCE PRESSE, Apr. 13, 2010, http://www.google.com/hostednews/afp/article/ALeqM5h04HtS77a3nSqi07n6Bjc0bIajDA.

69. *Id*.

70. *Id*.

71. *Id*.

72. *See Okinawa's Mayors, Citizens Stage Sit-in to Call for U.S. Base Relocation*, GLOBAL TIMES (China), Apr. 27, 2010, http://world.globaltimes.cn/asia-pacific/2011-04/526537.html; *see also Okinawa Mayors Stage Sit-in at Diet to Seek U.S. Base Removal*, JAPAN TODAY, Apr. 27, 2010, http://www.japantoday.com/category/politics/view/okinawa-mayors-stage-sit-in-at-diet-to-seek-us-base-removal.

73. *U.S. Floats Modified Plan on Futenma*, JAPAN TIMES, Apr. 17, 2010, http://search.japantimes.co.jp/cgi-bin/nn20100417a2.html.

74. Yutaka Yoshida, *Okinawa Marines Said Dispensable: Analysts Say Force Levels Have Been Greatly Reduced and Question Their Role as a Deterrent*, JAPAN TIMES, Apr. 16, 2010, http://search.japantimes.co.jp/cgi-bin/nn20100416f4.html.

75. *President Asked Hatoyama One Key Question: Can You 'Follow Through?'*, JAPAN TIMES, Apr. 19, 2010, http://search.japantimes.co.jp/cgi-bin/nn20100419a2.html.

76. *Obama Asked PM to Follow Through on Futenma Issue*, JAPAN TODAY, Apr. 3, 2010, http://www.japantoday.com/category/politics/view/obama-asked-pm-to-follow-through-on-futenma-issue.

neither Obama nor Hatoyama seemed to gain political leverage on the issue of Futenma. The base was simply too controversial.

Polls released on April 19 showed that more than half of Japanese voters wanted Hatoyama to step down if he could not resolve the base issue.[77] On April 20, Hatoyama's administration tried but failed to set up meetings with the three mayors on Tokunoshima;[78] the mayors gave the administration the cold shoulder. Despite the resistance in Tokunoshima, Hatoyama reiterated his pledge to resolve the base dispute by the end of May,[79] and Tokunoshima remained the Japanese government's favorite option for the relocation.[80] The U.S., however, rejected the proposal to relocate to Tokunishima.[81]

Katsuya Okada, then Minister for Foreign Affairs, allegedly presented John Roos with a proposal on April 23 that some read[82] as a broad acceptance of the 2006 accord. Yet the proposal did not totally conform to U.S. designs. It called for altering a new runway in the town of Henoko, for instance, and for transferring parts of the Marine facility away from Okinawa.[83] *The Washington Post* broke the story of these supposed concessions. But Okada's proposal may not have existed. Just a day after *The Washington Post* story, Media Monitors Network (MMN) questioned the credibility of the Okada account,[84] which Hatoyama himself denied outright. MMN's Gordon Arnaut railed against *The Washington Post*: "It boggles the mind that a flagship U.S. newspaper could get a major story so wrong. Not just off by a little bit, but exactly opposite to the actual truth. And timed, cynically, to coincide with a huge demonstration against the

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77. *Poll Puts Pressure on Japan PM over U.S. Base Plan*, AGENCE FRANCE PRESSE, Apr. 18, 2010, http://www.google.com/hostednews/afp/article/ALeqM5hcOLwYjZO8nkIYN2q7TePbxgU2Ow.

78. *Tokunoshima Mayors Rebuff Base Overture: Feasibility of Hatoyama Plan Questioned by Kitazawa*, JAPAN TIMES, Apr. 21, 2010, http://search.japantimes.co.jp/cgi-bin/nn20100421a1.html.

79. Yoko Kubota, *Japan PM Says End-May Remains Deadline on Base Feud*, REUTERS, Apr. 21, 2010, http://www.reuters.com/article/2010/04/21/us-japan-politics-idUSTRE63K1G920100421.

80. *Tokunoshima Still Eyed for Base Relocation*, JAPAN TIMES, Apr. 22, 2010, http://search.japantimes.co.jp/cgi-bin/nn20100422a4.html.

81. *U.S. Rejects Idea of Moving Futenma Facility to Tokunoshima*, PEOPLE'S DAILY ONLINE (China), Apr. 22, 2010, http://english.peopledaily.com.cn/90001/90777/90851/6960277.html.

82. John Brinsley, *Japan Broadly Accepts U.S. Plan to Move Okinawa Base, Washington Post Says*, BLOOMBERG (Apr. 24, 2010), http://www.bloomberg.com/apps/news?pid=20601101&sid=at3bAzysLeOk.

83. John Pomfret, *Japan Moves to Settle Dispute With U.S. over Okinawa Base Relocation*, WASH. POST, Apr. 24, 2010, http://www.washingtonpost.com/wp-dyn/content/article/2010/04/23/AR2010042305080.html?hpid=topnews.

84. Gordon Arnaut, *Credibility of the U.S. Media*, MEDIA MONITORS NETWORK (Apr. 25, 2010), http://usa.mediamonitors.net/content/view/full/73765.

base."[85] The disputed article from *The Washington Post* is no longer available online.

Ohisa, one of the three mayors on Tokunoshima, informed Hatoyama that he (Hatoyama) was not welcome to visit Tokunoshima.[86] Despite this remark, Hatoyama met with all three of the dissenting mayors, who, rather than capitulating, handed Hatoyama their petition signed by residents opposed to the Futenma base.[87] Protestors numbering 5,000 marched while the three mayors took their stand against Hatoyama.[88] The mayors' refusal to consent to Hatoyama's requests put Hatoyama in the position of having to go forward with the base plans despite the wishes of Tokunoshima residents, to leave the base where it was on Okinawa, or to split the base into two parts: one on Tokunoshima and one where it already existed on Okinawa.

On May 8, six DPJ lawmakers traveled to Saipan, part of the Northern Mariana Islands, a U.S. territory, as a last-ditch effort to relocate the Futenma base entirely outside of their country.[89] American leaders in Saipan had expressed interest in hosting the U.S. troops, but Obama has remained silent about this option.[90] During the lawmakers' trip, reports by Japanese news agencies suggested that Hatoyama would make his final decision in two days.[91] "We are putting the finishing touches to a government proposal right now," Hatoyama said.[92] In light of the foregoing, the six Japanese lawmakers probably intended their Saipan visit to make a symbolic point about America's insistence on occupying foreign territory despite the fact that a relatively nearby U.S. territory was a viable option for base relocation.

On May 17, Okinawans, in their own attempt at symbolism, formed a 17,000 person chain around the U.S. Marine air base.[93] The chain was eight

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85. *Id.*

86. *Japan Mayors Rebuff PM Hatoyama's Okinawa Alternatives*, BBC NEWS (May 7, 2010), http://news.bbc.co.uk/2/hi/asia-pacific/8668705.stm.

87. *Tokunoshima Mayors Reject Futenma Relocation Plan*, NIKKEI. COM (May 7, 2010), http://e.nikkei.com/e/fr/tnks/Nni20100507D07JF794.htm.

88. *Japan's Kagoshima Stages Rally to Protest U.S. Base Relocation,* XINHUA NEWS AGENCY (China) (May 08, 2010), http://news.xinhuanet.com/english2010/world/2010-05/08/c_13283079.htm.

89. Haidee V. Eugenio, *6 Japanese Lawmakers to Visit CNMI*, SAIPAN TRIBUNE (Northern Mariana Islands) (May 8, 2010) http://www.saipantribune.com/newsstory.aspx?newsID=99444&cat=1.

90. *Id.*

91. Yoko Kubota & Alex Richardson , *Japan to Decide on U.S. Base Plan Monday: Report*, REUTERS, May 9, 2010, *available at* http://www.reuters.com/article/idUSTRE6480KG20100509?type=politicsNews.

92. *Japanese PM: Decision on Futenma to be Made Soon*, CHINA DAILY, Apr. 27, 2010, http://www.chinadaily.com.cn/world/2010-04/27/content_9779739.htm.

93. *U.S. Air Base Surrounded by Human Chain of Protestors*, JAPAN TIMES, May 17, 2010, http://search.japantimes.co.jp/cgi-bin/nn20100517a1.html.

miles long.[94] On May 23, Hatoyama issued his final decision: the 2006 provisions of the Futenma accord would remain in effect. Obama got his way. Hatoyama resigned shortly thereafter—just eight months after taking office. Despite Obama's victory, the Futenma base dispute has not been settled. By the time this article goes to print, there will have been several updates on the Futenma base dispute during the tenure of the Kan administration. I doubt that the dispute will have been resolved. Only time will tell how the story of Futenma will end.

## II. EFFECTS OF THE FUTENMA BASE DISPUTE ON ARTICLE 9

Emma Chanlett-Avery says that "[a]lthough the current DPJ government has officially endorsed the plan to build the replacement facility in Nago, local opposition remains strong and the central government has limited political capital to push forward with implementation."[95] Like I, Avery seems to believe that the future of Futenma remains unclear. One point, however, is clear: unless U.S. bases like Futenma are removed from Japanese territory altogether, they will undermine the authority of Article 9 and force Japanese politicians to cut away at the already endangered principle of constitutional pacifism. That is because the Futenma accord pushes the limits of circumscribed military power and directly and proximately moves Japan in the direction of remilitarization: *directly* because the intermingling of Japanese people and resources with active U.S. military facilities allows the Japanese government to rely on another military to carry out activities that would implicate Article 9 if done by the Japanese, and *proximately* because the U.S. has pressured Japan to enhance her military size and prowess as a condition for minimizing the U.S. military presence in the country. Part II is organized to address first the recent militarization trends implicating Article 9, and second the Futenma base dispute that seems to have emanated from those trends.

After the atomic bombings, the U.S., in the person of General Douglas MacArthur, and the Japanese, in the person of Prime Minister Kijuro Shidehara, constructed Article 9.[96] These two leaders were instrumental to the passage of this provision. They met and discussed the proposed constitution at length; they remained mostly cordial.[97] MacArthur shared

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94. *Okinawa Residents Protest at U.S. Air Base,* AGENCE FRANCE PRESSE, May 16, 2010, http://www.google.com/hostednews/afp/article/ALeqM5gp7MbtOMcsGooUr1wbdDGYdbVugQ.

95. EMMA CHANLETT-AVERY, CONG. RESEARCH SERV., RL 33740, THE U.S.-JAPAN ALLIANCE 8 (2011).

96. *See generally* JOHN W. DOWER, EMBRACING DEFEAT: JAPAN IN THE WAKE OF WORLD WAR II 346-73 (1999). For a first-person account, see DOUGLAS MACARTHUR, REMINISCENCES (1964).

97. *See, e.g.,* RAY A. MOORE & DONALD L. ROBINSON, PARTNERS FOR DEMOCRACY: CRAFTING THE NEW JAPANESE STATE UNDER MACARTHUR 112-13 (2002).

classified documents with Shidehara, expressed concern over the future role and office of the emperor, and gave the impression that he (MacArthur) understood the best interests of the Japanese and was willing to distance himself from positions held by the Allies.[98] On one position, though, MacArthur was unwavering: "Japan must respect the views of foreign countries" when it came to renouncing war because a "constitutional provision permitting military forces and armaments would convince other countries that Japan was determined to rearm."[99]

The legislative history of Article 9 is extensive and arguably hazy,[100] but it suggests that the role of U.S. officials was dispositive to the promulgation of Article 9 because "the United States had to show the world that Japanese militarism would never revive and Japan would never be a threat to others, to Asia in particular."[101] Article 9 first appeared as one of two provisions outlined in General MacArthur's notes before it became the hallmark of the Japanese constitution by explicitly renouncing the use and maintenance of Japanese military forces;[102] the clause forbids Japan from resorting to war to resolve foreign conflict (see the epigraph above). According to Okubo Shiro, Article 9 originally appeared in the preamble and only later got transferred to the body of the document.[103] During deliberations over the prospective constitution, Japanese conservatives agreed to the provisions of Article 9 in exchange for the preservation of the tenno system, which was a hierarchical ruling tradition that held up the emperor as the ultimate and symbolic head of the nation.[104] The original meaning of Article 9 "was clearly intended to be a flat denial of every kind of war and of any development of war potential in Japan in order to prevent the possibility of Japanese aggression in Asia and elsewhere."[105] This meaning is based on the plain language of the article and agreed upon by "most mainstream Japanese constitutional law scholars."[106] Concerns about the breakdown of Article 9 and the expansion of Japanese war powers have been on the rise for several

98. *Id*.

99. *Id*. at 113.

100. For a succinct rundown of the legislative history, see THE JAPANESE LEGAL SYSTEM: INTRODUCTORY CASES AND MATERIALS 695 (Malcolm D. H. Smith & Hideo Tanaka, eds. 1984). Rather than "hazy," Karen Piotrowski uses the noun "confusion" to refer to the legislative history of Article 9. *See* Karen Piotrowski, *Keeping Pace with the Progress of the World: Article 9 of the Japanese Constitution*, 83 WASH. U. L.Q. 1653, 1662 (2005) ("confusion surrounds the exact origins of Article 9").

101. Okubo Shiro, *Japan's Constitutional Pacifism and United Nations Peacekeeping*, *in* JAPAN'S QUEST: THE SEARCH FOR INTERNATIONAL ROLE, RECOGNITION, AND RESPECT 102 (Warren Hunsberger & Richard B. Finn, eds., 1996).

102. *Id*.

103. *See* Piotrowski, *supra* note 100 at 1662-63 (citing KOSEKI SHOICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION (Ray A. Moore trans., 1998)).

104. Shiro, *supra* note 101, at 102.

105. *Id*. at 103.

106. Mark Fenwich, *Japan's Response to Terrorism Post-9/11*, *in* GLOBAL ANTI-TERRORISM LAW AND POLICY 339 (Victor V. Ramraj et al., eds., 2005).

years—indeed, it was not until the Cold War that Japan began to interpret Article 9 as allowing self-defense forces[107]—but such concerns gained traction during the Gulf War in the early 1990s.[108]

Although in 1990 Prime Minister Toshiki Kaifu proposed a bill to allow Japanese Self Defense Forces (SDF) to participate in U.N. peacekeeping activities, the bill was overwhelmingly rejected by Japanese politicians and the Japanese people.[109] The Gulf War, however, demonstrated that Japan could get around Article 9 while sending civil service members and eventually the SDF to the Persian Gulf,[110] even if Japan refused to partake in that war as a coalition member. Part of the reason that Japan joined with Western powers had to do with its obligation to the greater U.N. community.[111] The U.N. Charter requires member nations, as a condition of membership, to "accept the obligations contained in the present Charter" and to be "able and willing to carry out these obligations,"[112] including, if necessary, the compliance of member states with U.N. requests for armed assistance in international conflicts.[113] This U.N. mission and similar activities have made the "self-defense" mantras of the SDF seem misleading. Because of the apparent contradiction between SDF activities and the meaning of the signifier "self-defense," one author has accused Japan of engaging "in semantic contortions to downplay its military capabilities and activities."[114]

In 1997, the U.S. and Japan renegotiated their military roles for the region in and around Asia. The two countries established guidelines that marked "not only an increased level of defense burden sharing for Japan, but also a move toward taking greater responsibility for its own defense."[115] The guidelines called specifically for Japanese cooperation in Asian conflicts, search and rescue or evacuation assistance, battlefield rear area support, and actual implementation of the guidelines.[116] Some scholars considered the constitutionality of the guidelines vis-à-vis the three

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107. Mark A. Chinen, *Article 9 of the Constitution of Japan and the Use of Procedural and Substantive Heuristics for Consensus*, 27 MICH. J. INT'L L. 55, 59 (2005).

108. *See, e.g.,* Royer, *supra* note 2.

109. *Id*. at 790-92.

110. *See* Robert B. Funk, *Japan's Constitution and U.N. Obligations in the Persian Gulf War: A Case for Non-Military Participation in U.N. Enforcement Actions*, 25 CORNELL INT'L L.J. 363, 383-89 (1992).

111. *Id*. at 389-95.

112. U.N. Charter, art. 4, para. 1.

113. *See generally* Funk, *supra* note 110.

114. Zachary D. Kaufman, *No Right to Fight: The Modern Implications of Japan's Pacifist Postwar Constitution*, 33 YALE J. INT'L L. 266, 267 (2008).

115. Chris Ajemian, *The 1997 U.S.-Japan Defense Guidelines under the Japanese Constitution and their Implications for U.S. Foreign Policy*, 7 PAC. RIM L. & POL'Y J. 323, 324 (1998).

116. *Id*. at 338-342. For an extensive analysis of the guidelines, see Robert A. Fisher, *The Erosion of Japanese Pacifism: The Constitutionality of the 1997 U.S.-Japan Defense Guidelines*, 32 CORNELL INT'L L. J. 393, 401-07 (1999).

branches of government (judicial, executive, and legislative) that have interpreted Article 9 in different ways.[117] Even scholars could not reach definitive conclusions and could not offer clear or immutable policies as tests for constitutional validity.

The guidelines appear to have passed constitutional muster, but only by way of a liberal reading of Article 9. As one commentator put it, "Japan's current situation is not consistent with the wholehearted renunciation of war reflected in Article 9" because the SDF, "consisting of the Ground Self Defense Forces, the Maritime Self Defense Forces, and the Air Self Defense Forces, has one of the largest budgets in the world, and its navy has more destroyer-sized warships than the British Navy."[118] This commentator also notes that "Japan's preeminent economic status," coupled with its "reliance on a stable world situation to maintain that status," makes Japan an ideal military partner for other countries, which increasingly have pressured Japanese administrations and the Japanese Diet to relax their interpretations of Article 9.[119] Ultimately and practically, these guidelines represented only a minor escalation of Japan's military role,[120] but such escalation "eroded" Article 9 and "further opened the door to Japanese rearmament."[121] All of this happened long after the U.S. had already precipitated the "destruction of the ideological motivations of Article 9."[122]

Some have suggested that Japan has *already* violated Article 9—if not by maintaining SDF forces, then by deploying special envoys to assist U.S. efforts in Afghanistan,[123] dispatching naval troops to the Indian Ocean,[124] or aiding the U.S. in the construction of a missile defense system.[125] Traditionally, though, Japanese interpretations of Article 9 have not engaged in what American jurisprudents might refer to as "textualism" or

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117. *See* Fisher, *supra* note 116 at 418-21.

118. Matthew J. Gilley, *Japan's Developing Military Potential within the Context of its Constitutional Renunciation of War*, 14 EMORY INT'L L. REV. 1681, 1684 (2000).

119. *Id*. at 1684.

120. Ajemian, *supra* note 115, at 350.

121. Michael Panton, *Japan's Article 9: Rule of Law v. Flexible Interpretation*, 24 TEMP. INT'L & COMP. L.J. 129, 141 (2010).

122. *Id*.

123. *Japan Appoints Special Envoy to Afghanistan, Pakistan*, BBC MONITORING ASIA PAC—POL. (Mar. 1, 2009), *available at* LEXIS, BBC Monitoring: Int'l Rep., Asian Pac. Stories.

124. *See also* Takeo Kumagai, *Japan Extends Naval Presence in Indian Ocean*, 86 PLATTS OILGRAM NEWS, Dec. 15, 2008, at 2; *see also Japan Ruling Parties Approve Extending Iraq, Indian Ocean Missions*, BBC MONITORING ASIA PAC.—POL. (June 10, 2008) *available at* LEXIS, BBC Monitoring: Int'l Rep.—Asian Pac. Stories (stating Japan extended refueling support in the Indian Ocean to help with the reconstruction and antiterrorism mission).

125. *See also China warns US, Japan Against Pushing Missile Defence System*, THE INDEPENDENT, Sept. 24, 1998; *see also Russia Concerned at Japan's Plans to Deploy Missile Defence System*, BBC SUMMARY OF WORLD BROADCASTS (Dec. 24, 2002), *available at* LEXIS, BBC Monitoring: International Rep.—Asian Pac. Stories.

"originalism" as qualified and formalist mechanisms for understanding constitutional meaning. Japan's approach has been, for want of a better word, more pragmatic.[126] The question of whether Japan has violated Article 9 has not turned on the reduction of that provision to definite and fixed principles. Nevertheless, Japanese interpretation has transformed Article 9 into what at least one legal analyst has called a paradox:

> The paradox of Article 9 is evident when comparing the aspirational language and the reality of Japan's military forces. The divergence originated at the onset of the Korean War, and grew dramatically during the Cold War as the SDF continued to evolve in terms of capabilities and numbers. The rapid growth soon made plain that Article 9 is irreconcilable in its present form with the realities of today.[127]

As the following representative cases in Part II (Subsection A) will show, Japanese courts have dealt with Article 9 mostly in the domestic sphere and have remained generally deferential to legislative action.[128] Matthew J. Gilley casts some light on this judicial penchant: "When a domestic decision is involved, Japanese courts operate under a high presumption that the government's action is valid. Rights claimed by individuals under Article 9 . . . do not limit the government's conduct in these domestic contexts. Instead, the courts' standard seeks to avoid these questions of constitutionality and directs them to the political arena for resolution."[129] The result is that powers of interpretation have been left in the hands of the electorate and polity that use public opinion to mobilize politicians in one direction or another regarding Article 9.[130] Post-9/11 events and political agendas concerning terrorism and national security, however, took some of this power back out of the hands of the electorate or polity and arguably transferred that power into the hands of the American executive and legislative branches that have continued to pressure Japanese politicians into compliance with American foreign policy interests.

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126. For a reading of Article 9 from an originalist-like perspective, see Kenneth L. Port, *Article 9 of the Japanese Constitution and the Rule of Law*, 13 CARDOZO J. INT'L & COMP. L. 127 (2005).

127. Michael A. Panton, *Politics, Practice, and Pacifism: Revising Article 9 of the Japanese Constitution*, 11 ASIAN-PAC. L. & POL'Y J. 163, 178 (2010).

128. *Id.* at 1693-1703. *See also* Edward J.L Southgate, *From Japan to Afghanistan: The U.S.-Japan Joint Security Relationship, the War on Terror, and the Ignominious End of the Pacifist State?*, 151 U. PA. L. REV. 1599, 1624 (2003) ("In contrast to the U.S. Supreme Court—activist or otherwise—the Japanese Supreme Court has pursued a policy of extreme deference to the legislature in exercising judicial review.") (internal footnote omitted).

129. Gilley, *supra* note 118, at 1703.

130. *Id.*

### A. Judicial History of Article 9

Japanese courts have addressed Article 9 repeatedly. A few decisions bear mentioning because they serve as illustrative examples of how Japanese courts analyze and ultimately rule on Article 9 cases. These cases demonstrate the deference that Japanese courts usually allow the political branches regarding Article 9. These cases also raise jurisprudential questions about legality. For instance, if a constitution explicitly forbids a thing from happening, but allows that thing to happen in practice, does the constitutional ban have any constructive effect at all, or is the ban purely symbolic? If a constitution forbids the wearing of green, but a legislature takes actions that cause or enable people to wear green, and the courts rule that the legislature has acted properly, is the ban on wearing green a law or an ideal? Given the same hypothetical, what if the people wear just touches of green, or colors of off-green or almost green, and the legislature endorses those outfits despite the constitutional ban on green—would that make the wearing of green still illegal? The point is that the strict and plain language of Article 9 forbids, without exception, the use and maintenance of Japanese military force and arms, but an expansive legislative interpretation of force, given credence by Japanese courts, which have refused to revise or overturn these legislative interpretations, has led to a situation in which Article 9 means whatever the legislature says it means—which is to say that it means nothing or anything at all. As Carl F. Goodman puts it:

> However one views the terms of Article 9, it appears clear that what you get is something other than what at first glance—and perhaps even after searing examination—you see. This seeming contradiction between terms and actual practice is a reflection of a more general approach to constitutional interpretation in Japan.[131]

From the following cases, it seems apparent that Article 9 does not serve its intended function to eliminate the military activities in and of Japan; nor is Article 9 void of all purpose or utility, however, because it continues to constrain Japanese foreign policy by forcing Japanese leaders to "get around" Article 9.

#### *1.* Sakata v. Japan*, or "The Sunakawa Case" (1959)*

The Sunakawa case was the first judicial attempt to determine the constitutionality of certain activities vis-à-vis Article 9. The case arose when the defendants (or appellants) were prosecuted for trespassing on an

131. CARL F. GOODMAN, 2 THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS 235 (2008).

American military base in Sunakawa.[132] The defendants argued that the very existence of the American base offended Article 9.[133] Judge Akio Date, Judge Shunzo Shimizu, and Assistant Judge Ichiro Matsumoto handed down the decision, which reasoned principally that Japan could pursue military activity for self-defense purposes.[134] Put another way, the court sidestepped the issue of the SDF's legitimacy and instead authorized Japan's abstract right to self-defense. The case inaugurated not only a precedent for upholding a Japanese right to self-defense, but also a precedent for judicial equivocating about Article 9, particularly with regard to the SDF. Such equivocation has come to be known as the "doctrine of avoidance."[135]

### *2. The Naganuma Nike Missile Site Cases (1973)*

The Naganuma Nike Missile Site Cases refer to litigation initiated by Hokkaido residents against the Ministry of Agriculture, Forestry and Fisheries and carried out at multiple levels of appeal.[136] Naganuma I appeared before the Sapporo District Court, Naganuma II before the Sapporo High Court, and Naganuma III before the Supreme Court of Japan. The residents challenged the construction of a base site in Naganuma that would require the transfer, flooding, and damage of forest lands.[137] The residents also challenged the constitutionality of the SDF. The District Court held that the SDF was unconstitutional because the SDF constituted an "armed force."[138] In addition, the District Court invalidated the land transfer because, according to the court, the transfer did not serve the public interest.[139] On appeal, the Sapporo High Court reversed the District Court decision, which the Supreme Court of Japan affirmed on the grounds that the residents lacked standing to bring suit.[140] The residents were deemed to have had no standing because they did not suffer direct harm.[141] The constructive effect of the case was to narrow the class of people who could bring suit under Article 9.

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132. Saikō Saibansho [Sup. Ct.] Dec. 16, 1959, 1959(A) No. 710, 13 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [KEISHŪ] 3225 (Japan).

133. *Id*.

134. *Id*.

135. Panton, *supra* note 127, at 212.

136. [Sup. Ct.] Sept. 9, 1982, 36 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1679 (Japan), *translated in* LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 122-23 (1996) [hereinafter Uno v. Minister of Agric., Forestry & Fisheries].

137. *See id.*

138. *Id*.

139. *Id*.

140. *Id*. at 129.

141. *Id*.

### *3.* Ishizuka et al. v. Japan e. al.*, or "The Hyakuri Air Base Case" (1989)*

The Hyakuri Air Base Case involved a plot of land that the SDF sought to purchase to facilitate the construction of a military base.[142] The Court in this case extended the doctrine of avoidance.[143] Reasoning that under Article 9 the use of force for self-defense purposes was constitutional, the Mito District Court found for the SDF and used the political question doctrine to avoid formative resolutions about the constitutionality of the SDF.[144] The Tokyo High Court affirmed this decision without clarifying the role of the SDF vis-à-vis Article 9. This case demonstrates that the doctrine of avoidance has become a hallmark of judicial practice regarding Article 9 and also that the political question doctrine repeatedly has offered other branches of government wide latitude to carry out projects related to self-defense and the SDF.

### *4.* Mori v. Japan *(2008)*

In *Mori v. Japan*, over 5,700 appellants and 800 attorneys challenged their country's deployment of the SDF to the Middle East during the Iraq War.[145] In 2003, during the height of the U.S.-led invasion of Iraq, Japan contributed not only SDF personnel but also three transport aircrafts for mobilizing troops and supplies.[146] The appellants argued that Japan's involvement in Iraq violated their right to "live in peace."[147] They claimed that Article 9 granted them such a right.[148] For remedies, appellants sought an "injunction against the deployment, a confirmation that the deployment was unconstitutional, and ¥10,000 each (approx. US$100) in damages."[149] Appellants contended that the right to live in peace was actionable; the government contended that such a right was merely abstract and therefore that appellants lacked standing.[150] The Nagoya District Court ruled in favor of the government, and the Nagoya High Court affirmed.[151] In effect, the principle handed down from this decision was that the right to live in peace

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142. Saikō Saibansho [Sup. Ct.] June 20, 1989, 43 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 6, 385 (Japan) *translated in* Lawrence W. BEER & HIROSHI ITOH, THE CASE LAW OF JAPAN, 1970 THROUGH 1990 132 (1996) [hereinafter Ishizuka v. Japan].

143. *See* Panton, *supra* note 127, at 213.

144. Ishizuka v. Japan, *supra* note 142, at 131.

145. *See* Mori v. Japan*: The Nagoya High Court Recognizes the Right to Live in Peace*, 19 PAC. RIM. L. & POL'Y J. 549 (2010) (Hudson Hamilton trans.).

146. *Id.*

147. *Id.*

148. *Id.*

149. Mori v. Japan*, supra* note 145, at 549-50.

150. *Id.* at 550.

151. *Id.*

exists but was not implicated on these facts.[152] This holding means that elements of the SDF forces were unconstitutional but that remedies were not available to these plaintiffs. The court reasoned that the "integration of the SDF's air transport activities with the use of force by coalition forces in an international military conflict constituted the use of force by the SDF in violation of Article 9."[153]

The Nagoya High Court's decision was never appealed, so it remains binding in Nagoya and persuasive precedent elsewhere in Japan to the extent that it is not overruled. The court appears to have enunciated a standard couched in language about a "right to live in peace," which "can be called a compound right that can be expressed as a freedom right, a social right, or a political right, depending on the circumstances."[154] The right to live in peace is a new human right in Japan.[155] To invoke this right in a court of law, plaintiffs must demonstrate a "legal relationship" between the right and the military activity that violates Article 9.[156] Okinawans could cite the "right to live in peace" standard and the *Mori* case to challenge the constitutionality of Futenma and other bases on Okinawa. Finding Okinawan plaintiffs who have suffered direct harm from the bases should not be difficult. Moreover, courts could interpret the Japanese support of, and financial contributions to, U.S. bases on Okinawa as reaching an actionable level of Japanese integration with military activities that use force.

Unlike the three cases discussed earlier, *Mori v. Japan* suggests that Japanese courts will not always defer to other branches of government on matters pertaining to self-defense and the SDF. Courts usually defer to such branches by invoking the political question doctrine or by limiting standing to plaintiffs who suffered actual harm (the *Mori* court claimed that the plaintiffs could not establish a "legal relationship" between their right to live in peace and the war activities in question). These two elements—the political question doctrine and actual harm—together make up the cornerstone of the "doctrine of avoidance" whereby Japanese courts shy away from definitive conclusions about Article 9. Even though the plaintiffs were not eligible for a remedy in *Mori v. Japan*, Okinawans could rely on the decision in *Mori* to seek a constitutional remedy. Okinawans would have to cite the court's standard about a "right to live in peace" and demonstrate how that right bears a "legal relationship" to the military activities taking place in and around Okinawa.

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152. *Id.*
153. *Id.* (This language comes from a summary of the translation.).
154. Mori v. Japan, *supra* note 145, at 561.
155. *Id.* at 550.
156. *Id.* at 561.

B. Japan and Military Activity

Since 9/11, Japan has stepped up her military role on a global scale. The Japanese Diet passed the Antiterrorism Special Measures Law in 2001,[157] a measure that muddled the already confused commitment that Japan owed to both the U.N. and her national Constitution.[158] The Antiterrorism Special Measures Law lapsed in 2007, but it lead to a similar successor law, and its effect was once again to water down the explicit terms of Article 9 and to categorically commit Japan to U.S. political and military interests abroad. According to the law, Japan could offer security forces in the Iraq War, but in principle it could do so only if the forces were limited to humanitarian assistance.[159] Despite the apparent meaning of the law, "it is suspected that in reality the SDF performed war-participation acts that could be construed as cooperation in prosecuting the war."[160] Indeed, the law threatened the viability and credibility of Article 9 more than any statutory measure, political scheme, or partisan event up to that point. Scholars of the Japanese constitution have described the law in the following way:

> The intent [of the law] is to conduct "cooperation and support activities" including supply, repairs, servicing, medical care, and the transport of weapons, ammunition, and personnel, but assuming that the use of force is impossible without such help, this support is an essential part of military action, and is therefore clearly participation in war. This would be the first participation in the use of force by Japan's military apparatus in the postwar years, and would clearly violate Article 9 of Japan's Constitution.[161]

In spite of such objections by scholars and activists, Japan reaffirmed the contributory role of the SDF in 2003 with passage of the Anti-Terrorism Special Measures on Humanitarian and Reconstruction Assistance in Iraq.

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157. Anti-Terrorism Special Measures Law, Terotaisaku Tokubetsu Sochi Hô, Law No. 113 of 2001, *available at* http://www.kantei.go.jp/foreign/policy/2001/anti-terrorism/1029terohougaiyou_e.html (in English).

158. For more on this dilemma, see Craig Martin, *Japan's Antiterrorism Special Measures Law and Confusion over U.N. Authority*, JAPAN TIMES, Oct. 8, 2007, http://search.japantimes.co.jp/cgi-bin/eo20071008a2.html.

159. *See id*.

160. Kenji Urata, *The Universal Spirit of the Japanese Constitution: Re-Reading Article 9*, 3 PEACE & CONFLICT REV. 1, 2 (2008).

161. *See* Southgate, *supra* note 128, at 1604 (citing *An Urgent Appeal from Japan's Constitutional Scholars*, JAPAN COMPUTER ACCESS (Oct. 9, 2011), http://www.jca.apc.org/~kenpoweb/appeal_eng.html) (doubting the constitutionality of the Anti-Terrorism Special Measures Law).

This law was "highly specific and strictly limited in purposes and duties" and aimed to "implement the measures of assistance in Iraq."[162]

Scholars have labored to contextualize, synthesize, and assess the judicial holdings and political debates concerning the Anti-Terrorism Special Measures law in relation to Article 9.[163] In brief, the law has not been interpreted as violating the Japanese Constitution because of the law's specifications against the use of force or combat, as well as its precautionary stipulation entitled "Use of Weapons," which allows the SDF to use weapons but only in expressly limited instances.[164] According to this stipulation, the SDF would not be able to engage in a hostage rescue operation in Iraq since that might entail combat and thus exceed the scope and reach of Article 9.[165] In this sense, Article 9 constrained the activities of the legislative and executive branches even though the judiciary has deferred judgments about Article 9 to those branches.

The plain language of Article 9, however, is explicit about banning military troops and activity, and the reformulated role of the SDF flies in the face of the plain language of Article 9. Edward J. L. Southgate put it well when he said, "The Anti-Terrorism Special Measures Law invests the SDF with the responsibility of carrying Japan's burden of collective self-defense. Although the law was carefully tailored by the Koizumi cabinet to avoid deviation from Article 9, the reality is that the expanded operational abilities, both geographic and military, materially diverge from the spirit of the 'no war' clause."[166] It is clear, then, that whatever Article 9 signifies today, it is more than just the plain meaning of the plain language. Literalists or formalists might argue that with a historically significant and sensitive provision like Article 9, there is no meaning outside the plain language of the provision. By this logic, Japan has invalidated Article 9 already because of its actions in Iraq, Afghanistan, and the Indian Ocean, and especially because of its role in engineering a missile defense system in conjunction with the U.S. But Japan has not taken a literalist or formalist approach to interpreting Article 9.

Many Japanese politicians and citizens have called for not only reinterpreting but also revising Article 9 so that Japan can maintain fidelity to the constitution as well as investment in SDF activities abroad. "There appears to be a consensus among segments of Japanese society," explains Mark A. Chinen,

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162. Mika Hayashi, *The Japanese Law Concerning the Special Measure on Humanitarian and Reconstruction Assistance in Iraq: Translator's Introduction*, 13 PAC. RIM L. & POL'Y J. 579, 581 (2004).

163. *See, e.g.,* Southgate, *supra* note 128 at 1619-33.

164. Hayashi, *The supra* note 162, at 582 (translating the Law concerning the Special Measures in Iraq, Art. 2, ¶ 2, among other provisions).

165. *Id*. at 583.

166. Southgate, *supra* note 128, at 1633.

> that a confluence of trends—Japan's emergence as an economic power, its greater participation in Pacific and world affairs, its aspiration to a more important role in the United Nations, the severe criticism it received when it did not participate directly in the Persian Gulf War, pressures from the United States to expand its security relationship by putting SDF personnel in harm's way, developments on the Korean peninsula, the emergence of China as an economic and military force, and 9/11—could well require Japan to take steps that, if it wishes to remain true to a constitutional form of government, might involve far more than just a reinterpretation of Article 9.[167]

But so far Japan has not revised Article 9. If anything, Japan has taken steps that suggest that Article 9 is an ideal, not a practical reality that substantial revision would definitely impact. Besides her commitment of troops for humanitarian purposes in Iraq, for instance, Japan has dispatched envoys to Afghanistan to aid the U.S. War efforts there,[168] pledged to help the U.S develop a missile defense system,[169] deployed forces to the Indian Ocean,[170] and, with the exception of prominent individuals like Hatoyama,

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167. Chinen, *supra* note 107, at 65.

168. *Japan to Send Envoy to Take Part in US Review of Afghan Strategy*, BBC MONITORING ASIA PAC.—POL. (Feb. 25, 2009); *see also Japan Envoys to Meet USA's Holbrooke on Afghanistan 9 March*, BBC MONITORING ASIA PAC.—POL. (Mar. 6, 2009), *available at* LEXIS, BBC Monitoring: Int'l Rep.—Asian Pac. Stories (noting Japan's envoys to Afghanistan meet with U.S. representatives to show support for the United States' military shift to Afghanistan).

169. Calvin Sims, *U.S. and Japan Agree to Joint Research on Missile Defense*, N.Y. TIMES, Aug. 17, 1999, at A4; *see also* Calvin Sims, *U.S., Japan Join Forces on Missile Defence System*, GAZETTE (Montreal), Aug. 17, 1999, at B1; *see also Protecting Japan—Part IV; Missile Defense to Cost 30 Tril. Yen*, DAILY YOMIURI (Japan), Sept. 25, 2004, at 4; *see also North Korean Institute Denounces US, Japan Theatre Missile Defence Plans*, BBC MONITORING ASIA PAC.—POL. (Mar. 8, 1999), *available at* Factiva, Doc. No. bbcapp0020010901dv3800nph; *see also Russian Defence Chief Restates Criticism of Japan-US Missile Defence Plans*, BBC SUMMARY OF WORLD BROADCASTS, Asia-Pacific (Nov. 29, 2000), at part 3; *see also Japan to work on missile defenses*, ST. PETERSBURG TIMES, Aug. 17, 1999, at 1A.

170. *See* Howard W. French, *Threats and Responses: Japan's Role; U.S. Applauds Tokyo's Dispatch of Warship to the Indian Ocean*, N.Y. TIMES, Dec. 10, 2002, at A22, *available at* http://www.nytimes.com/2002/12/10/world/threats-responses-japan-s-role-us-applauds-tokyo-s-dispatch-warship-indian-ocean.html?src=pm; *Japan to Dispatch Three MSDF Vessels to Indian Ocean*, XINHUA (China), Nov. 8, 2001; *see also Japan Dispatches Another Warship to Indian Ocean to Assist US Mission*, BBC SUMMARY OF WORLD BROADCASTS (Nov. 26, 2004) *available at* LEXIS, BBC Monitoring: Int'l Rep.—Asian Pac. Stories (stating Japan has dispatched four Marine Self-Defense Force Aegis warships to the Indian Ocean to support U.S. operations); *see also* P. S. Suryanarayana, *Japan to Extend Anti-Terror Mission in Indian Ocean*, HINDU (Chennai), Apr. 24, 2005, http://www.hindu.com/2005/04/24/stories/2005042401730900.htm; *see also Japan to Extend Forces Indian Ocean Support Operations*, BBC MONITORING ASIA PAC.—POL. (Apr. 13, 2005); *see also Japan Extends Missions in Iraq, Indian Ocean Until 2009*, BBC MONITORING ASIA PAC.—POL. (June 13, 2008), *available at* LEXIS, BBC Monitoring: Int'l Rep.—Asian Pac. Stories.

encouraged and sustained the maintenance of U.S bases on Okinawa. Japan supports these bases insofar as Japanese citizens work on and fund the bases. In effect, the bases allow Japan to rely on the U.S. military to do what Japan is forbidden to do by Article 9. The most important of these developments, for the purposes of this paper, is of course the Futenma base dispute, which represents an intermingling of Japanese and U.S. military powers at the expense of a small group of islanders.

### C. Intermingling of Japanese People and Resources with the U.S. Military

Chinen underscores the critical role that the U.S. has played in diluting Article 9 of its constructive meaning. That role is magnified in the case of Futenma because Japan pays large sums of money to support this base and allows Japanese citizens to work on the base. For example, the Japanese government "used the politics of compensation as [a] strategy to pacify strong anti-base opposition,"[171] and to that end it "allocated 7.5 billion yen to each local district hosting U.S. military bases,"[172] distributed large endowments "to communities that accepted bases slated for relocation within Okinawa,"[173] and "offered 100 billion yen over a seven-year period for projects proposed under the Informal Council on Okinawa Municipalities Hosting U.S. bases."[174] Add to these numbers the fact that Okinawans work menial jobs on the base[175] and Futenma begins to look like an operation of the Japanese as much as of the U.S. In short, the American Futenma base and other American bases and troops on Okinawa offer the Japanese government a loophole to avoid violating Article 9. That is because Japan supports the bases almost as if they were its own, and the bases purportedly exist to service the interests of the Japanese as much as the interests of Americans.

Japan has combined its interests with American military interests by sharing in the funding of U.S. military bases, subsidizing certain military base activities, discouraging Okinawan demonstrations against the military bases, and incentivizing the maintenance of military bases in local communities—in part because these bases play a role that the SDF cannot play without clearly violating Article 9. In effect, the Futenma base and bases like it remilitarize Japan notwithstanding that these bases belong to Americans and that Japanese workers on the bases do not participate in

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171. ANDREW YEO, ACTIVISTS, ALLIANCES, AND ANTI-U.S. BASE PROTESTS 83 (2011).
172. *Id.*
173. *Id.*
174. *Id.* at 83-84.
175. *See, e.g.*, *Futenma Divides Okinawa's Expats*, JAPAN TIMES, June 8, 2010, http://search.japantimes.co.jp/cgi-bin/fl20100608zg.html (statement of interviewee) ("I still want Futenma though, because there are a lot of people still working there. Not just Filipinos but Okinawans too who'd lose their jobs in the restaurants and movie theaters if it closed.").

active combat. This impression is made stronger by the fact that the Japanese Maritime Self-Defense Forces (MSDF) have begun to cooperate with U.S. forces on and around the bases—so much so that "U.S. Navy officials have claimed that they have a closer daily relationship with the MSDF than with any other navy in the world, with over 100 joint exercises annually."[176]

It is not necessarily the case that, by itself, a U.S. base in Japan constitutes the exercise of war powers in violation of Article 9; it is that Futenma and other bases on Okinawa are supported by Japan, both financially and rhetorically, and that every year the number of Japanese citizens employed by the bases seems to increase.[177] Japan of course does not exert control over the bases the way the U.S. executive and upper-level U.S. military officials do. But, Japan has heavily influenced policy regarding the U.S. bases, which could not exist without Japanese support. As Part I of this article demonstrated, Japanese politicians and officials such as Hatoyama can have an enormous impact on U.S. foreign policy in general and the U.S. bases on Okinawa in particular. Part of the reason is that without Japanese political and financial support, the U.S. bases on Okinawa probably would not remain solvent or viable.[178] Japan does not

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176. EMMA CHANLETT-AVERY, CONG. RESEARCH SERV., RL 33740, THE U.S.-JAPAN ALLIANCE 12 (2011).

177. According to Reginald L. Fun:

> Japan pays part of the cost of the U.S. forces stationed in its country with annual burden-sharing payments that totaled about $4.9 billion in fiscal year 1997. The annual payments fall into four categories. First, Japan paid about $712 million for leased land on which U.S. bases sit. Second, Japan provided about $1.7 billion in accordance with the Special Measures Agreement, under which Japan pays the costs of (1) local national labor employed by U.S. forces in Japan, (2) public utilities on U.S. bases, and (3) the transfer of U.S. forces' training from U.S. bases to other facilities in Japan when Japan requests such transfers. Third, USFJ estimated that Japan provided about $876 million in indirect costs, such as rents foregone at fair market value and tax concessions. Last, although not covered by any agreements, Japan provided about $1.7 billion from its facilities budget for facilities and new construction which included new facilities under the Japan [*sic*] under the Japan Facilities Improvement Program, vicinity improvements, and relocation construction and other costs.

U.S. Gov't Accounting Office, GAO/NSIAD-98-66, Overseas Presence: Issues Involved in Reducing the Impact of the U.S. 16 (1998).

178. I say this in light of America's mounting debt crisis, economic downturn, and financial crisis, as well as the sheer costs of maintaining the bases that America would bear if Japan and the Okinawans did not already bear it. On this last point about America bearing the costs of the bases, consider the following:

> The overall U.S.-Japan security relationship requires a U.S. basing presence. U.S.-Japanese defense relations are governed by a uniquely one-sided security treaty and also by Japan's postwar constitution (put into place under heavy U.S. pressure and guidance) that prohibits Japan from creating a military organization with offensive capabilities. While provisions of the pacifist Article 9 of the Japanese constitution have been reinterpreted over time to allow Japan to create well-armed self-defense forces, Japan still relies on the United States to come to its defense, while maintaining that it is constitutionally prohibited from returning this favor for the United States or for American allies like South Korea. Consequently, the United States provides Japan with a security guarantee, and in return, the Japanese state contributes over 57 percent of the annual direct stationing costs of the United States Forces Japan (USFJ). This means that Japan is an inexpensive place for U.S. bases to be located.
>
> Second, the nature of the political relationship that governs the U.S. bases in Okinawa is trilateral, as opposed to bilateral. The United States, the Japanese mainland government, and the Okinawa prefectural government constitute three distinct actors, each with separate identifiable interests. The quid pro quo arrangements in other U.S. basing cases are usually bilateral, between Washington and the host government. Here, in contrast, the key compensatory relationship is not between Washington and Okinawa, but between Tokyo and Okinawa. The Japanese government effectively externalizes the permanent U.S. military presence on its territory by foisting it onto Okinawa, which provides 75 percent of the territory for USFJ installations despite being only one of forty-seven Japanese prefectures (and despite having an overall land mass only about the size of metropolitan Tokyo). The main Okinawan island hosts thirty-eight major installations covering 23,500 hectares, or about 18 percent of Okinawa's land mass. All four U.S military services—including the huge facilities of the Third Marine Expeditionary Force and the Kadena Air Force Base—are represented on the island. The number of U.S. military personnel on the island at any one time is about 25,000 (around a quarter of the entire U.S. presence in Asia), and the combination of their dependents and U.S. civilian contractors brings the total American defense-related presence up to 50,000. Compounding this sense of bearing an unfair basing burden, Okinawa remains relatively underdeveloped compared with mainland Japan. Its per capita income is about 75 percent of the Japanese average, making it the least wealthy Japanese prefecture.
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> In exchange for asking Okinawa to bear this 'special' or 'unequal' burden, the Japanese central government offers public works projects and budget subsidies to Okinawa's prefectural and municipal governments and selective incentives to certain of Okinawa's economic sectors. Taken together, these economic payoffs are sufficient to sustain Okinawan acquiescence for the U.S. military presence.

Alexander Cooley & Kimberly Martin, *Base Motives: The Political Economy of Okinawa's Antimilitarism*, 32 ARMED FORCES & SOC'Y 566, 571-72 (2006) (explaining in much further detail additional financial incentives and burdens borne by Japan and Okinawa).

control the U.S. bases, but itsaffects them in decisive ways and even keeps them operational with her financial support. Quantifying its degree of control over the bases is difficult and, in light of confidential military information, arguably impossible for the "outside" or nonmilitary observer. But it is safe to say that Japan's efforts make bases like Futenma more sustainable than they would be if only America provided their support and resources.

To preemptively counteract criticisms about the Japanese role in sustaining U.S. bases, or about American occupation of Okinawa in the face of widespread and longstanding local resistance to U.S. bases, American leaders, including Obama, have pushed Japanese leaders to expand Japan's military role in international affairs.[179] It is as if these American leaders have urged Japanese leaders to offend or discard Article 9 so that America can stop offending Article 9 on Japan's behalf. One wonders how the U.S. bases on Okinawa would stand up to judicial scrutiny because Okinawans seem to be a narrow enough class to have standing to sue under Article 9, and because the U.S. bases do not make up the SDF but instead rely on Japanese money, people, and resources to sustain themselves.[180] An Article 9 suit might allow Okinawans to circumvent some U.S.-Japanese agreements that have prevented Okinawans from exercising jurisdiction over certain criminal actions occurring in their territory or from litigating matters against the U.S. military.[181] Although most suits under Article 9 have yet to yield positive results for those seeking a strict and rigid

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179. *See, e.g.,* Gavan McCormack, *Deception and Diplomacy: The US, Japan, and Okinawa*, 9 ASIA-PAC. J. 21 (2011), *available at* http://japanfocus.org/-Gavan-McCormack/3532; *see also* Gavan McCormack, *Japan, through the US looking glass*, ASIA TIMES ONLINE, June 26, 2008, http://www.atimes.com/atimes/Japan/JF26Dh01.html; *see also* Gavan McCormack, *Remilitarizing Japan*, 29 NEW LEFT REV., Sept.-Oct. 2004, at 29, *available at* http://www.newleftreview.org/?view=2525.

180. The issue would seem to turn on sovereignty itself insofar as the issue would implicate Article 9 of the Constitution vis-à-vis Japan's duty to the U.S. under treaties, etc. *See* Toni M. Bugni, *The Continued Invasion*, 21 SUFFOLK TRANSNAT'L L. REV. 85, 110-11 (1997): "Although Japanese and U.S. officials need to recognize these problems [of Okinawan safety and resistance to U.S. bases] and work toward implementing feasible solutions to the problems caused by the bases on the island, the United States is legally able to continue holding its bases on Okinawa. Under the Treaty of Mutual Cooperation and Security, the United States has the right to station troops in Japan; Japan has the duty to provide land for U.S. military facilities. This agreement has not lapsed but has been updated and reaffirmed several times since its initial signing. Both countries recognize the validity of the treaty and its related agreements." The issue is whether the treaty itself offends Article 9 and, if so, which authority trumps the other, or alternatively the issue might be redefined if the U.S. military is intermingled with the Japanese government and citizenry. Some of these questions might be resolved by courts if Okinawans were to bring suit under Article 9.

181. *See, e.g*., Hiroshi Fukurai, *People's Panels vs. Imperial Hegemony: Japan's Twin Lay Systems and the Future of American Military Bases in Japan*, 12 ASIAN-PAC. L. & POL'Y J. 95, 117-23 (2010). *See also* Ian Roberts McConnel, *A Re-examination of the United-States-Japan Status of Forces Agreement*, 29 B.C. INT'L & COMP. L. REV. 165 (2006) (discussing the U.S.-Japan Status of Forces Agreement (SOFA)).

interpretation of the article's plain language, *Mori v. Japan* seems to have provided Okinawans with a plausible basis for bringing suit on the grounds that they have "a right to live in peace" that bears a direct legal relationship to the harm they have suffered from Japanese support of military activities.

If Japan wants to amend Article 9, that is Japan's business. America should not play a dispositive role in the process. If the Japanese leadership wants American troops to remain in Japan, as some individuals and groups frequently have claimed,[182] then the American military and American leaders should take pains to disclaim any determinative influence in the textual adaptation or nullification of Article 9. Revising or adapting Article 9 probably will not resolve the problems of Futenma or benefit Japan in the long-term; a "policy of constitutional transformation will upset the balance of power within Japan's government and tarnish Japan's legitimacy as a constitutional democracy," and the "expansion of Japan's military operations outside of its borders facilitated by a policy of constitutional transformation will further deteriorate Japan's already tenuous relations with neighboring states."[183] This claim assumes that Japanese courts will persist in their deference to the Diet and that serious revision to Article 9 would send a threatening message to other Asian countries.

Okinawans should look to *Mori v. Japan* at least to gain political leverage. America should withdraw its troops from Okinawa so that Japan can decide the fate of Article 9 for herself. At this rate, the likely demise of Article 9 will be blamed on the U.S. military and U.S. leadership, and it may be too late to convince anyone otherwise. But by withdrawing U.S. troops from Okinawa, America can at least ensure that it does not finally decide the outcome of Article 9 for the Japanese, even if it will have played a causative role in draining Article 9 of meaning and practical import. The death of Article 9 would signify much more than the failure of one country's unique and noble legal experiment; it would signify the failure of allegedly universal principles—*jus ad bellum*—to prove useful or practical as opposed to merely abstract and speculative.[184] The impending death of

182. *See, e.g.*, *Japan Wants U.S. Marine Base to Stay on Okinawa*, ASIANCORRESPONDENT.COM (Oct. 23, 2009), http://asiancorrespondent.com/21557/japan-wants-us-marine-base-to-stay-on-okinawa/.

183. David McArthur, *Constitutional Transformation and its Implications for Japanese Pacifist Democracy*, 7 SANTA CLARA J. INT'L L. 197, 198 (2009).

184. For context on this point, Craig Martin argues:

> [I]f this account is accurate, that is, if it can be shown that Article 9 was designed to implement principles of jus ad bellum as a pre-commitment device to prevent the use of force, and that those principles successfully operated to later constrain government policy with respect to the use of force, then the Japanese experience provides evidence that it is feasible to use constitutional design for the purposes of incorporating and implementing in the domestic legal system the international law norms on the use of armed force.

Article 9 will mean that similar articles and provisions will be unlikely to appear in the future constitutions of other countries.

## CONCLUSION

Some have argued that the bases on Okinawa obstruct economic growth on the island:

> [T]he U.S. bases in Okinawa impede economic development of the prefecture. U.S. military bases comprise 20% of the land area of Okinawa[;] consequently, they obstruct plans for roads and industrial development. Furthermore, although the United States agreed to return the wharves at Naha to Okinawan control twenty-three years ago, the U.S. Army still controls them. The Okinawans would like to transform those docks for commercial use to help bolster the local economy; they remain empty, however, except for the one military vessel that docks there once a month.[185]

On the other hand, many observers, including Alexander Cooley and Kimberly Zisk Martin, argue that the Okinawa bases boost the local economy, provide thousands of local jobs, keep small businesses afloat, and spawn rent payments and public works money.[186] If Cooley and Martin mean that Okinawa generates more revenue with the U.S. military presence than without, then they are probably right. But no one can say for sure. The problem with hypothetical statistics is that they are hypothetical. Perhaps tourism would have been stronger in Okinawa without U.S. soldiers running around. Or perhaps Japan could have found a better use for the island. At the end of the day, all we have is conjecture. What we *can* say with some degree of certainty is that feelings about the base are mixed, both on and off the island, both in Japan and in America, and that other viable alternatives to Okinawa are available, as evidenced by an unanimous vote[187] in the Senate of the Commonwealth of the Northern Mariana Islands to welcome the U.S. Marines currently stationed in Japan. One wonders why Obama will not transfer the Futenma troops and base to Tinian, an island that wants

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Craig Martin, *Binding the Dogs of War: Japan and the Constitutionalizing of Jus Ad Bellum*, 30 U. PA. J. INT'L L. 267, 268 (2008).

185. Bugni, *supra* note 180, at 97-98.

186. Alexander Cooley & Kimberly Zisk Marten, *Lessons of Okinawa*, N.Y. TIMES, July 30, 2003, http://www.nytimes.com/2003/07/30/opinion/30ZISK.html?pagewanted=1.

187. David Allen, *Tinian Island Makes a Push to Host Futenma Operations*, STARS AND STRIPES (Apr. 21, 2010), http://www.stripes.com/article.asp?section=104&article=69453.

the troops and base,[188] rather than forcing the troops and base upon a population that, with a few notable exceptions, despises the American military.

Lieutenant General Terry Robling, who commands the U.S. Marine bases in Japan, has a different argument for the presence of the U.S. military in Okinawa: "We provide the Japanese government with a credible deterrence force—a highly effective, highly trained and very mobile force that is very strategically located."[189] Robling adds that "the stability of the region has been caused by our presence here. Over 50 years now there's been relative peace in the Asia region."[190] The problem with this argument is that it is analogous to claiming that a lack of new terror attacks on U.S. soil is evidence that George W. Bush's anti-terror policies worked; the problem, in other words, is that there is no evidence—or, rather, that the evidence is in the absence of evidence. Ultimately, there is no proof. Not only is there no proof, but there is no way of knowing what might have been if circumstances were different—if Japan instead of the U.S. had maintained control over Okinawa.

Robling might be correct. The U.S. probably deterred some conflict. To what extent, however, is unquantifiable. Also unquantifiable is the amount of harm that the U.S. military presence caused over time. Even if the U.S. military has made Japan safer from outside forces, it has endangered many people on the island. According to Defense Ministry data, U.S. military personnel were responsible for 7,277 accidents and criminal cases dating back five years from March 2009.[191] Of these, 6,180 occurred while U.S. personnel were off-duty.[192] Furthermore, the U.S. presence may have triggered a resurgence in nationalism among countries like North Korea or China that have unstable relations with Japan. These countries have good reason to be skeptical of the nearby U.S. military. The point, in any event, is that because we cannot know what Japan would have been like without U.S. forces on Okinawa, we cannot say that Japan is better or worse off because of Americans. True, there are no easy answers to the Futenma base dispute,[193] but the most reasonable solution—the one that would please Okinawans and would have pleased the Hatoyama administration—is to withdraw American troops from Okinawa. Whether Okinawans bring suit

188. Haidee V. Eugenio, *House Relocation Urges U.S., Japan to Consider Tinian as Futenma Relocation Site*, SAIPAN TRIBUNE (Northern Mariana Islands), May 3, 2010, http://www.saipantribune.com/newsstory.aspx?newsID=99294&cat=1.

189. Alastair Leithead, *No Easy Answers in Okinawa*, BBC NEWS (Mar. 30, 2010, 15:05GMT), http://news.bbc.co.uk/2/hi/asia-pacific/8574208.stm.

190. *Id.*

191. *Bad Memories of U.S. Bases Linger*, JAPAN TIMES, Apr. 29, 2010, http://search.japantimes.co.jp/cgi-bin/nn20100429f1.html.

192. *Id.*

193. Leithead, *supra* note 187.

under the premises established in *Mori v. Japan* is outside the control of American leaders and activists. But troop withdrawal is another matter.

Only by U.S. troop withdrawal will Japan be left to decide for herself whether the provisions of Article 9 remain viable in the rapidly developing and globalized world. Only by U.S. troop withdrawal will Japan retain her complete sovereignty and Okinawa her regional integrity. Only by total U.S. troop withdrawal, finally, will Okinawans be afforded the opportunity to produce a sustainable infrastructure and to shift resources to more socially and culturally beneficial uses. The Futenma base dispute has left Okinawa in a state of fear and uncertainty. That is not fair to Okinawans. That is not diplomacy. That is something else. What, exactly, is difficult to say.

# TURKEY AND THE EUROPEAN UNION: AN ASSOCIATION IN THE MAKING

*Yelena E. Archiyan*[1]



## INTRODUCTION

What began as a six country regional governmental organization has become, since 1951, a dominant coalition, representing twenty-seven nations across almost all of Europe.[2] A candidate since 1987, Turkey has had a long history with, and played a large role in, Europe through its membership in various European organizations since the late 1940s.[3] Examples of such organizations include the Organization for Economic Co-

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1. Michigan State University College of Law, J.D. expected 2012; Aquinas College, B.S. in International Business 2008.

2. *See The History of the European Union: Animated Map*, EUROPA, http://europa.eu/abc/history/animated_map/index_en.htm (last visited Nov. 17, 2011).

3. *See European Commission: Enlargement*, *EU-Turkey Relations*, EUROPA, http://ec.europa.eu/enlargement/candidate-countries/turkey/eu_turkey_relations_en.htm (last visited Nov. 17, 2011) [hereinafter *EU-Turkey Relations*].

operation and Development (OECD), Council of Europe, Western European Union, and most notably, the North Atlantic Treaty Organization (NATO).[4] Turkey and the EU formed a partnership in 1963 upon the signing of the Ankara Agreement,[5] which formally allowed for the commencement of negotiations for full membership.[6] Although accession negotiations began in October of 2005,[7] the EU has been reluctant to admit Turkey, citing the need for, among other things, fulfilling the requirements of the Copenhagen criteria,[8] enhancing human rights, resolving border disputes, recognizing the Armenian Genocide, and improving its citizens' political freedoms.[9]

Negotiations began six years ago, and the EU has yet to admit Turkey.[10] While there are many barriers standing in Turkey's way, this article will primarily focus on the major ones. It will argue that while Turkey has made substantial progress in its domestic affairs, economic policies, and some progress in improving relations with its neighbors, Turkey requires additional reforms. The first part of this paper will provide background information on the EU, including its history and the accession process. The second part will address major obstacles relating to Turkey's geography, international disputes, and human rights issues. The third part will analyze the government's constitutional provisions in the context of its modern internal affairs, and demonstrate that while certain rights are explicitly enumerated in Turkey's latest Constitution, they do not extend beyond the text of that Constitution. In practice, few such rights exist, and in application, few are effective. The final part will compare and contrast

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4. *See Members and Partners*, OECD, http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html (last visited Nov. 17, 2011); *47 Countries, One Europe*, COUNCIL OF EUROPE, http://www.coe.int/aboutCoe/index.asp?page=47pays1europe&l=en (last visited Oct. 12, 2011); *List of 28 Delegations*, WESTERN EUROPEAN UNION, http://weu.int/ (last visited Nov. 17, 2011); *NATO Member Countries*, NATO, http://www.nato.int/cps/en/SID-BAFED586-DD86353C/natolive/nato_countries.htm (last visited Nov. 17, 2011).

5. *EU-Turkey Relations*, *supra* note 3.

6. These types of association agreements are not uncommon. They prepare a candidate country for full membership and approximate the EU legislation. "[T]hey are agreements with extended trade liberalization between the EU and the country associated." They "entail stronger economic and political ties between the two parties." Email from Europe Direct to Yelena Archiyan (Mar. 24, 2011, 7:13:59 EST) (on file with author).

7. *EU-Turkey Relations*, *supra* note 3; *Europe in 12 Lessons, Enlargement and Neighbourhood Policy*, EUROPA, http://europa.eu/abc/12lessons/lesson_3/index_en.htm (last visited Nov. 17, 2011) [hereinafter *Enlargement and Neighbourhood Policy*].

8. *Syntheses de la legislation*, *Glossary: Accession Criteria (Copenhagen Criteria)*, EUROPA, http://europa.eu/legislation_summaries/glossary/accession_criteria_copenhague_en.htm (last visited Nov. 17, 2011) [hereinafter *Accession Criteria*].

9. *See* EC, *Turkey 2010 Progress Report Accompanying the Communication from the Commission to the European Parliament and the Council*, at 35, COM (2010) 660 (Nov. 9, 2010), *available at* http://ec.europa.eu/enlargement/pdf/key_documents/2010/package/tr_rapport_2010_en.pdf [hereinafter *2010 Progress Report*].

10. *EU-Turkey Relations*, *supra* note 3.

Turkey's negotiation process with the processes of EU's two newest members: Bulgaria and Romania.

## I. THE BASICS OF THE EUROPEAN UNION

### A. Background

Kofi Annan once said, "No nation needs to face or fight alone the threats which this organization was established to diffuse."[11] Even though he was referring to the United Nations, the European Union has a similar purpose; it merely accomplishes this goal on a regional level. States with similar characteristics integrate to form regional coalitions so they can "better address world problems."[12] In 1951, six European nations integrated to form the European Coal and Steel Community whose purpose was to reduce nationalism and promote peace.[13] The European Coal and Steel Community became the European Economic Community.[14] The purpose of this transformation and expansion was to integrate economically and politically.[15] Having a united Europe with similar goals also prevents any one European country from becoming a regional hegemon, as was the case before the 1950s. Of course, the key success of the EU has been its ability to keep peace in Europe.[16] The European Economic Community became the "European Union" in 1992 upon the signing of the Treaty of Maastricht.[17]

It was not until 1973 that other European countries began joining the EU, and accession continues to this day. While theoretically all members of the EU are equal, in reality the most populous member-nations have the most power. This is so because they have the most votes in the Council of the EU, which is responsible for "defin[ing] [EU's] general political direction

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11. JOHN ROURKE, INTERNATIONAL POLITICS ON THE WORLD STAGE 190 (10th ed. 2005).

12. *Id.* at 191.

13. *See The History of the European Union*, EUROPA, http://europa.eu/abc/history/1945-1959/index_en.htm (last visited Nov. 17, 2011).

14. *Id.*

15. *Id.*

16. Not only has there been no outbreak of war in Europe since the EU's creation, but for the first time in European history, there has been a transfer of sovereignty from individual nation-states to a collective organization. The creation of the EU is significant for another reason—no longer is the modern nation-state a complete model of political organization. The EU's other accomplishments, and why they reflect Turkey's desire to join, include Europe's economic strength, the opportunity to enter new markets, the potential for adopting the euro, and being part of a "functioning institutional framework." Hans N. Weiler, The EU at a Crossroads: The Tension Between Expansion and Integration 5-6 (2004) (transcribed lecture notes), *available at* http://www.stanford.edu/~weiler/ERT1_manuscript.pdf.

17. *History of the European Union*, *supra* note 13.

and priorities."[18] Today, France, Germany, the United Kingdom, and Italy are the most influential in policy-making because they have the most votes.[19]

Most recently, Bulgaria and Romania were admitted as members. Whereas they applied for admission in 1995, Turkey has been aspiring to join since 1987, and only in 1999 did the Helsinki European Council decide to upgrade Turkey to "candidate country status."[20] A country is granted this status when the EU Council officially accepts its application for membership.[21] Official talks began at the Copenhagen Summit in 1993, at which time the European Commission said that the EU could conclude negotiations with Turkey only after 2014.[22]

The EU's most current Progress Report[23] revealed the enlargement strategies and main challenges facing Turkey's membership for the 2010-11 year. The Commission stated that Turkey sufficiently satisfies the political criteria,[24] but much work still remains with respect to human rights,[25] freedom of the press,[26] and the Kurdish question.[27] With respect to democracy and the rule of law, the Commission noted that "Turkey still needs to align its legislation as regards procedure and grounds for closures of political parties with European standards."[28] With respect to Turkey's regional issues and international obligations, the Cyprus and Greek questions still need work. On a positive note, the Commission noted that Turkey is successfully meeting the EU's economic criteria, even though the nation suffered a series of financial crises beginning shortly after the turn of the century.[29]

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18. *The European Council-An Official Institution of the EU*, EUROPEAN COUNCIL, http://www.european-council.europa.eu/the-institution.aspx?lang=en (last visited Dec. 1, 2011).

19. *See Council of the European Union*, *Voting Calculator,* CONSILIUM, http://www.consilium.europa.eu/council/voting-calculator.aspx (last visited Oct. 21, 2011).

20. PASCAL FONTAINE, EUROPE IN 12 LESSONS 13 (2004), *available at* http://ec.europa.eu/publications/booklets/eu_glance/22/en.pdf [hereinafter Fontaine]; *see also Enlargement and Neighbourhood Policy*, *supra* note 7.

21. *European Commission Enlargement*, *Glossary, Candidate Countries*, EUROPA, http://ec.europa.eu/enlargement/glossary/terms/candidate-countries_en.htm (last visited Nov. 17, 2011).

22. *Turkey's Quest for EU Membership*, EU CTR. OF N.C., EU BRIEFINGS, Mar. 2008, at 2, 5, *available at*, http://www.unc.edu/depts/europe/business_media/mediabriefs/Brief4_Turkey%27s_quest_web.pdf.

23. *See generally 2010 Progress Report*, *supra* note 9.

24. *See id.* at 6-16.

25. *Id.* at 17.

26. *Id.* at 21.

27. *See id.* at 35.

28. *Id.* at 7.

29. *See generally 2010 Progress Report*, *supra* note 9.

B. Accession

Article forty-nine of the Treaty on European Union defines the process of accession.[30] A nation is eligible for accession if it complies with the EU's principles, which are enumerated in Article Two.[31] Article forty-nine further provides that the candidate nation must submit an "application to the Council, which must act unanimously."[32] Before the Council takes a vote, it consults with the Commission and the Parliament, "which shall act by a majority of its component members."[33] Finally, "[t]he conditions of admission and the adjustments to the Treaties on which the Union is founded . . . shall be the subject of an agreement between the Member States and the applicant State."[34] The contracting states must ratify this agreement "in accordance with their respective constitutional requirements."[35]

An aspiring country must meet three qualifications known as the Copenhagen Criteria: first, the country must be democratic, which means that there must be a presence of human rights and freedoms, respect for the nation's minority population(s), and the rule of law; second, the country must meet the economic requirement (it must have a free market system); finally, the aspiring nation must be able to adhere to the entire EU law (*acquis communautaire*)[36] which consists of over 80,000 pages of legislation.[37] The *acquis communautaire* includes: (1) "the content, principles and political objectives of the treaties"; (2) "legislation adopted pursuant to the Treaties and the case law of the Court of Justice"; (3) "declarations and resolutions adopted by the Union"; (4) "instruments under the Common Foreign and Security Policy"; (5) "instruments under Justice and Home Affairs"; and (6) "international agreements concluded by the Community and those entered into by the Member States among themselves within the sphere of the Union's activities."[38]

Notwithstanding the above requirements, not one EU member-state that joined "had complied fully with the *acquis* at the time of . . . entry."[39] All entering countries were provided a transitional period.[40] The EU cautions

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30. *See* Consolidated Version of the Treaty on European Union art. 49, Mar. 10, 2010, 2010 O.J. (C 83) 43 [hereinafter TEU].

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *See Accession Criteria*, *supra* note 8.

37. FONTAINE, *supra* note 20, at 12.

38. *European Commission Enlargement*, *Glossary*, *Acquis*, EUROPA, http://ec.europa.eu/enlargement/glossary/terms/acquis_en.htm (last visited Nov. 17, 2011).

39. HARUN ARIKAN, TURKEY AND THE EU: AN AWKWARD CANDIDATE FOR EU MEMBERSHIP 34 (2003).

40. *Id.*

nations that avoidance of compliance "cannot go against the nature and spirit of the *acquis*"; "it can only be put in place in order to guarantee that the ultimate principle of full applicability of the *acquis communautaire* to the new outermost regions stemming from Article 299(1) EC is respected."[41] While it was made clear that the enlargement of 2007 would require applicants to accept the *acquis communautaire* before accession, it is even clearer that was not the case. Consider, for example, Bulgaria: upon its accession, the EU believed that Bulgaria had made efforts to adjust its legislation and administration to make them conform to the laws and rules of the EU. Nevertheless, the EU said that "[s]ustained support from the European Union will be available for addressing the remaining issues.[42] This suggests that, in theory, Turkey need not satisfy all chapters of the *acquis* before it will be offered membership. But the question of whether the EU will require Turkey to satisfy all chapters so as to delay admission for as long as possible, which is what it seems to have been doing since 2005, remains to be seen.

## II. TURKEY'S NON-CONSTITUTIONAL ISSUES IMPEDING ACCESSION

### A. Geography

As its name suggests, the European Union is located in Europe. According to the Treaty on European Union, only "European States" may apply for membership.[43] Although the Treaty does not define what a "European State" is, currently all but one EU member are located on the European continent.[44] According to the current physical structure of the EU, it became evident that "the line in the South was drawn to the Mediterranean" when the EU rejected Morocco's application in 1987 on the grounds that the country is not in Europe even though it is Spain's neighbor to the south.[45] The defining border to the west is naturally the Atlantic

41. Dimitry Kochenov, *Substantive and Procedural Issues in the Application of European Law in the Overseas Possessions of the European Union Member States,* 17 MICH. ST. J. INT'L L. 195, 280 (2009).

42. *European Commission Enlargement*, *Bulgaria—EU-Bulgaria Relations*, EUROPA, http://ec.europa.eu/enlargement/archives/bulgaria/eu_bulgaria_relations_en.htm (last visited Nov. 17, 2011).

43. TEU art. 49.

44. Cyprus is officially located in the Middle East. CIA, *Cyprus,* WORLD FACTBOOK , https://www.cia.gov/library/publications/the-world-factbook/geos/cy.html (last visited Nov. 17, 2011). Malta, while situated in the Mediterranean Sea, is officially located in Southern Europe. CIA, *Malta,* WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/mt.html (last visited Nov. 17, 2011).

45. EUR. COMM'N, GOOD TO KNOW ABOUT EU ENLARGEMENT 10 (2009), *available at* http://ec.europa.eu/enlargement/pdf/publication/screen_mythfacts_a5_en.pdf.

Ocean.[46] To the north, the EU's border is between Finland and Norway.[47] The problem is stretching to the east. While the Black Sea is a natural border to the east, Bulgaria and Romania, both of which border the Black Sea, are already members. In theory, the EU could stretch to the Caucuses,[48] but it was explicit that to go as far as Russia "would create unacceptable imbalances."[49]

Officially, Turkey is located in Southeastern Europe and Southwestern Asia. Only the minuscule portion of Turkey that lies to the West of the Bosporus is located in Europe. The capital of Turkey, Ankara, is located in Asia, and a great majority of Turkey's population lives on the Asian continent.[50] Its neighbor to the northwest is Bulgaria and to the south is Cyprus, both of which are EU members.[51]

The implications associated with admitting Turkey, a mostly non-European nation, into the EU would be significant. What precedent will be set if Turkey becomes a member? Will Syria, Lebanon, and Israel want to join, making the argument that they too border the Mediterranean Sea? The end result is this: however far the EU decides to expand, its expansion endeavors must be cautious to maintain effective and democratic functionality.[52]

### B. The Cyprus Dispute

In its latest Progress Report on Turkey, the EU Commission noted that Turkey needs to improve its bilateral relations with Cyprus.[53] In fact, in 2006 the EU put a hold on the opening of negotiations of eight chapters of the *acquis* because of Turkey's restriction on the "free movement of goods carried by vessels and aircraft registered in Cyprus or whose last port of call was in Cyprus."[54] This means that in the nearly impossible event that Turkey meets the other chapters before it lifts its restrictions, it will be

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46. Press Release, Europe's Next Frontiers, Mr. Olli Rehn's Lecture at the Finnish Institute of International Affairs (Oct. 27, 2006), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/06/654&format=HTML&aged=0&language=EN&guiLanguage=en (last visited Mar. 22, 2011) [hereinafter Europe's Next Frontiers].

47. *Id.*

48. *See Enlargement and Neighbourhood Policy*, *supra* note 7.

49. *Id.*

50. *Turkey Entry 'Would Destroy EU,'* BBC NEWS (Nov. 8, 2002), http://news.bbc.co.uk/2/hi/europe/2420697.stm (noting former French President Valery Giscard d'Estaing's statement that ninety-five percent of Turkey's population lives outside of Europe).

51. Dan Bilefsky, *Romania and Bulgaria Join European Union*, N.Y. TIMES, Jan. 1, 2007, http://www.nytimes.com/2007/01/01/world/europe/01cnd-union.html?ex=1325307600&en=6b90297ac208df26&ei=5088.

52. *Enlargement and Neighbourhood* Policy, *supra* note 7.

53. *2010 Progress Report*, *supra* note 9, at 36.

54. *Id.* at 47; *see also EU-Turkey Relations*, *supra* note 3.

unable to open negotiations with the EU on these eight chapters until the hold is removed.

The dispute between Turkey and Greece over the Island of Cyprus began shortly after Cyprus gained its independence from Great Britain in 1960.[55] Guerilla warfare broke out on the island when Turks responded to the Greek movement called *enosis* (unification of Cyprus and Greece) through a process called *takism* (division of Cyprus between Greece and Turkey).[56] At the end of this revolutionary movement, Turkey came to control 38% of Cyprus's territory.[57] The Cypriot Government claims that what provoked Turkey's reaction was the Cypriot government's attempt to make changes to the Constitution, which was "unworkable."[58]

Cyprus is divided into two parts. The parts are disconnected by the "Green Line," which "separates the government-controlled areas from the rest of the island."[59] The portion that is occupied by Turkey is called the Turkish Republic of Northern Cyprus (TRNC) and is highly dependent upon Turkey for its agriculture, tourism, and aid.[60] Turkey's occupation is viewed as illegal and is unrecognized internationally.[61] Greece and its counterpart in Cyprus (Republic of Cyprus), and Turkey and its counterpart (TRNC) each have mutual defense agreements.

Although the entire island of Cyprus was admitted into the European Union in 2004, only the free portion of the island adheres to the *acquis communautaire* of the European Union.[62] In 2002, the United Nations took the initiative to reunite the people of Cyprus through the Annan Plan.[63] The Annan Plan consisted of three stages: (1) "negotiations were to be held

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55. A settlement was reached in 1959, but the London-Zurich agreements were signed in 1960 by Great Britain, Greece, and Turkey. Patricia Carley, *U.S. Foreign Policy and the Future of Greek-Turkish Relations*, *in* GREEK-TURKISH RELATIONS AND U.S. FOREIGN POLICY: CYPRUS, THE AEGEAN, AND REGIONAL STABILITY 1, 2 (1997), *available at* http://www.usip.org/files/resources/pwks17.pdf.

56. Ali Kazancigil, *The Cypriot Question*, *in* TURKEY TODAY: A EUROPEAN COUNTRY? 173, 175 (Olivier Roy ed., 2004); *see also* COMM'N ON CYPRUS' PROGRESS TOWARDS ACCESSION, REGULAR REPORT FROM THE COMMISSION ON CYPRUS' PROGRESS TOWARDS ACCESSION 11 (1998), *available at* http://ec.europa.eu/enlargement/archives/pdf/key_documents/1998/cyprus_en.pdf.

57. Kazancigil, *supra* note 56, at 176.

58. *Government Web Portal*, CYPRUS, http://www.cyprus.gov.cy/portal/portal.nsf/dmlgovernment_en/dmlgovernment_en?OpenDocument (last visited Nov. 17, 2011).

59. *European Commission Enlargement*, *Turkish Cypriot Community*, EUROPA, http://ec.europa.eu/enlargement/turkish_cypriot_community/index_en.htm (last visited Nov. 17, 2011).

60. WILLIAM MALLINSON, PARTITION THROUGH FOREIGN AGGRESSION: THE CASE OF TURKEY IN CYPRUS 8 (2010).

61. *Id.* at 1.

62. *Id.* at 3.

63. Muzaffer Ercan Yilmaz, *The Cyprus Conflict and the Annan Plan: Why One More Failure?*, 5 EGE ACAD. REV. 29, 35 (2005), *available at* http://eab.ege.edu.tr/pdf/5/C5-S1-2-M4.pdf (Turk.). *See generally* The Comprehensive Settlement of the Cyprus Problem (Mar. 31, 2004), *available at* http://www.hri.org/docs/annan/Annan_Plan_April2004.pdf.

between the two Cypriot communities under UN auspices"; (2) "a conference was to be organized in which the Greek and Turkish Cypriots, and Greece and Turkey were to take part"; and (3) "a referendum [was to have been] held on the plan in both communities."[64] The Annan Plan did not make it past stage three because Greek Cypriots voted 75.8% against it in the referendum.[65] Although both sides were historically resistant to any peaceful resolution, Turkish Cypriots surprisingly voted 64.9% in favor of reunification in the referendum.[66] Perhaps the reason the referendum was not approved by the Greek Cypriots is because all of their claims in the European Court of Human Rights would have to be withdrawn.[67] In effect, the Plan would have denied Greek Cypriots their legal rights.[68]

Cyprus's accession on May 1, 2004 symbolized a serious impediment for Turkey. Cyprus's former President Tasos Papadopoulos[69] "made it very clear that Cyprus as an EU member state would block any decision regarding Turkey's EU membership[] until a solution for Cyprus had been reached on better terms for the Greek Cypriots than the Annan Plan."[70] Under Article 49 of the Treaty on European Union, all member states must ratify the accession agreement before a country may be admitted into the EU.[71] The chances of Cyprus ratifying Turkey's admission are slim and will likely remain that way until a cooperative agreement desirable for both sides, especially the Greek Cypriots, is reached.[72]

### C. Aegean Sea Dispute

A similar dispute between Turkey and Greece involves the status of the Aegean Sea. This dispute was discussed at the 48th Meeting of the EU-Turkey Association Council in 2010.[73] The dispute revolves around the question of who controls the territorial waters, the airspace, and the

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64. ERIC FAUCOMPRET & JOZEF KONINGS, TURKISH ACCESSION TO THE EU: SATISFYING THE COPENHAGEN CRITERIA 177 (2008).

65. A. Marco Turk, *The Negotiation Culture of Lengthy Peace Processes: Cyprus as an Example of Spoiling that Prevents a Final Solution*, 31 LOY. L.A. INT'L & COMP. L. REV. 327, 330 (2009).

66. *Id.*

67. VAN COUFOUDAKIS, INTERNATIONAL AGGRESSION AND VIOLATIONS OF HUMAN RIGHTS 17 (2008)

68. *Id.*

69. Tasos Papadopoulos was succeeded by Dimitris Christofias in 2008. *Christofias Wins Cyprus Presidential Election*, USA TODAY, Feb. 24, 2008, http://www.usatoday.com/news/world/2008-02-24-cyprus-elections_N.htm.

70. FAUCOMPRET & KONINGS, *supra* note 64, at 179.

71. TEU art. 49.

72. Turk, *supra* note 65.

73. *See 48th Session of the Turkey-EC Association Council*, UE-TR 4806/10, at 19 (May 12, 2010) (statement by Mr. Ahmet Davutoğlu & H.E. Mr. Egemen Bağiş), *available at* http://register.consilium.europa.eu/pdf/en/10/st04/st04806.en10.pdf [hereinafter *48th Session of Turkey-EC Association Council*].

continental shelf.[74] Greece's position on this issue is that it should be able to extend its dominion over the Aegean Sea to the limit established by the 1982 Convention on the Law of the Seas (LOS), which says that "[e]very State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles, measured from baselines determined in accordance with [the] Convention."[75] Currently, it only claims six nautical miles of the Sea.[76] Furthermore, it argues that pursuant to LOS and the 1958 Geneva Convention on the Continental Shelf, it should have the right to exploration and exploitation of the continental shelf up to two hundred nautical miles from its coastal and island baselines.[77] Turkey, on the other hand, argues that "much of the Aegean seabed is . . . a prolongation of the Anatolian land mass that is part of Turkey."[78]

While actions in furtherance of normalizing relations have been taken by both Greece and Turkey, including those involving international arbitration and cases taken to the International Court of Justice, improvements have been minimal.[79] Several resolutions have been proposed, including a maritime joint development regime. This would involve the parties themselves deciding the appropriate level of cooperation. It has been suggested that a joint organizational structure for the exploration and exploitation of natural resources in the seabed should be established. The absence of politics in the regime would also be beneficial.[80] At the 2010 meeting of the EU-Turkey Association Council, the Council noted that Turkey is "ready to continue to work with Greece towards the settlement of [this issue] through peaceful means in accordance with international law."[81]

### *1. Conclusions on Turkey's Disputes with Greece over Cyprus and the Aegean Sea*

While it is understandable that Greece is using its presence in the EU in a self-interested fashion to keep out Turkey, a question arises: would it not

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74. ARIKAN, *supra* note 39, at 150.

75. UN Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, art. 3 [hereinafter Law of the Sea].

76. Michael N. Schmitt, *Aegean Angst: A Historical and Legal Analysis of the Greek-Turkish Dispute*, 2 ROGER WILLIAMS U. L. REV. 15, 16 (1996). It should be noted that the international standard for sea extension is three nautical miles. *Id.* at 24.

77. Law of the Sea, *supra* note 75, art. 76(1) & (4).

78. Chip Arvantides, *Disputing the Continental Shelf Region in the Aegean Sea: The Environmental Implications of the Greek--Turkish Standoff*, AMERICAN UNIVERSITY, http://www1.american.edu/ted/ice/aegean.htm (last visited Nov. 17, 2011).

79. Yucel Acer, *A Proposal for a Joint Maritime Development Regime in the Aegean Sea*, 37 J. MAR. L. & COM. 49, 50 (2006).

80. *Id.* at 76.

81. *48th Session of Turkey-EC Association Council*, *supra* note 73, at 19; *see also* Press Release 12353/09 (Presse 228), at 11, Council of the EU, 2957th Council Meeting, General Affairs and External Regulations (July 27, 2009), *available at* http://register.consilium.europa.eu/pdf/en/09/st12/st12353.en09.pdf.

benefit Greece to have Turkey as a member? It is quite obvious that since 1981 "Greece has pursued a policy, which implies that improvement in the EU-Turkey relations, and Turkey's accession to the EU, should depend upon the settlement of disputes between Greece and Turkey."[82] But is Greece taking the correct approach? Would it not make more sense for Greece to support Turkey's accession and advance its policies of dispute resolution after Turkey becomes an EU member? Turkey as an EU member would probably be an "easier neighbor to deal and live with than [one that is] alienated, fundamentalist and militaristic."[83] While Turkey may be reluctant to settle these international border disputes until all other issues are resolved and until it gains EU membership, there seems to be a paradox here—resolving these disputes amounts to a condition of membership, at least according to the EU's annual progress reports on Turkey.[84] On the other hand, Turkey has little incentive to do what the Commission recommends with respect to these issues because, from its perspective, the EU is reluctant to offer it full membership anyway, [85] so why should it concede first? However, the EU has nothing to lose by not offering Turkey full membership. In fact, several European leaders, most notably Nicolas Sarkozy and Angela Merkel, are against Turkish membership.[86] Europe is

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82. ARIKAN, *supra* note 39, at 47.

83. Bulen Aras, *The Importance of Turkey to Relations Between Europe and the Turkic Republics of the Former Soviet Union*, 2 UCLA J. INT'L L. & FOREIGN AFF. 91, 109 (1997) (quoting Seyfi Tashan, *A Turkish Perspective on Europe-Turkey Relations on the Eve of the IGC*, 20 FOREIGN POL'Y (Ankara) 61-64 (1996)).

84. *See 2010 Progress Report*, *supra* note 9, at 37 (noting the requirement that Turkey "commit unequivocally to good neighbourly relations and to a peaceful settlement of disputes in accordance with the United Nations Charter").

85. *See A Mediterranean Maelstrom*, ECONOMIST, Dec. 10, 2009, http://www.economist.com/node/15065921?story_id=15065921;http://www.economist.com/node/15065921?story_id=15065921; *see also* Stephen Kinzer, *Turkey, Rejected, Will Freeze Ties to European Union*, N.Y. TIMES, Dec. 15, 1997, http://www.nytimes.com/1997/12/15/world/turkey-rejected-will-freeze-ties-to-european-union.html?sec=&spon=&pagewanted=all; *Turkey Warns EU Becoming 'Christian Club,'* EUBUSINESS (Jan. 30, 2011), http://www.eubusiness.com/news-eu/davos-economy-meet.8d9.

86. *See* David Charter, *Leave Turkey's Bid to Join EU to Us, Nicolas Sarkozy Warns Barack Obama*, SUNDAY TIMES (London), http://www.timesonline.co.uk/tol/news/world/europe/article6041404.ece; *French President Sarkozy Visits Turkey*, RIA NOVOSTI (Moscow) (Feb. 25, 2011), http://en.rian.ru/world/20110225/162749832.html. *See also* Patrick R. Hugg, *Accession Aspirations Degenerate: A New Chapter for Turkey and the EU*, 9 WASH. U. GLOB. STUD. L. REV. 225, 236 (2010); *Charlie Rose: A Conversation with French Interior Minister, Nicolas Sarkozy* (PBS television broadcast July 13, 2007) [hereinafter *Charlie Rose*]; Craig Smith, *European Union Formally Opens Talks on Turkey's Joining*, N.Y. TIMES, Oct. 4, 2005, http://www.nytimes.com/2005/10/04/international/europe/04turkey.html?_r=2&ex=1286078400&en=5190c31623f6ec33&ei=5088&partner=rssnyt&emc=rss; Bruno Waterfield, *EU President Herman Van Rompuy Opposes Turkey Joining*, TELEGRAPH (London), Nov. 19, 2009, http://www.telegraph.co.uk/news/worldnews/europe/eu/6600570/EU-president-Herman-Van-Rompuy-opposes-Turkey-joining.html.

concerned about dealing with a country that is "too big, too poor, too undemocratic—as well as too Muslim and non-European."[87] So, would it not make the most logical sense that Turkey, rather than the EU, make amends in furtherance of EU membership?

D. Denial of Armenian Genocide

The EU Parliament has encouraged Turkey to recognize the Armenian Genocide.[88] The Genocide took place in 1915 and resulted in the deaths of 1,500,000 Armenians.[89] While this act of genocide was committed by the Ottoman Turks and not the government in place today, the modern government still has an obligation to acknowledge what its predecessor did nearly a century ago. The modern government stepped into power in the early 1920s when the Ottoman Empire was dissolved and a modern Republic of Turkey was created and recognized by the Treaty of Lausanne.[90] A major difference between the Ottoman Turkish government and the modern Turkish government is secularism. The new government transformed the nation into a secular state and instilled in it democratic practices.

The United Nations Convention on the Prevention and Punishment of the Crime of Genocide defines genocide as:

> [A]ny of a number of acts committed with the intent to destroy, in whole or in part, a national, ethnic, racial or religious group; killing members of the group; causing serious bodily or mental harm to members of the group; deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part; imposing measures intended to prevent births within the group, and forcibly transferring children of the group to another group.[91]

The Armenian genocide meets this definition.[92] In fact, many advanced, industrialized nations, as well as individuals, have recognized the Armenian

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87. Shada Islam, *A Reluctant Embrace*, YALEGLOBAL (Dec. 16, 2004), http://yaleglobal.yale.edu/content/reluctant-embrace.

88. Resolution on the Opening of Negotiations with Turkey, EUR. PARL. DOC. P6_TA (2005) 0350, *available at* http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+TA+P6-TA-2005-0350+0+DOC+PDF+V0//EN; EUR. PARL. DOC. 46 (2004) [hereinafter Written Declaration] (declaring that recognition of the Genocide is a precondition to the opening of negotiations with Turkey).

89. U.N. GAOR, 57th Sess., 17th plen. mtg. at 28, U.N. Doc. A/57/PV.17 (Sept. 19, 2002).

90. *See* Treaty of Peace Between the Allied Powers and Turkey (Treaty of Lausanne), July 24, 1923, 28 L.N.T.S. 11, *reprinted in* 18 AM. J. INT'L L. 1 (Supp. 1924).

91. Convention on the Prevention and Punishment of the Crime of Genocide art. II, Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

92. REMEMBRANCE AND DENIAL 14 (Richard G. Hovannisian ed., 1998).

Genocide, [93] including Russia, Argentina, France, Greece, and even the Pope.[94] Thus far, about twenty countries have recognized the 1915 massacre as "genocide."[95] Turkey, in contrast, has historically denied and continues to deny what its predecessor government did ninety-six years ago.[96] To be clear, Turkey's primary argument is that there were no killings. Alternatively, it argues that if killings occurred, they did not amount to genocide.[97] However, there is unambiguous evidence along with academic scholarship proving that the massacre of more than 1,000,000 Armenians took place.[98]

On September 28, 2005, the European Parliament urged Turkey to recognize the Genocide.[99] This took place around the time negotiations with Turkey began. More recently, an amendment has been added to the 2010 Progress Report on Turkey, which "[u]rges Turkey to ratify the protocols with Armenia, to open the border with this neighbor unconditionally and to acknowledge the genocide of Armenians, Greeks and Assyrians."[100] Turkey has its reasons for denying the genocide, two of which relate to its concern about how it will be perceived in the international community and to avoid giving Armenia back its territory. But if Turkey were to acknowledge the genocide, it is doubtful it would lose the respect of the international community. Instead, recognition would most likely lead to cooperation between Turkey and Armenia, provide closure to both countries, and most importantly, bring Turkey one step closer to EU membership.

### E. Satisfying the Copenhagen Economic Criteria

Under the Copenhagen standards, a candidate country must show two things to satisfy the economic criteria: (1) "existence of a functioning market economy; and (2) "capacity to cope with competitive pressure and market forces within the EU."[101] According to the 2010 Progress Report on

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93. AIDA ALAYARIAN, CONSEQUENCES OF DENIAL: THE ARMENIAN GENOCIDE 125 (2008).

94. *Id.*

95. Harut Sassounian, *Genocide Recognition and a Quest for Justice*, 32 LOY. L.A. INT'L & COMP. L. REV. 115, 117 (2010).

96. *Id.* at 122.

97. *See 60 Minutes: Battle Over History* (CBS television broadcast Feb. 28, 2010), *available at* http://www.cbsnews.com/video/watch/?id=6253043n [hereinafter *Battle over History*].

98. *See id.; see also* REMEMBRANCE AND DENIAL, *supra* note 92, at 272.

99. Written Declaration, *supra* note 88.

100. Eur. Parl., Draft Motion for a Resolution, Amendments 1-315 on Turkey's Progress Report, amend. 200 (Jan. 25, 2011), *available at* http://www.europarl.europa.eu/RegData/commissions/afet/amendments/2011/456654/AFET_AM(2011)456654_EN.pdf [hereinafter Amendments].

101. *2010 Progress Report*, *supra* note 9, at 38.

Turkey, the Commission concluded that Turkey has made adequate progress in this area.[102]

In comparative terms, Turkey is doing no worse than Bulgaria and Romania when they were in the negotiation stages.[103] Turkey has, however, along with the rest of the world, suffered from the recent economic crisis, which has delayed certain aspects of its economic progress.[104] Turkey's economic problems are addressed not by the EU, but by the International Monetary Fund (IMF) and the World Bank.[105]

To briefly summarize the EU Commission's conclusions on the existence of a functioning market economy in Turkey, the 2010 Progress Report stated that the "consensus on economic policy essentials has been preserved" but "better planning, coordination and communication" would help boost the confidence in the "government's economic policy."[106] In addition, the government's privatization efforts have helped Turkey's economy considerably.[107]

With respect to the economy's "capacity to cope with competitive pressure and market forces within the Union," the Commission in 2010 gave Turkey mixed reviews.[108] It stated that while Turkey is recovering from the economic crisis, the opportunities for structural reforms, due to the strong fundamental pillars that the government has been creating since 1980, and low interest rates are available.[109] It also stated that Turkey's growth is delayed due to "high inactivity and insufficiently broad-based productivity growth."[110] It concluded, however, that the crisis did not negatively affect the market mechanism functions.[111]

All this is relevant to Turkey's accession because the EU wants member nations to be able to adjust to the EU economy, which obviously is much bigger than the economy of a single nation. In doing so, it expects candidates to improve and align their economic policies with the policies of the EU so that its populace can compete with the citizens of the EU. There

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102. *Id.* at 38-44.

103. *Compare id. with Bulgaria 2005 Comprehensive Monitoring Report*, COM (2005) 534 final (Oct. 25, 2005), *available at* http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/sec1352_cmr_master_bg_college_en.pdf [hereinafter *Bulgaria 2005 Comprehensive Report*], *Romania 2005 Comprehensive Monitoring Report*, COM (2005) 534 final (Oct. 25, 2005), *available at* http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/sec1354_cmr_master_ro_college_en.pdf, *and Comprehensive Monitoring Report on Cyprus's Preparations for Membership* (2003), *available at* http://ec.europa.eu/enlargement/archives/pdf/key_documents/2003/cmr_cy_final_en.pdf.

104. *2010 Progress Report*, *supra* note 9, at 38.

105. *Id.* at 67.

106. *Id.* at 38.

107. *Id.* at 41.

108. *See generally id.* at 38-44.

109. *Id.* at 41-42.

110. *2010 Progress Report*, *supra* note 9, at 43.

111. *Id.*

is an *acquis* chapter on this aspect called the Freedom of Movement of Workers.[112] It takes into account, among other things, the educational system in a candidate country, literacy rates, and corruption levels.[113] The Turkish government is participating in the EU's education and youth programs to better prepare its young generation for competition in the workforce in the EU.[114] Fifteen new universities were established in a period of one year.[115] Turkey has also taken aggressive steps to fight corruption. For example, it approved the Conventions of the European Council towards fighting against corruption.[116] It also became a member of the Group of States against Corruption (GRECO) and ratified the United Nations Convention against Corruption.[117] In 2009, it ranked 61st out of 180 countries on the corruption scale, scoring 61 out of 100 points.[118]

Some numeric factors, including GDP, inflation rates, income inequality, human development, unemployment, and foreign direct investment can show a lot about how a country is doing economically. Eurostat, the official EU statistics database, compares countries' GDP per capita relative to one another and relative to the EU itself whose average (accounting for all 27 members) is set to one hundred. Turkey received a score of 47 in 2008, the latest year for which GDP information for Turkey is available.[119] Romania also received a score of 47, while Bulgaria got 43 points.[120] Turkey's

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112. *Id.* at 48.

113. The literacy rate in Turkey was over ninety-five percent for men and nearly eighty percent for women in 2004. CIA, *Turkey,* WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/tu.html (last visited Nov. 17, 2011) [hereinafter CIA, *Turkey*]. Compare these numbers with the literacy rate in Bulgaria: 98.7% for men and 97.7% for women in 2001. CIA, *Bulgaria,* WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/bu.html (last visited Nov. 17, 2011) [hereinafter CIA, *Bulgaria*]. The literacy rate was 98.4% for men and 96.3% for women in Romania in 2002. CIA, *Romania*, WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/geos/ro.html (last visited Nov. 17, 2011) [hereinafter CIA, *Romania*].

114. *2010 Progress Report*, *supra* note 9, at 88-89.

115. Ninth Development Plan (2007-2013), Law No.: 877, at 49, June 28, 2006, *available at* http://ekutup.dpt.gov.tr/plan/ix/9developmentplan.pdf [hereinafter Ninth Development Plan].

116. *Id.* at 59.

117. *See generally Group of States against Corruption*, COUNCIL OF EUROPE, http://www.coe.int/t/dghl/monitoring/greco/default_en.asp (last visited Nov. 17, 2011); *UN Convention Against Corruption*, UN OFFICE ON DRUGS AND CRIME, http://www.unodc.org/unodc/en/treaties/CAC/index.html (last visited Mar. 25, 2011).

118. TRANSPARENCY INT'L, ANNUAL REPORT 2009, at 48-49 (July 2010), *available at* http://www.transparency.org/publications/annual_report [hereinafter ANNUAL REPORT 2009] (follow "Transparency International's Annual Report 2009" hyperlink). Only three current EU member states are behind Turkey: Bulgaria, Romania, and Greece (all ranking at 71). *See id.*

119. *See* European Commission, *GDP Per Capita in Purchasing Power Standards*, EUROSTAT, http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&plugin=1&language=en&pcode=tsieb010 (last visited Nov. 17, 2011).

120. *Id.*

inflation rate was 8.6% in 2010, while Bulgaria's was 3% and Romania's was 6.1%.[121] The inflation rate in Cyprus was 2.6% in 2010.[122]

Income inequality is measured by the GINI index on a scale of one to one hundred, with one representing no inequality and one hundred representing the maximum amount of inequality. Turkey and Romania received a score of 39.7 and 31.2 in 2008, respectively, while Bulgaria received a score of 45.3 in 2007, the latest year for which information for Bulgaria was available.[123] The human development index measures the "level of human development of people in a society that accounts for inequality."[124] The 2010 report revealed that Turkey was in 83rd place while Bulgaria and Romania took 58th and 50th place, respectively.[125] If Turkey were a member of the EU, it would rank last out of all current EU members.

Turkey's unemployment rate in 2010 was 12%, while Bulgaria's was 9.5%, and Romania's was 6.9%.[126] Foreign direct investment is also a useful measure of how strong a country's economy is. It is defined as "an investment made to acquire lasting interest in enterprises operating outside of the economy of the investor."[127] The EU Commission believed that Turkey's ability to diversify its trading had an effect on alleviating the impact of the economic crisis.[128] The United Nations Report indicated that as a percentage of gross fixed capital formation, Turkey's FDI inward flow in 2009 was 7.3%, while its outward flow was 1.5%.[129] Comparatively, as a percentage of gross fixed capital formation, Bulgaria's FDI inward flow in 2009 was 38.3%, while its outward flow was -1.2%.[130] Finally, Romania's

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121. European Commission, *HICP—Inflation Rate: Annual Average Rate of Change (%)*, EUROSTAT, http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=tsieb060&tableSelection=1&footnotes=yes&labeling=labels&plugin=1%20 (last visited Nov. 17, 2011).

122. *Id.*

123. CIA, *Distribution of Family Income—Gini Index*, WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/fields/2172.html (last visited Dec. 2, 2011).

124. UN Development Programme, *The Inequality-Adjusted HDI (IHDI)*, UNDP, http://hdr.undp.org/en/statistics/ihdi/ (last visited Nov. 17, 2011).

125. UN Development Programme*, Table 3, Inequality-Adjusted Human Development Index*, UNDP, uhttp://hdr.undp.org/en/media/HDR_2010_EN_Table3_reprint.pdf (last visited Nov. 17, 2011).

126. CIA, *Unemployment Rate (%)*, WORLD FACTBOOK, https://www.cia.gov/library/publications/the-world-factbook/fields/2129.html (last visited Nov. 25, 2011). Surprisingly, unemployment in these three countries is about average. Lithuania's, Estonia's, and Latvia's unemployment rates were 17.8%, 16.9%, and 18.4%, respectively. *Id.*

127. *Foreign Direct Investment (FDI)*, UNCTAD, http://www.unctad.org/Templates/Page.asp?intItemID=3146&lang=1 (last visited Nov. 17, 2011).

128. *2010 Progress Report*, *supra* note 9, at 44.

129. U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2010, COUNTRY FACT SHEET: TURKEY, http://www.unctad.org/sections/dite_dir/docs/wir10_fs_tr_en.pdf.

130. U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2010, COUNTRY FACT SHEET: BULGARIA, http://www.unctad.org/sections/dite_dir/docs/wir10_fs_bg_en.pdf.

FDI inward flow in 2009 was 15.3% of gross fixed capital formation, while its outward flow was at 0.5%.[131]

The conclusions to be drawn from these numerical indicators are that Turkey, for the most part, is near the bottom in almost all categories relative to other EU member-states. Nonetheless, the latest Progress Report indicated that Turkey is relatively well aligned with EU policies in meeting the economic criteria.[132] The Commission also found that there was "strong economic interdependence between the EU and Turkey."[133] While the EU is impressed with some aspects of Turkey's economy, it is awaiting more improvements in some specific areas. For example, the government still needs to implement structural reforms, including investing in human capital and providing social benefits. It should implement legislation to equalize the playing field for women so they can compete fairly with men for jobs.[134] Turkey also needs to attract more foreign direct investment. To do so, it needs to modify its judicial system, manage its corruption, and develop its physical infrastructure.[135] It is clear, however, that Turkey is much closer to meeting the Copenhagen economic criteria than it is to meeting the Copenhagen political criteria as well as satisfying the requirement to adhere to the entire EU law.

### F. Acquis Communautaire

The third non-negotiable condition of EU accession is adherence to the *acquis communautaire* (the entire EU law). The aspiring EU state must have the "ability to take on the obligations of full membership," including the administrative, judicial, and legislative aspects of the EU law.[136] The phrase has a broad definition and includes "all the real and potential rights and obligations of the EU system and its institutional framework."[137] For Turkey, this means supporting the "UN Secretary General's effort to bring the process of finding a comprehensive settlement of the Cyprus problem to a successful conclusion."[138] Upon accession, this 80,000 page document

131. U.N. CONF. ON TRADE & DEV., WORLD INVESTMENT REPORT 2010, COUNTRY FACT SHEET: ROMANIA, http://www.unctad.org/sections/dite_dir/docs/wir10_fs_ro_en.pdf.

132. *2010 Progress Report*, *supra* note 9, at 38-44.

133. *Id.* at 44.

134. FAUCOMPRET & KONINGS, *supra* note 64, at 91.

135. *2010 Progress Report*, *supra* note 9, at 42, 77. *See also* Ninth Development Plan, *supra* note 115, at 36.

136. ARIKAN, *supra* note 39, at 44.

137. Heather Grabbe, *European Union Conditionality and the "Acquis Communautaire,"* 23 INT'L POL. SCI. REV. 249, 253 (2002) (quoting Carlo Gialdino, *Some Reflections on the Acquis Communautaire*, 32 COMMON MKT. L. REV. 1089 (1995).

138. *Id.* at 71.

must be adopted and translated into the applicant country's language.[139] In Turkey's case, only 20% of it has been translated.[140]

The process of negotiations is as follows: First, the non-problematic chapters, such as Science and Research, are disposed of.[141] Once a country aligns its policies with a certain chapter, the chapter is then presented to the Council for its adoption by a unanimous vote.[142] If a chapter poses problems for a country, the country has the option to ask for "transitional measures, opt-outs and/or derogations."[143] In response, the Commission "would [create] a Draft Common Position (CP) for the EU and send [it] to the Council."[144] The Council will then engage in a screening process during which it will adopt a common negotiating document.[145] The CP is then presented to the applicant state and, if it accepts, its acceptance "would be decided as an Article of Accession Treaty."[146] If it does not, the Commission and Council will modify the CP as many times as needed before the applicant state accepts its provisions.[147] In the 2010 Progress Report on Turkey, the Commission addressed Turkey's adherence to each of the 33 *acquis* chapters.[148] A summary is presented below.

| *Acquis* Chapter | Turkey's Status on Alignment |
|---|---|
| Free movement of goods | Limited progress has been made; Turkey has not yet incorporated the requirements of the *acquis* |
| Freedom of movement for workers | Alignment is at an early stage |
| Right of establishment and freedom to provide services | Alignment is at an early stage |
| Free movement of capital | Some alignment has been made |
| Public procurement | Some aspects are in the advanced stage of alignment |
| Company law | Limited alignment |
| Intellectual property law | High level of alignment |
| Competition policy | High level of alignment |
| Financial Services | Some alignment has been made |
| Information society and media | Some alignment has been made |
| Agriculture | Limited alignment |

139. TURKEY-EU RELATIONS 143 (Meltem Müftüler-Baç & Yannis A. Stivachtis eds., 2008).
140. *Id.* at 143.
141. *Id.* at 123.
142. *Id.*
143. *Id.*
144. *Id.*
145. TURKEY-EU RELATIONS, *supra* note 139, at 123.
146. *Id.*
147. *Id.*
148. *See generally 2010 Progress Report*, *supra* note 9, at 44-98. In this paper, I address only some of these chapters.

| | |
|---|---|
| Food safety, veterinary and phytosanitary policy | Progress has been made, but further efforts are necessary |
| Fisheries | Some alignment has been made |
| Transport policy | Some alignment has been made with the exception of the railway sector |
| Energy | High level of alignment |
| Taxation | Some alignment has been made |
| Economic and monetary union | Some alignment has been made |
| Statistics | High level of alignment |
| Social policy and employment | Some alignment has been made |
| Enterprise and industrial policy | Sufficient level of alignment |
| Trans-European networks | Sufficient to high level of alignment |
| Regional policy and coordination of structural instruments | Some alignment has been made |
| Judiciary and fundamental rights | Alignment in certain areas of the judiciary have been made |
| Justice, freedom, and security | Alignment is at an early stage with regard to migration; further efforts are needed with regard to external borders & Schengen; alignment is at an early stage with regard to judicial cooperation in criminal and civil matters; further efforts are needed with regard to police cooperation, customs cooperation, and the fight against drugs |
| Science and research | High, but incomplete level of alignment |
| Education and culture | Good progress on education and culture, but lacking legislative alignment |
| Environment | Limited alignment on horizontal legislation; limited alignment on air quality; high level of alignment on waste management; little alignment on water quality; no alignment on nature protection; limited alignment on industrial pollution control and risk management; limited alignment on chemicals and climate change; high level of alignment on noise; |
| Consumer and health protection | Low alignment in the area of consumer protection; some alignment in the area of public health |
| Customs union | High level of alignment in certain aspects |
| External relations | High, but incomplete level of alignment |
| Foreign, security, and defense policy | Some alignment has been made |
| Financial control | Limited alignment |
| Financial and budgetary provisions | Limited alignment[149] |

149. *Id.*

From the foregoing, it appears that either Turkey has a long way to go before it can align its policies with all of these chapters, unless it can ask for a transitional measure or an opt-out, or that the Commission is intentionally raising its standards to delay Turkey's accession.

## III. LEGAL IMPEDIMENTS

Article 49 of the Maastricht Treaty is procedural in nature and outside the control of a candidate country in that the decision whether to allow admission lies with the European Union Council, Parliament, and member-states. Furthermore, because the *acquis communautaire* is everything the EU did prior to a candidate's accession, it, too, is outside the candidate's control. Because adopting the *acquis* is a condition of membership, a candidate has no other choice than to accept its substance. The development and stability of a nation's economy is also subject to external conditions. However, the political criteria—the presence of human rights and freedoms, respect for a nation's minority populations, and the rule of law—are all within the candidate country's control, and it is the country's constitution that sets the foundation for these items. Moreover, because it is in the government's discretion to provide or take away these rights and freedoms, the political criteria should weigh more heavily. Each country has its own unique facts; what may be standing in the way of one may not be an issue for another. According to previous progress reports, Turkey has many deficiencies in this area. Some issues cannot be resolved as easily as the government enacting a law, such as with Cyprus, the Aegean Sea dispute, or the functionality of a market economy. The same is not true, however, when it comes to Turkey's domestic policies and relations with its citizens. In 2010, Turkey has demonstrated this is so: Turkey's legal system underwent major reforms when its Constitution was amended through a public referendum,[150] the Law on Fundamental Principles of Elections and Electoral Rolls was amended to allow for language other than Turkish to be used in election campaigns,[151] and a Kurdish department at a university was established.[152] It appears that after five decades of being an applicant, Turkey is finally liberating itself from a longstanding history of archaic traditions and aligning itself with the political requirement of the Copenhagen criteria.[153] This section will focus on the specific issues regarding Turkey's constitutional and other legal reforms and their flaws. This is only one aspect of the Copenhagen political criteria; there are a total

150. *Id.* at 7.
151. *Id.* at 31-32.
152. *Id.* at 31.
153. *Turkey's Pre-accession Strategy*, EUROPA, http://europa.eu/legislation_summaries/enlargement/ongoing_enlargement/e40113_en.htm (last visited Nov. 17, 2011).

of three requirements to satisfy the political criteria—democracy, rule of law, and respect for human rights and protection of minorities.[154]

A. Constitutional Provisions

Modern Turkey has had three constitutions: the 1924 Constitution; the 1961 Constitution, which brought developments in the parliamentary system; and the 1982 Constitution, which remains in effect today.[155] The 1982 Constitution gave great powers to the executive[156] and formed the basis of the Turkish legal system and its defects. After the 1982 Constitution went into effect and prior to the referendum of 2010, [157] the government was severely criticized as undemocratic. Though amendments were made in 2010, the Constitution remains an impediment to Turkey's accession to the EU because it fails to provide the rights it guarantees. Even more undemocratic and controversial is the Turkish Penal Code, which infringes upon the rights of its citizens and gives the government great powers to suppress and punish those with whom it disagrees.

First, Article 14 of the Turkish Constitution takes away what it provides in later articles. It says, "[n]one of the rights and freedoms embodied in the Constitution shall be exercised with the aim of violating the indivisible integrity of the state with its territory and nation, and endangering the existence of the democratic and secular order of the Turkish Republic based upon human rights."[158] What this seems to mean is that although citizens have certain fundamental rights, they cannot be exercised if they threaten to violate Turkey's integrity. The second part of the provision presumes that inherent in Turkey's integrity is democracy, secularism, and human rights protections. Several modern examples demonstrate this is not the case. One is Turkey's ban on certain political parties.[159] Another is a law that makes it illegal to use any language other than Turkish in political life.[160] The government has used this law to prosecute violators. For example, in

154. *2010 Progress Report*, *supra* note 9, at 6.

155. *Constitution of the Republic of Turkey*, REPUBLIC OF TURKEY MINISTRY OF FOREIGN AFFAIRS, http://www.mfa.gov.tr/constitution-of-the-republic-of-turkey.en.mfa (last visited Nov. 17, 2011).

156. *Id.*

157. *2010 Progress Report*, *supra* note 9, at 7, 8.

158. TÜRKIYE CUMHURIYETI ANAYASAS [CONSTITUTION OF THE REPUBLIC OF TURKEY] (1982), art. 14, *available at* http://www.anayasa.gov.tr/images/loaded/pdf_dosyalari/THE_CONSTITUTION_OF_THE_REPUBLIC_OF_TURKEY.pdf.

159. Pinar Aydinli, *Turkey Reform Article Rejected in Blow to Govt*, REUTERS, May 3, 2010, *available at* http://www.reuters.com/article/2010/05/03/us-turkey-constitution-vote-idUSTRE6423S020100503. *See also 2010 Progress Report*, *supra* note 9, at 21.

160. Sabrina Tavernise, *Kurd's Speech Defies Turkish Taboo*, N.Y. TIMES, Feb. 24, 2009, http://www.nytimes.com/2009/02/25/world/europe/25turkey.html. This law is different from the Law on Fundamental Principles of Elections and the Electoral Registry, which, since April 2010, allows the use of the Kurdish language in election campaigns. *See 2010 Progress Report*, *supra* note 9, at 31-32.

1991, Leyla Zana took her oath for Parliament in Kurdish. She also dared "to speak Kurdish and wear the Kurdish colors in the ribbons in her headband in Parliament."[161] For this she spent 10 years in prison.[162] The policy that no language other than Turkish may be used in political life still exists today.[163] More recently, Turkey's Parliament Speaker reminded a party chairman of this policy after a political party chairman "addressed party representatives in Kurdish for 10 minutes during [a] meeting."[164] Although the chairman was not jailed, he was reminded that legal action would be taken against anyone who does not comply with the law.[165]

Related to this is a nationwide policy that the Kurdish language cannot be taught in schools. However, for the first time in the country's history, a Turkish university "established the first Kurdish . . . language department[], and started to accept students to post-graduate programmes organised by these departments."[166] Despite this one development, "Kurdish language training in public schools is, in fact, illegal.[167]

The second controversial provision in Turkey's constitution is Article 26, which says

> Everyone has the right to express and disseminate his thoughts and opinion by speech, in writing or in pictures or through other media, individually or collectively. . . .
>
> . . . . The exercise of these freedoms may be restricted for the purposes of protecting national security, public order and public safety, the basic characteristics of the Republic and safeguarding the indivisible integrity of the State with its territory and nation . . . .[168]

The reason this provision is controversial is because, like many others, in practice it has proven to be false; citizens who have attempted to express

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161. *Kurdish Political Prisoner Leyla Zana Released After a Decade in Jail*, DEMOCRACY NOW! (June 10, 2004), http://www.democracynow.org/2004/6/10/kurdish_political_prisoner_leyla_zana_released.

162. *Id.*

163. *2010 Progress Report*, *supra* note 9, at 33.

164. *Turkish Parliament Speaker Warns BDP About Speaking Kurdish*, HURRIYET DAILY NEWS (Turk.), Nov. 10, 2010, http://www.hurriyetdailynews.com/n.php?n=bdp8217s-kurdish-speech-deemed-8216illegal8217-by-parliament-speaker-2010-11-10.

165. *Id.*

166. This was at Mardin Artuklu University. *See 2010 Progress Report*, *supra* note 9, at 32.

167. *Id.* at 33.

168. TÜRKIYE CUMHURIYETI ANAYASAS [CONSTITUTION OF THE REPUBLIC OF TURKEY] (1982), art. 26. This copy of the Constitution does not reflect the 2010 amendments, which, for the purposes of this discussion, are irrelevant.

their thoughts in public have been punished.[169] Despite its alleged protection in the Constitution, freedom of expression is lacking.[170] While the 2010 Progress Report on Turkey indicated the media is enjoying greater freedoms than ever before, it also mentioned that a substantial number of lawsuits have been brought against journalists.[171] There is "[u]ndue political [pressure] on the media," which greatly hinders the exercise of freedom of the press."[172] An important illustration of this is the case of Hrant Dink,[173] which serves as an example of Turkey's lack of freedom of expression as well as radical measures taken by its society for the purpose of denying the Armenian Genocide.[174] Dink was an editor of an Armenian newspaper called *Agos* published in Turkey. He was a human rights activist and debated "openly and critically issues of Armenian identity and official versions of history in Turkey relating to" the Armenian Genocide.[175] Even after receiving death threats for his views, he continued to write until he was murdered.[176] Before his death he was prosecuted three times for writing about the Genocide. He was charged with insulting the Turkish identity under Section 301 of Turkey's Penal Code [177] and was "handed a six-month suspended prison sentence."[178]

In 2010, the European Court of Human Rights issued a judgment holding that Turkey failed to protect Hrant Dink's life.[179] Specifically, the Court found that the Turkish government was in violation of Articles 2, 10, and 13 of the Convention de sauvegarde des droits de l'homme et des libertés fondamentales.[180] These articles are the right to life, freedom of expression,

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169. *See*, *e.g.*, Dink v. Turkey, App. Nos. 2668/07, 6102/08, 30079/08, 7072/09 & 7124/09, Eur. Ct. H.R. (2010) (unpublished) (text of this judgment is available only in French).

170. *See*, *e.g.*, AMNESTY INT'L, AMNESTY INTERNATIONAL REPORT 2009: STATE OF THE WORLD'S HUMAN RIGHTS-TURKEY 36, 330 (2009), *available at* http://report2009.amnesty.org/sites/report2009.amnesty.org/files/documents/air09-en.pdf (describing an incident in Turkey involving the imprisonment of children for their participation in demonstrations).

171. *Progress Report 2010*, *supra* note 9, at 21.

172. *Id.* at 78.

173. *Dink*, ¶¶ 8–17.

174. *See Battle Over History*, *supra* note 97.

175. *Turkey: Murder of Journalist Deplored*, AMNESTY INT'L (Jan. 19, 2007), http://amnesty.org.uk/news_details.asp?NewsID=17235.

176. *Battle Over History*, *supra* note 97.

177. *Turkish-Armenian Writer Shot Dead*, BBC NEWS (Jan. 19, 2007), http://news.bbc.co.uk/2/hi/europe/6279241.stm.

178. *Turkey 'Failed to Protect' Slain Journalist Hrant Dink*, BBC NEWS (Sept. 14, 2010), http://www.bbc.co.uk/news/world-europe-11301412.

179. *See generally* Dink v. Turkey, App. Nos. 2668/07, 6102/08, 30079/08, 7072/09 & 7124/09, ¶¶ 139-45, Eur. Ct. H.R. (2010); Yigal Schleifer, *In Turkey, Hundreds of Minors Imprisoned on 'Terrorism' Charges,* CHRISTIAN SCI. MONITOR (May 26, 2009), http://www.csmonitor.com/World/Middle-East/2009/0526/p06s01-wome.html.

180. Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221.

and the right to an effective remedy, respectively.[181] Accordingly, the Court ordered the Turkish government to pay Dink's family 105,000 euros in compensation.[182] Turkey's response to this incident is somewhat surprising in that it said it would not appeal the Court's judgment. Immediately following the shooting, Turkey promised to bring those responsible for the murder to justice. To be clear, there is no evidence that the government itself was responsible for Dink's murder. Nonetheless, the government was aware that Dink had received death threats and did nothing to protect him.[183] It is not for the act of murder that the EU reprimanded Turkey; rather it is for its failure to protect the journalist prior to the murder.[184] It is also worth reiterating that the government prosecuted him for his expressions.

### B. Other Laws and Their Use Against the Kurds

The Kurds are a large minority group in Turkey and comprise about eighteen percent of Turkey's total population.[185] The Kurds claim that Turkey's Constitution discriminates against them[186] and specifically point to Articles 3, 42, and 66.[187] Article 3 provides "[t]he Turkish state, with its territory and nation, is an indivisible entity. Its language is Turkish."[188] Article 66 in relevant part provides, "[e]veryone bound to the Turkish state through the bond of citizenship is a Turk. The Child of a Turkish father or a Turkish mother is a Turk."[189] Therefore, the Kurds argue that they are intentionally left out of the Constitution.[190]

In response to the Turkish government leaving the Kurds powerless, the Kurdistan Workers' Party (PKK) was formed in 1984.[191] It sought Kurdish independence and an independent Kurdish state.[192] Since the PKK's formation, the Turkish government has taken steps to restrain its

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181. *See id.* arts. 3, 10, 13.

182. *Dink*, ¶ 150.

183. *Turkey 2009 Progress Report Accompanying the Communication from the Commission to the European Parliament and the Council*, at 12, COM (2009) 533 (Oct. 14, 2009), *available at* http://ec.europa.eu/enlargement/pdf/key_documents/2009/tr_rapport_2009_en.pdf.

184. Europe's Next Frontiers, *supra* note 46.

185. CIA, *Turkey, supra* note 113 (data from 2008).

186. *Have Your Say: Lack of Kurdistani Identity in Turkish Constitution*, KURDISH MEDIA (Sept. 13, 2006), http://www.kurdmedia.com/article.aspx?id=13220.

187. *Id.*

188. TÜRKIYE CUMHURIYETI ANAYASAS [CONSTITUTION OF THE REPUBLIC OF TURKEY] (1982), art. 3.

189. *Id.* art. 66.

190. *Have Your Say: Lack of Kurdistani Identity in Turkish Constitution*, *supra* note 186.

191. HENRI J. BARKEY & GRAHAM E. FULLER, TURKEY'S KURDISH QUESTION 15 (1998).

192. *Id.*

influence.[193] Between 1984 and 1999, the Turkish military used its Anti-Terror laws to suppress the PKK. The Anti-Terror laws lay out the government's emergency powers. Article One of the Law to Fight Terrorism (Act No. 3713) defines terrorism:

> Terrorism is any kind of act done by one or more persons belonging to an organization with the aim of changing the characteristics of the Republic as specified in the Constitution, its political, legal, social, secular and economic system, damaging the indivisible unity of the State with its territory and nation, endangering the existence of the Turkish State and Republic, weakening or destroying or seizing the authority of the State, eliminating fundamental rights and freedoms, or damaging the internal and external security of the State, public order or general health by means of pressure, force and violence, terror, intimidation, oppression or threat. An organization for the purposes of this Law is constituted by two or more persons coming together for a common purpose. The term "organization" also includes formations, associations, armed associations, gangs or armed gangs as described in the Turkish Penal Code and in the provisions of special laws.[194]

From this definition, it appears that because the PKK desires an independent Kurdistan, its aim must be to change the characteristics of the Republic of Turkey. It must logically follow that the PKK is a terrorist organization.

Furthermore, under Article Eight of this Act, "written and oral propaganda and assemblies, meetings and demonstrations aimed at damaging the indivisible unity of the Turkish Republic with[in] its territory and nation are forbidden, regardless of the methods, intentions and ideas behind such activities."[195] Under this Act, the government has closed pro-Kurdish newspapers; banned political parties; and jailed politicians, journalists, and human rights activists.[196] Moreover, in 2009 and 2010, 350 children as young as 12 were characterized as terrorists by the government because they attended a demonstration organized by the PKK.[197] They were

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193. FAUCOMPRET & KONINGS, *supra* note 64, at 177.

194. Law No. 3713 ("Terorle Mucadele Kanunu"), Official Gazette, No. 20842, art. 1, Apr. 12, 1991, *available at* http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/arsiv/20843_1.pdf&main=http://www.resmigazete.gov.tr/arsiv/20843_1.pdf (Turk.) [hereinafter Anti-Terror Law].

195. *Id.* art 8.

196. ARIKAN, *supra* note 39, at 126; *see, e.g.*, Dink v. Turkey, App. Nos. 2668/07, 6102/08, 30079/08, 7072/09 & 7124/09, Eur. Ct. H.R. (2010).

197. Jonathan Head*, Young, Kurdish, and Jailed in Turkey*, BBC NEWS (May 24, 2010), http://www.bbc.co.uk/news/10146284; Press Release, Amnesty Int'l, Turkey Must Stop Unfair Child Prosecutions Under Anti-Terrorism Laws, Says Amnesty International (June 17, 2010), *available at* http://www.amnestyusa.org/document.php?id=ENGUSA20100617001&lang=e&rss=recentnewshttp://www.amnestyusa.org/document.php?id=ENGUSA20100617001&lang=e&rss=recentnews.

convicted under Act 3713, and serve in adult prisons. [198] Mere presence at such demonstrations renders these children PKK members.[199] There is a presumption that all Kurdish protests are organized by the PKK.[200]

Turkey is making progress with respect to applying this anti-terror law to children and prosecuting them as adults. For example, in 2010 the legislature adopted the law for stone-throwing children, the purpose of which was to ease punishment for children charged under the Anti-Terror Laws. [201]

Another reform is the repeal of Articles 141 and 142 of its Penal Code (Act No. 765).[202] The repeal came from Article 23 of the Law to Fight Terrorism Act.[203] These two articles "banned any form of association or propaganda with the purpose of establishing communist, dictatorial or racist regimes."[204] In addition, Article 163 of the Penal Code was repealed. This Article "banned any kind of association or propaganda with the aim of transforming Turkey's basis social or political order in conformity with any religious principles and beliefs."[205] Moreover, controversial Article 301 of the Turkish Penal Code was amended in 2005. Originally, Article 301 said:

> (1) Anyone who publicly denigrates Turkishness, the Republic or the Grand National Assembly of Turkey shall be punished with imprisonment of from six months to three years.
>
> (2) Anyone who publicly insults the Government of the Republic of Turkey, the judicial bodies of the state, the military or police shall be punished with imprisonment of from six months to two years.
>
> (3) Where a Turkish citizen denigrates Turkishness in a foreign country, the penalty shall be increased by one third.

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198. Head, *supra* note 197.

199. *Id.*

200. *Id.*

201. *Some 50 'Stone-Throwing Children' Released From Prison in Turkey*, HURRIYET DAILY NEWS (Turk.), July 26, 2010, http://www.hurriyetdailynews.com/n.php?n=five-stone-throwing-children-released-from-prison-as-new-law-is-enacted-2010-07-26.

202. TÜRK CEZA KANUNU [TURKISH PENAL CODE], art. 312(2), *available at* http://www.resmigazete.gov.tr/main.aspx?home=http://www.resmigazete.gov.tr/eskiler/2004/10/20041012.htm&main=http://www.resmigazete.gov.tr/eskiler/2004/10/20041012.htm (Turk.).

203. Anti-Terror Law, *supra* note 194, art. 23.

204. ARIKAN, *supra* note 39, at 126.

205. *Id.*

> (4) Expressions of opinion with the intention of criticism shall not incur punishment.[206]

Following the amendment, Article 301 says:

> (1) A person who publicly denigrates Turkish Nation, the State of the Republic of Turkey, the Grand National Assembly of Turkey, the Government of the Republic of Turkey or the judicial bodies of the State, shall be sentenced a penalty of imprisonment for a term of six months and two years.
>
> (2) A person who publicly denigrates the military or security structures shall be punishable according to the first paragraph.
>
> (3) Expressions of thought intended to criticize shall not constitute a crime.
>
> (4) The prosecution under this article shall be subject to the approval of the Minister of Justice.[207]

In effect, the new Article 301 reduced the term of imprisonment and eliminated the provision increasing the penalty by one third if denigration of "Turkishness" is carried out in a foreign country. It appears that the government liberalized Article 301 to a certain extent. Nevertheless, it still remains illegal to insult Turkey since both adults and children are being punished for expressing themselves through such democratic practices as demonstrations.

### *1. Conclusion*

It is no easy task to reform an entire Constitution to align it with the policies of the EU. There are major differences in philosophy, culture, and politics between the EU as a whole and Turkey as an individual nation. Aligning itself with the EU will require a transformation of principles that have historically guided Turkish life. However, the aforementioned issues with Turkey's legal policies require some flexibility on Turkey's part. While it can be commended for its progress so far, it is doubtful that Turkey will be at a disadvantage if it simply agrees to recognize the Kurds, allows

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206. TÜRK CEZA KANUNU [TURKISH PENAL CODE], art. 301, *available at* http://www.tuerkeiforum.net/enw/index.php/Translation_of_selected_Articles_of_the_Turkish_Penal_Code#Section_9:_Offences_against_Privacy.

207. The new Article 301 is reprinted in Bülent Algan, *The Brand New Version of Article 301 of Turkish Penal Code and the Future of Freedom of Expression Cases in Turkey*, 9 GERMAN L. J. 2237, 2239-40 (2008).

them to exercise their traditions and speak their language.[208] As with recognizing the Armenian Genocide, it will only bring Turkey closer to EU membership.

## IV. A COMPARISON WITH OTHER RECENTLY JOINED EU MEMBERS: BULGARIA AND ROMANIA

In general, after eleven years of negotiations, Turkey has only aligned itself marginally with the EU, and has shown the greatest improvement in its economic development.[209] While it can be argued that recently-joined EU member states were not in any better shape at the time of their accession than Turkey is today, a closer look shows that, in fact, they were. While Turkey's liberalized trading enables it to compete better with advanced nations, certain other factors, including its geographic location, political and judicial internal policies, as well as tense relations with its neighbors, are what were absent from Bulgaria and Romania. It is important to bear in mind that decisions are made by representatives of countries that are similarly situated.[210] Their decisions do not necessarily reflect what is best for the EU; they are based on the national interests of those who have power to effect policy.[211] After all, intergovernmental organizations are only as strong as their strong member-states want them to be.[212] While Romania and Bulgaria may be less economically-modernized than Turkey, they really were better candidates for EU membership than Turkey is today as evidenced by the EU trend of offering membership to countries that are predominantly Christian and share European philosophy and culture.

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208. Perhaps the Turkish government is concerned that if it begins to concede, the Kurds will unreasonably ask for more rights.

209. For a comparative analysis of the economic alignment of Turkey and other recently joined countries, see *supra* Part III(e).

210. Those that were historically strong have the most voting power today.

211. For example, consider Germany and France's reluctance to support Turkey in its quest for EU membership. Germany's opposition concerns the shift in voting power in the European Parliament due to Turkey's large population, which will eventually outnumber Germany's. *See* Smith, *supra* note 86 (noting that Turkey's large voting power in the EU Parliament could sway Europe's agenda); *Population at 1 January*, EUROSTAT, http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&language=en&pcode=tps00001&tableSelection=1&footnotes=yes&labeling=labels&plugin=1 (last visited Nov. 17, 2011). In addition, Germany is worried about immigration and the cultural dissimilarities. *See* Damien McElroy, *Angela Merkel Win Ends Turkey's EU Hopes*, TELEGRAPH (London), Sept. 29, 2009, http://www.telegraph.co.uk/news/worldnews/europe/turkey/6244276/Angela-Merkel-win-ends-Turkeys-EU-hopes.html. Similarly, Nicolas Sarkozy, speaking for France, has said that he has "always been opposed to [Turkey's] entry and . . . remains[s] opposed." *See* Charter, *supra* note 86. He is concerned with Turkey's geographic location and the potential of destabilization of Europe if Turkey becomes a member. *See Charlie Rose*, *supra* note 86. Perhaps Bulgaria and Romania were offered membership because they did not present threats of this sort to powerful members.

212. Roger Durham, Chair & Professor of Political Science, Class Lecture at Aquinas College (Oct. 22, 2007).

One important comparison point is the level of democracy in Turkey, Bulgaria, and Romania. Of those three countries, only Turkey bans political parties. Only in Turkey are there constitutional provisions that infringe upon the rights of minorities by explicitly denying them citizenship. And only Turkey imprisons children because they attend demonstrations. On a positive note, however, in all three nations there is a general presence of 1) a pluralistic government system; 2) fair elections, and 3) peaceful transfers of power.[213] There are also similarities on the issue of minority protection: In both Bulgaria and Romania, there is a big problem relating to the treatment of the Roma population who does not receive equal protection from the governments. In fact, since their accession, the Roma from both nations have been immigrating to Western Europe.[214] Turkey's treatment of the Kurds has also caught the Commission's attention, which urges Turkey to provide the Kurds fundamental rights.

With respect to individual freedoms, in 2005 the Commission identified Bulgaria's freedom of expression situation as having improved. Examples of this include the Bulgarian courts' interpretation of "the law in a manner that favoured journalistic expression" and the absence of restrictions in the audio and visual media sector.[215] Additionally, the Commission praised the Bulgarian government for its progress in the area of freedom of association. There was an increase in the number of non-governmental organizations operating in Bulgaria throughout the early 2000s. This was also true in Romania. On the issue of freedom of religion, in its 2004 Progress Report the Commission noted there were some issues relating to "procedural guidelines in the Law of Denominations" in Bulgaria, while the Romanian government actually did provide freedom of religion both through its Constitution and in practice.[216] Additionally, the Commission pointed out that while there was some mistreatment on the part of law enforcement agents toward certain groups of people, including the Roma, children, homosexuals, and prisoners, "Romania aligned its legislation with European practice and standards."[217]

On the issue of human rights violations, both Bulgaria and Romania played a role in the Holocaust[218] but both have recognized the Holocaust

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213. TURKEY-EU RELATIONS, *supra* note 139, at 282.

214. The French government, however, has made their stay unwelcome. There have been massive deportations of the Roma out of France. *See France Faces Showdown on Roma at European Union Summit*, BBC NEWS (Sept. 16, 2010), http://www.bbc.co.uk/news/world-europe-11323053.

215. *Bulgaria 2005 Comprehensive Monitoring Report*, *supra* note 103, at 13.

216. *2004 Regular Report on Romania's Progress Towards Accession*, COM (2004) 657 final (Oct. 6, 2004), *available at* http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/rr_ro_2004_en.pdf [hereinafter *Romania 2004 Report*].

217. TURKEY-EU RELATIONS, *supra* note 139, at 290.

218. *See generally Executive Summary: Historical Findings and Recommendations*, YAD VASHEM, http://www1.yadvashem.org/yv/en/about/events/pdf/report/english/EXECUTIVE_SUMMARY.pdf (last visited Nov. 25, 2011) (discussing the issue of

and claimed responsibility. Turkey, in contrast, fails to recognize the Armenian genocide despite the existence of evidence that it did, in fact, take place.

On the issue of transnational disputes, Turkey compares only to Romania: There was a dispute between Romania and Ukraine involving Serpent Island and the Black Sea maritime boundary delimitation.[219] In addition, "Romania . . . opposes Ukraine's reopening of a navigation canal from the Danube border through Ukraine to the Black Sea."[220] Turkey's transnational disputes involve Greece (over the Island of Cyprus and the Aegean Sea),[221] Syria (over Turkish hydrological projects),[222] Armenia (over the area of Nagorno-Karabakh),[223] and Iraq (over Iraq's support of the PKK).[224] Bulgaria has no transnational disputes.[225]

Some similarities are also found in the economic sectors. The EU Commission found that Bulgaria and Romania suffered from economic fluctuations during the same time Turkey suffered from its economic crises.[226] Ultimately, the Commission found their economic policies were on par with what the EU expected.[227]

Another comparison point is the judicial systems of the three countries. It is true that both Bulgaria and Romania rank lower on the corruption scale than Turkey, but it is also true that there are widespread corruption practices in all three countries at all levels. In Turkey, for example, the judicial branch lacks independence from political pressure, [228] reflected by the practice of judges reporting to the Ministry of Justice. Prosecutors also

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responsibility); U.S. Holocaust Memorial Museum, *Bulgaria*, HOLOCAUST ENCYCLOPEDIA, http://www.ushmm.org/wlc/en/article.php?ModuleId=10005355 (last visited Nov. 25, 2011).

219. CIA, *Romania*, *supra* note 113. *See also Romania 2004 Report*, *supra* note 216, at 127. The resolution of Romania's dispute with Ukraine was not a condition of EU membership, however. The dispute was resolved by the International Court of Justice in 2009, two years after Romania's accession. *See* Maritime Delimitation in the Black Sea (Rom. v. Ukr.), 2009 I.C.J. 61 (Feb. 3).

220. CIA, *Romania*, *supra* note 113.

221. *See 2010 Progress Report*, *supra* note 9, at 37.

222. CIA, *Turkey*, *supra* note 113.

223. *Status Quo of Nagorno-Karabakh is not an Option, President of European Commission Says*, NEWS.AM (March 16, 2011), http://www.news.am/eng/news/51527.html; *Romania 2004 Report*, *supra* note 216, at 127; *see also* Amendments, *supra* note 100, amend. 201 (the EU urging Turkey "to continue its efforts towards the resolution of the Nagorno-Karabach conflict").

224. *See Regular Report on Turkey's Progress Towards Accession*, at 152-53, COM (2004) 656 final (Oct. 6, 2004), *available at* http://ec.europa.eu/enlargement/archives/pdf/key_documents/2004/rr_tr_2004_en.pdf; *Turkey 2009 Progress Report*, at 86, COM (2009) 533 final (Oct. 14, 2009), *available at* http://ec.europa.eu/enlargement/pdf/key_documents/2009/tr_rapport_2009_en.pdf; *2010 Progress Report*, *supra* note 9, at 34-35.

225. CIA, *Bulgaria, supra* note 113.

226. *Bulgaria 2005 Comprehensive Monitoring Report, supra* note 103, at 18-25.

227. *Id.* For further comparisons, see *supra* Part III(e).

228. TURKEY-EU RELATIONS, *supra* note 139, at 285.

have close connections with judges and magistrates. In Bulgaria's case, the government was able to improve its judiciary, but the Commission urged it to better prosecute organized crime and corruption. [229] While corruption presented a major setback, the government was able to make significant progress by 2007.[230] From 1998 to 2006, the Commission rated Romania's progress in reforming the judiciary as insufficient; it was only in 2006 that the Commission noticed some progress in this area.[231]

What is apparent from these comparisons is that each potential candidate has its own unique problems, but what can be concluded is that the problems specific to Bulgaria and Romania, even collectively, do not reach the number and significance of Turkey's problems. While Turkey is capable of aligning itself with the EU, if the EU is really delaying the process because it just does not want Turkey as a member, it will find ways to delay membership further.[232] The problems presented in this paper do not address all problems the EU has found with Turkey and only scratch the surface of the major ones.

## CONCLUSION

Turkey needs to be recognized for the reforms it has made so far. These reforms did not come easy for Turkey, a nation that is less-European, both culturally and historically, than any EU member today. The EU does not necessarily require a candidate-nation to "Europeanize" since there are no religious or cultural conditions. Instead, what it requires is what every nation in the twenty-first century should already have respect for those living within its borders, respect for human rights, a stable economy, a functioning legal system, and at least passable relations with its neighbors. These are reasonable expectations. What is unreasonable, however, is member-states using their voting and veto powers to serve their own

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229. *Id.* at 286.

230. Bulgaria was admitted on January 1, 2007. Ironically, Bulgaria is the most corrupt country in the EU today. *See* Doreen Carvajal & Stephen Castle, *Mob Muscles its way Into Politics in Bulgaria*, N.Y. TIMES, Oct. 15, 2008, http://www.nytimes.com/2008/10/16/world/europe/16bulgaria.html?scp=1&sq=Mob%20Muscles%20its%20way%20Into%20Politics%20in%20Bulgaria&st=cse; ANNUAL REPORT 2009, *supra* note 118, at 49.

231. *See generally Monitoring Report on the State of Preparedness for EU Membership of Bulgaria and Romania*, COM (2006) 549 final (Sept. 26, 2006), *available at* http://ec.europa.eu/enlargement/pdf/key_documents/2006/sept/report_bg_ro_2006_en.pdf.

232. It has taken Turkey longer than any other current member to become a member since first submitting its application. It has been 24 years since Turkey submitted its application for EU membership. Bulgaria and Romania applied in 1995 and accessed in 2007. The Czech Republic applied in 1996 and assessed in 2004, and Cyprus applied in 1990 and assessed in 2004. *See European Commission, Enlargement, Negotiations*, EUROPA, http://ec.europa.eu/enlargement/archives/enlargement_process/future_prospects/negotiations/eu10_bulgaria_romania/index_en.htm (last visited Nov. 17, 2011). These statistics demonstrate that the EU is taking an unreasonably long time to admit Turkey into the Union.

interests. The EU's mission is to promote peace, and with that aim in mind it should rationally decide whether Turkey has met the EU's accession requirements.

From Turkey's perspective, it should weigh all the benefits of EU membership against the burdens of meeting the Copenhagen criteria. But Turkey has not been fighting for admission for the past twenty-four years to just simply give up. This shows that it is dedicated to its quest for admission. The reality is, Turkey has quite a bit of domestic problems and transnational disputes to resolve, and has a ways to go until it reaches true democracy. Until it does, the EU will be hesitant to move forward. This article ends with the statement that most articles on this issue end: Turkey has a long road ahead.

# THE LITTLE ISLAND THAT COULD: HOW REFORMING CULTURAL PRESERVATION POLICIES CAN SAVE EASTER ISLAND AND THE WORLD'S HERITAGE

*Abby L. Barfelz**

"As the traveler who has once been from home is wiser than he who has never left his own doorstep, so a knowledge of one other culture should sharpen our ability to scrutinize more steadily, to appreciate more lovingly, our own." –*Margaret Mead*

## AN INTRODUCTION TO EASTER ISLAND

### A. History

Nestled in the South Pacific nearly 2,400 miles off Chile's west coast and roughly 2,500 miles East of Tahiti, Easter Island is one of the most remote places on Earth.[1] This tiny island, called Rapa Nui ("Big Island") by natives, is a mere 64 square miles in area[2] and is home to approximately 4,000 people and 7,000 wild horses.[3] Originally settled in 300 A.D., the island was annexed by Chile in 1888 and officially declared a Chilean province in 1966[4] though natives of Easter Island are descendents of the Maori people[5] and identify themselves as Polynesians rather than Latinos like their mainland countrymen.[6]

Although the South Pacific has long been a vacation destination, the landscape of Easter Island is not typical of many South Pacific islands and

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1. Easter Island Crib Sheet, A Profound Journey, http://www.apj.co.uk/rapanui/easter-island-fact-sheet.asp (last visited May 15, 2011) [hereinafter Crib Sheet].
2. Jayne Clark, *Easter Island Looks to the Future*, USA TODAY (Jan. 4, 2007), http://www.usatoday.com/travel/destinations/2007-01-04-easter-island_x.htm.
3. Will Weissert, *Record Tourism Could Harm Easter Island Statues*, USA TODAY (June 24, 2008) http://www.usatoday.com/travel/destinations/2008-06-24-easter-island-moais_N.htm.
4. *Crib Sheet*, *supra* note 1.
5. The Maori are an indigenous people of New Zealand. *See Maori Culture,* VIRTUAL NEW ZEALAND, http://www.virtualoceania.net/newzealand/culture/maori/ (last visited July 16, 2011).
6. Clark, *supra* note 2.

not nearly as accessible.[7] Yet Easter Island "ranks on many a traveler's places-to-see-before-you-die list."[8] Travelers are lured to Easter Island by hundreds of giant-headed stone statues called Moai, carved from the 11th through 17th centuries by native islanders with rudimentary basalt tools.[9] Almost nine-hundred such statues exist, comprising over half of the island's 1,524 archaeological sites.[10] Found across the island, Moai stand guarding ancient settlements, all facing inland except seven statues at Ahu Akivi which gaze out over the ocean.[11] The statues are almost exclusively male,[12] and each is unique.[13] While the average height is 13 feet and weight approximately 12.5 tons,[14] the largest Moai ever carved is known as "El Gigante" and stands 70 feet high.[15] "El Gigante's" enormous dimensions are perhaps why it was never removed from the quarry; the largest ever *moved* measured only 30 feet and weighed 87 tons.[16]

Like "El Gigante," many Moai were never transported to their final destinations. Over 300 can be seen in various stages of completion and transit amidst the bedrock of one of the island's three extinct volcanoes.[17] Locals call this area "the nursery" because it is from here that 95% of the stone used to carve the Moai was taken,[18] but some statues were moved as far as 12 miles.[19] Today, hundreds of Moai remain here, partially buried and keeping watch over the volcano.[20] Visitors can still see where islanders carved the side of the volcano in order to move the giant statues.[21]

Much of the allure and intrigue surrounding Easter Island is the mystery of *how* the Moai were transported to their various locations across the island. Though local folklore would have visitors believe "they walked,"[22] a more commonly-accepted theory holds the island's palm forests were cut down and the logs used to roll the statues.[23] Whatever the actual reason for

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7. *Id.* ("The island is difficult to get to. Its landscape is not lovely in the traditional sense.").
8. *Id.*
9. *Id.*
10. Weissert, *supra* note 3.
11. *Id.*
12. Of the 887 Moai on Easter Island, only ten unearthed statues are believed to have some female characteristics. *Id.*
13. *Id.* ("[E]ach is unique, with sizes and features—even ears, lips and torsos—that vary.")
14. *Id.*
15. Weissert, *supra* note 3.
16. *Id.* (emphasis added).
17. *Id.*
18. *Id.*
19. Clark, *supra* note 2.
20. Weissert, *supra* note 3.
21. *Id.*
22. Clark, *supra* note 2.
23. Weissert, *supra* note 3.

the deforestation, its toll on the island is well-documented.[24] With the removal of the trees came devastating tribal warfare, increasingly scarce resources, eventual cannibalism, and finally the toppling of many of the Moai altars.[25] It is also shortly after this time that the carving of Moai and the erection of new altars ceased.[26] The mysterious end to the Moai-building era and its place in the Island's history remain popular topics of academic publication and speculation.

Although deforestation, tribal warfare, and cannibalism did not fully eradicate the Rapa Nui population, much of Easter Island's population that *did* survive was eventually wiped out by slave raids and disease.[27] In the 1860s, slave raids removed many of Easter Island's inhabitants, and most would never return.[28] Those who did return brought smallpox and, as a result, the number of native inhabitants had dwindled to 110 by the 1870s.[29]

### B. Tourist Economy

The mysterious statues and near tragic history of the Rapa Nui people have drawn travelers to Easter Island for decades, but interest in the island saw a dramatic increase when Rapa Nui National Park, which covers 60 percent of the island, was designated a UNESCO[30] World Heritage Site in 1995.[31] Each year, more and more people venture to this remote corner of the Earth to experience this unique and mysterious culture. In the 1990s, supply ships arrived at Easter Island only once per year; now they do so every 40 days.[32] Estimates place the number of visitors to the island in 2006 at 52,000—almost ten times the annual visitors in the 1990s.[33] This increase in visitors has had a positive impact on the island: with increased tourism came increased tourist spending, and now the island "depends largely on the hoardes of tourists who flock to visit its archaeological sites and monumental Polynesian statues each year."[34]

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24. *See, e.g.*, Weissert, *supra* note 3; *Crib Sheet*, *supra* note 1; Whitney Dangerfield, *The Mystery of Easter Island*, SMITHSONIAN.COM (Apr. 1, 2007), http://www.smithsonianmag.com/people-places/The_Mystery_of_Easter_Island.html; JENNIFER VANDERBES, EASTER ISLAND (2003); JO ANNE VAN TILBURG, EASTER ISLAND: ARCHAEOLOGY, ECOLOGY AND CULTURE (1994).

25. Weissert, *supra* note 3.

26. *Crib Sheet, supra* note 1.

27. Clark, *supra* note 2.

28. *Id.*

29. *Id.*

30. United Nations Educational, Scientific and Cultural Organization. For further information, see http://www.unesco.org (last visited Sept. 29, 2011).

31. Weissert, *supra* note 3.

32. Clark, *supra* note 2.

33. Weissert, *supra* note 3.

34. Natalie Muller, *Sustainable Tourism Projected for Chile's Easter Islands*, MERCOPRESS (June 27, 2009), http://en.mercopress.com/2009/06/27/sustainable-tourism-projected-for-chiles-easter-islands.

The tourism boom also created a demand for increased tourist accommodations. Since by law only Rapa Nui people can own land,[35] outside entrepreneurs must partner with local land owners on development projects, creating a direct revenue stream to the native population. In 2008, a local dive-shop owner partnered with Santiago, Chile-based hotel company Explora to build the island's first "upscale lodging" on his land.[36] In addition to more hotels and resorts, there were plans to build an art museum and school of archaeology—firsts for the island—and a "guide school to formally educate islanders in the richness of the 16,000 [sic] archaeological sites."[37]

## I. MASS TOURISM AND THE WORLD'S HERITAGE

### A. The "Catch-22"

As the largest industry in the world, tourism, particularly "cultural tourism," brings countless economic benefits but also can threaten the more fragile sites.[38] Today, the Moai are threatened by both tangible and intangible enemies. They face many environmental predators[39] and "a host of natural enemies" including the "sun, surf, winds and humidity . . . blights, lichen and moss."[40] When these are combined with the negative effects of an increased human presence,[41] it seems the Moai may be in graver danger than previously acknowledged.[42] The local population has not remained silent as the strain on the island increased, but the Rapa Nui people have not exactly been heard either; any opposition has been met with rough resistance rather than the sought-after policy reform.[43] These protests

35. Clark, *supra* note 2.

36. *Id.*

37. *Id.*

38. Henry Cleere, *The World Heritage Convention in the Third World, in* CULTURAL RESOURCE MANAGEMENT IN CONTEMPORARY SOCIETY 99, 104 (Francis P. McManamon & Alf Hatton eds., 2000).

39. According to Hanga Roa's Mayor, Pedro Edmunds, there are "54 types of blights feast on Moais." Weissert, *supra* note 3.

40. *Id.*

41. *See, e.g.*, *id.* ("Most tourists are careful not to harm Moais, but some unknowingly walk or climb on them, exacerbating natural deterioration. Others deface them deliberately, including a Finnish tourist who was fined $17,000 after hacking an ear lobe off [a] statue.").

42. *Id.* ("'More tourism, more deterioration. More visitors, more loss'" observed one archaeologist. "'We are at the point where, either we protect what we have or we lose it.'").

43. *See* PETER J. MEYER, CONG. RESEARCH SERV., R40126, CHILE: POLITICAL AND ECONOMIC CONDITIONS AND U.S. RELATIONS (2011).

Frustrated by the lack of government response to their concerns, some Rapa Nui activists have engaged in land occupations. In August 2009, a Rapa Nui group blocked the airport for two days to demand greater immigration controls. Conflict erupted again in March 2010, when locals learned that the individual President Piñera appointed as governor of the territory had reportedly received his position as a result of his ties to a business group with

expressed legitimate concerns: projections indicate increased visitors will eventually overwhelm the existing waste management and water sanitation systems and, left unchecked, the development will be unsustainable.[44] These so-called "congestion costs" caused by overcrowding may result in physical damage to the heritage sites.[45] Tragically, these dangers are not unique to Easter Island.[46]

The world's heritage is under siege from cultural tourism.[47] Many factors have contributed to the destruction of some of the world's heritage and the endangerment of the rest, not the least of which is mass cultural tourism.[48] "'[C]ultural tourism' in its broad mass-tourism sense means large numbers of people, a matter of particular concern to superstar attractions such as . . . heritage locations, which have to deal with the pressures of visitor numbers on a daily basis."[49] This "mass tourism" can create "adverse cultural consequences . . . when the cultural integrity of a site or community is threatened by a flood of visitors."[50]

Many world heritage sites face a similar "Catch-22" to that of Easter Island: more tourists bring more revenue which enables greater preservation efforts, but the increased tourism bringing the revenue is the source of the threat creating the need for protection and preservation, and the best way to reduce the threat may be to reduce the tourists. The vicious cycle of destruction to the world's heritage created by mass tourism almost seems a necessary evil: "[f]or many heritage sites and attractions, tourism is virtually

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intentions to acquire land the Rapa Nui had ceded to the government for public purposes. Since then, Rapa Nui activists have occupied lands and taken over buildings, demanding stricter immigration controls, the return of their ancestral lands, and a stronger role in governance. In February 2011, a number of Rapa Nui activists were injured when police forcibly removed them from a hotel that they had been occupying.
*Id.* at 9. (footnotes omitted)

44. *Impacts of Tourism on Easter Island,* EASTER ISLAND FOUND., http://islandheritage.org/wordpress/?page_id=58 (last visited May 15, 2011) [hereinafter *Impacts of Tourism*].

45. DAVID THROSBY, THE ECONOMICS OF CULTURAL POLICY 151 (2010).

46. Many other countries face similar tourist-overcrowding issues. *See* Tracy McVeigh, *Tourist Hoardes Told to Stay Away from World Heritage Sites by the Locals*, THE OBSERVER (London) (Sept. 5, 2009), http://www.guardian.co.uk/environment/2009/sep/06/mass-tourism-environmental-damage.

47. Throsby*, supra* note 45*,* at 146 ("The term *cultural tourism* is used to relate to both aspects of tourist activity." *Id.* "*Mass tourism*, characterized in business terms as being a high-volume low-yield operation, and *niche tourism*, referring to tourism products that cater to small numbers of discriminating tourists with high revenue yield per person." *Id.*) (emphasis in original).

48. CRAIG FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 224 (2010) ("[H]eritage was threatened in a great number of ways[;] . . . increasing urbanization, industrialization, social and economic upheaval, pollution and climate change were all contributing to the decay, degradation and destruction of this 'world heritage'.").

49. Throsby, *supra* note 45, at 146.

50. *Id.*

their only source of revenue; thus investment in restoration, conservation, etc., is heavily dependent on future income streams from this source."[51]

There are different theories as to why cultural tourism became such a global phenomenon. One scholar credits increased living standards and education levels for "permitt[ing] a substantial portion of the population not only to visit but also to enjoy what other countries and their past ha[ve] to offer."[52] Whatever the source of tourists' interest in world heritage, "excessive commercialisation of cultural property" must be addressed because "the preservation of the cultural goods themselves must always prevail over their exploitation."[53] Recognizing the heritage dichotomy, scholars and economists alike now acknowledge the "dangers of over visitation of particular places" and how it is "more than a challenge to . . . respond adequately and preserve" threatened cultural heritage sites.[54] So how can we approach cultural preservation to effectively convey the dangers to heritage sites and gain additional support?

### B. The People's Right to Heritage

Cultural heritage has already garnered attention from those who believe it should be recognized and protected as a fundamental right under international law. One scholar proposes it is the "notion of inheritance" which serves as the foundation of cultural heritage: "[a]ll that we are is an expression of the culture we inherited . . . [i]t is this notion of inheritance, of receiving something from one generation and possibly passing it on to the next which intuitively underpins the notion of cultural heritage."[55] Similarly, there does appear to be a recognition of the "'human right' to culture"[56] and the acknowledgement by governments they "have a responsibility for the social and cultural well-being of society."[57] International texts and agreements speak of rights to "benefit from the cultural heritage[,] contribute towards its enrichment" and to "exercise[] the right to cultural heritage."[58]

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51. *Id.* at 149.

52. UGO MIFSUD BONNICI, AN INTRODUCTION TO CULTURAL HERITAGE LAW 58 (2008).

53. *Id.* at 57.

54. *Id.* at 58.

55. Forrest, *supra* note 48, at 7.

56. BONNICI, *supra* note 52, at 26 ("Articles 22 and 27 of the Universal Declaration of Human Rights of 1948 and article 27 of the International Covenant on Civil and Political Rights as well as article 15 of the Covenant on, [sic] Economic, Social and Cultural Rights, clearly point towards recognition of this right.").

57. THROSBY, *supra* note 45, at 33.

58. BONNICI, *supra* note 52, at 29.

Despite their recognition in international agreements as "basic elements of civilization and national culture,"[59] cultural rights may be the "most neglected category of human rights."[60] This is particularly true with respect to indigenous peoples[61] such as the Rapa Nui of Easter Island. In this context, preserving their culture is key to their fundamental rights.[62] There is a "powerful movement [] underway to secure a safe anchorage of [indigenous peoples'] rights to international law. These rights are largely cultural, in so far as they tend to guarantee the survival of the language, religion . . . and distinct way of life."[63]

Though many visitors to Easter Island undoubtedly come to see the Moai, others come for a more comprehensive cultural experience. One scholar attributes "[m]uch of the significance of Rapa Nui . . . not to the remarkable statues but rather to the extraordinary remains of the way of life of the early Polynesian settlers."[64] Ensuring the survival of the Moai as remnants of ancient traditions, religious beliefs, and other cultural practices of the Rapa Nui people would seem a necessary and basic human right entitled to protection under international law. Merely preserving access to sites for indigenous people may not be enough, however—ensuring some local control over, or at least participation in, the preservation process may be "an essential condition for the enjoyment of their internationally recognized cultural rights."[65]

## II. EASTER ISLAND PRESERVATION EFFORTS

### A. Preserving the Moai & the Emergence of Sustainable Tourism on Easter Island

There have already been restoration and conservation efforts implemented on Easter Island. About 50 Moai have been restored at 11

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59. Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, pmbl., Nov. 14, 1970, 823 U.N.T.S. 231; *See* JAMES CUNO, WHO OWNS ANTIQUITY? MUSEUMS AND THE BATTLE OVER OUR ANCIENT HERITAGE 26 (2008).

60. Ana Filipa Vrdoljak, *Self-Determination and Cultural Rights*, *in* CULTURAL HUMAN RIGHTS 41, 41 (Franscisco Francioni & Martin Scheinin eds., 2008).

61. Federico Lenzerini, *Indigenous Peoples' Cultural Rights and the Controversy over Commercial Use of Their Traditional Knowledge*, *in* CULTURAL HUMAN RIGHTS 119, 127 (Franscisco Francioni & Martin Scheinin eds., 2008).

62. "Indeed, preservation of the cultural identity of peoples represents the central element and simultaneously the very *ratio* of the protection of cultural rights. The cultural identity of any human being is, in fact, shaped by the collective cultural context to which he/she belongs." *Id.* (emphasis in original).

63. Francesco Francioni, *Culture, Heritage and Human Rights: An Introduction*, in CULTURAL HUMAN RIGHTS 1, 5 (Franscisco Francioni & Martin Scheinin eds., 2008).

64. Cleere, *supra* note 38, at 103.

65. FORREST, *supra* note 48, at 141.

sites,[66] but the restoration efforts have only hastened their deterioration:[67] "[r]epairing and replacing Moais upright can cause them to deteriorate faster since they are more exposed than statues that remain face down and buried."[68] Though some preservation efforts have accelerated deterioration, others yielded promising results: in 2003, five Moai were treated with a sealant to protect against humidity and lichen.[69] Although early results of the treatment were positive, it was simply too expensive for widespread use.[70]

In 2009, the Chilean government and UNESCO developed a plan for sustainable tourism on Easter Island.[71] The plan "aim[ed] to develop tourism strategies that respect the outstanding universal value of the Rapa Nui National Park" by "promot[ing] training and involvement of the local communities . . . in sustainable ecotourism."[72] Entitled "Training in Sustainable Ecotourism in Easter Island," the plan was implemented during the second half of 2009 thanks to a large grant by the Government of Japan and supported by a U.S. contribution of $200,000.[73] According to UNESCO, "[t]he initiative aim[ed] to enable participants[74] to acquire the skills they need for the island's natural and cultural resource management."[75] UNESCO officials believe that by balancing the need for heritage preservation with that of community development the program will be able to successfully reduce the negative impact of tourism.[76]

Another preservation project which hoped to reduce the strain on the island's fragile ecosystem began in 2009.[77] This project, known as the "Integral Management of Tourist Destination Easter Island," was financed by InnovaChile[78] and introduced by the EuroChile Business Foundation[79]

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66. Clark, *supra* note 2.

67. Weissert, *supra* note 3.

68. *Id*.

69. *Id*.

70. *Id*. Preservation estimates are "well into the millions." Clark, *supra* note 2.

71. *UN and Chile Launch Sustainable Tourism Initiative for Easter Island,* UN NEWS SERVICE (May 29, 2009), http://www.un.org/apps/news/printnewsAr.asp?nid=30958 [hereinafter *Sustainable Tourism Initiative*].

72. *Id*.

73. *UNESCO Sets in Motion Easter Island Eco-tourism Training Program,* UNESCO (December 6, 2009), http://portal.unesco.org/geography/en/ev.php-URL_ID=11376&URL_DO=DO_TOPIC&URL_SECTION=201.html [hereinafter *Eco-tourism*].

74. The program will benefit "institutions, businesses and individuals who have involvement in the island's tourist trade." *Id*.

75. *Id*.

76. *Eco-tourism*, *supra* note 73.

77. Muller, *supra* note 34.

78. InnovaChile is an initiative that supports research in science and technology as well as entrepreneurship. *See* https://csrg.inf.utfsm.cl/twiki4/bin/view/ACS/Innova-Chile (last visited July 16, 2011).

79. The EuroChile Business Foundation is the Chilean branch of the Enterprise Europe Network, an organization dedicated to the advancement and foreign expansion of businesses. *See Gateway to the World for Small Business*, ENTERPRISE & INDUSTRY ONLINE

and seeks to benefit as many as 289 of the island's small tourism businesses.[80] The program was implemented as a coordinated effort between the Easter Island Tourism Board, Easter Island's Provincial Government, and other organizations.[81] Similarly, additional efforts have focused on the island's limited resources and how they are affected by increased tourism. International Help Fund Australia[82] has been "working to alleviate some of the[] pressures on Easter Island by promoting recycling and composting programs, water sanitation projects and installing composting toilets at the most heavily-visited sites."[83] Since this and other restoration efforts were only recently implemented, their long-term successes or failures have yet to be determined.

## III. DEVELOPING NATIONAL POLICY TOWARD CULTURAL PRESERVATION

### A. Proposed Reformation of Chilean Cultural Policy: Economic Approaches to Cultural Heritage

Despite the efforts of international relief organizations, the threats to the Moai of Easter Island continue. As one scholar points out, "no matter how unobtrusive the tourist tries to be, some adverse impact may be inevitable, pointing to a need for careful planning and management of tourism projects in indigenous areas."[84] Mass tourism affects every aspect of "cultural enterprise" and "brings with it enormous economic potential."[85] The trend toward an emphasis on the economic potential of cultural heritage[86] suggests this as a logical focal point for the reform and development of cultural heritage policy. First, the host nation must recognize the economic value of the heritage site and should determine which theory of cultural policy as it relates to economics is best suited for that particular country.[87] Developing a domestic economic-based cultural policy begins with applying basic economic concepts such as supply and demand to the national heritage sites.

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MAGAZINE (Aug. 26, 2010), http://ec.europa.eu/enterprise/magazine/articles/smes-entrepreneurship/article_10558_en.htm.

80. Muller, *supra* note 34.

81. *Id*.

82. International Help Fund Australia is a nonprofit, nongovernmental organization whose mission is "[t]o collaborate with Pacific Islanders, governments, and businesses to improve the quality of life by developing practical environmental management initiatives as well as economic, cultural, health and education programs and projects that promote ecologically sustainable development and self reliance." *Who We Are*, INT'L HELP FUND AUSTL., http://www.internationalhelpfund.org/ (last visited July 16, 2011).

83. *Impacts of Tourism*, *supra* note 44.

84. THROSBY, *supra* note 45, at 153.

85. *Id.* at 151.

86. *Id*. at x.

87. *Id.*

### *1. Determining the Value of Cultural Heritage*

Items of cultural heritage such as monuments and archaeological sites must first be identified as an asset having value.[88] Determining the value of heritage is important because the "consumption behavior of individuals is motivated by the value they attach to the goods and services they consume . . . and value to society at large guides . . . the decisions of government."[89] Although there are "[f]our sources of cultural value [that] can be identified,"[90] this paper focuses on the value derived from the "consumption" of cultural heritage and its "preservation and continuity."[91]

### *2. Attributing a "Direct Use" Value*

Attributing value to cultural heritage can be achieved through the process of "valuation," also known as "evaluation."[92] This process should "underlie[] consideration of policy in any area of public concern" but will be specifically discussed as applied to cultural heritage policy.[93] In his book "The Economics of Cultural Policy," David Throsby argues that a "full assessment of the economic value must account both for the direct use value as revealed in the markets for cultural goods and services, and the non-use value as estimated by alternative analytical procedures."[94] This "use value" of cultural heritage is identified as "the value that accrues to individuals, households or firms through the direct consumption of heritage services."[95] One type of use value of particular interest to monuments and cultural heritage sites is that of their "direct use value," which Throsby identifies as "accru[ing] to tourists visiting heritage sites" whose "relevant value can be measured by entrance fees, or . . . by travel-cost analysis."[96] In other words, a particular cultural heritage item's value may be measured based on how much people are willing to pay to access the site.[97] As of July 2011,

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88. *Id.* at 107.
89. *Id.* at 17.
90. THROSBY, *supra* note 45, at 42. The four sources of cultural value identified by Throsby are: "arts production and consumption; cultural identity and symbolism; cultural diversity; and cultural preservation and continuity." *Id*.
91. *Id.*
92. *Id.* at 17. "The process by which value is assigned to something is referred to as *valuation* or *evaluation*, described . . . as the process of 'estimating, ascribing, modifying, affirming and even denying value.'" *Id.* (emphasis in original). The word "*valorization*" is also used occasionally and refers to "a process by which value is imparted to some object as a result of deliberative action or external event, such as the increase in value accorded to sites of cultural heritage when they are added to the World Heritage List." *Id.* (emphasis in original).
93. THROSBY, *supra* note 45, at 17.
94. *Id.* at 20.
95. *Id.* at 109.
96. *Id.*
97. *Id.* at 19.

accommodations alone on Easter Island cost several thousands of dollars, while flights to Easter Island from the United States cost thousands more.[98]

Another way the value of a cultural heritage site might be established is to determine the characteristics of that particular site and how they contribute to its value. Ascribing economic value to a monument or site "requires a recognition of the fact that such goods fall into the category of *mixed goods*, i.e., goods that have both private-good and public-good characteristics."[99] These characteristics can help determine the value of cultural heritage as an asset, but a comprehensive valuation requires an examination of "non-market benefits" as well.[100] Throsby identifies three "sources" of these non-market benefits as they relate to cultural heritage: *existence* value,[101] *option* value,[102] and *bequest* value,[103] collectively known as "non-use values."[104] He argues that *all three* of these sources must be addressed to establish an accurate economic value.[105]

### *3. The Difficulty With Economic Measurement*

Though Throsby suggests that a way to measure these values is to determine how much people are willing to pay to access the site from which they will derive these value benefits,[106] the exact value of cultural heritage can be hard to measure. Part of the difficulty in measuring the value of cultural heritage is due to the fact that sites "yield *cultural value* in addition to whatever commercial value they may possess, and that this cultural value may not be fully measurable in monetary terms."[107] Considering the diverse

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98. A check of the Explora website listed single accommodation rates ranging from $3,360 to $4,800 U.S. for three nights, which includes roundtrip airport transfers, three meals per day, as well as daily island explorations. *See* http://www.explora.com/explora-rapa-nui/rates-and-conditions/ (last visited July 16, 2011). Sample airfare found on the popular travel website Kayak.com listed the cheapest roundtrip airfare from Chicago to Easter Island at $1,570 per person on LAN Airlines (fare found July 16, 2011 on www.kayak.com with sample travel dates in August 2011 chosen at random).

99. THROSBY, *supra* note 45, at 19 (emphasis in original). Public goods are described by Throsby as "those whose benefits accrue to everyone in a given community," while private goods are "those whose benefits accrue entirely to private agents." *Id.*

100. *Id.*

101. Existence value refers to the value that people attribute to the arts "simply because they exist." *Id.*

102. Option value refers to peoples' retention of the option to "consume the arts at some time in the future." *Id.*

103. THROSBY, *supra* note 45, at 19 (emphasis in original). Bequest value refers to the belief that "it is important to pass the arts on to future generations." *Id.*

104. *Id.* at 110 (emphasis in original).

105. *Id.* at 19.

106. *Id.*

107. *Id.* at 16 (emphasis added). "In other words, cultural goods and services are valued . . . for social and cultural reasons that are likely to complement or transcend a purely economic evaluation. These reasons might include spiritual concerns, aesthetic considerations, or the contribution of the goods and services to community understanding of

benefits heritage sites can bring, Throsby ultimately recognizes that "[i]dentifying cultural value is one thing, measuring it is another" and acknowledges that "it is hard to see how the value of identity can be expressed in financial terms at all."[108]

### *4. Maximizing the Value of Cultural Heritage*

Once a host nation assesses a value to its cultural heritage, it must focus on maximizing that value while simultaneously preserving and conserving the sites themselves. One such way to maximize the value yet minimize the effects of mass tourism might be to establish a "threshold carrying capacity."[109] This involves identifying the maximum number of tourists in a given period—per day, per month, etc.—that a monument or heritage site can sustain without becoming at risk.[110] This "threshold carrying capacity" concept is already in use for other types of endangered areas[111] and could likely be implemented as part of a cultural heritage preservation policy with relative ease.[112] Many administrators that already implement a threshold carrying capacity do so by simply imposing "quantitative controls" on the admission to sites.[113] The only real foreseeable difficulty that may arise is in determining the particular threshold for each heritage site.[114] Leaving the threshold number too low may cost the island's businesses valuable tourism revenue. On the other hand, setting the threshold number too high will inevitably result in continued exploitation and endangerment of the site.

### *5. Cultural Heritage as a Commodity*

Other scholars suggest effective cultural heritage preservation can be achieved by viewing heritage as a commodity. In his book "International Law and the Protection of Cultural Heritage," Craig Forrest states that "[a]ny cultural heritage, irrespective of its origin, may be considered as

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cultural identity" *Id.* "Cultural value in this context is a multifaceted concept reflecting qualities such as the aesthetic, symbolic, spiritual or historical values attaching to a particular item." THROSBY, *supra* note 45, at 20.

108. *Id.*

109. *Id.* at 152.

110. *Id.*

111. "The concept has been used in connection with natural heritage sites such as national parks, coral reefs, [and] wilderness areas." *Id.*

112. *Id.*

113. THROSBY, *supra* note 45, at 152.

114. *Id.*

Local and national governments that are keen to exploit the economic potential of the mass tourism market will frequently engage the cultural sector as one of the drawcards for attracting visitors, but in doing so they need to be aware of both the positive and negative impacts that exposure to mass tourism can bring for individual businesses in the arts and cultural industries.

*Id.*

being of value to the State, who directly benefits from its presence as a tourist attraction."[115] Forrest's approach highlights a different perspective on cultural heritage: since heritage is viewed as having several types of economic value,[116] its increasing relevance in the public policy sphere can lead to the "commodification of heritage."[117] The process of commodifying cultural heritage "involves the re-interpretation and packaging of existing heritage resources as new heritage products to be used by contemporary society and which in most cases produces direct economic benefits."[118]

In fact, it "may be possible to raise particular goods to a level above that of a commodity when those goods are considered of such importance that they are 'priceless' and not susceptible to exchange."[119] Elevating cultural heritage beyond a commodity can also add legal value to the site.[120] The attribution of legal value in turn further "elevat[es] this selected material above other material"[121] and the "development of legal protection regimes has acted to then reinforce and bolster . . . cultural heritage management in general."[122] Despite this elevation and the increasing importance of cultural heritage relative to other industries,[123] Forrest cautions against the liability of elevating cultural heritage beyond the level of a commodity: "attempt[s] to 'protect' cultural heritage by its elevation to a legal position above that of a commodity . . . only results in [the] market going underground."[124] From this perspective, *overprotection* of cultural heritage appears potentially as hazardous to the monuments and heritage sites as under-protection.

### *6. The "Urbanization" of Easter Island*

Whether viewed as an asset having value, a basic commodity, or something elevated triggering increased legal protection, a common theme among the discussions of cultural policy economists is the application of basic economic principles to cultural heritage policies. Although specifically focused on urban conservation and planning as they relate to cultural heritage, many of the principles outlined by scholars Harry

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115. FORREST, *supra* note 48, at 7.

116. "These objects are not only economically valued in terms of the direct price paid for their acquisition, but also in terms of insurance premiums and evaluations, taxation values and security costs." *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 6.

120. *Id.* at 18.

121. Forrest, *supra* note 48, at 18.

122. *Id.* at 19.

123. "[C]ultural heritage is no longer a burden to national budgets but an important industry both in itself and to other industries, such as biomedicine, sustainable agriculture and international tourism." *Id.* at 7.

124. "The protection of cultural heritage in this way has led to a black market of a billion dollars." *Id* at 6.

Coccossis and Peter Nijkamp are equally applicable to conservation and planning strategies in less-urbanized settings such as Easter Island.[125] Coccossis and Nijkamp emphasize the importance of recognizing that cultural heritage "as with most artifacts [goes] through a long-term life cycle in terms of physical condition and quality. Then society has to face the choice between development and conservation."[126]

The increased tourist interest in Easter Island has led to the recent construction of resorts, schools, and museums mentioned previously in this paper.[127] This expansive development in the tourist sector could be viewed as one type of "urbanization" of Easter Island. Like Throsby, Coccossis and Nijkamp recognize the potentially devastating effects of increased development: "[w]hile it is generally acknowledged that urban development means the creation of new assets in terms of physical, social and economic structures, it is at the same time recognized that each development process often also destroys traditional physical, social and cultural assets derived from our common heritage."[128] Although monuments and other sites do in fact "represent part of the historical, architectural, and cultural heritage," aside from tourist revenues they "do not usually offer a direct productive contribution to the economy."[129] These competing interests may require that a different sort of economic policy be applied to heritage.

### *7. Assessing the Chosen Economic Strategy*

In order to weigh the value of monuments and sites and their influence on cultural heritage, Coccossis and Nijkamp advocate for the use of "impact assessments."[130] Also referred to as "impact analyses," Coccossis and Nijkamp identify these as a "necessary component of any meaningful economic evaluation methodology."[131] In order to perform an effective impact analysis, a host nation must consider not only multiple criteria surrounding cultural heritage, but "all relevant consequences of all feasible alternatives."[132] This allows the nation to determine which policy is best suited for the specific heritage sites located within its boundaries as well as identify the reasons why other policies may not be the best fit.

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125. *See* H. Coccossis & P. Nijkamp, *Urban Conservation and Planning*, *in* PLANNING FOR OUR CULTURAL HERITAGE (Harry Coccossis & Peter Nijkamp eds., 1995).
126. *Id.* at 3.
127. *See supra* text accompanying note 37.
128. Coccossis & Nijkamp, *supra* note 125, at 4.
129. *Id.*
130. *Id.* at 6.
131. *Id.* at 8.
132. *Id.* at 13.

At the heart of the "multi-dimensional nature of a compound evaluation of the cultural built heritage"[133] is the "need for an integrated cultural and functional economic urban development strategy, in which economic, social, architectural, and historical aspects" are addressed.[134] The form of multi-dimensional theory advocated by Lichfield, which is perhaps best applied to Easter Island development, is the "community impact evaluation," a modification of the traditional Cost Benefit Analysis.[135] Using a "community impact evaluation" method of Impact Analysis allows the host nation to focus on both the economic impact of development and "all impacts affecting the welfare of that community, thus also embracing social, natural environment, hazard, etc."[136] When determining the impact of development on individual sites and monuments, the *value* of that particular site or monument must be considered. Each site's value is based on many factors,[137] and using this "multiple criteria analysis" demonstrates the site's value "not only in the case of 'hard' (cardinal) information, but also in the case of 'soft' (qualitative) information."[138]

### *8. Implementation of the Reformed Policy*

Once a site has been valued and its impact upon the heritage is analyzed, the host nation must devise and implement policies for cultural resource management that will ensure preservation of the heritage. First, the host nation should consider "why the resource has been set aside for special treatment, its nature and significance, and the contemporary setting of the site."[139] Next, "[o]nce the decision is made to manage a resource actively, a management plan should be prepared that documents the rationale for the treatment and describes in detail how the management is to be

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133. N. Lichfield, *Community Impact Analysis for the Cultural Built Heritage, in* PLANNING FOR OUR CULTURAL HERITAGE 39, 46 (Harry Coccossis & Peter Nijkamp eds., 1995). "Cultural Built Heritage" or "CBH" is defined as "that quantitatively minor part of the built environment which the contemporary generation resolves has cultural value, and accordingly merits special protection from erosion, in order that it can be better enjoyed by the current generation and passed on to the future." *Id.* at 39.

134. Coccossis & Nijkamp, *supra* note 125, at 13.

135. Lichfield, *supra* note 133, at 46.

136. *Id.* at 47. "[T]he community in question is defined in relation to the extent (in geography and time) of the impact which is under consideration. In conservation this could range from the quite local (where the monument or site has only village value) to the international (where a world heritage site is concerned)." *Id.*

137. Coccossis & Nijkamp, *supra* note 125, at 13. "Its value for society is determined by various attributes such as age, uniqueness, artistic value, style period, integration in urban structure, and economic revenues." *Id.*

138. *Id.*

139. Francis P. McManamon & Alf Hatton, *Introduction: Considering Cultural Resource Management in Modern Society*, in CULTURAL RESOURCE MANAGEMENT IN CONTEMPORARY SOCIETY 1, 8 (McManamon & Hatton eds., 2000).

implemented."[140] The final step toward "[e]ffective management of cultural resources requires decisions about how the resources can be best protected, preserved, utilized and interpreted."[141]

Some argue that modern cultural resource management extends beyond archaeological resources to the management of all culture-related activities at all levels of government.[142] Of course, the specific culture-related activity with which this paper is concerned is that of cultural tourism. The cultural tourism phenomenon "has developed a distinct section within its broader sphere of interest which deals with the management of travel, access to, marketing and interpretation of heritage sites."[143] In light of the growing mass tourism industry, modern cultural resource management recognizes that managing large scale visitation to cultural sites has become increasingly important in the effective management of those sites.[144]

### *9. Local versus National Policy Management*

The ultimate objective of modern cultural resource management is to minimize "[t]he impacts of the visitors . . . while enhancing visitor experiences."[145] Scholars Francis P. McManamon and Alf Hatton contend that while cultural resource management must be implemented locally, it must also have strong national legal and financial support.[146] Effective cultural resource management, they argue, must not only clearly define what the cultural resources are, but also consist of a minimum degree of national intent to preserve the heritage, political support, and agency cooperation.[147] McManamon and Hatton also advocate the unification of cultural resources policy with as many other public policy objectives as possible to create a stronger, heritage-oriented policy.[148] Simply aligning the

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140. *Id.*

141. *Id.*

142. "[A]ll the activities covered by the various terms include both policy making at local, regional, national and international levels of government, as well as the day-to-day business of managing both the organizations that administer 'heritage' and the cultural resources themselves." *Id.* at 3.

143. *Id.* at 5.

144. *Id.*

145. McManamon & Hatton, *supra* note 139, at 5. "The visitor experience must be accomplished in such a manner and by such means as will leave the primary resources unimpaired for the continued enjoyment and multiple experience use of future generations." *Id.*

146. *Id.* at 6.

147. *Id.* at 6-7.

148. "The greater the number of other interests, such as housing, revenues, pipelines, etc., that can be required to take into account the protection and preservation of cultural resources as part of their activities, the stronger will be the public policy for cultural resources. . . . Likewise, the wider the range of circumstances in which the protection and preservation of cultural heritage sites must be considered, the stronger will be the public policy." *Id.* at 7.

policies won't be enough: "[u]nless equal consideration or priority is given to cultural resource protection and preservation as a result of public policy, the policy is not effective."[149]

*10. Agency Cooperation*

Agency cooperation may also be one factor in determining the success or failure of cultural resource management. McManamon and Hatton argue that "[m]inistries responsible for heritage preservation and those responsible for economic development, tourism, law enforcement and other related areas must work cooperatively" to ensure the cultural resource management policies are "implemented forcefully and diligently."[150] Similarly, and perhaps the most vital aspect of public policy as it relates to cultural resource management, is *public* involvement: "[l]ocal attitudes about preservation of historic structures is recognized as a key aspect for the preservation of these kinds of cultural resources."[151] Local involvement, both political and community-based, is essential for the success of cultural resource management policy.[152]

*11. Community Support for Preservation*

In fact, McManamon and Hatton emphasize the importance of local support: "[c]ommunities residing near or among the locations of cultural resources have important, sometimes critical, influences on the protection and preservation of these resources."[153] Perhaps the best way to garner local public support is to portray the cultural heritage as a thing of value and source of not only economic revenue but community pride, as well as cultural resources as "precious things to be preserved, protected and interpreted."[154] The local community could also be persuaded to "envision the resources as linked personally or culturally to them and as resources . . . that are to be protected as part of their community's heritage"[155] by creating a sense of community identity.[156]

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149. *Id.*

150. McManamon & Hatton, *supra* note 139, at 7.

151. *Id.* at 11.

152. *Id.* at 10. "The actions of local officials and local communities increasingly are of importance in cultural resource preservation, protection and interpretation." *Id.*

153. *Id.* For specific discussions of how local populations have responded to threats to their cultural heritage, see McVeigh, *supra* note 46.

154. McManamon & Hatton, *supra* note 139, at 12.

155. *Id.* at 11.

156. *Id.* at 12. "Opportunities for local communities to learn about cultural resources and how they are studied and preserved, help to maintain a constituency that will support these activities, even to build larger and stronger public support." *Id.*

McManamon and Hatton suggest four methods to "develop supportive local preservation attitudes and actions": education,[157] development controls,[158] integration,[159] and "partnerships in resource stewardship."[160] While each of these methods plays an important role in local cultural heritage preservation, education is perhaps the best way to ensure local support for cultural heritage management. In fact, leaders in cultural heritage management and many related fields "have embraced public education and outreach as an important tool for preservation."[161] While information specific to the local community and its heritage are important, public education initiatives should also focus on "general points related to the value of cultural resources, the care that must be used when studying or treating or using these resources, and the often fragile, sometimes non-renewable, nature of cultural resources."[162]

Once the local public has been educated in their heritage and the importance of its preservation, the next step is to involve local citizens in the actual process of preservation. As McManamon and Hatton point out, locals are "among the most effective means of working for the protection of sites in local development schemes and land use plans."[163] After the public has been educated and involved in the preservation process, the cultural heritage preservation efforts should become assimilated or "integrated" into overall local development plans. Viewing preservation as separate and distinct from the entire community development may make it more difficult to see it as an integral part of the whole. Ultimately, "archaeological sites should be considered and incorporated into the overall cultural resource protection and preservation programme of a nation rather than as distinct from . . . other kinds of cultural resources."[164] Perhaps the most valuable result of public education and integration into the preservation process, coupled with the cooperation of local and national agencies, is the ability of the local community to see the fruits of its labor. Whether it results in the preservation of a monument or heritage site or the conservation of natural cultural resources, local citizens and communities can see tangible evidence of the difference they have made.

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157. They suggest both formal and informal education programs. *Id.*

158. "[N]ational and local statutes or development controls." *Id.*

159. "[T]he integration of resource interpretation and preservation into local economic development programmes." McManamon & Hatton, *supra* note 139, at 12.

160. "[P]artnerships in resource stewardship that link national, state and regional preservation programmes with local communities." *Id.*

161. *Id.*

162. *Id.* at 12-13.

163. *Id.* at 13.

164. *Id.* at 16.

### B. Necessity of International "Fallback Provisions"

#### *1. Been There, Done That*

One of the ways McManamon and Hatton have identified to develop local support for preservation projects is to establish "partnerships in resource stewardship."[165] By creating an atmosphere of shared responsibility and local and national cooperation, they believe that cultural preservation goals can be more quickly and effectively realized. When it comes to Easter Island, however, the opposite appears true: Some of the current and former preservation efforts on Easter Island identified supra do seem to have incorporated McManamon and Hatton's "four methods" of public participation. The UNESCO eco-tourism project on Easter Island, for example, set as one of its objectives "to enable participants to acquire the skills they need for the island's natural and cultural resource management."[166]

Another goal is to encourage and facilitate "community development of a resource management plan for sustainable tourism . . . with approval from local officials and counterparts."[167] Once these plans are developed and approved, the UNESCO program would expand to oversee "implementation of micro eco-tourism and sustainable development programs."[168] This joint effort by UNESCO and the local Easter Island community was heralded by Chilean President Michelle Bachelet as "an outstanding initiative to transform the community into a key protagonist that values and fosters its own heritage"[169] and for allowing "the local community [to take] a leading role in the enhancement and promotion of their own heritage."[170]

While local and national cooperation sounds good in theory, it has proven difficult in practice. The 2003 experiment discussed earlier which treated five Moai with a sealant not only eventually proved too costly, but experts from both Japan and UNESCO who jointly spearheaded the project "complained that problems with preservation [on Easter Island] are exacerbated by the fact that the island must report to Chile."[171] While part of the difficulty arose due to the lack of control and involvement of the Rapa Nui people,[172] the Mayor of Easter Island's only town, Hanga Roa, has stated the physical distance between the mainland and its island province is also to blame. "'They don't leave us room to be creative'" he told USA

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165. McManamon & Hatton, *supra* note 139, at 12.
166. *Eco-tourism, supra* note 73.
167. *Id.*
168. *Id.*
169. *Id.*
170. *Sustainable Tourism Initiative*, *supra* note 71.
171. Weissert, *supra* note 3.
172. *Id.*

Today. "'Everything is in Santiago, where so many have never even visited the island.'"[173]

### *2. A National Economic Policy toward Cultural Preservation Might Not be Enough*

Regardless which theory of economics ultimately underlies Chile's reformed attitude toward cultural preservation, the UNESCO experiment serves as a reminder that often there are logistical problems with solely nationalist policies and preservation efforts. Although the host nation may have "progressively assumed a primary responsibility for the protection, at law and . . . in practice, of the cultural heritage, [it] does not mean that other entities, societies, and common citizens have been exonerated from the positive duty of caring, protecting and maintaining cultural property."[174] Similarly, though the duty of heritage preservation has traditionally been reserved to the states, "global threats to cultural heritage [have] necessitated the creation of international systems to assist States in their primary protective role."[175] As cultural heritage scholar Ugo Mifsud Bonnici observed, "[w]hilst the concept of special protection through law to the cultural heritage was evolving in the individual nation states, it was also becoming evident that this protection should also be extended to the sphere of International Law, public and private."[176]

## IV. INTERNATIONAL POLICY TOWARD CULTURAL PRESERVATION

### A. Development of the Current International Legal Framework and How It Fails the World's Heritage

Despite acknowledging that international involvement in heritage preservation would clearly benefit endangered sites, developing cultural heritage beyond the national level has been slow.[177] Though many countries have developed heritage preservation plans "within their own national boundary . . . the Conventions, Charters and Declarations which now form the basis of International Cultural Heritage protection Law have arrived, step by step, only during the twentieth century."[178]

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173. *Id.*
174. BONNICI, *supra* note 52, at 49.
175. FORREST, *supra* note 48, at 17.
176. BONNICI, *supra* note 52, at 29.
177. *Id.* at 167.
178. *Id.*

*1. UNESCO Framework*

Scholars have long identified the importance of the United Nations Educational, Scientific, and Cultural Organization (UNESCO) to preservation efforts. Founded in 1945, UNESCO is the arm of the United Nations entrusted with the duty of preserving cultural heritage.[179] As such, it has "fallen to UNESCO to provide the legal framework for heritage protection, a function that is central to preservation around the world."[180] In fact, "the recognition that the protection of cultural heritage is the common concern of humankind[] provides the basis for a principle of international co-operation, best implemented through the co-ordinating function of UNESCO."

Although the earliest recognition of the special protection enjoyed by cultural heritage under international law came from the 1907 Hague Convention,[181] in 1967 UNESCO members met in Mexico City to discuss "what they understood cultural policy to mean, and describe[] the practice of cultural policy in their own country."[182] This meeting set the stage for and then spawned a series of reports while demonstrating changing attitudes toward the protection of cultural heritage. Though there is "no shortage of legal texts dealing with culture and cultural rights,"[183] perhaps the most important work directed at preserving cultural property was the Convention Concerning the Protection of the World Cultural and National Heritage, otherwise known as the World Heritage Convention.[184]

An "international regulatory arrangement[] which provide[s] incentives to governments to act responsibly towards globally significant heritage sites in their care,"[185] the World Heritage Convention was passed in response to the "merging of two separate movements: the preservation of cultural sites and the conservation of nature."[186] Adopted in 1972 by the UNESCO General Conference and entered into force in 1975,[187] the purpose of the

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179. For a thorough discussion of the founding and history of UNESCO, see *The Organization's History*, http://www.unesco.org/new/en/unesco/about-us/who-we-are/history/ (last visited Sept. 29, 2011); *see also* Lyndel V. Prott, *UNESCO International Framework for the Protection of Cultural Heritage*, *in* CULTURAL HERITAGE ISSUES: THE LEGACY OF CONQUEST, COLONIZATION, AND COMMERCE 257 (James A.R. Nafziger & Ann M. Nicgorski eds., 2010).

180. *Id.*

181. BONNICI, *supra* note 52, at 29.

182. THROSBY, *supra* note 45, at 1.

183. Francioni, *supra* note 63, at 2.

184. Convention Concerning the Protection of the World Cultural and Natural Heritage, Nov. 16, 1972, 27 U.S.T. 37, 1037 U.N.T.S. 151 (entered into force Dec. 15. 1975) [hereinafter World Heritage Convention], *available at* http://whc.unesco.org/en/conventiontext.

185. THROSBY, *supra* note 45, at 49.

186. CUNO, *supra* note 59, at 44.

187. World Heritage Convention, *supra* note 184.

convention was to "recognize heritage items in particular countries that [were] of 'universal significance' and seek to ensure their conservation and proper management."[188] By signing the Convention, "'each country pledges to conserve not only the World Heritage Sites situated on its territory, but also to protect its natural heritage' and 'integrate the protection of the cultural and national heritage'" into local preservation efforts.[189]

Another purpose of the Convention was to "encourage the establishment of an inventory of endangered sites."[190] Enter the World Heritage List, an international database of sites deemed to have worldwide cultural significance. To be included on the List, heritage sites must be nominated and, if the individual site meets certain criteria,[191] the nomination is either accepted or rejected by a representative committee.[192] There are many benefits for countries to have their heritage sites chosen for inclusion on the World Heritage List, including international recognition, which may in turn "make it easier for governments to allocate funds to support the capital or operating expenditures involved" in their management."[193] Listing on the World Heritage List not only creates notoriety and economic advantages for the site, it also "carries with it responsibilities for ensuring the preservation of the site and for the regulation of its management such that the natural or cultural values that were the justification for its listing are properly maintained."[194]

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188. THROSBY, *supra* note 45, at 126. The conference recognized "that the cultural heritage and the natural heritage are increasingly threatened with destruction not only by the traditional causes of decay, but also by changing social and economic conditions which aggravate the situation with even more formidable phenomena of damage or destruction." World Heritage Convention, *supra* note 184, at 1. Most notably, the conference also considered that "deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of all the nations of the world." *Id*.

189. CUNO, *supra* note 59, at 45.

190. *Id.*

191. The particular criteria for nomination and selection to the UNESCO World Heritage List can be found at http://whc.unesco.org/en/criteria (last visited Sept. 29, 2011).

192. THROSBY, *supra* note 45, at 119 ("The main mechanism that public authorities around the world use to regulate the built heritage is listing, i.e., the establishment of lists of properties within a given jurisdiction . . . that are considered to be of cultural significance. Criteria are generally laid down to specify the characteristics that define cultural significance such that any property meeting these criteria will be eligible for inclusion on a particular list."; *Id.* at 126 ("Countries nominate particular buildings, collections of buildings, locations, etc., for inscription onto the List, and their acceptance or otherwise is determined by a representative committee.").

193. *Id.* at 126, 127.

194. *Id.* at 127.

### *2. The Framework's Failure*

Easter Island was designated a World Heritage Site in 1995 when it was added to the listing category of "cultural landscape."[195] With its listing came recognition of the island's "ecological and patrimonial value" as significant to the world's heritage.[196] As Throsby points out, however, "[l]isting can on occasion be a double-edged sword, [such as] when it attracts such an increase in tourist numbers that threshold visitation levels are exceeded and damage to the site ensues."[197] As discussed in the section entitled "MASS TOURISM AND THE WORLD'S HERITAGE: *The 'Catch-22'*," this is precisely what happened on Easter Island, and led to the increased and continued threats to the Moai. As an UNESCO World Heritage Site, Easter Island is entitled to the full protection of the 1972 Heritage Convention and its predecessors. Therein, however, lies the problem: "International Conventions themselves do not have the force of law."[198] The conventions are merely "awareness-raising Convention[s]": they cannot prevent destruction of cultural heritage nor guarantee its protection or preservation."[199]

Among the "fundamental principle[s] of the law governing conventions" are that conventions are binding to the parties and must be executed in good faith."[200] When a State chooses to enter into an International Convention, it "agrees that it will assume certain international obligations in regard to [its] cultural heritage and which will require it to act (or refrain from acting) in certain ways."[201] These conventions are "essentially 'law making,' or 'standard setting' conventions in the sense that they are intended to have affect [sic] generally and to introduce into international law new norms."[202] As such, however, the UNESCO conventions do not actually provide any protection for cultural heritage; instead, "[i]t is the States Parties to the Conventions who provide the protection for cultural heritage through the implementation of the convention in good faith."[203]

Since the UNESCO Conventions themselves don't offer heritage protection, Forrest Argues they are more like a contract because the Conventions "create[] mutual obligations between each state that is a party . . . and each other State Party," and "should one State breach its obligations under the Convention, the State which has thereby suffered from the breach

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195. *Crib Sheet*, *supra* note 1.
196. Muller, *supra* note 34.
197. THROSBY, *supra* note 45, at 127.
198. CUNO, *supra* note 59, at 43.
199. *Id.* at 45.
200. FORREST, *supra* note 48, at 48.
201. *Id.*
202. CUNO, *supra* note 59, at 49.
203. *Id.* at 48.

may seek a remedy against the other State."[204] Regardless of whether viewed as a contract or an otherwise binding agreement, there is no clear way to internationally enforce the Convention.[205] Conventions are implemented when ratified by individual nations who then pass enforcing legislation—legislation with only "national jurisdiction."[206] In the event any State or group of States "contravene the terms of the national legislation, they can only be held accountable locally, *not* internationally."[207] It is this lack of "teeth" that has failed the world's heritage. Unless and until existing International Agreements become enforceable *internationally*, their fate lies in the hands of national governments, and their status as "convention[s] that can be ignored" remains.[208]

### B. Proposed Reformation of International Cultural Policy: Enforcement, Intervention and Appointment

Though drafted and implemented with the best intentions, it has become clear that the existing international legal framework is insufficient to protect the world's heritage. Many believe it is "time to question whether the nation-state bias of UNESCO and its Conventions has proven to be a help or hindrance to the protection of the world's cultural heritage."[209] UNESCO's failure to protect heritage has led many scholars and academics to believe that some action is now necessary.[210] Much of the current debate surrounding the protection of cultural heritage at the international level arises in the context of '*what sort of action is required?*'

First, the host nation should be given the opportunity to protect its own heritage through national preservation policies and efforts. This falls within the current international legal framework. Where this framework falls short, however, is in failing to provide for international recourse if the host nation's policies and practices have failed and the heritage is endangered as a result. It is in such circumstances, where the host nation has first been given every opportunity to protect its own heritage, where enforcement by way of international intervention (enforcement?) becomes necessary.[211] Unfortunately, "none of the existing treaties specifically authorizes a right of intervention in the national policies of a host state which fails to provide adequate protection for culturally important property."[212]

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204. *Id.* at 49.
205. *Id.* at 27.
206. *Id.*
207. *Id.* (emphasis added).
208. CUNO, *supra* note 59, at 27, 28.
209. THROSBY, *supra* note 45, at 153.

211. M. Catherine Vernon, *Common Cultural Property: The Search for Rights of Protective Intervention*, 26 CASE W. RES. J. INT'L L. 435, 448 (1994).
212. *Id.* at 455.

*1. The Right of Intervention*

The right to intervene is not a new concept. Over a decade before the dramatic increase in tourism on Easter Island threatened the Moai, there were proposals for action which could have saved them. In 1992, the Italian government "proposed that U.N. inspectors monitor the world's cultural heritage, and that the international community share responsibility for cultural sites on UNESCO's World Heritage List" but soon "withdrew the proposal when it met stiff opposition from the Executive Board of UNESCO."[213] Though the idea was rejected nearly twenty years ago, recent failures to protect cultural heritage, such as that which led to the destruction of the Bamiyan Buddhas by the Taliban,[214] now "provide a basis for the argument that the current protective regime, which does not authorize intervention, should be improved upon by adding the right of intervention."[215]

As indicated, the right of intervention would be regarded as a virtual last resort, invoked only in the direst situations. As they currently exist, international conventions require states to agree to protect their own cultural heritage.[216] While still imposing this obligation, future conventions would go even further—requiring states to consent to intervention in the event their national policies fail.[217] The authority for intervention would be clearly stated in the proposed text of any future conventions, thereby requiring nations to consent to UNESCO's (or whichever other organization or nation is so chosen by the delegates) right to intervene as a condition of adoption and ratification.

There have been recent glimpses of a possibly growing acceptance toward the idea of international intervention. The Universal Declaration on Cultural Diversity was adopted by the UNESCO General Conference in 2001[218] and outlined such cooperative ventures but ultimately was little more enforceable than its predecessors.[219] UNESCO members, recognizing a declaration alone would be insufficient, began the process of forming a "new international treaty that would be established and implemented through the United Nations systems and that would carry with it all the authority the world body could muster."[220] This in turn led to the adoption

213. *Id.* at 444.

214. "This is the organization that by the terms of its charter had no grounds on which to act to prevent the Taliban from shooting rockets at the Bamiyan Buddhas." CUNO, *supra* note 59, at 148.

215. Vernon, *supra* note 211, at 440.

216. FORREST, *supra* note 48, at 48.

217. *Id.* at 49.

218. Universal Declaration on Cultural Diversity, UNESCO, Res. 25, 31st Sess., UNESCO Doc. 31 C/25 (Nov. 2, 2001), *available at* http://unesdoc.unesco.org/images/0012/001271/127160m.pdf.

219. THROSBY, *supra* note 45, at 175.

220. *Id.*

and ratification of the Cultural Diversity Convention in 2007[221] which "pays particular attention to the need for sustainable culture and economic development . . . [and] deals with threats . . . by affirming the right of countries to take protective action if vulnerable forms of cultural expression are in danger of extinction or serious curtailment."[222] This convention also does not go far enough to ensure the protection of the endangered world heritage.

Once a right to intervention is established, the permissible scope of that intervention must also be determined. The nationalist traditions of the existing UNESCO conventions have recognized the authority of nation-states to control their own heritage. When a host nation fails to protect its heritage, however, there must be a method by which to enforce the international agreement in which the host nation became obligated to preserve it. This method arises through intervention and the delegation of responsibility for the heritage. Among the rights of control given to the nation states under current legal framework is the right of delegation: "[t]he state can delegate the management or the custody, maintenance and exhibition of objects of cultural value to other entities."[223] UNESCO or other international body will not necessarily be required to physically intervene, though certainly if that is necessary to protect the heritage site it would be within its power to do so; instead, the designated international monitoring body will assume control over the preservation and protection efforts until the host nation is able to show it is once again capable of managing its own heritage.

### *2. Appointing a Heritage Trustee*

The "right of delegation" serves as the authority upon which UNESCO may demand consent to intervene. There is already national precedent for such international action; similar policies are currently in place in Japan, where "in cases in which an owner cannot be located, damages or fails to adequately protect a designated cultural property . . . the government [has] the authority to name a custodian . . . for the cultural property."[224] The idea of an "international trusteeship" was similarly broached by James Cuno in his book "Who Owns Antiquity?" but he goes on to acknowledge such is

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221. U.N. Convention on the Protection and Promotion of the Diversity of Cultural Expressions, UNESCO General Conference, 33rd Session, Paris, 20 Oct. 2005, available at http://www.unesco.org/new/en/culture/themes/cultural-diversity/cultural/expressions/the-convention/convention-text/ (last visited Sept. 30, 2011).

222. THROSBY, *supra* note 45, at 179.

223. BONNICI, *supra* note 52, at 45.

224. WHO OWNS THE PAST?: CULTURAL POLICY, CULTURAL PROPERTY, AND THE LAW 334 (Kate Fitz Gibbon ed., 2005).

already the function of UNESCO and highlights many of the shortcomings addressed elsewhere in this paper.[225]

Though the idea of an internationally enforceable right of intervention has been proposed (and subsequently rejected) for decades, the fact remains true that there have been no workable alternatives in place and the world's heritage remains in danger. Without any realistic alternatives being implemented, intervention remains the best option for heritage preservation. As such, international interference "in the form of protective intervention becomes justifiable" when "a nation is not fully equipped to manage common cultural property located within its territorial boundaries."[226] Actually implementing an international trusteeship-based intervention policy, however, may depend on "increased international advocacy for a team of knowledgeable cultural property advisors with an internationally recognized right to enter, inspect, recommend, and implement protective action for the common cultural heritage."[227]

### C. A Word of Caution

Lurking in the shadows, however, are the "notions of traditional private property rights under domestic law, and the concept of territorial sovereignty under international law . . . which support the right to exclude anyone or anything from interfering with a recognized property right."[228] It is this delicate balance between common cultural heritage rights—the rights to access and enjoy the heritage, the right to preserve it for future generations—and the long-accepted nationalist ideas of ownership and property which makes rallying in support of intervention difficult for the many who oppose it. Walking this fine line, maintaining this delicate balance, is also why *proper* safeguards and actual, imminent danger to world heritage must be required before *any* intervention can occur.

Premature intervention could have devastating diplomatic effects. Scholar and economist David Throsby warns of the dangers of hasty action and urges application of the "Precautionary principle"[229] in cases where intervention is considered.[230] Applying this principle would therefore "requir[e] decisions that may have irreversible consequences to be taken with extreme caution."[231] Such decisions clearly would include those

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225. CUNO, *supra* note 59, at 147.
226. Vernon, *supra* note 211, at 448.
227. *Id.* at 444-45.
228. *Id*. at 454.
229. THROSBY, *supra* note 45, at 195. Throsby explains the idea behind the precautionary principle: "When facing decisions with irreversible consequences, such as the destruction of cultural heritage or the extinction of valued cultural practices, a risk-averse position must be adopted." *Id.*
230. *Id.* at 164.
231. *Id.*

regarding any action taken against a host nation on behalf of its heritage: "[t]reatment and care of cultural resources raise many questions, and it is important to approach any intervention carefully and conservatively."[232] Intervention is certainly not something to be taken lightly; the right to intervene should only be invoked when all else fails, when the individual host nation has either willfully or negligently failed to protect its heritage.

## CONCLUSIONS

Allowing international relief organizations and other non-governmental organizations, as well as UNESCO, to not only participate in Easter Island's cultural heritage preservation, but to establish and oversee the efforts and, where necessary, to intervene on behalf of the endangered heritage, may be the only ways to ensure adequate preservation efforts and the continued existence of the world's cultural heritage. Chile should be given every opportunity to reform its national policies to ensure adequate protection of the Moai and other heritage sites. So should every other country in which heritage sites are found. But once the host country fails, it is the duty of all mankind to ensure that the legacy of the heritage of those who came before us endures for those who come after. The heritage cannot protect itself—it is up to the individual host nations to implement policies and develop plans to preserve it. If those national policies should fail, it is up to the rest of the world to step in and preserve our common heritage or risk losing it forever.

232. McManamon & Hatton, *supra* note 139, at 16.