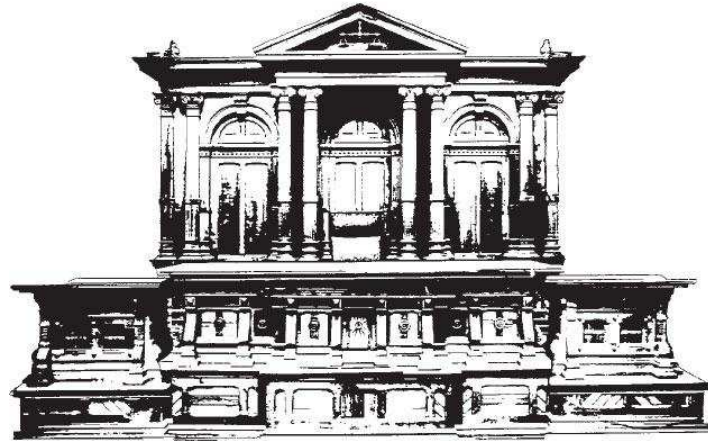


# CREIGHTON INTERNATIONAL AND COMPARATIVE LAW JOURNAL



---

Volume 1

Spring 2011

---

## *Founding Editors*

Jeffrey S. Anderson  
Mark A. Hoff  
Amanda M. McMichael  
Katherine H. Stevens  
Michael W. Forker  
Danielle R. Kerckhoff  
Brandon E. Mehl

## *Moderators*

Professors Bruce E. Aronson, Michael J. Kelly, Raneta J. Mack, Stephen C. Sieberson, Sean Watts, and David P. Weber

## TABLE OF CONTENTS

### INTRODUCTION

- 3 The Importance of International and Comparative Law: Exploring Complex Issues in a Global Community  
*Raneta Lawson Mack*

### ARTICLES

- 5 No Innocents Here: Using Litigation to Fight against the Costs of Universal Service in France  
*Dorit Rubinstein Reiss*
- 30 A Contribution from the Spanish Constitutional Court to the European Construction Process: Requesting Preliminary Ruling  
*Pedro Tenorio*
- 55 Religion and the Alien Tort Statute  
*Chad G. Marzen*
- 60 Ownership of Underwater Cultural Heritage in the Area  
*Liu Lina*
- 81 A New Class of Persons: Intercountry Adoptees and Postcolonial Theories of Cultural Hybridity  
*George Waddington*

### NOTES

- 100 Politics, Leverage, And Beauty: Why The Courtroom Is Not The Best Option For Cultural Property Disputes  
*Nicole Bohe*
- 117 Captain of a Ship of Fools on a Cruel Sea: How European Leadership May Sink the Proposed Arms Trade Treaty  
*Adam Arthur Biggs*

## THE IMPORTANCE OF INTERNATIONAL AND COMPARATIVE LAW: EXPLORING COMPLEX ISSUES IN A GLOBAL COMMUNITY

*Raneta Lawson Mack\**

Amanda Knox sits in an Italian prison convicted of the sexual assault and murder of her British roommate, Meredith Kercher, in Perugia, Italy.<sup>1</sup> While the criminal charges may be familiar to audiences in the United States, the criminal justice processes that resulted in Knox's conviction are probably a mystery to the vast majority of American observers. Perhaps as expected, this lack of familiarity with the Italian system led many Americans to disparage the Italian process as unfair and biased against foreign defendants. Consequently, while Ms. Knox's guilt or innocence was the focus of the criminal trial in Italy, the Italian criminal justice system was indicted and put on trial in the United States. When considered in a global legal context, however, different processes do not necessarily connote inferior or unjust systems. Indeed, a rush to judgment about the fairness of the Italian process as compared to the United States' system overshadows and perhaps inhibits a deeper understanding of the unique components that shape the Italian criminal justice system. When examining legal systems in other countries, an appreciation of how those processes function is crucial to determining whether specific procedures and guidelines have been administered in a just fashion. This type of contextual assessment shifts the focus from a paradigm that asks whether Italian processes are equal to those in the United States to an in-depth functional analysis that seeks to determine whether Italy has followed its own processes to reach a just result.

The ultimate question of Ms. Knox's guilt or innocence will be decided by the Italian criminal justice system. Whether the Italian criminal justice system has dispensed justice in this particular case will likely be debated for years to come in the international court of public opinion aided by the insights and critical analyses of scholars around the world. Enhancing the depth and breadth of knowledge about global legal standards is a key function of comparative legal analysis, particularly in the criminal justice context. The comparative process introduces us to that which is dissimilar, calls upon us to explore those differences, and then compels us to examine the impact of those distinctions. In some cases, comparative analysis forms the basis to advocate for legal reform in one system or another. But, more often, a deeper understanding of individual systems is an end in itself. In sum, the comparative process enhances our understanding of disparate systems while simultaneously raising awareness of our own systemic successes and failures. Comparative legal journals provide a forum to share this knowledge across a broad spectrum.

As I write this, chaos reigns across the Middle East as anti-government protestors rally throughout the region for a "Day of Rage." In Egypt, a flashpoint for the waves of unrest, the government has responded, in part, by deploying elite counterterrorism forces and disrupting Internet service throughout the country. These mass uprisings highlight traditional international law issues such as democracy, human rights and national and individual self-determination. However, the overlay of social media as a vehicle for fomenting and organizing the current state

---

\* Professor of Law, Creighton University School of Law. I am honored to have the opportunity to contribute to the first volume of the Creighton University School of Law Comparative and International Law Journal.

<sup>1</sup> Ms. Knox's case is currently on appeal. In December 2010, a judge granted Ms. Knox's petition for an independent review of the DNA evidence in the case. The Italian appellate process allows a review of the case on the merits much like a retrial in the United States.

of unrest raises compelling contemporary international legal questions. For example, does a government that disconnects its citizens from a medium that can increase worldwide awareness of a country's domestic issues and galvanize support from around the world violate basic human and civil rights? Is there a fundamental right to Internet connectivity especially when it might be used to promote governmental reform? Can social media serve as an accurate litmus test for the extent and depth of the dissatisfaction of a people? Finally, how can (should?) the international community respond to such direct appeals? Without question, international law scholars will be dissecting and analyzing these and many other related issues for years to come. International law journals will undoubtedly provide an outlet for exploring these and many other pertinent questions surrounding Egypt's transformation.

These two brief examples illustrate the profound potential and the corresponding benefit of expanding avenues for scholarly analysis and critique of comparative and international law. It is against this backdrop that Creighton University School of Law launches the Creighton International and Comparative Law Journal (CICLJ). This journal hopes to provide a forum for scholars to discuss the most relevant and timely international and comparative issues of the day. This journal is unique in the history of Creighton Law School because it is our second student-run journal, it was entirely inspired and initiated by a talented group of students, and it is an online journal. For Creighton Law School, the CICLJ will enhance our reputation in the global legal community and bring well-deserved recognition to our outstanding concentration program in International and Comparative Law. For our students, the CICLJ will provide yet another opportunity to hone critical writing, editing and analytical skills. For the scholarly community, because the journal will be published in an online format, the CICLJ will serve as a means to distribute scholarship to a vast audience in a timely fashion on a medium that is fast becoming the preferred method of publication.

The students who invested the time and energy to bring this journal project to fruition deserve special recognition. They are (in alphabetical order): Jeffery Anderson, Michael Forker, Mark Hoff, Danielle Kerckhoff, Amanda McMichael, Brandon Mehl and Katherine Stevens. On behalf of the faculty at Creighton Law School, I commend you for your hard work in producing this first volume. We are pleased to add the CICLJ to the proud history of Creighton Law School. We look forward to this first edition of the CICLJ and anticipate many more volumes that explore the complexities of international and comparative law in our global community.

# NO INNOCENTS HERE: USING LITIGATION TO FIGHT AGAINST THE COSTS OF UNIVERSAL SERVICE IN FRANCE

*Dorit Rubinstein Reiss\**

## INTRODUCTION

A major difference between United States and European practice and outlook is found in the relationship of regulation to competition. In the United States, opening a utility market to competition is described as “deregulation.” In Europe, however, opening market to competition is seen as requiring careful regulation after monopoly rights and duties are cancelled, to prevent abuses from powerful corporate actors and protect valuable interests.<sup>1</sup> When I carelessly referred to the liberalization of the telecommunications market as “deregulation,” a Swedish interviewee corrected me: “No. Before, we had an unregulated monopoly. Now, we have regulated competition.”<sup>2</sup> One reason for this difference in perspective can be attributed to a difference in starting points. The United States had traditionally provided utilities by means of licensed monopolies, which while heavily regulated were still privately held companies, while most countries in Europe provided utilities through nationalized industries administered directly by the state in some way. Thus, the U.S. already had a vast array of regulation in play, some of which was eliminated in order to permit competition. Another factor is that several countries in Europe distrust the market to deliver certain kinds of goods and thus see a need for careful regulation. Those involved in regulating the newly competitive sectors correctly recognize that the greatest danger to successful liberalization is the previous state monopoly (the “incumbent”), both because of its size and power and because it has every incentive not to cooperate with the liberalization in normal circumstances.<sup>3</sup> Although in specific cases operators may have interests

---

\* Associate Professor, UC Hastings College of the Law. I am grateful to Bruce Carruthers, David Coolidge, Aaron Rappaport, and François Varloot for very useful comments to previous versions of this project and to Frederic Carteron and Shelley Kennedy for invaluable research assistance and input.

<sup>1</sup> Vincent Wright, *Public Administration, Regulation, Deregulation and Reregulation*, in *MANAGING PUBLIC ORGANIZATIONS: LESSONS FROM CONTEMPORARY EUROPEAN EXPERIENCE* 244, 252-253 (Kjell A. Eliassen and Jan Kooiman eds., 1993) (describing the European context and showing that the result of reforms to liberalize sectors was reregulation, not just deregulation); STEVEN K. VOGEL, *FREER MARKETS, MORE RULES* 16-18 (1996) (demonstrating that privatization led to deregulation, focusing on cases from Britain and Japan); Giandomenico Majone, *Cross-National Sources of Regulatory Policymaking in Europe and the United States*, 11 *J. OF PUB. POL'Y* 79, 85 (1991). This description is somewhat simplistic; careful observers of regulation across both Europe and the United States emphasize the connection between state withdrawal from delivery and public services and a growth in regulation. See, *CREATING COMPETITIVE MARKETS: THE POLITICS OF REGULATORY REFORM* (Marc K. Landy et al. eds. 2007). Nonetheless, I believe it captures differences in the basic approaches.

<sup>2</sup> Interview with a member of the Swedish Post and Telecom Agency, in Stockholm, Sweden (Sept. 7, 2004). Some of the information included in this article has not appeared in publication before and is based on original empirical research conducted through open ended interviews with actors in Sweden, France and England in 2004. The interviews were conducted under guarantees of anonymity, as required to get the approval of the Institutional Review Board at UC Berkeley working under federal regulations to protect human subjects. For that reason, the names of the interviewees, and on occasion (when it's too revealing) the specific location of the interview, will not be reported, though the date of the interview and the institutional affiliation of the interviewees will be reported.

<sup>3</sup> PETER CAMERON, *COMPETITION IN ENERGY MARKETS: LAW AND REGULATION IN THE EUROPEAN UNION* 8, 18, 55-56 (2002); Damien Geradin, *The Opening of State Monopolies to Competition: Main Issues of the Liberalization Process*, in *THE LIBERALIZATION OF STATE MONOPOLIES IN THE EUROPEAN UNION AND BEYOND*, 181, 181-183 (Damien Geradin ed., 1999); Helena Lindskog, *The Telecommunications Market In Sweden From Monopoly To*

that would lead them to support the move to liberalization,<sup>4</sup> they are less likely to support the new obligations placed on them following liberalization: they will naturally want to maximize the advantages accruing to them from liberalizing while minimizing the restrictions placed on their use of their market power. To balance this power advantage of the previous incumbents, European Union institutions regulating utilities sectors tend to focus on enforcing competition.<sup>5</sup> This approach comfortably fits the emphasis in the EU treaties on ensuring free movement of goods and services and preventing protectionism of large national firms against competition.<sup>6</sup>

However, the incumbent operator is not the only powerful economic actor in European member states. Some of the new entrants are also powerful corporations. The natural image of the new entrant in communications for many laypeople is the small communications start up,<sup>7</sup> which can be described in contrast to huge, impersonal multi national corporations or huge incumbents that initially dominate the market. But many of the operators entering the European communications market are “new entrants” to a specific country, but as described in part 1.b, in no other way resemble a small start up.<sup>8</sup> These sophisticated, powerful economic actors naturally want to maximize the benefits from liberalization. One avenue for them is to use the European Institutions to promote the aspects of liberalization they prefer – for example, access to the incumbent network – and at the same time use them to avoid the counterweights put in place to prevent harm from liberalization and avoid obligations put in place to protect valuable interests. That is not to say that these actors do not need protection against the incumbent, with its inherent advantages, just to caution that they should not be automatically seen as the “under dog,” a David needing help against a Goliath. That is not a criticism of these new entrants; part of the philosophy behind liberalization is that the entry of new competitors would bring the benefits of free market competition to the sector. Sophisticated competitors, out to maximize their benefits,

---

Competition, Paper presented at the 2004 Applied Business Research Conference, San Juan, Puerto Rico, 9 (2004), available at: <http://www.heldag.com/articles/Telecom%20market%20ABR%202004%20%20H%20Lindskog.pdf>. (Last visited April 16, 2010).

<sup>4</sup> For example, Thatcher convincingly argued that telecommunications operators in Europe supported liberalization and achieving freedom from the government as a way to reduce political control over them and political intervention in their actions and to get better access to capital. See Mark Thatcher, *The National Politics of European Regulation: Institutional Reform in Telecommunications*, in UTILITIES REFORM IN EUROPE 11, 13 (David Coen & Mark Thatcher eds., 2001); Mark Thatcher, *Winners and Losers in Europeanisation: Reforming the National Regulation of Telecommunications*, 27 W. EUR. POL. 284 (2004) [hereinafter Thatcher 2004]. For electricity, several authors showed that EDF, France’s incumbent electricity operator supported, even though reluctantly, some liberalization since it would allow it to expand to other markets and it believed it is in a good position to withstand competition. Ian Bartle, *When Institutions No Longer Matter: Reform of Telecommunications and Electricity in Germany, France and Britain*, 22 J. PUB. POL’Y 1, 16 (2002); Rainer Eising, *Policy Learning in Embedded Negotiations: Explaining EU Electricity Liberalization*, 56 INT’L ORGS. 85, 97-99; Rainer Eising & Nicolas Jabko, *Moving Targets: National Interests and Electricity Liberalization in the European Union*, 34 COMP. POL. STUD. 742, 745-47 (2001). This willingness to support initial liberalization, however, does not undermine the point made here: the operators may have an interest in some liberalization, but they also have an interest in preserving their own market power as much as possible within the liberalized market.

<sup>5</sup> Vivien A. Schmidt, *Europeanization and the Mechanics of Economic Policy Adjustment*, 9 J. EUR. PUB. POL’Y 894, 908 (2002); Thatcher 2004, *supra* note 4.

<sup>6</sup> Joachim Scherer, *Electronic Communication Law and Policy of the European Union*, in TELECOMMUNICATIONS LAW IN EUROPE: LAW AND REGULATION OF ELECTRONIC COMMUNICATIONS (Joachim Scherer ed., 5th ed. 2005); Christian Joerges, *Good Governance Through Comitology?*, in EU COMMITTEES: SOCIAL REGULATION, LAW AND POLITICS 311, 316 (Christian Joerges & Ellen Vos eds., 1999); Schmidt, *supra* note 5 at 906.

<sup>7</sup> Some examples of smaller telecommunications companies include Primus Telecommunications, [www.pirumustel.co.uk](http://www.pirumustel.co.uk), Thus, <http://mediacentre.thus.net/company-information/>, and Voxbone, [www.voxbone.com](http://www.voxbone.com).

<sup>8</sup> See *infra*, notes 34-39 and the accompanying text.

can probably balance the weight of the incumbent better than only small new companies, and thus contribute to competition. But the designers of the system and its regulators need to be aware that this is a battle of giants, and design the system to prevent abuses from either side.

This Article demonstrates that this concern is not only theoretical, by telling the story of how French operators attempted to avoid their universal service obligations through European and then French litigation. In 2001, the European Court of Justice (“ECJ”) found the French system of funding universal service in telecommunications to be in violation of EU law.<sup>9</sup> Subsequent funding decisions were repeatedly attacked by operators in the French administrative courts, especially the Conseil d’État, for a number of reasons.

The decision and its aftermath can be seen—as the ECJ clearly saw it—as another attempt by France to put obstacles in the path of new entrants. Under this view, France does not share the ideology of free competition and unregulated markets and is anxious to protect its national champion, France Télécom, from competition through all means fair or foul. However, the battle around funding universal service can also be seen in another light—as a carefully thought out attack by sophisticated competitors on a regulatory scheme protecting a value they had no wish to pay for, universal service. A similar strategy—litigating to fight regulation—was adopted in the United States by industry actors unhappy with regulation aimed at them or burdens put on them.<sup>10</sup> This paper suggests that that approach better fits existing data, and will be useful for understanding the behavior of the operators after the ECJ decision, when they brought repeated cases against universal service decisions by the French regulator.

Three general lessons emerge from this different reading of the battle around French Universal Service Funding. First, it supports the warning mentioned above, that the incumbent may not be the only actor with an incentive to combat or subvert the post-liberalization regulatory framework, and that regulators and courts should be wary of abuses of the system by new entrants too. Second, there is a real tension between the need to provide private actors a forum in which to defend themselves against excessive regulation and to protect their rights and the need to prevent use of the court system to cause delays and torpedo regulation. Ways to resolve that tension need to be considered. Finally, France’s universal service experience emphasizes the importance of designing regulatory systems to prevent potential problems (or create procedural safeguards in the right places)—an issue considered in other contexts.<sup>11</sup> In this

<sup>9</sup> Case C-146/00, *Commission v. France*, 2001 E.C.R. I-9767.

<sup>10</sup> In the Telecommunications context, see Rebecca Beynon, *The FCC's Implementation of the 1996 Act: Agency Litigation Strategies and Delay*, 53 FED. COMM. L.J. 27, 28 (2000). Though Beynon attributes much of the blame for the litigation to the commission. *Id.* at 29.; John M. de Figueiredo, *Litigating Regulation: Corporate Strategy in Telecommunications* 1-2 (2000) (copy available with author) available at [http://web.mit.edu/jdefig/www/papers/litigation\\_regulation.pdf](http://web.mit.edu/jdefig/www/papers/litigation_regulation.pdf) (last visited April 22, 2010); Terrence P. McGarty, *Current Telecommunications Legal Issues, Litigation v. Legislation: Is the 1996 Act a Beginning or an End?* (MIT ITC working paper, 2002) (copy available with author) available at: [http://www.telmarc.com/2002\\_10\\_25%20Current%20Legal.pdf](http://www.telmarc.com/2002_10_25%20Current%20Legal.pdf) (last visited April 22, 2010); but see (noting that the danger is from the regulators and judicial review is necessary). On the negative role of courts in making it harder to regulate, see Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525, 539-56 (1997).

<sup>11</sup> Dara K. Cohen et al., *Crisis Bureaucracy: Homeland Security and the Political Design of Legal Mandates*, 59 STAN. L. REV. 673, 712-13, 745-46 (2006) (noting why agencies are not always designed for success); Robert F. Durant, *Agency Evolution, New Institutionalism, and 'Hybrid' Policy Domains: Lessons from the 'Greening' of the U.S. Military*, 34 POL'Y STUD. J. 469, 469-71 (2006); DAVID E. LEWIS, *PRESIDENTS AND THE POLITICS OF AGENCY DESIGN: POLITICAL INSULATION IN THE UNITED STATES GOVERNMENT BUREAUCRACY, 1946-1997* 6-7 (2003); Terry M. Moe, *The Politics of Bureaucratic Structure*, in *CAN THE GOVERNMENT GOVERN*, 267, 268-69 (John Chubb & Paul Peterson eds., 1989); B. Dan Wood & John Bohte, *Political Transaction Costs and the Politics of*

specific context, the French experience casts doubts on the desirability of using an operator-supported fund to finance public service operators may not value. Operators are more apt to act strategically to block a large annual assessment than they are to object to the addition of a small monthly charge to customers' bills.

Part I of this Article describes the French market post liberalization, and the framework put in place by France to fund universal service. Part II describes the version of the story reflected in the ECJ decision. Part III suggests the alternative version and describes the data supporting it. Part IV discusses the implications of the story. This Article then concludes with some general observations.

## I. FUNDING UNIVERSAL SERVICE IN FRANCE

### A. THE FRAMEWORK FOR FUNDING UNIVERSAL SERVICE

European Union law requires all member states to open their telecommunications market to competition as of 1998. From then on, the invisible hand of the market should rule the sector, rather than the former state monopolies.<sup>12</sup> However, alongside the impetus for reform, concerns were raised about the effect such reform might have on values important to the people of the member states, such as universal service.<sup>13</sup> Universal service in this context refers to providing access to telecommunications in ways a "pure" free market would not.<sup>14</sup>

Important literature addresses whether there should be a right to basic services like telecommunications and electricity.<sup>15</sup> However, in relation to telecommunications in Europe in general and France in particular, the question is fairly well settled by law, and the argument is about implementation. Article 16 EC of the Treaty of Amsterdam said that:

[G]iven the place occupied by services of general economic interest in the shared values of the Union as well as their role in promoting social and territorial cohesion, the Community and the Member States, each within their respective powers and within the

---

*Administrative Design*, 66 J. OF POL. 176, 178-82 (2004); AMY ZEGART, *FLAWED BY DESIGN: THE EVOLUTION OF THE CIA, JCS, AND NSC* 49-52 (1999).

<sup>12</sup> PIERRE LAROCHE, *COMPETITION LAW AND REGULATION IN EUROPEAN TELECOMMUNICATIONS* 35 (2000).

<sup>13</sup> Damien Geradin, *The Opening of State Monopolies to Competition: Main Issues of the Liberalization Process*, in *THE LIBERALIZATION OF STATE MONOPOLIES IN THE EUROPEAN UNION AND BEYOND*, 181, 181-183 (Damien Geradin ed., 1999); JOHANNES M. BAUER, *Regulation and state ownership: conflicts and complementarities in eu telecommunications*, 76 ANNALS OF PUB. AND COOPERATIVE ECON. 151, (2005); Pierre Larouche, *Telecommunications*, in *THE LIBERALIZATION OF STATE MONOPOLIES IN THE EUROPEAN UNION AND BEYOND*, 15 (Damien Geradin ed., 2000); Wolf Sauter, *Universal Service Obligations and the Emergence of Citizens' Rights in European Telecommunications Liberalization*, in *PUBLIC SERVICES AND CITIZENSHIP IN EUROPEAN LAW: PUBLIC AND LABOUR LAW PERSPECTIVES*, 117, 134-36 (Mark Freedland & Silvana Sciarra eds., 1998).

<sup>14</sup> Dorit Rubinstein Reiss, *Agency Accountability Strategies After Liberalization: Universal Service in the United Kingdom, France, and Sweden*, 31 L. & POL'Y 111, 118-119 (2009).

<sup>15</sup> See Sauter, *supra* note 13, at 120-21; Élie Cohen & Claude Henry, *Sur les Bases et l'Évolution Récente des Services Publics Industriels et Commerciaux en France et dans l'Union Européenne*, in *SERVICE PUBLIC, SECTEUR PUBLIC*, 9, 9-10 (Conseil d'Analyse économique ed., 1997); Mark Freedland, *Law, Public Services, and Citizenship - New Domains, New Regimes?*, in *PUBLIC SERVICES AND CITIZENSHIP IN EUROPEAN LAW*, (Mark Freedland & Silvana Sciarra eds., 1998); Elisenda Malaret Garcia, *Public Service, Public Services, Public Functions, and Guarantees of the Rights of Citizens: Unchanging Needs in a Changed Context*, in *PUBLIC SERVICES AND CITIZENSHIP IN EUROPEAN LAW*, 57, 58-59 (Mark Freedland & Silvana Sciarra eds., 1998); Adrienne Heritier, *Market integration and social cohesion: the politics of public services in European regulation*, 8 J. EUR. PUB. POL'Y 825 (2001).



scope of application of this Treaty, shall take care that such services operate on the basis of principles and conditions which enable them to fulfill their missions.<sup>16</sup>

In the telecommunications context the European Union has officially decreed that access (though not free access) to telecommunications is an important and basic right. The Universal Service Directive states that liberalization goes hand in hand with securing the delivery of universal service.<sup>17</sup> Section 14 then goes on to say: “The importance of access to and use of the public telephone network at a fixed location is such that it should be available to anyone reasonably requesting it.”<sup>18</sup>

The details, however, are left to the member states, and can vary substantially.<sup>19</sup> Similarly, the decision whether to compensate the operators providing universal service for their costs has been left to the member states—within certain constraints aimed at assuring that the funding mechanism will not give the incumbent an unfair advantage. A number of European states have chosen to potentially compensate their universal service providers (“USO”) and therefore evaluate USO costs. However, once the ratio between cost and compensation has been evaluated, only two countries, France and Italy, use a direct fund.

France was especially concerned about the effect of the liberalization process on public service. Public service is an important value in France.<sup>20</sup> In addition, the previous economic tradition in France emphasized other values besides competition and free markets, including large national champions which were held in high regard, and which served the nation, sometimes even when that was contrary to their narrow economic interests.<sup>21</sup>

Under these circumstances, it was easy for France to adopt a universal service program including geographic balancing and relatively generous provisions for vulnerable customers.<sup>22</sup> It also seemed obvious to members of the French government that fairness required compensating France Télécom for the burden placed on it by its universal service obligations.<sup>23</sup> Since universal

<sup>16</sup> Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, Oct. 2 1997, 1997 O.J. (C 340) 1, 37 I.L.M. 56. For a more detailed description of the development of Universal Service in EU law and especially in relation to network services, see Stephane Rodrigues, *La régulation communautaire des services publics de réseaux, vers une théorie générale de la concurrence régulée?*, 44 Flux 80, (2001).

<sup>17</sup> Council Directive 2002/22, 2009 O.J. (L 108) 51.

<sup>18</sup> Directive 2002/22, *supra* note 17, at 53.

<sup>19</sup> Dorit Rubinstein Reiss, *Regulatory Accountability: Telecommunications and Electricity in the United Kingdom, France and Sweden* (Feb. 2008) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).

<sup>20</sup> Schmidt, *supra* note 6, at 906; Cohen & Henry, *supra* note 15, p. 12; DENOIX DE SAINT MARC, *LE SERVICE PUBLIC: RAPPORT AU PREMIER MINISTRE* 17 (1997); Tony Prosser, *Public Service Law: Privatization's Unexpected Offspring*, 63 LAW & CONTEMP. PROBS. 63, 75-76 (2000); Elodie Renaudin, *L'évolution du Service Universel dans le Secteur des Télécommunications* (2004) (unpublished DEA Droit Public des Affaires dissertation, Université Paris x Nanterre) (on file with author), available at <http://droitfil.free.fr/MemSU.PDF>.

<sup>21</sup> COHEN & HENRY, *supra* note 15, p. 51; Barry Owen, *France*, in *COMPARATIVE PUBLIC ADMINISTRATION* 45 (J.A. Chandler ed., 2000); Nicolas Charbit, *Country Report: France*, in *THE LIBERALIZATION OF ELECTRICITY AND NATURAL GAS IN THE EUROPEAN UNION* 123 (Damien Geradin ed., 2001); JABKO & EISING, *supra* note 5; See MARK THATCHER, *THE POLITICS OF TELECOMMUNICATIONS: NATIONAL INSTITUTIONS, CONVERGENCE, AND CHANGE IN BRITAIN AND FRANCE* 159-60 (2000) (noting the case of France Télécom, transferring parts of its revenue to the national treasury rather than reinvesting it in its own network). Similarly, in an interview with a member of the French Electricity Company, EDF, a member mentioned that in spite of the costs of universal service going up, the ministry did not want electricity tariffs to rise and forced EDF to keep the prices artificially low, against their business interest. Interview with EDF official, in Paris, Fr. (Jan. 11, 2005).

<sup>22</sup> Reiss, *supra* note 145, 125-126.

<sup>23</sup> Interview with member of the French Telecommunications Agency, ART, in Paris, Fr. (Dec. 9, 2004).

service is an important public value, and the state wishes to provide it for the community, the cost should be shared among all users.

Accordingly, sections R. 20-31 to R. 20-34 of the Posts and Telecommunications Code established a funding mechanism for universal service.<sup>24</sup> Here France made its first crucial policy choice. Rather than fund universal service through adding a set amount to customers' telecommunications bills (as it did in electricity, for example),<sup>25</sup> or through adding a supplementary interconnection charge (as was done in telecommunications in Belgium),<sup>26</sup> the government created a universal service fund, to which all operators were required to contribute (later passing the costs on to their customers). This raised complex implementation issues. The most basic task entrusted to the regulator, Autorité de Régulation des Télécommunications ("ART"),<sup>27</sup> was to calculate what universal service cost—not an easy calculation. However, beyond the problem of calculating the cost, important questions about distributing the burden remain. Which operators will contribute? How will their share be calculated? There are several ways to do this, and any choice would be controversial, since there will inevitably be winners and losers.

Under the European directive, Universal Service costs are determined by calculating the costs of providing it minus the costs that the operator would incur anyway, i.e., comparing the costs to the operator in a situation where they have to provide universal service with a hypothetical situation in which they would not have to provide it. However, that still leaves a lot to be determined. The costs assessed for universal service in France can be grouped under five headings:

1. Rebalancing France Télécom's tariffs until 2000, as a temporary measure.
2. The costs of geographic balancing—i.e., assuring that all customers, regardless of where they live, pay the same maximum price for fixed access and fixed voice telecommunications service, so that rural customers and customers living in remote locations (where the costs of providing services are higher) will not pay substantially higher sums than those in urban areas.
3. Social tariffs—special low tariffs for "vulnerable customers," who cannot afford full price.
4. The costs of providing public payphones even where it is not profitable.
5. The costs of publishing an annual free paper directory and running a vocal directory service at a reasonable price.

While the calculation of the costs for items 2 through 5 was done in a fairly straightforward (although quite lengthy) way using measured data, for item 1 France used a very complicated formula which required both estimated and measured data. France Télécom collected the measurable data with some accuracy, but the basis for the estimation was

---

<sup>24</sup> Loi 97-475 du 13 mai 1997 Code des Postes et Communications Electroniques [Law 97-475 May 13, 1997 Posts and Telecommunications Code], JOURNAL OFFICIEL DE LA RÉPUBLIQUE FRANÇAISE [J.O.] [OFFICIAL GAZETTE OF FRANCE], May 14, 1997, Art. R20-31 - R20-34.

<sup>25</sup> Interview with former member of the French Energy Regulation Commission, CRE, in Fr. (Jan. 21, 2005).

<sup>26</sup> Interview with member of the French Telecommunications Agency, ART, in Paris, Fr. (Dec. 9, 2004).

<sup>27</sup> The regulator of telecommunications in France used to be l' Autorité de régulation des télécommunications, known as the ART; however, following the regulatory package of 2003 the agency became the Autorité de régulation des communications électroniques et des postes, known as ARCEP. I am referring generally to ART since at the time of the events surrounding the EU decision, it was the ART, and I think that consistency in using the name will prevent confusion.

challenged successfully by the European Commission before the ECJ.<sup>28</sup> The calculation of all five components is complex, lengthy, and requires masses of data, supplied annually by the universal service supplier, France Télécom (most of the data is subject to audits annually conducted by the regulator, ART). The entire process is work intensive and requires a high level of expertise.

France initially decided to include all licensed operators, including mobile operators, but not Internet Service Providers (“ISP”), as contributors. The requirement that mobile operators share in paying for the costs for only 1997 was struck down by the ECJ's decision, but those operators were not absolved from contributing to the costs of universal service in subsequent years. France calculated the burden on each operator according to the volume (in terms of minutes) of network usage; it later decided to charge each operator by revenue, seeing revenue as a more equitable measure. France Télécom was also a contributor, and in fact paid the major share (under both systems).

In addition, during the first few years France used several transitional arrangements. For example, instead of calculating some of the components of the formula for the first two years, where the numbers were not being collected yet, it used flat rate estimates based on numbers used by other European countries.

#### B. WHO IS REQUIRED TO PAY UNIVERSAL SERVICE?<sup>29</sup>

As explained above, the costs of universal service are mostly spread between France's fixed and mobile operators. Who are these operators?

The main provider of universal service is the French incumbent, France Télécom, currently only partly owned by government (45.3%), but strongly influenced by it in more than one way. The head of the firm was usually a figure with substantial political connections (a former president of France Télécom, Thierry Breton, had then become the Minister for industrial affairs and is known to be a friend of Raffarin, the former Prime Minister,<sup>30</sup> and his successors – both the chairman of the board and the CEO – are also well connected).<sup>31</sup> In addition, many agency members have worked, for France Télécom, as have many members of other companies

<sup>28</sup> The rebalancing tariff, the first component, is calculated using the following formula:  $C = 12 \times (P_e - P) \times N$  where  $P_e$  is the estimated monthly subscription charge after rebalancing;  $P$  is the actual subscription charge at the time and  $N$  is the number of customers without special contracts. This information is taken from the ECJ decision. Case C-146/00, *Commission v. France*, 2001 E.C.R. I-9767 [hereinafter Case C-146/00].

<sup>29</sup> This discussion is largely based on the data collected for my dissertation, Dorit Rubinstein Reiss, *Regulatory Accountability: Telecommunications and Electricity in the United Kingdom, France and Sweden* (Feb. 2008) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).

<sup>30</sup> In the words of one Frenchman in an informal conversation, ‘ils se tutoient’, or they address each other using the familiar ‘tu’ address.

<sup>31</sup> *Didier Lombard, Chairman of Strategy Committee, FRANCE TELECOM*, [http://www.orange.com/en\\_EN/group/governance/board-directors/index.jsp](http://www.orange.com/en_EN/group/governance/board-directors/index.jsp) (last visited Mar. 25, 2010). From the biography of Didier Lombard, appointed CEO and then chairman of the board of directors of France Télécom after Breton: From 1988 to 1990, he was the Scientific and Technical Director at the Ministry of Research and Technology. From 1991 to 1998, he was General Manager of Industrial Strategy at the Ministry in charge of Economy, Finance and Industry. He is Officier de la Légion d'honneur and Commandeur dans l'Ordre National du Mérite. *Id.*; *Stephane Richard, Chief Executive Officer, FRANCE TELECOM*, [http://www.orange.com/en\\_EN/group/management/members/Stephane\\_Richard.jsp](http://www.orange.com/en_EN/group/management/members/Stephane_Richard.jsp) (last visited Mar. 25, 2010). In February 2010, Stephane Richard was appointed as CEO; he graduated from the prestigious Ecole Nationale d'Administration, served in many high positions in industry and in many high level public service posts, including Chief of Staff for the French Minister for the Economy, Industry and Employment (2007-2009). *Id.*

or of other actors who work in the telecommunications field. However, France Télécom did not just receive funding for universal service, it also paid into the fund, both as “France Télécom” and for its mobile operator, Orange, and since it was – by any criteria – still the largest operator, it paid the largest share. A member of France Télécom described this as “we take the money out of our right pocket to pay into our left pocket.”<sup>32</sup>

In addition to France Télécom, France had three substantial mobile operators: Orange, which is a part of the France Télécom group, SFR (Société Française De Radiotéléphone) and Bouygues Télécoms.

In 2008, SFR merged with the fixed operator Neuf Cegetel, and therefore at that point also owned a fixed network:

“With 19.7 million mobile customers and 3.9 million high-speed Internet customers, the new SFR – created from the merger between SFR and Neuf Cegetel\* – is the leading alternative mobile and fixed-line operator in Europe, offering solutions tailored to the needs of individuals, companies and operators.”<sup>33</sup>

SFR is a large company with years of experience and substantial sophistication. It is also owned by large companies. The Vivendi group mostly holds SFR.<sup>34</sup> Vivendi is a large multi national company, self-described as “a world leader in communications and entertainment.”<sup>35</sup> SFR is clearly not a small startup without business savvy or ability to defend itself.

The other mobile operator, Bouygues Telecoms, belongs to the Bouygues group, a powerful economic conglomerate with subsidiaries in the construction area and communications area in France and worldwide.<sup>36</sup> Once again, it is by no means a start up or a company without business experience.

The fixed operators in France include, among others, Belgacom, Belgium’s incumbent, BT France – a subsidiary of the British incumbent – and other large firms.<sup>37</sup> There are, of course, small startups as well, but many of the cases, as a glance at the list in Appendix II demonstrates, were brought by large and sophisticated operators.

<sup>32</sup> Interview with member of France Télécom, in Paris, Fr. (Dec. 22, 2004).

<sup>33</sup> SFR, VIVENDI, <http://www.vivendi.com/vivendi/SFR,952> (this was the text there when last visited Mar. 10, 2010; it has since been changed and now reads: “: SFR is a 56% subsidiary of Vivendi. With more than 20 million mobile customers, 4.6 million broadband Internet customers and 6,248 million euro in revenues for the first half of 2010, SFR is Europe’s leading alternative operator and France’s leading alternative telecommunications operator. SFR is an integrated operator, owner of its mobile and fixed-line infrastructures, able to respond effectively to the needs of all customers – the general public, professionals, businesses and other operators.”. This change supports rather than undermines the point made – that SFR is not a small start up but rather a part of a large and experienced company).

<sup>34</sup> This information is taken from Vodafone’s own site, where it lists its holding in other telecommunications company. Available at: [http://www.vodafone.com/start/investor\\_relations/structure\\_and\\_management/subsidiaries.html](http://www.vodafone.com/start/investor_relations/structure_and_management/subsidiaries.html), (last visited Mar. 10, 2010).

<sup>35</sup> Press Release, Vivendi, Vivendi to Emphasize its Position as a World Leader in Communications and Entertainment with its New Advertising Campaign (Mar. 9, 2009), available at [http://www.vivendi.com/vivendi/IMG/pdf/PR090309\\_CAMPAGNE\\_PUBLICITAIRE.pdf](http://www.vivendi.com/vivendi/IMG/pdf/PR090309_CAMPAGNE_PUBLICITAIRE.pdf).

<sup>36</sup> *Presentation of the Bouygues Group*, BOUYGUES, <http://bouygues.com/en/group/presentation/presentation-of-the-bouygues-group/presentation-of-the-bouygues-group/> (last visited Mar. 10, 2010).

<sup>37</sup> *Les Opérateurs Télécoms*, ARCEP, <http://www.arcep.fr/index.php?id=9320> (last visited Mar. 10, 2010).

## II. THE ECJ DECISION STORY—FRENCH RESISTANCE

To read the ECJ's decision and the very few relevant scholarly references to the decision,<sup>38</sup> universal service is the story of French resistance to the European Union's desire to create real competition in the market. France, when creating its system for funding universal service, has in design and implementation skewed the funding system to benefit France Télécom at the expense of new operators. However, the European Commission refused to let France get away with this. The most dramatic battle began in 2000, when, after repeated communications with France did not lead to corrective action, the European Commission filed a complaint with the ECJ against the French universal service funding system.

On December 6, 2001 the ECJ justified the commission's misgivings and ruled against France,<sup>39</sup> finding that its system for funding universal service violated the European directives.<sup>40</sup> The findings can be grouped under four headings. First, inflating the costs of universal service, thereby benefiting France Télécom at the expense of new entrants. For example, ECJ criticized France's inclusion of "red list" costs—the list of customers whose name will not appear in the directory, non-listed customers—as part of the calculation. Conversely, France did not calculate the "intangible benefits" that France Télécom will receive from being the universal service provider.<sup>41</sup> France was also charged with "estimating up" in several cases—i.e., evaluating costs beyond what was the rate in other countries. Second, the commission strongly criticized several methodological "shortcuts" used by France to calculate the costs of the first years. France chose not to calculate some of the components in its formula, instead using estimates based on the practices in other countries as shortcuts. For example, it set the net cost of non-profitable subscribers at one percent of total turnover; and the geographical component at three percent of turnover. It also calculated the initial cost of a non-profitable household as if all households were non-profitable, claiming it is unable to identify those that were profitable before the balancing of the tariffs. The claim against the method was that the French calculations lacked transparency, both because some of the components of the formula were estimated based on comparisons with other countries without explanation of the specific numbers arrived at, and because French government did not submit information it was required to provide under the law. Finally, the Commission and France disagreed on the interpretation of several provisions of the directive. For example, the commission – and the Court – interpreted the directive as requiring the tariffs, if not completely rebalancing them by 2000, at least a detailed timetable. The French Government did not interpret the directive to require such a timetable.

Finding against the French system, the ECJ, under this version of the story, bravely forced the rogue state to correct its problematic practices. Indeed, ART's reevaluation after the ECJ's decision showed substantial reductions in the assessed amount of costs of universal service and the amount operators had to pay to the fund. The amount for 1998 went down from

---

<sup>38</sup> COLIN D. LONG, *GLOBAL TELECOMMUNICATIONS LAW AND PRACTICE* (2004); Renaudin, *supra* note 20, at 36-37; Michel Berne, *Telecommunications Universal Service in France*, 10 INFO 121, 125-26 (2008).

<sup>39</sup> Case C-146/00.

<sup>40</sup> *Id.* A detailed description of the claims and the ECJ decision is attached here as Appendix I.

<sup>41</sup> Britain, for example, did consider their incumbent's – British Telecoms, now BT – in their analysis of universal service costs. This led the British regulator, at the time, Oftel, the Office of Telecommunications, to conclude that the benefits cancel out the costs and BT does not deserve to be reimbursed. Dorit Rubinstein Reiss, *Regulatory Accountability: Telecommunications and Electricity in the United Kingdom, France and Sweden* (Feb. 2008) (unpublished Ph.D. dissertation, University of California, Berkeley) (on file with author).

4,374 million francs before the ECJ's decision to 1,806 million francs after it; the amounts for 1999 went down from 1,646 million francs before to 725 million francs after the decision.<sup>42</sup>

However, even with the ECJ's brave interference, the French system was not completely fixed, and constant vigilance was required. Luckily, the operators competing with France Télécom took the burden on themselves. Accordingly, when the French regulator continued to be recalcitrant, the association of French operators—AFORST—filed another complaint with the commission.<sup>43</sup> Similarly, operators brought several suits in the French courts against France, demanding that the system be corrected.

This version of the story can be supported by other examples of tensions between the commission and France over France's protection of national champions, and scholarship showing the French tendency to strongly support such champions.<sup>44</sup> It can also be supported by focusing on ideological differences in values between France and the commission.<sup>45</sup> Universal service is important to the French. The commission, on the other hand, has been promoting and supporting liberalization for years. It values open competition and the market. The definition of universal service in the EU directive surrounds it with many caveats. The commission that enforces it does not encourage it. The ECJ, as part of the EU institutions and as an institution enforcing treaties that place great weight on open competition, may be more sympathetic to the operators' view than to the French desire to assure generous compensation of the universal service provider.<sup>46</sup> However, this is not the only possible story.

### III. AN ALTERNATIVE STORY: NEW ENTRANTS V. UNIVERSAL SERVICE FUNDING

A very different story can be told about the struggle around universal service funding. While the two stories do not directly contradict each other, the second story suggests different cautions, many of which figure prominently in the United States regulation of the sector.

Under the second story, when transposing the universal service system into domestic law, the French government created a mechanism to properly fund universal service. That mechanism will allow the level of services the French government wanted to secure and assure that France Télécom will not bear the costs of universal service on its own. If France Télécom is to operate

<sup>42</sup> This recalculation of the amount after the ECJ's decision is taken from: Autorité de régulation des télécommunications (2002) *Décision 02-329, Avril 23 2002, "Proposant les évaluations rectificatives du cout du services universel et les contributions des operateurs pour les années 1997 a 1999 et proposant une modification de l'évaluation prévisionnelle du cout du service universel et des contributions des operateurs pour l'année 2002*. Can be found on the regulator's site, at: [www.arcep.fr/](http://www.arcep.fr/).

<sup>43</sup> Renaudin, *supra* note 20, at 36.

<sup>44</sup> Frank S. Benyon DIRECT INVESTMENT, NATIONAL CHAMPIONS AND EU TREATY FREEDOMS: FROM MAASTRICHT TO LISBON 96 (2010); Ian Bartle, *When Institutions No Longer Matter: Refrm of Telecommunications and Electricity in Germany, France and Britain*, 22 J. PUB. POL'Y 1, 7 (2002) Volker Schneider, *Institutional Reform in Telecommunications: The European Union in Transnational Policy Diffusion*, in TRANSFORMING EUROPE: EUROPEANIZATION AND DOMESTIC CHANGE 60, 77 (Maria Green Cowles et al. eds., 2001); Bartle, *supra* note 4 at 7; Thomas Kiessling & Yves Blondeel, *The EU Regulatory Framework in Telecommunications: A Critical Analysis*, 22 TELECOMMS. POL'Y 571, 572-92 (1998); Sebastian Eyre & Nick Sitter, *From PTT to NRA: Towards a New Regulatory Regime?*, in EUROPEAN TELECOMMUNICATIONS LIBERALISATION 39, 48-50 (KJELL A. ELIASSEN & MARIT SJØVAAG eds., 1999). But for a different vision that sees Europe and national governments as cooperating in liberalization. Thatcher, *supra* note 5.

<sup>45</sup> NICOLAS JABKO, PLAYING THE MARKET: A POLITICAL STRATEGY FOR UNITING EUROPE, 1985-2005 160-63 (2006).

<sup>46</sup> I am grateful to Frederic Carteron who, though his analysis was different than the one above (and one I hope he publishes separately), raised the point of differing values.

as any other firm competing in the market, forcing it to solely fund the non-profitable services government thinks should be provided, it would be at a disadvantage compared to its competitors. Rather, costs should be part of the cost of doing business in France and shared in a way that puts all market players in the same situation. Accordingly, the mechanism requires other operators to contribute to a universal service fund that will cover the costs. ART calculates the costs according to criteria detailed by the legislature. The costs are apportioned among operators according to an objective formula based on the advantages they get from the system. While France Télécom, the monopoly that receives the highest advantages, will bear the bulk of the costs, other operators will bear a proportion of the costs according to their profits. France designed the system according to its best understanding of what was allowed under European Union law, although it did place a value on compensating France Télécom for real costs it incurs in providing what is, in effect, a social service.<sup>47</sup>

The competing operators are for-profit companies that do not share the French government's commitment to universal service. Even if they may be sympathetic to universal service in principle, they naturally want to minimize their share, or not pay it. Faced with large annual bills for universal service, they have a strong incentive to mobilize and fight to undermine the funding system. Initially, they took the fight to Europe. After the ECJ had its say finding much to fault with the French system and the French regulator fixed the system accordingly, they had to find a different way to avoid the costs. The telecommunications operators started challenging every decision of the French regulator in the courts—whether or not such a challenge had merit and realistic chances of success.

Accordingly, this view sees the ECJ decision in a different way. The source of the EU action is, in this view, a result from the operators' objection to paying for universal service. Specifically, it stemmed from complaints lodged by two associations of operators, l'Association Française des Opérateurs Privés en Télécommunications ("l'AFOPT") and l'Association des Opérateurs de Services de Télécommunications ("l'AOST").<sup>48</sup> Accordingly, the motivation of the process is not in the commission's efforts to force France to tow the line, but in the operators' unhappiness with having to pay.

This view also emphasizes another direct consequence of the ECJ decision. Aside from lower universal service costs assessed against the operators, the decision added substantial costs and upheavals to a system that was not easy to implement to start with. The ECJ decision sent the Ministry and ART back to the drawing board, to redesign the funding mechanism according to the ECJ's requirements and to redo the work done for the first years, 1997-1999 at the least. A year and a half later, in April 2002, ART suggested modifications.<sup>49</sup> The modifications deviated from ECJ's decision in a few details, where ART saw the ECJ's decision as being based on a misunderstanding of the situation. For example, ART explains in its decision that while the ECJ criticized ART for not including a detailed breakdown of the calculation of the element  $Pe$ <sup>50</sup> in its formula, ART believed that a detailed breakdown was actually included. However, for the most part ART put in place substantial changes in the system, cooperating with the ECJ decision. Following ART's work, on July 11, 2002 the minister enacted a regulation ("arrêt")<sup>51</sup> setting the

---

<sup>47</sup> Interview with member of the French Telecommunications Agency, ART, in Paris, Fr. (Dec. 9, 2004); Interview with member of France Télécom, the French telecommunications incumbent, in Paris, Fr. (Dec. 22, 2004).

<sup>48</sup> Autorité de régulation des télécommunications, *supra* note 44.

<sup>49</sup> Autorité de régulation des télécommunications, *supra* note 44.

<sup>50</sup> Which represents the standard monthly line rental charge of reference in the formula, i.e. the theoretical line rental charge that would be achieved if complete rebalancing took place.

<sup>51</sup> The French system, where the executive enjoys substantial powers to legislate as well as to create rules, has more

sums for 1998-1999 as well as for 2002 according to ART's recommendation. Shortly after that, ART sent out individual decisions setting each operator's contribution for 2002. Later on it also sent out the individual decisions regarding 1998-1999.

At this point the operators started using the domestic courts to combat the requirement that they share in paying the cost for universal service. In the years following the ECJ decision many cases were brought against the regulator. Some had merit, but many were brought without any attempt to appeal to the minister, ignoring a basic procedural requirement embedded in the French Code of Administrative Justice.

The first case decided was brought by the company Tiscali, objecting to the assessment of over three million Euros for its universal service contribution in 2002. Tiscali emphasized its financial difficulties and the fact that the law was not yet changed in accordance with the ECJ's decision.

The court made two important rulings.<sup>52</sup> As a general matter it stated that funding universal service was an important policy objective for which the minister was responsible. Since the matter could be urgent, the minister had, in principle, the right to enact temporary decrees setting amounts to be paid even before the law was changed in accordance with the ECJ decision. However, the court ruled that such decisions must be made in a transparent way. The *arrêt* in this case was not published, nor were the operators notified about it before receiving their apportionment—therefore it was void. While the court acknowledged that the operator had a case in this instance, it made it clear that the operator's main contention, that no costs can be placed on operators until a new decree<sup>53</sup> is passed, was wrong. The Minister and ART can require Operators to contribute to the universal service fund before the law is amended according to the ECJ decision, as long as the process is transparent and the ruling observed.

The Tiscali case was the opening shot, followed by many other cases. In 2005 alone, the Conseil d'État decided 15 cases regarding ART's decisions about universal service for the years up to 2002. In an interview with a member of ART, he said that almost every decision of the regulator was attacked in the courts.<sup>54</sup> In 2002 – 2006, at least one operate, often more, systematically attacked every decision setting the rules used to calculate the costs for the past year and the final calculation and compensations balances for that year.<sup>55</sup>

Out of the 15 cases decided in 2005, 10.5 of the complaints against ART's price determinations were rejected by the court for not requiring “reclamation” from the minister – in more familiar American parlance, for non-exhaustion of administrative remedies.<sup>56</sup>

---

than one kind of rule/regulation. An *arrêt* is a relatively low-level – i.e., specific, and subject to other types of regulations - implementation decree.

<sup>52</sup> CE Sect., June 18, 2003, Societe Tiscali Telecom Req. No. 250608, available through [www.legifrance.com](http://www.legifrance.com) (last visited April 29 2011).

<sup>53</sup> A decree is a higher level general regulation.

<sup>54</sup> Interview with member of the French Telecommunications Agency, ART, in Paris, Fr. (Dec. 9, 2004).

<sup>55</sup> *Id.* A complete list of cases, with a (very) short description of each, is attached as Appendix II.

<sup>56</sup> For several of these the complaint against the decree was acknowledged as justified under Tiscali, but the ART's decision could not be addressed because the company in question did not address the minister beforehand. Therefore, only part of the complaint was rejected for non-exhaustion. *See, e.g.*, CE Sect., Apr. 1, 2005, Societe 9 Telecom Req No 250609 available through [www.legifrance.com](http://www.legifrance.com) (last visited April 29 2011); CE Sect., Apr. 1, 2005, S.A. Bouygues Telecom, Req. No. 250572, available through [www.legifrance.com](http://www.legifrance.com) (last visited April 29 2011); CE Sect., Dec. 5, 2005, S.A. Bouygues Telecom, Req. No. 257683 available through [www.legifrance.com](http://www.legifrance.com) (last visited April 29 2011). The principle that before taking an administrative agency to court an actor must exhaust – make use of – the procedures to challenge the decision offered by the agency is a long standing one in American administrative law. *See, for example, Sims v. Apfel*, 530 U.S. 103, 108-110, 120 S.Ct. 2080 2085-2087, 147 L.Ed.2d



Article R. 772-2 of the Code of Administrative Justice states, in the relevant parts: “Les requêtes mentionnées au deuxième alinéa de l'article précédent doivent être précédées d'une réclamation adressée à la personne morale qui a établi la taxe. . . .”<sup>57</sup> Which translates to: The demands (requests) mentioned in the second paragraph of the previous article<sup>58</sup> must be preceded by an appeal (reclamation) to the actor establishing the tax.<sup>59</sup>

In other words, the law clearly requires an application to the minister against the assessment made against the operator. In spite of this clear requirement, the cases were filed without any attempt by the companies to address their concerns to the regulator or minister beforehand. As described above, the companies are sophisticated large actors, including French branches of other European incumbents, such as Teleitalia, the Italian incumbent, and telecommunications companies which belong to large, sophisticated French business conglomerates, such as Bouygues Telecoms and SFR. They are well acquainted with French law, or at least, they can hire lawyers who are. It is unlikely the lawyers missed the non-exhaustion requirement described above. The impression is that cases are being brought to the Conseil d'État even if operators know the case will be rejected. The question is, why.

One explanation is that the operators, rightly or wrongly, expect the minister to automatically side with the regulator, and do not want to waste time on a futile appeal. This may be true, but they must know that not approaching the minister will harm their chances at appeal. Another explanation is needed.

In a system where decisions need to be made every year and where the decisions require a high level of expertise and intensive labor, recurring appeals can be very disruptive. The Conseil d'État did not overrule any of the cases on substantive grounds; but it annulled several of the decisions that were made before the passage of the 2003 decree on procedural grounds. It did so in decisions that came down in 2005, after the decree was in place. That means the companies could hope to delay the process and/or recoup some of the costs. The courts could be used to delay and weaken the implementation of the universal service funding mechanism.

#### IV. DISCUSSION

The first question is which version of the story is more convincing. The first story fits views of the French economy as based on support of national champions and opposition to the liberalization process.<sup>60</sup> It can fit with previous tensions between France and the European Commission on liberalization, and it is supported by the dramatic decrease in costs of universal service charged to the operators compared to the costs before the ECJ decision. However, the second version seems more convincing.

---

80 (2000) At the state level see *Project: State Judicial Review of Administrative Action*, 43 ADMIN. L. REV. 571, 661-679 (1991).

<sup>57</sup> CODE DE JUSTICE ADMINISTRATIVE art. 772-2. The second paragraph in the article has been omitted.

<sup>58</sup> Demands related to taxes and other impositions that fall under the administrative jurisdiction. *See id.*

<sup>59</sup> The translation is my own.

<sup>60</sup> Élie Cohen & Claude Henry, *Sur les Bases et l'Évolution Récente des Services Publics Industriels et Commerciaux en France et dans l'Union Européenne*, in SERVICE PUBLIC, SECTEUR PUBLIC (Conseil d'Analyse économique ed., 1997); Sebastian Eyre & Nick Sitter, *From PTT to NRA: Towards a New Regulatory Regime?*, in EUROPEAN TELECOMMUNICATIONS LIBERALISATION 39 (KJELL A. ELIASSEN & MARIT SJØVAAG eds., 1999); Rainer Eising & Nicolas Jabko, *Moving Targets: National Interests and Electricity Liberalization in the European Union*, 34 COMP. POL. STUD. 742 (2001); Mark Thatcher, *Winners and Losers in Europeanisation: Reforming the National Regulation of Telecommunications*, 27 W. EUR. POL. 284 (2004) [hereinafter Thatcher 2004].

The realities of universal service are such that the benefits to France Télécom from increasing the funding are not very great. France Télécom pays the largest share of universal service costs. The legal framework allows other operators to provide certain parts of the universal service too. In particular, companies can offer social tariffs—reduced tariffs to individual groups—and be reimbursed for their loss from the universal service funds. For a time, at least one company took advantage of that option.<sup>61</sup> Therefore, increasing universal service funding is not a dramatic help for France Télécom. The French government's interest in inflating the costs of universal service to support the incumbent is not as great as it might appear at first blush.<sup>62</sup>

But the more important evidence supporting the second story is the continuing and recurrent appeals to the courts. The heavy use of the domestic courts after the ECJ decision—especially bringing cases doomed to failure—suggests reluctance to pay the contribution, whatever the amount. Even winning regularly, the need to constantly defend its behavior in court adds to the agency's burden and may lead it to be very cautious in its decision-making.<sup>63</sup>

Judicial review of administrative agencies seeks to prevent abuses and offer a counter to agency professional biases.<sup>64</sup> However, as acknowledged by scholars, judicial review carries its own risks.<sup>65</sup> One of those risks, though not the only one, is the ability of regulatees to use courts to delay and undermine regulation they are unhappy with. The idea that courts can be used to delay implementation of regulation is not new.<sup>66</sup> However, dealing with the problem presents a constant challenge, and few real solutions have been suggested. The problem is that the companies involved have a legitimate interest to defend. The operators need a way to protect their rights and prevent abuses by the regulators, as well as to solve disputes with them—and the courts are an acknowledged mechanism to handle these kinds of issues.<sup>67</sup> In the French case especially, companies had good reasons to worry about the regulator being subservient to France Télécom, since there were close ties between many members of the regulators and France Télécom—specifically, many members of the regulator were trained in the *École Nationale*

---

<sup>61</sup> The company Kertel provided social tariffs between 2000-2002. See *Autorité de régulation des télécommunications (2000) Décision 00-459, May 17 2000, relatif a la demande de la société Kertel de proposer tarifs sociaux*; *Autorité de régulation des télécommunications (2002) available at www.arcep.fr. (recommending that Kertel be allowed to provide social tariffs)*; *Décision 02-308, April 23 2002, relatif au retrait pour l'année 2002 de la société Kertel de la prestation de « tarifs sociaux » available at www.arcep.fr. (recommending that Kertel be allowed to stop providing social tariffs)*.

<sup>62</sup> Though it is a help, and could make it harder for a new competitor to successfully compete if they do indeed pass on their costs to the consumer through higher prices.

<sup>63</sup> On negative consequences of heavy litigation on agency behavior see EUGENE BARDACH & ROBERT A. KAGAN, *GOING BY THE BOOK: THE PROBLEM OF REGULATORY UNREASONABLENESS* 101-118 (1982); ROBERT A. KAGAN & LEE AXELRAD, *REGULATORY ENCOUNTERS: MULTINATIONAL CORPORATIONS AND AMERICAN ADVERSARIAL LEGALISM* 389-400 (2000).

<sup>64</sup> Martin Shapiro, *Judicial Delegation Doctrines: the US, Britain, and France*, 25 W. EUR. POL. 173 (2002).

<sup>65</sup> Tom Burke, *On the Rights Track: the Americans with Disabilities Act*, in *COMPARATIVE DISADVANTAGES? SOCIAL REGULATIONS AND AMERICAN ADVERSARIAL LEGALISM* 242, 244 (Pietro Nivola ed., 1997); CHRISTOPHER F. EDLEY JR., *ADMINISTRATIVE LAW: RETHINKING JUDICIAL CONTROL OF BUREAUCRACY* 237-244 (1992); MARTIN SHAPIRO, *WHO GUARDS THE GUARDIANS?: JUDICIAL CONTROL OF ADMINISTRATION* 128-134 (1988); ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 29-32 (2001).

<sup>66</sup> Rebecca Beynon, *The FCC's Implementation of the 1996 Act: Agency Litigation Strategies and Delay*, 53 FED. COMM. L.J. 27 (2000); Thomas O. McGarity, *The Courts and the Ossification of Rulemaking: A Response to Professor Seidenfeld*, 75 TEX. L. REV. 525 (1997); KAGAN, *supra* note 66 at 225; STUART A. SCHEINGOLD, *THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE* 145-46 (1974).

<sup>67</sup> MARTIN SHAPIRO, *COURTS: A COMPARATIVE AND POLITICAL ANALYSIS* 17-19 (1981).

Supérieure des Télécommunications (now Telecom Paris Tech), previously funded by France Télécom, or worked for the company before being members of the regulator.<sup>68</sup> Therefore, a mechanism for defending their rights is justifiably important to these companies.

On the other hand, the companies also have good reasons not to accept the system of funding universal service. From the point of view of the new entrants, avoiding costs they do not have to bear is part of their “job”—they are corporations judged by the amount of money they make for their shareholders, and fighting to establish themselves in a new market. Even if they agree with the idea of universal service in principle, there is no reason for them to want to pay for it if they can avoid or minimize costs—a classic free rider situation. As sophisticated strategic actors they know how to use to their advantage all the mechanisms in place, including the courts. The problem, then, is how to balance the new entrants' legitimate interest in protecting their rights while minimizing their ability to abuse the system.

One alternative is to use judicial review doctrines to balance those interests, especially in the case of the Conseil d'État. The Conseillers d'État have been trained as civil servants and specialize in handling administrative cases. Furthermore, some members of the Conseil fill important roles in the public service.<sup>69</sup> They can be trusted to understand the realities of administration and create appropriate doctrines.

The problem with this solution is not the inability of the Conseil d'État to handle the cases before it, but the way the court is used in this area. It is litigation itself, not how cases are decided, that diverts resources to handling cases, and has the potential to cause delay and uncertainty.<sup>70</sup>

Another solution is to impose substantial costs. Access to the Conseil d'État is in fact limited by the risk of the loser having to pay costs, including lawyers' fees.<sup>71</sup> In some of the cases below, though not in many, costs have already been awarded to the government; however, those costs were clearly not enough to deter since they are not very high. One way to reduce problematic lawsuits is for the Conseil d'État to use its powers to award higher levels of costs—“punitive” costs—where appropriate. The concern is that such a power may deter suits that should be brought—i.e., have too much of a chilling effect. The judges' expertise may justify entrusting them with such power. On the other hand, since the Conseil d'État does have very close ties to the administration, on the face of it, concerns may be raised about it using that power to protect the government. However, the Conseil d'État enjoys a high level of respect and is seen as independent, certainly not as being hand in glove with the government,<sup>72</sup> it can safely use its powers to impose costs without much risk of provoking undue criticism. Yet another possible way around the problem is to design the regulatory system to reduce incentives to use the courts as a delay tactic.

The French experience can act as a deterrent to other countries—European or not—who want to fund universal service. Since no sane regulator wants to spend substantial amounts of time in the courts, and since in addition to the complexity of setting the initial contribution

---

<sup>68</sup> Interview with member of France Télécom, the French telecommunications incumbent, in Paris, Fr. (Dec. 22, 2004). That is not to say the regulator does work for France Télécom's interests – but it could look that way.

<sup>69</sup> L. NEVILLE BROWN & JOHN S. BELL, *FRENCH ADMINISTRATIVE LAW*, 63 (5th ed. 1998); YVES ROBINEAU & DIDIER TRUCHET, *LE CONSEIL D'ÉTAT* (1994).

<sup>70</sup> KAGAN, *supra* note 66, vii, 13-14.

<sup>71</sup> Generally true for many civil law countries. See UGO A. MATTEI, ET AL., *SCHLESINGER'S COMPARATIVE LAW: CASES, TEXTS, MATERIALS* 691-92 (Foundation Press, 7th ed. 2009).

<sup>72</sup> ROGER PERROT, *INSTITUTIONS JUDICIAIRES* 35 (11th ed. 2004); JEAN VINCENT ET AL., *INSTITUTIONS JUDICIAIRES: ORGANISATION, JURIDICTIONS, GENS DE JUSTICE* 82-84 (5th ed. 1999).

amounts the French system led to a very high level of litigation, others may hesitate to follow their lead. In fact, no European country besides France and Italy adopted a direct funding mechanism.<sup>73</sup>

France's difficulties with its universal funding mechanism support funding the universal service through some means other than a special fund. One way would be a direct addition to customers' bills—in which case the costs would be directly passed on to consumers, as is done by the French electric utilities; transaction costs might be reduced in this case. Another is adding additional charges through one of the other funding schemes, such as interconnection prices. A fund, where the operators are directly charged large concentrated sums once a year, makes them feel the loss much more. Since it is a direct cost and is strongly felt the operators are likely to mobilize to fight it. As has been observed by scholars, a burden on a concrete, concentrated group is much more likely to generate resistance than a burden on a diffused group.<sup>74</sup>

## CONCLUSION

It may be tempting to see the French experience as a case of an anti-market state trying to impose costs on new entrants in favor of its former state monopoly. That it is not the only way in which the struggle around the costs of universal service can be seen. Surprisingly—or unsurprisingly—the French experience in these cases mirrors developments in the United States where sophisticated companies use courts to limit regulation. However, the European institutions, accustomed to viewing the French system as a "dirigist" institution willing to bend and avoid the law to support its national champions, are not sensitive to the other side of the equation, new entrants' struggle to avoid handling of cases like the one brought to the commission.

In addition, in this case the opening of the market directly led to an increase in litigation, mirroring Kagan's predictions for Europe.<sup>75</sup> Litigation around universal service is now a fact of life for ART. Both it and the government should consider how to minimize the problems it creates while safeguarding the legitimate interests of the companies involved.

---

<sup>73</sup> Though some of them provide some funding to universal service indirectly through their interconnection tariffs. See Thomas Kiessling & Yves Blondeel, *The EU Regulatory Framework in Telecommunications: A Critical Analysis*, 22 TELECOMMS. POL'Y 571 (1998).

<sup>74</sup> See, e.g. JAMES Q. WILSON, POLITICAL ORGANIZATIONS 308-14 (1973); R. Kent Weaver, *The Politics of Blame Avoidance*, 6 J. PUB. POL'Y 371, 373-74 (1986).

<sup>75</sup> Robert A. Kagan, *Should Europe Worry About Adversarial Legalism?*, 17 OXFORD J. LEGAL STUD., 165, 172-75 (1997).

APPENDIX I: ECJ'S DECISION—COMMISSION'S COMPLAINTS, FRANCE'S RESPONSES, AND THE ECJ'S CONCLUSIONS

*First Complaint*

Commission's claims	France responses	Decision
Requirement to contribute to universal service in 1997 has no basis in community law since FT was still a monopoly. Costs can only be refunded if there is an unfair burden; that is not the case with a monopoly.	Article 4c does not require not charging for 1997. There is no express link between abolishing the monopoly and funding universal service.	Since in 1997 France Télécom had a monopoly on voice telephony there was no unfair burden if it had to bear the full cost of the universal service obligations.

*Second Complaint*

Commission's claims	France responses	Decision
France did not rebalance its tariffs before 1/1/1998 and did not send a detailed time line. It put in the law that the balancing will be complete before 31/12/2000 but did not send a detailed timetable.	Disagree that there needs to be a timetable—a final date is enough under the directive, and they have that.	The law requires that rebalancing must be achieved, and the subscription tariff must be equal to it—both based on costs. Undercutting the balancing tariff is unjustified. Balancing was not achieved, even if the difference was small, and the French Government should submit the timeline.

*Third Complaint: method of calculating next costs*

Commission's claims	France responses	Decision
Profitable household subscriptions were included: profitable—if cost less than revenues. Need to determine this selectively. In reality, all subscribers in France were included as part of the calculation.	Ok to provide services to customers which can be provided at a loss or condition beyond normal commercial standard, not focusing on profitable/non profitable.	Annex III to directive sets the description of costs which may be included—only those directly from universal service provision. Provider must not be burdened but equally may not get financial benefit from it. Only costs from non-profitable activities are relevant. The French legislation does not limit costs included sufficiently.

Commission's claims	France responses	Decision
<p>Calculation not transparent: there is no objective criteria: Unclear how Pe was determined. Based on practices in other countries, but there is no real basis—first, in the countries of reference the detailed billing of customers is part of the basic subscription and that's optional for FT. This leads to an artificial increase in Pe, and Pe included costs from maintaining the red list, which P did not.</p>	<p>The 65 frank price stemmed from a comparison between countries which lead to a margin of 55-75. So, the value is sufficiently transparent. Impossible before balancing to identify the subscribers served in accordance with normal commercial standards.</p>	<p>Bench marking is generally ok to set prices, but must be done carefully. The commission is right that the range in the Champsaur report is very broad. So, more specifics are necessary, and only costs related to universal service can be included.</p>

*Fourth complaint: using flat rate rather than calculation for certain components*

Commission's claims	France responses	Decision
<p>Net cost for non-profitable subscribers artificially set at one percent of turnover. This is higher than estimates in other countries, and higher than that used in France in 1999-2000.</p>	<p>The Champsaur report shows there was no reliable way to calculate costs in 1998, so suggested a margin hat led to one percent. Unclear if it's possible to calculate 1997 costs—ART does not have data. Only reliable method, though imprecise. Little significant for cost to providers—their position was minor in these years.</p>	<p>The directive requires a precise calculation of net cost, and states how the costs are to be calculated. It therefore does not permit a flat-rate calculation. The 1997-1998 system is therefore flawed.</p>
<p>Geographical component was calculated as three percent of turnover. Unclear how amount arrived at, although elements are mentioned.</p>	<p>Three percent stemmed from an international comparison—a pragmatic approach. A complex calculation would only lead to a very marginal change. 1999 methodology can be used to 1997-98, but it's really difficult. And allowing the precedent of choosing another methodology will lead to uncertainty for traders.</p>	

Commission's claims	France responses	Decision
Hardship tariffs: calculations imprecise. Change of system does not fix the infringement.	In 1999 a new system was introduced, with reduction for minimum wage earners and disabled veterans. In special cases the state assumed specific debts.	

*Fifth Complaint: other components of universal service drawn to increase costs*

Commission's claims	France responses	Decision
Calculation of net cost of non-profitable zones: does not include proceeds from inclusion in red list and comfort services. No intent to remedy the pre 1999 situation. Publication of directory separate from red list.	Costs and proceeds of comfort services only taken into account since 1999; red list cannot be separated from the publication of an annual directory. It's not a separate cost components.	French Government concedes it did not comply with directive, commission rejects their claim about the red list—it's separate from the directory.
In 1998 the calculation is based on traditional data, not on best practice.	As much as possible, an account was taken of the commission's recommendations relating to the application of Annex III. Application of the methodology of 1999 to 1998 is really hard.	
No account of intangible benefits to FT.	Agreed—cannot estimate it retroactively.	

*Sixth Complaint*

Commission's claims	France responses	Decision
No reporting of the contributions of parties to universal service costs.	Agreed.	Complaint founded.

APPENDIX II: CASES BROUGHT BY COMPETITORS AGAINST THE ART'S UNIVERSAL SERVICE DETERMINATIONS<sup>76</sup>

<i>Case Number, Date</i>	<i>Party Bringing Case</i>	<i>Legal Issue</i>	<i>Parties' Request</i>	<i>Court's Decision</i>
1. 250813, November 8, 2002	La Société Tiscali Télécom	Delay of payment according to ART's decision.	That ART's decision requiring Tiscali to pay in two installments 3, 670,000 Euros for its universal service contribution for 2002 be suspended.	Grave doubt about legality of the decision and grave damage from no suspension lead to decision being suspended.
2. 250608, June 18 2003	La Société Tiscali Télécom	Can the minister temporarily set universal service contribution without a new system put in place?	Annulment of the decree of the minister setting universal service for 2002 and costs.	Yes, minister could create a temporary system, but the mode of evaluation of costs and the rules of the system should be published. They were not. Decision overturned for lack of transparency. Costs awarded to Tiscali.

<sup>76</sup> In ascending order of date. All cases here were brought before the Conseil d'état.



<i>Case Number, Date</i>	<i>Party Bringing Case</i>	<i>Legal Issue</i>	<i>Parties' Request</i>	<i>Court's Decision</i>
3. 250643, April 1 2005, Conseil D'État	Société Cegetel	Objects to the mode of calculating the contribution and the mathematic approach.		<p>1. Decree already declared invalid in Tiscali's case, claim moot.</p> <p>2. For specific sum—denied for non exhaustion, not addressing minister.</p>
4. 250644, April 1 2005, Conseil D'État	Société Française De Radiotéléphone (SFR)	Objects to the mode of calculating the contribution and the mathematic approach.		<p>1. Decree already declared invalid in Tiscali's case, claim moot.</p> <p>2. For specific sum—denied for non exhaustion, not addressing minister.</p>
5. 250645, April 1 2005, Conseil D'État	Société Réunionnaise Du Radiotelephone	Objects to mode of calculating contribution and the mathematic approach.		<p>1. Decree already declared invalid in Tiscali's case, claim moot.</p> <p>2. For specific sum—denied for non exhaustion, not addressing minister.</p>

<i>Case Number, Date</i>	<i>Party Bringing Case</i>	<i>Legal Issue</i>	<i>Parties' Request</i>	<i>Court's Decision</i>
6. 250609, April 1 2005, Conseil D'État	Société Telecom 9	Objects to the mode of calculating the contribution.	Annuling ART's decision informing the plaintiff of the sums it needs to pay in 2002.	Denied for non-exhaustion—the company did not address a first complaint to minister; decision not suffering from defects sufficient to rend it null and void.
7. 250610, April 1 2005, Conseil D'État	Societe Belgacom Telecom France	Objects to the mode of calculating the contribution and the mathematic approach.	Annuling ART's decision informing the plaintiff of the sums it needs to pay in 2002.	Denied for non-exhaustion.
8. 250611, April 1 2005, Conseil D'État	Societe Kaptech	Objects to the mode of calculating the contribution and the mathematic approach.	Annuling ART's decision informing the plaintiff of the sums it needs to pay in 2002.	Denied for non-exhaustion.
9. 250612, April 1 2005, Conseil D'État	Société Ventelo France	Objects to the mode of calculating the contribution and the mathematic approach.	Annuling ART's decision informing the plaintiff of the sums it needs to pay in 2002.	Denied for non-exhaustion.
10. 250614, April 1 2005, Conseil D'État	Société Louis Dreyfus Communication	Objects to the mode of calculating the contribution and the mathematic approach.	Annuling ART's decision informing the plaintiff of the sums it needs to pay in 2002.	Denied for non-exhaustion.

<i>Case Number, Date</i>	<i>Party Bringing Case</i>	<i>Legal Issue</i>	<i>Parties' Request</i>	<i>Court's Decision</i>
11. 250572, April 1 2005, Conseil D'État	S.A. Bouygues Telecom	Objects to the mode of calculating the contribution and the mathematic approach.	Annuling ART's decision informing the plaintiff of the sums it needs to pay in 2002.	Denied for non-exhaustion.
12. 251239, April 11 2005, Conseil d'État	Société Française De Radiotéléphone (SFR), Société Réunionnaise Du Radiotéléphone, S.A. Bouygues Telecom, Société Cegetel	Changing the regulation of financing the universal service to bring it into conformity with EU law—current modification insufficient.	Annuling the minister's decree ("arret") and ART's subsequent specific decisions about the universal service contributions for 2000.	At the relevant date, the law was not corrected according to ECJ decision and there was no urgency to demand money that has been spent eighteen months before; therefore, the minister did not have the authority for the decree. Decree is annulled.  However, as to ART's decision, denied for non-exhaustion.
13. 252125, April 11, 2005, Conseil D'État	S.A. Bouygues Telecom	Jurisdiction over demand to reimburse sums.	That the minister's decision, refusing to reimburse it for its contributions in 1997-2001 be overturn and that the state reimburse it.	Denied for non jurisdiction—should be brought to the tribunal administratif de Versailles

<i>Case Number, Date</i>	<i>Party Bringing Case</i>	<i>Legal Issue</i>	<i>Parties' Request</i>	<i>Court's Decision</i>
14. 250516, May 30, 2005, Conseil D'État	L'association Française Des Opérateurs De Réseaux Et Services De Télécommunications (AFORS)	Attacking the method of calculation for not fitting into the EU framework and distorting competition.	To force the minister to repeal the 1997 decree.	Mooted because decree was already repealed before decision.
15. 257683, December 5, 2005	Bouygues Telecom	Attacking system for not considering immaterial advantage.	To annul the 2003 decree for not considering these advantages.	The method takes those cost into consideration in a different way; the government did nothing wrong by delegating to ART the authority to set the method to calculate those benefits; there is no problem with the current system.
16. 257747, December 5, 2005	L'association Française Des Opérateurs De Réseaux Et Services De Télécommunications (AFORS Telecom).	Attacking system for not considering immaterial advantages.	To annul the 2003 decree for not considering these advantages.	System is ok (addressing substance). <i>Reread.</i>

<i>Case Number, Date</i>	<i>Party Bringing Case</i>	<i>Legal Issue</i>	<i>Parties' Request</i>	<i>Court's Decision</i>
17. 252659, December 12, 2005	S.A. Bouygues Telecom	The legality of the minister decreeing the costs of universal service for 1998-99 without the law being changed first.	Annuling the decree and ordering the reimbursement of the company.	1. Decree annulled—ECJ overturned system, new system not yet in place, no urgency. 2. As for reimbursement, denied for lack of jurisdiction, should go to the "Tribunal Administratif de Paris."
18. 262646, December 12, 2005	Société Française De Radiotéléphone (SFR), Société Réunionnais Du Radiotéléphone, S.A. Bouygues Telecom, Société Cegetel	Attacking the mode of calculation.	Annulment of a decree.	Denied for non-exhaustion.
19. 250656, 28 December 2005	L'association Française Des Opérateurs De Réseaux Et Services De Télécommunications ; L'association Française Des Opérateurs De Réseaux Et Services De Télécommunications	Attacking mode of calculation.	Annuling the decree setting sum for 2002 and retroactively for 1997-2000.	Decree already annulled—part by minister and part by decision in favor of Tiscali.

# A CONTRIBUTION FROM THE SPANISH CONSTITUTIONAL COURT TO THE EUROPEAN CONSTRUCTION PROCESS: REQUESTING PRELIMINARY RULING

*Pedro Tenorio\**

## INTRODUCTION

This Article<sup>1</sup> focuses on the convenience or the obligation of the Spanish Constitutional Court (“CC”) to request preliminary rulings before the Court of Justice of the European Union<sup>2</sup> (“CJEU”). This is a very practical and real problem that requires an urgent answer, as it becomes in Spain increasingly important at the present time. In order to illustrate this, let us remember two different cases.

First, in the Judgment of September 19, 2008,<sup>3</sup> the Spanish Supreme Court overturned a resolution of the Spanish Agency of Data Protection, which ordered the Archbishop to note in the baptism register the exercise of the right to cancel an inscription (which would be the consequence of declaring apostasy in the data protection legislation field). The resolution was based on the idea that the baptism register was a “file” under the data protection legislation. Huelin Martínez de Velasco, a senior judge of the Supreme Court, wrote a dissenting opinion.<sup>4</sup> The dissent employed autonomous concepts of European law (like the definition of “file”) included in a European directive that pursues the complete harmonization of the national legislations on personal data protection to determine the dispute. The dissent’s interpretation was not clear, and the aforesaid judge considered that the Supreme Court should have presented a preliminary ruling to the CJEU. Something similar occurred in the Judgment of the Supreme Court of October 14, 2008,<sup>5</sup> although in this particular case, the dissenting opinion was more thorough. We do not know whether the case will be submitted to the Spanish Constitutional Court. In such a case the Court would find itself in the same situation as the Supreme Court in relation to the European Union Law. Therefore, the reasoning found in Judge Huelin’s dissenting opinion would have also been applicable.

The second case is the Judgment of the Spanish Constitutional Court 199/2009, September 28,<sup>6</sup> about the Euro order. In this judgment, the Spanish Constitutional Court overturned a court order of the Spanish Audiencia Nacional because the referring court order decided to hand a British citizen to Rumanian authorities applying the Euro order. The Spanish Constitutional Court considered that the referring court order violated the right of the challenger to a procedure with all the guarantees (recognized in Article 24.2 of the Spanish Constitution<sup>7</sup>), because the challenger was convicted to a four-year punishment of prison in his absence.

---

\* Professor of Constitutional Law (UNED, Madrid) and Legal Advisor of the Spanish Constitutional Court.

<sup>1</sup> This work has precedent in another piece of work I wrote: *Tribunal Constitucional y cuestión prejudicial ante el Tribunal de Justicia de la Unión Europea*, LA LEY, Nov. 30, 2010, at 1, 1. However, this work doubles the length of the previous one and is particularly more detailed in the analysis of the Spanish Constitutional Court law with regard to the topic.

<sup>2</sup> Former European Communities Court.

<sup>3</sup> STS, Sept. 19, 2008.

<sup>4</sup> STS, Sept. 19, 2008 (Martinez de Velasco, J., dissenting).

<sup>5</sup> STS, Oct. 14, 2008.

<sup>6</sup> S.T.C. 199/2009, Sept. 28.

<sup>7</sup> C.E. Art. 24.2.

Furthermore, the Spanish Audiencia Nacional had not established the condition that the punishment imposed in absence could be revised. Judge Pérez Tremps wrote the dissenting opinion.<sup>8</sup> Judge Tremps based his dissent on various arguments, but this Article focuses on the argument that a European government cannot impose, on any other European governments, its own parameter of protection of fundamental rights. Rather, each European government must function within a common parameter. According to Judge Tremps, if the Constitutional Court viewed a punishment in absence as a violation of the so called “absolute content”<sup>9</sup> it should have presented a preliminary ruling to the CJEU concerning the European rule that regulates the Euro order committing an irresponsibility if Spain did not apply said norm.<sup>10</sup>

## I. IMPORTANCE OF THE PRELIMINARY RULING IN THE CONSTRUCTION OF EUROPEAN LAW

### A. THE PRELIMINARY RULING AS A FEDERALIZING FACTOR IN THE EUROPEAN JURISDICTIONAL ORGANIZATION

Lately, many authors outlined the similarities between the Court of Justice of the European Union and the National Constitutional Courts. In particular, they outlined that, in practice, the Court of Luxembourg does not restrain itself to its function of negative legislator.<sup>11</sup>

The Court of Luxembourg, in a similar way to the Constitutional Courts of the European continent, reserves the monopoly of declaring the unconstitutionality of an act. The function of the Court of Justice of the European Union is to reassure the primacy of European law over the national legislation. It is up to the Court of Justice to define the limits between the interpretation and the application of the European rules. This function makes the preliminary ruling a federalizing factor<sup>12</sup> in the European jurisdictional organization<sup>13</sup>.

<sup>8</sup> S.T.C. 199/2009, Sept. 28 (Tremps, J., dissenting).

<sup>9</sup> *Id.* at n.6.

<sup>10</sup> This Article will not consider a different question, which is whether the judges violate Article 24 of the Spanish Constitution when they refuse to present a preliminary ruling. On this matter, the Spanish Court’s opinion is that there is no infringement. S.T.C. 58/2004 corroborates that doctrine, despite the doctrinal discussion it has derived. In effect, according to Dámaso Ruíz-Jarabo, *Los tribunales constitucionales ante el Derecho comunitario*, in 95 LA ARTICULACIÓN ENTRE EL DERECHO COMUNITARIO Y LOS DERECHOS NACIONALES: ALGUNAS ZONAS DE FRICCIÓN 199, 199 (Madrid, Consejo General del Poder Judicial, Estudios de Derecho Judicial, 2007), S.T.C. 58/2004 would represent an inflection point on the traditional doctrine of the Court in this aspect. On a similar line, Juan Ignacio Ugartemendía Eceibarrena, *El recurso a la prejudicial (234 TCE) como cuestión de amparo (A propósito de la STC 58/2004, de 19 de abril de 2004, que otorga el amparo frente a una vulneración del Article 24 CE originada por el incumplimiento de la obligación de plantear cuestión prejudicial comunitaria)*, in 11 REVISTA ESPAÑOLA DE DERECHO EUROPEO 465, 469, 474 (2004), the referred Judgment represents yet another step in the europeanisation of fundamental (national) Law towards effective judicial protection, a certain europeanisation of its guarantee, a short step towards Europeanization of constitutional rights, that would progress in the same direction as the constitutionalization of the European Union. Nevertheless, STC 58/2004 “does not change the constitutional doctrine, it just follows it.” Ignacio Borrajo Iniesta, *Los tribunales constitucionales ante el Derecho comunitario*, in 95 LA ARTICULACIÓN ENTRE EL DERECHO COMUNITARIO Y LOS DERECHOS NACIONALES: ALGUNAS ZONAS DE FRICCIÓN 252-53 (Madrid, Consejo General del Poder Judicial, Estudios de Derecho Judicial, 2007).

<sup>11</sup> DANIEL SARMIENTO RAMIREZ-ESCUADERO, PODER JUDICIAL E INTEGRACIÓN EUROPEA. LA CONSTRUCCIÓN DE UN MODELO JURISDICCIONAL PARA LA UNIÓN 159, (Cátedra Garrigues, Thomson-Civitas, Madrid, 2004).

<sup>12</sup> *See A.*

<sup>13</sup> In this way it is pointed out by Sarmiento, *supra* note 12, at 50-51, 55, in spite of indicating the difference between the interpretation and implementation of community Law, it has no great significance. *See also* María Fraile Ortiz, *Negativa del juez nacional a plantear una cuestión prejudicial ante el Tribunal de Justicia de las*

B. THE PRELIMINARY RULING IS THE MOST IMPORTANT REGULATED MECHANISM OF DIALOG AMONGST JUDGES

The Spanish doctrine saw an “inevitable tension between doctrines of the Court of Justice of the European Union and those of the Spanish Constitutional Court,” caused by “the fact that the European integration has not reached the point of complete fusion between European law and the national legislation.”<sup>14</sup> For years,<sup>15</sup> the consciousness of this tension caused the doctrine to outline the importance of the so called “dialogue among judges”<sup>16</sup> for the formation of the European Constitutional law. There are many others that insisted on the importance of the dialog among judges in the construction, development, and strengthening of the so called “European Constitutional Law.” The concept of the dialogue among courts has transcended the doctrine and reached the judgments of the courts. The Declaration 1/2004<sup>17</sup> of the Spanish Constitutional Court, for instance, mentions this dialogue between the Constitutional Courts and the Court of Justice of European Union. This judicial dialogue includes not only the regulated dialogue (the dialogue which derives from procedural rules or international obligations that diminish the freedom of national judges who are forced to dialogue with the supranational judge), but also the unregulated dialogue, which is “free, frantic and unbridled.”<sup>18</sup> This dialogue takes place horizontally as well as vertically. So, in the European Union, the most important mechanism of regulated dialogue is the preliminary ruling.

---

*Comunidades Europeas*, 7 REVISTA ESPAÑOLA DE DERECHO EUROPEO 433, 441-43, 458-59 (2003) (pointing out the relative character of the difference).

<sup>14</sup> RICARCO ALONSO GARCÍA, *EL JUEZ ESPAÑOL Y EL DERECHO COMUNITARIO* 115, 118 (Valencia, Tirant lo Blanch, 2003).

<sup>15</sup> In the Anglo-Saxon context, see Alec Stone Sweet, *Constitutional dialogues in the European Community*, in *THE EUROPEAN COURT AND NATIONAL COURTS, DOCTRINE AND JURISPRUDENCE: LEGAL CHANGE IN ITS SOCIAL CONTEXT* 303, 325 (A. M. Slaughter et al. eds. 1998). Among us, Gil Carlos Rodríguez Iglesias & José Alejandro del Valle Gálvez, *El derecho comunitario y las relaciones entre el Tribunal de Justicia de las Comunidades Europeas, el Tribunal Europeo de los Derechos Humanos y los Tribunales Constitucionales nacionales*, in 2 REVISTA DE DERECHO COMUNITARIO EUROPEO 239 (1997). For current further reading about this matter, we must mention: Anthony Arnall, *THE EUROPEAN UNION AND ITS COURT OF JUSTICE* (2nd ed., 2006); Ginevra Cerrina Feroni, *Karlsruhe, Lussemburgo, Strasburgo: la "Interpretationsverbund" dei diritti fondamentali ancora lontana*, in *CORTI NAZIONALI E CORTI EUROPEE* 191 (Napoli, Edizioni Scientifiche Italiane, 2006); Gianmario Demuro, *I rapporti fra Corte di Giustizia delle Comunità Europee e Corte Europea dei Diritti dell'Uomo*, in *LA CORTE COSTITUZIONALE E LE CORTI D'EUROPA* 39 (Torino, Giappichelli, 2003); Santiago Ripol Carulla, (Dir.) & Juan Ignacio Uguatemendía Uceizabarrena (Coord.), *ESPAÑA ANTE LOS TRIBUNALES INTERNACIONALES EUROPEOS. CUESTIONES DE POLÍTICA JUDICIAL*, OÑATI (IVAP 2008); Alejandro Saiz Arnaiz, *El Tribunal de Justicia, los Tribunales Constitucionales y la tutela de los derechos fundamentales en la Unión Europea: entre el (potencial) conflicto y la (deseable) armonización. De los principios no escritos al catálogo constitucional, de la autoridad judicial a la normativa*, in *CONSTITUCIÓN EUROPEA Y CONSTITUCIONES NACIONALES* 531 (Valencia, Tirant lo Blanch, 2005); Gustavo Zagrebelsky, *DIRITTI E COSTITUZIONE NELL'UNIONE EUROPEA* (Roma-Bari, 2003).

<sup>16</sup> See Giuseppe de Vergottini, *MÁS ALLÁ DEL DIÁLOGO ENTRE TRIBUNALES* 22 (Civitas, Madrid, 2010).

<sup>17</sup> S.T.C. 1/2004, Jan. 14.

<sup>18</sup> Professor Laurence Burgorgue-Larsen, Professor of Public Law in La Sorbonne, in her Communication to the VIII Congress of Constitutional Lawyers of Spain (Feb. 4-5, 2010). The European constitutional law has a complex structure in which community Law and internal origin Law, and even the legal system of the Human Right European Convention, are imbricated. Professor Burgorgue-Larsen also suggests integrating discrepancy as a dialogue method. The dialogue leads, bears the agreement and opposition, contraction or discord and agreement, concord and approval. In this context, the judgments of the German Federal Constitutional Court traditionally contemplated, as resisting European integration must be considered as another form of dialogue.



## II. PRELIMINARY RULING AND SPANISH CONSTITUTIONAL COURT

This Article does not wish to revise the traditional way in which the relationship between the Law of the European Union and the national law is presented. The rules of the relationship between the European Union Law and the national law are that of the European Union Law. That is, the European Union Law has the primacy and the direct effect of the rules. In the cases in which both orders overlap, the national judge, as well as the European Union Law judge who supervises the application of this legal system, may present a preliminary ruling before the Court of Justice of the European Union rules on the issue.

Having noted this, and coming back to the subject of this Article, the convenience or the obligation of the Spanish Constitutional Court to present preliminary ruling, this Article examines whether:

- a. The Spanish Constitutional Court can present their preliminary ruling before the CJEU;<sup>19</sup> and
- b. In the case that the answer to a) is affirmative, it must then be defined what is the appropriate way to present the preliminary ruling.<sup>20</sup>

### B. WHETHER THE SPANISH CONSTITUTIONAL COURT CAN PRESENT THEIR PRELIMINARY RULING BEFORE THE CJEU.

Up to now, the Spanish Constitutional Court answered with a negative answer to the first referred question. The Court based its answer on a particular conception of the European Union Law, its relationship with the so called “*bloc constitutionnel*,” and its relationship with the Constitutional Court.<sup>21</sup> This could be called a relationship of separation. This Article will study the cases in which, up to now, the Court of Justice has been demanded by the parties to present preliminary ruling, and cases that have been solved by a decision.

#### 1. STC 28/1991, OF FEBRUARY 14.

In the case solved by the STC 28/1991,<sup>22</sup> the appellant raised what could be called a community constitutionality appeal. A community constitutionality appeal refers to the way of adducing that, a breach of a Community Law rule is, indirectly, unconstitutional because it violates the constitutional principle or principles in which the incorporation of Community Law to Spanish Law is based, particularly on Article 93 of the Spanish Constitution.<sup>23</sup> This Article later discusses the Italian doctrine, which also adopted a specific terminology to name those

<sup>19</sup> See *infra* notes 24-109 and accompanying text.

<sup>20</sup> See *infra* notes 110-44 and accompanying text.

<sup>21</sup> Antonio Torres del Moral, *El Tribunal Constitucional español en negativo: cuestiones disputadas, inéditas, irresueltas y de lege ferenda*, in LA CIENCIA DEL DERECHO PROCESAL CONSTITUCIONAL. ESTUDIOS EN HOMENAJE A HÉCTOR FIX-ZAMUDIO EN SUS CINCUENTA AÑOS COMO INVESTIGADOR DEL DERECHO, T. II, TRIBUNALES CONSTITUCIONALES Y DEMOCRACIA 595 (Eduardo MacGreggor Ferrer & Arturo Zaldivar Lelo de Larrea eds., 2008). The treatment of European Law by the Constitutional Court is one of the most challenging and open questions. *Id.*

<sup>22</sup> S.T.C. 28/1991, Feb. 14.

<sup>23</sup> C.E. Art. 93.

appeals of constitutionality that violate Article 117 of the Italian Constitution,<sup>24</sup> by which the compliance of the legislative activity to Community Law is established.

The Basque Parliament brought the appeal and argued against two principles which were added by the Organic Law 1/1987, April 2<sup>25</sup> to the Organic Law 5/1985, June 19, on the General Electoral System (“LOREG”),<sup>26</sup> in order to regulate the elections to the European Parliament. The first principle, Article 211.2 (d) LOREG,<sup>27</sup> concerns the capacity of membership of the European Parliament as incompatible with that of membership of the Legislative Assembly in an Autonomous Community. Pursuant to the second, Article 214,<sup>28</sup> the circumscription for the election of European Parliament Deputies was the national territory.

The appellant based the unconstitutionality of the two principles in its contradiction with Article 5<sup>29</sup> of the Act regarding the election of representatives in the European Parliament by direct universal suffrage, adopted by the European Council on September 20, 1976.<sup>30</sup> In the opinion of the Basque Parliament, such contradiction would determine the violation of Articles 93,<sup>31</sup> 96.1,<sup>32</sup> and 9.1<sup>33</sup> of the Spanish Constitution, as well as its Article 14.<sup>34</sup> Regarding the appeal of Article 214 LOREG, the appellant just quoted the declarations made during the

---

<sup>24</sup> Art. 117 Costituzione (It.).

<sup>25</sup> LEY ORGÁNICA, 1/1987 LOREG.

<sup>26</sup> LEY ORGÁNICA, 5/1985 LOREG.

<sup>27</sup> LEY ORGÁNICA, Art. 211.2 (d) LOREG.

<sup>28</sup> LEY ORGÁNICA, Art. 214 LOREG.

<sup>29</sup> LEY ORGÁNICA, Art. 5 LOREG.

<sup>30</sup> Decision 76/787/ECSC, EEC, Euratom, of the representatives of the Member States meeting in the council relating to the Act concerning the election of the representatives of the Assembly by direct universal suffrage. It was precisely stated that whereas Article 6(1) of the Decision enumerated the incompatibilities Community Law established, Article 6(2) authorized the Member State to fix applicable incompatibilities nationally until a standard electoral system was effective (Article 7.2). However, the power to establish the causes of incompatibility would be limited by Article 5, which particularly allowed a dual mandate. Therefore, Community Law authorized the dual mandate by a provision that national law could not repeal because the Decisions are not dispositive law, as it could be clearly inferred under the provisions of Article 189 of the Treaty establishing the EEC and the concordant ECSC and Euratom Treaties. As it was not clearly stated in Article 5, it was legal to distinguish between the dual mandate in the State Parliament and the one in the local Parliaments. The opposite would be to establish an unlawful inequality, that is to say, discrimination, basically relevant and obviously unreasonable, that would consequently lead to an interpretation of the mentioned Article 5 that is incompatible to the principles under Article 14 of the Constitution and is, therefore, banned by Article 9.1, among others.

<sup>31</sup> C.E. Art. 93.

<sup>32</sup> C.E. Art. 96.1.

<sup>33</sup> C.E. Art. 9.1.

<sup>34</sup> C.E. Art. 214. The appeal supported that Article 93 CE entrusted the Government and the courts with the guarantee of the performance of the Treaty of Accession to the European Community and of the rules deriving from it. On the one side, Article 96.1 established the inclusion into the internal legal system of the external conventional rules which the public powers would be subject to pursuant to Article 9.1. On the other side, the Treaty of Accession to the Community in Article 2 of the Act relating to the conditions of such accession envisaged the reception of the primary Community Law, among which rules was the aforementioned Article 5 of Decision 76/787 of the Council. Being a mandatory provision, it was not legitimate for the legislature to give ruling to the incompatibility regime which contradicted this Article 5. As Article 211.2 (d) of the introduced Organic Law on the General Electoral System expressly changed the mentioned ruling, it appeared as invalid by unconstitutionality infringement of Arts. 93, 96.1, and 9.1 CE.

drafting of the appealed law by the spokesmen of the three Parliamentary Groups in the Autonomous Assembly.<sup>35</sup>

---

<sup>35</sup> The facts at issue of the judgment reproduced the fragments of the interventions in the mentioned debate by the Spokesmen of the Parliamentary groups *Eusko Alkartasuna*, *Euskadiko Ezkerra* and *Nacionalistas Vascos* in the following literal terms:

First, the right to self-government of the nationalities and regions, recognized and guaranteed under the Article, which is expressed in the same manner as the list of fundamental rights and civil liberties –that is to say, it constitutes such right as previous to the Constitution itself and as an assumption of its own legitimacy–, should also appear in the organization of the electorate as a sign and guarantee of political pluralism, defined under Article 1.1 EC, as a supreme value of the system.

Having stated as a starting point that the right to self-government is an assumption of the State's legitimacy, the following should be pointed out: That the starting point is particularly important within the scope of Article 2 of the Constitution, in the cases of the Basque Country, Catalonia, Galicia, which are the direct target of the expression “nationality” and, above all, the first two cases. We should not forget, when reading and interpreting Article 2, the public legal debate it caused. In this sense, we understand that, if the nationalities and regions express their political, cultural, and social pluralism, and they execute part of the State's political power, it should be obvious that the provinces –and, in some cases, the Autonomous Communities– are outstanding territorial entities for the purposes of the organization of the electorate. Likewise, the Autonomous Communities should also be significant for the purposes of the organization of the electorate for the elections to the European Parliament.

There are two aspects to bear in mind for the purposes of supporting the unconstitutionality thesis of the exclusive voting district. On the one hand, as a consequence of the entry in the European Community, the political power of the Autonomous Communities remains affected –it could also be said diminished–; and this would not lead to an increase in power of the State's general bodies. On the other hand, as the European Community lacks its own executive body, the Autonomous Communities, pursuant to their Statutes of Autonomy, are important political and administrative figures for the European Community.

Finally, in this line of arguments, we should remark the existence of repeated recommendations made by the European Parliament, so that the electorate of each Member State is organized within the scope of a plurality of districts. With this approach, no opposing argument can be made. The so-called State's legal personality has sometimes been put forward, because in the European Parliament it is not the States but the citizens which are represented, and proof of that is the fact that in the European Parliament the groups or the members are organized according to ideological affinities, and not to their belonging to a certain State. What is expected, all in all, is that such political pluralism of the Spanish state could also be reflected and showed in the organization of the electorate.

Besides, the single electoral district on its own does not guarantee proportionality. First, because the battle of strict proportionality is definitively lost since the moment in which those recommendations exist and since there is a working group that supports the configuration of a plurality of voting districts in every State. However, we should also bear in mind that, if proportionality is an important value, it can be established by means of grouping Autonomous Communities, for instance, with minimums in population, although always following the Parliament recommendations and the working lines of the groups developing the future European electoral bill. In this regard, it means to respect the frequently mentioned communities that are distinct enough, whether by geographic reasons –such as, for instance, the islands–, by their history or by ethno-linguistic reasons. In this regard, it should be mentioned that the difference between nationalities and regions under Article 2 may and must entail a special treatment of the historic nationalities. Because of the preceding reasons, we understand that the exclusive voting district is not in accordance with the Constitution.

PLENARY SESSION IN THE PARLIAMENT OF THE BASQUE COUNTRY (Apr. 30, 1987) (Intervention of the Spokesman of the Parliamentary group *Eusko Alkartasuna*).

We particularly believe that the chosen political option does not correspond to the constitutional and administrative legal framework defined in the Constitution under Article 2, Title VIII, in the correspondent Statute of Autonomy, and concretely in ours, the Basque Statute of Autonomy. This Parliament of the Basque Country, and from this point of view I believe we are politically and legally legitimated to establish this application for judicial review of proposed legislation, so that, although the Constitution does not contain an explicit order of how the voting districts should be, it does seem that the adopted is not perfectly

The Basque Parliament requested the Spanish Constitutional Court declare the appealed principles unconstitutional. It also requested, under Article 177 of the EEC Treaty<sup>36</sup> and the concordant Articles in the ECSC and Euratom Treaties, that the Spanish Constitutional Court address the European Court of Justice to interpret Article 5 of the European Electoral Act<sup>37</sup> and declare whether the capacities of membership in the European Parliament and membership in the Basque Parliament were compatible.

The Court dismissed this latter appeal.<sup>38</sup> The Court explained that Article 211.2 (d) LOREG did not violate the Constitution (Articles 9.1, 14, 93 and 96.1), but those principles of Article 5 of the European Electoral Act. Therefore, the Court stated that the contrast brought before the Constitutional Court between those Constitutional provisions and the legally contested

---

compatible with or does not match the design of the model Autonomous State reflected on the Constitution and the Statutes of Autonomy.

*Id.*

[W]e understand that the political autonomy of the nationalities and regions is an organizing principle of this State. We believe it should not be avoided in such a moment as this when the incorporation of a supraplural scope takes place. We believe that the intention of the constituent was always to favor the political integration of the Autonomous Communities by means of its presence in the different forums and institutions in which influential decisions are taken and the exclusive voting district is obviously not a mere instrument to answer this organizing principle.

PLENARY SESSION IN THE PARLIAMENT OF THE BASQUE COUNTRY (Apr. 30, 1987) (Intervention of the Spokesman of the Basque Nationalist Parliamentary group).

In short, in those fragments the following was stated: that the right to self-government of the nationalities and regions ... should also be present in the organization of the electorate, particularly in the cases of the Basque Country, Catalonia and Galicia; that, as a consequence of the entry in the European Community, the political power of the Autonomous Communities was diminished, and that the Autonomous Communities, according to their Statutes of Autonomy, are important political and administrative figures for the European Community; the existence of repeated recommendations made by the European Parliament, in the sense that the electorate of each Member State is organized within the scope of a plurality of districts. Invalidity of the argument of the State's international legal personality "because in the European Parliament it is not the States but the citizens which are represented;" invalidity of the argument of proportionality because this could be established "by means" of grouping Autonomous Communities, for instance, with minimums of population, but always following the recommendations of the Parliament itself. PLENARY SESSION IN THE PARLIAMENT OF THE BASQUE COUNTRY (Apr. 30, 1987) (Intervention of the Spokesman of the Parliamentary group Eusko Alkartasuna); that the chosen political option does not correspond to the constitutional and administrative legal framework defined in the Constitution under Article 2, Title VIII, in the correspondent Statutes of Autonomy, and concretely in ours, the Basque Statute of Autonomy. *Id.*; that it was contrary to the self-government of the nationalities and regions, which is an organizing principle of the State.

*Id.*

<sup>36</sup> EEC Treaty art. 177 (now art. 234 EC)

<sup>37</sup> S.T.C. 28/1991, Feb. 14,

<sup>38</sup> S.T.C. 28/1991, Feb. 14, FJ 7.

[W]e must reject such cause of claim by simply thinking that the *ratio decidendi* of our dismissing order does not keep any relation to the European community law that the appealing parliamentary body invoked in order for us to judge the constitutional validity of the contested legal provision. We have not and should not mentioned anything in this constitutional process about the settlement of Article 211.2 d) LOREG pursuant to Article 5 of the European Electoral Act because the problem of this settlement is not constitutional. As the Treasury Counsel notices, European Community Law has its own guarantee bodies, among which this Constitutional Treaty is not present. Therefore, no interpreting application about the scope of the mentioned Community Law should be addressed to the CJEU, because Article 177 of the EEC Treaty is only effective in the processes where Community Law should be enforced to guarantee a standard interpretation.

*Id.* FJ stands for *Fundamento Jurídico*, which could be translated as "pleas of law". A Spanish Constitutional Court Judgment is divided in three parts: pleas of fact, pleas of law, and operative part of judgment.

rule would only occur immediately or indirectly. The opposition to the Constitution by the electoral provision lies exclusively on the intended violation of the Community rule, which would become a type of constitutional proceeding for validating such contested rule. Nevertheless, continues the Judgment, it is precisely this premise on which the appellant bases its argument. Article 5 of the European Electoral Act as a Constitutional canon of Article 211.2 (d) LOREG should first and foremost be accepted in order to execute the contrast brought up in the process,

because only if it is admitted that Article 5 of the European Electoral Act is a rule which composes the constitutional corpus applicable to the case and that, as such, has the power to determine directly or indirectly the validity of the contested electoral rule, this Court will be able to analyze the denounced contradiction between the European electoral rule and the national electoral rule.<sup>39</sup>

The Court then dismissed that premise, and argued that neither Article 93 CE, nor 96.1 CE, invoked by the appellant, turn the European Electoral Act into a constitutionality canon. The Court explained that the regulatory content of Article 93 stating that, pursuant to it, from the date of its accession, the Reign of Spain is linked to European Union Law, primary and secondary, which, as the Court of Justice of the European Communities wording states, constitutes a real legal system integrated in the Member States' legal system, and imposes itself to its judicial bodies.<sup>40</sup>

However, this does not dictate that Article 93 CE turns Community Law into a constitutionality canon. In this sense, the Judgment continues as follows: “[h]owever, the aforementioned link does not imply that, pursuant to Article 93, Community Law rules have gained constitutional status or strength, nor it implies that the casual violation of those rules by a Spanish provision involves an infringement of the mentioned Article 93 CE.”<sup>41</sup> Therefore, the Court states that Article 93 CE

is not affected by the casual contradiction between the national law –State and regional- and Community law, a question which is out of the scope and content of this rule. Nor even the final digression of this constitutional provision could support such charge...because...this provision simply determines the State bodies to which the guarantee of the performance of European Union law is entrusted, regarding the type of activity that requires the execution of Community decisions.<sup>42</sup>

After denying that Article 93 CE could be affected, not even indirectly by Article 211.2 (d) LOREG, the Court proceeded to reject the charge of Article 96.1 CE. The Court denied that Article 96.1 CE turns Community Law into a constitutionality canon.

---

<sup>39</sup> *Id.* at FJ 4.

<sup>40</sup> Case 6/64, *Costa v. Enel*, 1964 E.C.R. 585.

<sup>41</sup> S.T.C. 28/1991, Feb. 14, FJ 4. The judgement proceeds:

This provision clearly constitutes the last basis of such connection because its acceptance –established by the Treaty of Accession, which is its immediate basis- expresses state sovereignty. However, this does not allow to forget that the constitutional provision, of procedural organic nature, just regulates the way of executing a certain type of international treaties, so that it determines that only those treaties may be compared to Article 93 CE in a constitutionality process, because such supreme rule is their formal valid source.

*Id.*  
<sup>42</sup> *Id.*

No international treaty receives from Article 96.1 CE more than the status of rule which, invested with the passive strength the provision gives to it, is part of the internal legal system; therefore, the assumed contradiction in treaties by laws or other subsequent mandatory provisions is not a matter that affects their constitutionality and should not be decided by the Constitutional Court (STC 49/1988, FJ 14, *in fine*), but when it is exclusively a problem of selecting the applicable Law to the particular case, its resolution corresponds to the ordinary judicial bodies. In short, the casual violation of the European Union law by later state or regional laws and rules does not turn into a constitutional case what is a mere conflict of *subconstitutional rules* to be solved within the scope of ordinary legislation.<sup>43</sup>

In its following line of argument, the Court did not reveal the content of Article 5 of the European Electoral Act but an inference can be made that it deals with the impossibility of accumulating the European Act with internal state acts. However, what is decisive for the Court is that the contradiction between the European Electoral Act and the Organic Law on the General Electoral System is not a constitutional problem:

the assumed contradiction –which is the center of this appeal and supports the current cause of action- between Article 211.2 [(d) of the Organic Law on the General Electoral System and Article 5 of the European Electoral Act, lacks constitutional relevance, even though it really occurred, because the denounced antinomy does not attempt, directly or indirectly, the provisions on Article 93, 96.1 and 14 CE.<sup>44</sup>

Then in FJ 6, the Court clearly states the dialogue with the Court of Justice to the ordinary legislation:

Naturally, the reached conclusion does not prevent the use of lawfully configured legal defense media -which effectiveness is guaranteed upon Article 24.1 EC- in order for the candidates affected by the incompatibility laid down in the present appealed provision to rise before such antinomy. The judicial bodies will then comment, in the corresponding processes, about the repeated contradiction as a previous step to the enforcement or non-enforcement of Article 211.2 [(d) of the Organic Law on the General Electoral System, to which purpose such bodies are authorized (or forced, as the case may be) to request the European Court of Justice, under Article 177 of the CEE Treaty and concordant provisions of other constituent Treaties, an interpretive declaration about the scope of Article 5 of the European Electoral Act.<sup>45</sup>

To clarify the alleged contradictory nature of the Spanish law regarding Community law with the launch of this appeal, a member elected in the Autonomous Community and the European Parliament, to whom the Spanish Law is enforced by the electoral administration, should appeal the act before the ordinary legislature and request the approach of a preliminary ruling before the Court of Justice.

Finally, based on the Court's understanding of the relationship between the Constitution and Community Law, the Court dismisses the approach of preliminary ruling.

[W]e are obliged to dismiss such cause of action by simply thinking that the reason of our rejected announcement bears no relation with the European community rule the appealing parliamentary body invoked in order for us to judge the constitutional validity of the appealed legal provision. We have not mentioned and must not declare in this

---

<sup>43</sup> *Id.* At FJ 5.

<sup>44</sup> *Id.*

<sup>45</sup> *Id.* at FJ 6.

constitutional process the settlement of Article 211.2 (d) LOREG under Article 5 of the European Electoral Act, because the problem of this settlement is not constitutional. As the Treasury Counsel foresees, the European Community Law has its own guarantee bodies, which this Constitutional Court is not among. Therefore, no application of interpreting the scope of the aforementioned community rule must be addressed to the Court of Justice, because Article 177 of the EEC Treaty only operates in the processes to which Community Law should be enforced in order to guarantee a standard interpretation of the mentioned Law.<sup>46</sup>

The Judgment, in short, aims to design a clear distinction, relation, and separation between Constitution and Community Law. Nevertheless, we should remark that Community Law is somehow enforced. Indeed, when analyzing the appeal of Article 214 LOREG, the Court dismissed the cause of action based on the lack of argument in the appeal. However, the Court adds some statements in which it comments about the content of Community Law:

For that reason, although nothing would at first prevent the state legislator, making use of his freedom of appraisal, from stipulating the territorial organization of the electoral body in the European elections in accordance with the autonomous design -whereas the current unconstitutional autonomy of the European Community Member States (Article 7 of the European Electoral Act) persist- we should reiterate that such would not be a constitutionally obliged measure, but the result of a politic decision which opportunity and decision must not be judged by this Court.<sup>47</sup>

To sum up, the Spanish Constitutional Court dismissed what we could call a community constitutionality appeal. A breach of a Community Law rule is not, indirectly, unconstitutional on the grounds it violates the Constitution provisions under which the incorporation of Community Law to Spanish Law takes place.

## 2. STC 372/1993, OF FEBRUARY 14.

STC 372/1993<sup>48</sup> was an appeal for legal protection directed both to a Judgment of the Criminal Court at the Audiencia Nacional in Madrid which condemned the appellant as the author of an exchange control crime,<sup>49</sup> and to another Judgment setting aside a Judgment pronounced by the Second Court of the Supreme Court which confirmed such judgment<sup>50</sup> as far

---

<sup>46</sup> *Id.* at FJ 7.

<sup>47</sup> *Id.* at FJ 8.

<sup>48</sup> S.T.C. 373/1993, Feb. 14.

<sup>49</sup> The *Sala de lo Penal* (Chamber of Criminal Matters) of the Audiencia Nacional found the applicant guilty of a monetary crime, punishing him with two months of imprisonment, a fine of 14,000,000 pesetas (\$115,079) and an order to pay a quarter of the costs. The Court considered proven that the applicant had given someone also sentenced in the case, by intermediation of a third person, the amount of 26,750,000 pesetas (\$219,880) to be transferred to France. This last person was discovered and arrested at the border when attempting to cross the border on a motor vehicle carrying the money in a hidden space of the car.

<sup>50</sup> Having made the report for the hearing of such appeal, after the coming into effect of Real Decreto 1816/1991, of December 20, on economic external transactions, the appellant added, during the hearing, another ground consisting of the denial of the offense by which he had been sentenced, after the repeal of Article 6 of Organic Law 10/1983 by the mentioned Real Decreto.

The Supreme Court did not set aside the judgement regarding the sentence given to the appellant, because, on the one hand, the trial judge in the Court did not execute examining functions; on the other hand, there was enough charge evidence for entering a judgment; and, finally, the mentioned Real Decreto 1816/1991 had not liberalized the offenses contained under Article 6 of Organic Law 3/1983 and had not created new crime figures resulting from its

as the applicant was concerned. The submissions, on the other hand, were not equal. In some of the submissions, such as the violation of fundamental laws regarding the presumption of innocence and the impartiality of the judge, the appeal was brought against both decisions. Others, such as the violation of the rights of freedom, equality and the principle of legality, could only be put down to the Judgment of the Supreme Court because it could only have been put forward before it and upon hearing that the entry into force of Real Decreto 1816/1991,<sup>51</sup> on economic external transactions, had unpunished the judged offence. As for the hearing of the appeals brought against the Judgment of the Supreme Court, which are the point of interest of this Article, it should be specified that at the perpetration of the acts, as well as during its procedure, the Judgment of resort, lodging and execution of the appeal to the Supreme Court, together with Organic Law 10/1983,<sup>52</sup> on the exchange control legal system, Real Decreto 2402/1980,<sup>53</sup> was in force and completed the criminal provisions contained in the aforementioned Law as set of regulations on the subject. So that the Judgment of Resort sentenced the appellant as the author of fraud, as provided for and sanctioned in Arts. 6 (A) 1 and 7.1.2 of Organic Law 10/1983.<sup>54</sup> The Court found that the appellant violated the exchange control legal system by trying to export an amount of cash tender above 2.000.000 Pesetas (\$16,466.08) without the mandatory previous authorization under the provisions of the aforementioned Real Decreto.

Once the appeal to the Supreme Court against the Conviction Judgment was brought and entered, the executive issued the Real Decreto 1816/1991,<sup>55</sup> whose second final Provision repealed the Real Decreto 2402/1980 and executed the liberalization of external transactions and transfers, as provided for in Directive 88/361/EEC,<sup>56</sup> which laid down a transitional term for Spain applicable to certain types of transactions.<sup>57</sup> The Article expired on December 31, 1992, so the Government decided to bring it forward before then.

Based on this new economic external transactions rule, the appellant introduced a new ground in the hearing held on February 19, 1992. The new argument was that the offences regulated under Art. 6 of Ley Orgánica 10/1983<sup>58</sup> had been abolished by Real Decreto 1816/1991.<sup>59</sup> So, the conduct in which the Sentence was based had become unpunished. However, the Second Chamber of the Supreme Court confirmed the decision made by the Audiencia Nacional and dismissed this ground.

The request for legal protection addressed to the Constitutional Court considered that the previous courts violated the principles of legality,<sup>60</sup> freedom,<sup>61</sup> and equality<sup>62</sup> as far as the mentioned Real Decreto, which created again an offense type, which elements were not

---

regulatory status. In short, the only importance of the new regulation in the present cause of action was to increase to 5,000,000 pesetas (\$41,114) the sum to which the crime type joined.

<sup>51</sup> B.O.E. 1991, 310.

<sup>52</sup> LEY ORGÁNICA, 10/1983 LOREG

<sup>53</sup> Real Decreto (R.M.) 2402/1980, Oct. 10.

<sup>54</sup> LEY ORGÁNICA, 10/1983 LOREG

<sup>55</sup> B.O.E. 1991, 310.

<sup>56</sup> Council Directive, 88/361/EEC, June 24, 1988.

<sup>57</sup> *Id.* at art. 6.

<sup>58</sup> LEY ORGÁNICA, 10/1983 LOREG, de 16 de agosto, por la que se modifica LA LEY, 40/1979, de 10 de diciembre, sobre régimen jurídico de control de cambio.

<sup>59</sup> B.O.E. 1991, 310.

<sup>60</sup> C.E. Art. 25.1.

<sup>61</sup> C.E. Art. 17.

<sup>62</sup> C.E. Art. 14.



envisaged in Ley Orgánica 10/1983, and which was incompatible with the Community Directive. In those circumstances the appellant requested to be granted protection and asked the Constitutional Court to submit a preliminary ruling about the compatibility of the national provision with the Directive before the Court of Justice made a ruling. The Court dismissed the appeal for legal protection and answered that there was no need to submit a preliminary ruling.

The important subject here is that the appellant, under protection from the point of view of the principle of legality, put forward the inconsistency of Real Decreto 1816/1991 with the Community Directive 88/361/EEC. To his opinion, such Community provision allowed Spain a closing date until December 31, 1992 to begin the liberalization of capital movements among Member States of the EEC. Moreover, Real Decreto 1816/1991 brought forward such liberalization when it entered into force. Consequently, any interpretation of this Real Decreto that is incompatible with the abolition of any exchange control system violates Article 25.1 CE.<sup>63</sup> Accordingly, this Court should request a preliminary ruling about the compatibility between State and Community Law before the European Court of Justice.

The Court refuses the violation of the principle of legality<sup>64</sup> by the contradiction between the Real Decreto in question and the Community directive. To this respect, some legal doctrine considerations are first raised in FJ 7 and then applied in FJ 8 to the concrete case. As general doctrine, the following points should be remarked: First, only Articles 14 to 29 and 30.2 CE are appropriate to decide if the actions of public authorities are constitutional or not. The Community Law is not appropriate to this purpose. Second, the rules in the Community legal system “do not represent an autonomous constitutionality canon (STC 252/1988, 132/1989, 28/1991, 64/1991 and 111/1993, among others).”<sup>65</sup> Third, the appeal for legal protection addressed to the Constitutional Court, has to be based in the violation of fundamental rights, not in violation of Community Law.<sup>66</sup> Fourth, the Community legal system has its own guarantee bodies, among which the Constitutional Court is excluded. The power to verify if an internal rule is appropriate from the point of view of Community Law is up to the Judiciary, with the collaboration of the European Court of Justice if necessary. Finally, the Constitutional Court cannot request preliminary ruling based upon Article 177 of the Treaty establishing the European Economic Community<sup>67</sup> before European Court of Justice because this provision is only effective in the processes in which Community Law is applied precisely to guarantee a standard interpretation of Community Law.<sup>68</sup>

Curiously, after these sharp affirmations on the application of this doctrine to the specific case, some considerations about the compatibility between the Real Decreto and the Directive are made.<sup>69</sup> Indeed, FJ 8 stated that the principle of legality had not been violated for these reasons: First, because the aforementioned Real Decreto, in the moment in which the Supreme

---

<sup>63</sup> CE Art. 25.1.

<sup>64</sup> C.E. Art. 25.1.

<sup>65</sup> S.T.C. 372/1993, Dec. 13, FJ 4.

<sup>66</sup> S.T.C. 64/1991, Mar. 22.

<sup>67</sup> EEC Treaty Art. 177.

<sup>68</sup> S.T.C. 28/1991, Feb. 14.

<sup>69</sup> S.T.C. 372/1993, Dec. 13, FJ 4 already stated something from which the matter of compatibility with Community Law and the presentation of preliminary ruling could be inferred, so it is not unknown to the court:

From the referred actions, there is no proof that the applicant had raised to the court competent to know the appeal for the Supreme Court any community preliminary ruling about the compatibility of such Real Decreto with Community Directive 88/361/EC; however, the answer given by the Supreme Court implies a dismissal of such approach.

*Id.*

Court passed its decision, had moved the liberalization of the external economic transactions a year forward, while the Directive 88/361/EC did not require it until December 31, 1991. So, no contradiction between state and Community Law was possible. Since, this argument of appeal under Article 25.1 CE tried to force the Court to control the adaptation of the rules applicable to Community Law, a task that does not correspond to this Court. Therefore, neither the violation of Article 25.1 CE must be estimated nor must the preliminary rule to the European Court of Justice be requested, as the appellant claims.<sup>70</sup>

Although the Court tries to justify its dismissal because what has been raised is not competence of the Court, it repeatedly states that the Real Decreto does not contradict community law. Community Law and internal law are then interwoven, not apart. They may be separated but it is not an easy task. This Judgment analyzes implicitly the compatibility between internal law and Community Law. It is necessary to recognize that the Constitutional Court applies Community Law even if it only does it in a similar way as it enforces and interprets ordinary law, although the highest authority in that field is the Supreme Court.

### 3. STC 143/1994, OF MAY 9.

STC 143/1994<sup>71</sup> was an appeal for protection filed by the Spanish General Council of Economists Associations against the judgment given by the Supreme Court (Third Chamber, Second Division) which declared inadmissible the appeal brought by the mentioned body against Real Decreto 338/1990<sup>72</sup> of March 9 and the Ministerial Order of March 14, 1990<sup>73</sup> which regulate the Tax Identification Number. More specifically, the Spanish General Council of Economists Associations brought a judicial review against the regulatory provisions that regulated the composition and use of the Tax Identification Number because the regulatory provisions violated the fundamental right to privacy established under Article 18 EC<sup>74</sup> and the regulatory provisions contained procedural and formal errors. The Supreme Court stated that the appeal was inadmissible because the Spanish General Council of Economists Associations lacked standing to sue, due to the fact that such appeal did not have a direct or legitimate interest in contesting the Real Decreto and the Order regulating the Tax Identification Number. The creation of such number would not at all affect the functions within the jurisdiction of the Council regarding the Economists Associations it is composed of or the functions that assisted the Associations regarding its members. Likewise, the Judgment added that the obligation imposed on the economists of such correspondent Associations to obtain a Tax Identification Number was not due to their profession or their enrolment in an association, but because the obligation was imposed on all citizens. The Judgment rejected the importance of the fact that the economists were assigned fiscal and tax matter counseling<sup>75</sup> because the Tax Identification Number would not extraordinarily complicate this task.

The appeal for protection argued that the contested Judgment violated the fundamental right to judicial protection,<sup>76</sup> the right to a process without improper delays and the right to

---

<sup>70</sup> S.T.C. 372/1993, Feb. 14, FJ 8.

<sup>71</sup> S.T.C. 143/1994, May 9.

<sup>72</sup> Real Decreto (R.D.) 338/1990, March 8.

<sup>73</sup> Orden Ministerial (O.M), March 14, 1990.

<sup>74</sup> Treaty Establishing the European Communities art. 18, Dec. 24, 2002, 2002 O.J. (C 325) 45.

<sup>75</sup> Real Decreto (R.M.) 871/77, April 26, 1977.

<sup>76</sup> The violation of Article 24.1 CE might be due to the fact that the action brought against the regulatory provisions of the Tax Identification Number had been dismissed, despite the fact that the Council held an unmistakable

privacy recognized under sections 1 and 4 in Article 18 EC. The rejection of the appeal allegedly violated of the fundamental rights which form part of the general rules of European Community Law, which are legal security, honor, privacy, effective judicial protection of the Courts and other European Community Institutions according to the body of law of the European Court of Justice. It was also stated that the Judgment of the Court infringed the right to process without improper delays.<sup>77</sup> The lodged Judgment also violated the fundamental rights of privacy and human dignity. The appeal for protection concluded requesting the annulment of the contested Judgment and the lodged general provisions. Finally two preliminary rulings before the European Court of Justice were submitted. Once the Constitutional Court admitted the appeal, the further statements of the appellant under protection put forward the violation of Articles 30, 34, 59 and 67 of the Treaty establishing the European Community<sup>78</sup> on the freedom to provide movements of goods and capitals services and referred to several judgments to support the claim while requesting formulation of the ruling to the Court of Justice. The Court denied protection and denied the request of formulation of preliminary ruling.<sup>79</sup>

Due to its difficulty, it may be suitable to specify the object of the appeal for protection. On the one hand, the claim denounced the violation of a series of fundamental rights directly attributable to the set of regulations of the Tax Identification Number.<sup>80</sup> On the other hand, Article 24.1 CE<sup>81</sup> was also referred to, as it was violated in the later difficulties of the opened process in order to appeal the mentioned regulations before administrative court rules.

The Constitutional Court first rejected the claim addressed against the Supreme Court.<sup>82</sup> The Court began by reminding the nature of legal configuration which the right invoked by the appellants possesses, and continued by stating that the Supreme Court had reasonably enforced and interpreted Article 28.1.b of LJCA.<sup>83</sup>

Then the claim regarding the right to privacy was argued. Indeed, the offender held that the contested regulation violated the right to privacy.<sup>84</sup> The Court briefly put forward that it

---

standing to sue. After reasoning about the meaning and function of the requirement of legal capacity, the lawsuit stated that the General Council of Economists Associations is one of the most suitable bodies to sense that the regulatory provisions of the Tax Identification Number violate the rights of privacy and human dignity regarding the rights and obligations of the economists and the functions attributed to the Council by its Statutes of Autonomy (approved by the Ministerial Order of June 24, 1971). By denying the interest to the Council, the contested judgment would have summarized the interests of the comprising people and the professionals, who knew and denounced the effects deriving from the challenged law. Moreover, they were obliged to provide information to the Administration through the instrument which legality was questioned, becoming, therefore, accomplices of a serious transfer of fundamental rights. The constitutional legal practice would then establish an extensive interpretative criterion of the requirement of legal capacity, pursuant to Article 24.1 CE, which would oblige to a generous interpretation of Article 28.1 of the Ley de Jurisdicción Contencioso Administrativa (Administrative Appeal Courts Law) ("LJCA"). Both provisions were obviously violated by the contested judgment, which would break the recognition of the legal capacity executed in favor of the Council by contesting other similar provisions.

<sup>77</sup> Since it dealt with a previous allegation issued to the contrary in the answer claim form, with violation of the principles that rule the administrative process, breaching the terms established for its admission (Articles 71-73 LJCA), which would moreover prevent other subjects from entering the proceeding as assistants in the time allowed.

<sup>78</sup> Treaty Establishing the European Community, 2006 O.J. (C 321) 37.

<sup>79</sup> S.T.C. 143/1994, May 9, FJ 8.

<sup>80</sup> Real Decreto (R.M.) 338/1990, of March 9; Orden Ministerial (O.M.), March 14, 1990 (which developed the previous one).

<sup>81</sup> C.E. Art. 24.1.

<sup>82</sup> S.T.C. 143/1994, May 9, FFJJ 2-4.

<sup>83</sup> LEY DE LA JURISDICCION CONTENCIOSO-ADMINISTRATIVA Art. 28.1b LJCA.

<sup>84</sup> C.E. Art. 18.4.

referred to the arguments in the claim before the Supreme Court and reiterated only the so-called violation of Article 18.4 CE by the alleged lack of guarantees about the use of the information obtained through the operations identified with the Tax Identification Number.

In a further paragraph, the Court dismissed the violation of Article 18 CE, interpreted in the light of the international treaties ratified by Spain, as Article 10.2 CE demands.<sup>85</sup>

At the end, the Court deals with a central question to our argument:

The actor's appeal in the sense that preliminary ruling should be requested before the European Court of Justice, as the contested decisions violate 'the principles of Community Law of legal security, honor, privacy, effective judicial protection by the Courts, etc.' is to be rejected. As there are no specific rules in such legal system which, in an autonomous way, could become interpretative instruments of the Constitution, regarding the fundamental rights invoked in the present appeal, under Article 10.2 EC, the doctrine is entirely effective and already established in the precedent judgements of the Court, which rejects the safeguard of respect for Community Law as part of its competence. Because there are already institutional and procedures suitable for this purpose in the mentioned legal system. Therefore, the claim of the party is evidently inadmissible.<sup>86</sup>

Actually, with this brief statement the Court gives two different arguments. First, that there is no international treaty that is part of Community Law that should be used to interpret Article 18 of the Spanish Constitution. Second, the Court reinforces its doctrine according to which the Court is not competent to enforce Community Law. Community Law has its specific interpretation and enforcement institutions. But it seems that the *ratio decidendi*, as the Judgment states, is the first argument which would not contribute nowadays if a similar appeal was argued before the Spanish Court. If this appeal were given on the present date (March 2011), the Spanish Constitutional Court could not have argued about the absence of Community Law. Indeed, nowadays the Charter of Fundamental Rights of December 7, 2000, adapted on December 12, 2009 in Strasbourg, has to be enforced in our legal system because of two reasons. First, because it is established in Ley Orgánica 1/2008,<sup>87</sup> by imposing that our fundamental rights should be interpreted according to the Charter. Second, because Article 6 of TEU,<sup>88</sup> in the version from the Treaty of Lisbon, already effective since December 1, 2009, establishes that "The Union recognizes the rights, liberties and principles set out in the Charter of Fundamental Rights of 7 December 2000, as adapted at Strasbourg, on 12 December 2007 in Strasbourg, which shall have the same legal value as the Treaties."<sup>89</sup>

#### 4. STC 265/1994, OF OCTOBER 3.

Two appeals for protection were brought against a decision made by the Second Chamber of the Supreme Court, which confirmed on appeal another judgment of the First Division of the Criminal Chamber of the Audiencia Nacional. This judgment found one of the appellants guilty of a continuing offense of flight of capital, which carried with it a sentence of six years and one day of major imprisonment, a fine of 500,000,000 pesetas (\$4,109,800) and the payment of

<sup>85</sup> S.T.C. 143/1994, May 9, FFJJ 5-7.

<sup>86</sup> S.T.C. 28/1991, Feb. 14, among others.

<sup>87</sup> LEY ORGÁNICA, 1/2008 LOREG.

<sup>88</sup> Treaty of Lisbon Amending the Treaty on European Union and the Treaty Establishing the European Communities art. 6, Dec. 13, 2007, 2007 O.J. (C 306) 1.

<sup>89</sup> TEU art. 6.

1/12th of the costs. The other appellant, an offender of the same crime, was given a sentence of six years and one day of major imprisonment, a fine of 90,000,000 pesetas (\$739,932) and the same order to pay the costs. In that judgment, two other people were also sentenced as offenders of the same crime to six years and one day of major imprisonment, a fine of 217,000,000 Pesetas (\$1,783,724) and the same custodial sentence and fine of 104,000,000 Pesetas (\$854,764), apart from the same order to pay the costs. All the offenders appealed to the Supreme Court, but the corresponding appeal was rejected and two of them appealed for protection before the Constitutional Court.

The appellants for protection considered that the challenged judgments had violated their rights to effective judicial protection,<sup>90</sup> to presumption of innocence<sup>91</sup> and to the principle of legality in criminal law matters recognized under Article 24.1, Article 24.2, and Article 25.1 CE respectively. Regarding the so-called violation of the right to crime legality<sup>92</sup> it is based upon two arguments, among which the second should be pointed out.<sup>93</sup>

<sup>90</sup> 6.A.1

<sup>91</sup> Regarding the so-called violation of the right to presumption of innocence (Article 24.2 CE), it was put forward that the conviction was not based upon a probative activity which could be considered enough for the purposes of overcoming such presumption. The self-incriminatory statement given by the appellants during the police report drawn up on the day they were arrested was the only one taken into account. It was not only drawn up under unusual circumstances but it had not been reproduced in the hearing of evidence in such conditions as to allow its contradiction. This was due to the failure to appear of the agents who received it. Apart from this, it was rectified by its authors and other witnesses at the process supported by plenty of defence documentary evidence.

<sup>92</sup> C.E. Art. 25.1.

<sup>93</sup> The other three procedural means should also be mentioned to a better understanding of the appeal. These were as follows:

a) The first of these procedural means to attack the contested judgement is developed from these considerations: 1) crime types contained in Article 6 of LCC corresponded to the "open-ended criminal laws," that is to say, those rules which content needs a complement situated in another legal provision of the same or lower rank; 2) therefore, by requesting the performance of such types, which "infringe the control exchange legal system" established by law, it was obvious that any modification of the system would have immediate consequences over the typical or atypical character of the action; 3) by virtue of the Real Decreto 1816/1991, the requirement of the "previous administrative authorization" disappeared, leaving all those offences, where the assumption was precisely this requirement, senseless; 4) however, the mentioned Real Decreto introduced *ex novo* certain estimations not contemplated under LCC until that time by establishing, under Article 4, an exception to the total liberalization of the transfer with other countries which was contrary to the requirements of the criminal principle of legality.

In the opinion of the appellants, Real Decreto 1816/1991 not only established that a behaviour that was previously punishable remained like that, but it created a new *ex novo* crime, because its elements could not be considered as coincident with the ones pursuant to Article 6.A.1 of LCC. This was because of the following reasons: 1) the minimum account in this last provision for the existence of a monetary crime was 2,000,000 pesetas (\$16,440), whereas in the Real Decreto it is increased to 5,000,000 pesetas (\$41,104); 2) contrary to the provisions in Article 6.A.1 of LCC, Real Decreto 1816/1991 remarked that the authorization should be understood "by person and trip"; 3) whereas Article 6.A.1 of LCC made only reference to Spanish or foreign coins or bank notes, or any other means of payment or instruments of transfer of money set in pesetas or foreign currency, Real Decreto 1816/1991 broadened the object to bearer bank checks, set in pesetas or foreign currency, and to coin or bar gold; 4) the protected legal right stopped being the same, as could be inferred from its own Statement of Purpose.

Based on these arguments, the applicants held that such marked differences between Article 6.A.1 of LCC and Real Decreto 1816/1991 on active subjects, material object, protected legal right and amount were clearly indicative of the fact that the Real Decreto had not modified any of the non-essential assumptions of the LCC by applying the technique of the open-ended criminal laws. On the contrary, it "created a new crime type which has nothing to do with the regulation of such law, as a result of broadening the scope of punishable actions not by introducing accidental elements but essential ones for the Constitution of the type of offence." This violated the reserve of the Organic Law which characterizes criminal matters and the principle of typology inherent to the principle of criminal legality since a new type of crime was established by rules without legal level (independent rule).

This Article will consider the case which established that Real Decreto 1816/1991 abolished the legal system of exchange control, with which the assumption to enforce Article 6 of LCC had disappeared. The appellants for protection considered that any interpretation of the Real Decreto that maintained the exchange control was incompatible with Directive 88/361/CEE,<sup>94</sup> of which the Real Decreto was a mere transposition instrument to national law. So, bearing in mind that Community Law prevails over national law, and that it does not preserve the figure of previous authorization, it should be concluded that the Judgment given by the Second Chamber of the Supreme Court applying Article 4.1 of Real Decreto<sup>95</sup> had violated the rights to liberty, legal crime, and equality.<sup>96</sup> Consequently, the Constitutional Court was specifically requested to either rule about this so-called conflict between national and Community Law because it affected fundamental rights,<sup>97</sup> or to submit the following preliminary ruling before the European Court of Justice, based on Article 177 of the CEE Treaty:

5. 'Are Real Decreto 1816/1991 and the developing Order of 27 December 1991 a truthful transposition of Community Directive 88/361/CEE of 24 June 1988?'<sup>98</sup>
6. Is Article 4 of Real Decreto 1816/1991, of 20 December, on external economic transactions, compatible with Article 67 of the Treaty of Rome, with the European Single Market and with equality and proportionality rights, whereas it imposes previous authorization to a European citizen in order to cross the Spanish border to reach another CE country carrying coins, bank notes, or bank checks, set on pesetas or foreign currency, or coin or bar gold, which value is above 5,000,000 pesetas ([\$]41,084[]) by person and trip, and with which failure to comply is punished with the prison and a fine based in Article 10 of the mentioned Real Decreto?'<sup>99</sup>

---

Furthermore, it stated that every intention of complementing the new criminal type by a remission of the provision which contained, Article 4.1 of Real Decreto 1816/1991, to the estimations contained in the Second Chapter of LCC would have implied to face banned analogy. It was finally alleged that this "new crime type" also violated the principles of proportionality and equality, since the rest of the transfers with other countries were liberalized.

b) The third procedural means of argumentation held that the Judgement of the Second Chamber of the Supreme Court violated the principle of criminal legality, since it had not applied retroactively, which was the most favorable rule. This was made according to the fact that Real Decreto 1816/1991 had completely abolished the legal system of exchange control, which was the only interpretation that, according to the previous section, would be compatible with the provisions under Directive 88/361/CE.

c) As the last procedural means of argumentation, regarding the so-called violation of the right to criminal legality, the appellants for protection alleged that, if contrary to what they reasoned, the offense remained a monetary crime (Article 4.1 of the Real Decreto in accordance with Article 6.A.1 of LCC), their punishment would only be supported if the concurrence of the composing elements of such typology had been proved enough. However, such was not the case, because they did not prove that the exportation of currency was "higher than 5,000,000 Pesetas (\$41,104) by person and trip"; besides it would also not have been the case if, by adding up the exported amounts, the limit had been exceeded. However, it could not have been demonstrated that the limit would have been exceeded in every trip made by the same person. These were essential requirements to talk about a typical behaviour. In other words: the text in Article 4 of Real Decreto 1816/1991 excluded the figure of a continuing offence, charged to the appellants, regarding the typology contained in such Article.

<sup>94</sup> Directive 88/361/CEE, June 24.

<sup>95</sup> Even though it is incompatible with Community law.

<sup>96</sup> Instead of giving immediate applicability to the Directive and, consequently, estimating that the action had been decriminalized.

<sup>97</sup> See S.T.C. 107/1984, Nov. 23; S.T.C. 28/1991, Feb. 14; S.T.C. 64/1991, Mar. 22.

<sup>98</sup> Antecedente de Hecho n. 3; S.T.C. 265/1994, Oct. 3

<sup>99</sup> *Id.*

In the later allegations before the Court, it was also reported, as a complementary fact to the basis containing the appeal for protection presented by one of the appellants, that there existed a preliminary ruling before the European Court of Justice requested by the Audiencia Nacional, regarding the issue of Directive 88/361/CEE. The Constitutional Court rejected this claim and stated there was no need in submitting preliminary ruling. The Judgment begins by stating that the first thing to be undertaken is the study of the arguments about the alleged violation of the right established in Article 25.1 CE, which is attributed to the Second Chamber of the Supreme Court on January 28, 1993. Nevertheless, the Judgment first answers if Directive 88/361/CEE, of 24 June, would have effect on the proceedings. As alleged by both defenses, under the principle of direct effect the Directive would have already had brought about a complete liberalization of capital movements from Spain towards foreign countries, since December 31, 1992.

It is difficult to distinguish the *ratio decidendi* of this question in the judgment. If by *ratio decidendi* we mean the cause or ground enough and suitable to solve a question, the reason for this is that the capital movements had not run in this case through EC countries but through Andorra and Switzerland. However, the Court's clear will in establishing a doctrine of not requesting preliminary ruling<sup>100</sup> can be inferred from the judgment. Indeed, the Judgment, FJ 2, begins by establishing a general doctrine excluding the formulation of preliminary ruling:

As has been stated in previous occasions and must be repeated now, the alleged contradiction of Community law by later national provisions is not a question that affects their constitutionality, because, in such case, it should be determined by the European Court of Justice (STC 49/1988, 28/1991, 61/1991 and 180/1993). On the other hand, this excludes the formulation of preliminary ruling by the Constitutional Court before such body based in Article 177 of the Treaty of Rome. Because this provision is only effective in the processes where application of Community law should be made and precisely to guarantee a standard enforcement of that.<sup>101</sup> Therefore, there is no possibility of such preliminary ruling. The request for a preliminary ruling has already been submitted by some legal bodies before the European Court of Justice in similar terms to those indicated in the appeals for protection.

However, the Judgment proceeds to make a remark on what was previously classified in this Article as *ratio decidendi*, which would invalidate the earlier considerations.

Nevertheless, it should be pointed out that the crucial effect the appellants for protection attribute to the mentioned community directive would exclusively refer to the capital movements between the Member States of the European Union. That is a prerequisite that does not match the capital movements which destination was several opened current accounts in Switzerland after crossing the Principality of Andorra, as the ones carried out by the appellants for protection. It is highly significant here that whereas Article 1.1 of the mentioned Directive contains the term 'abolish' regarding the restrictions of capital movements between Member States, Article 7.1 establishes that the Member States 'will make efforts to achieve' the same degree of liberalization in the regime applied to the corresponding transfers to capital movements with third countries as the one in the operations among residents of the rest of the Member States. This indicates that the provisions under Directive 88/361/CEE on capital movements between Member States of

---

<sup>100</sup> It should be made present that the Spanish Constitutional Court understands that it does not only lodge doctrine on the *ratio decidendi* of its judgements. See, for instance, the important S.T.C. 155/1999, June 25.

<sup>101</sup> See S.T.C. 372/1993, Dec. 13, FJ 7.

the European Union are no longer compulsory in such cases as the one concerned here, which tackles the movements of capital to third countries.<sup>102</sup>

There is no further reference in the rest of the judgment to the argument analysed here.

### C. WHY THE CONSTITUTIONAL COURT MUST PRESENT PRELIMINARY RULINGS BEFORE THE CJEU.

The submission of preliminary ruling before the European Court of Justice by the Constitutional Court imposes itself for many reasons. Before considering them, it could be pointed out that, as a matter of political convenience, the Spanish Constitutional Court should present, where applicable, preliminary ruling. First, because it would favor the process of building Europe,<sup>103</sup> although modestly, and, second, because the Spanish Constitutional law could also influence, even more modestly, in European Law.

There are also powerful arguments based on positive law that justify an affirmative answer. However, this Article will only outline them. First, the relationship between the Spanish Constitutional Court and the so-called “*bloc constitutionnel*,” and the European Union Law is not a relationship of separation. It is not a relationship that allows considering the Constitutional Court as a judge of the European Union law *in the scope of presenting preliminary ruling*. Not only are Spanish National Law and the European Union Law not separated, but they are intimately related. Furthermore, the possibility of them crossing exists. This does not mean that we must consider European Union Law, not even the primary one, as a parameter of constitutionality, nor does it mean that the Spanish Constitutional Court is capable of controlling the legislative acts of the European Union.

Second, the CJEU is the deciding competent body which must decide which bodies can put forward a preliminary ruling, and the CJEU is favorable to authorize this for constitutional courts. In effect, as the Court Luxembourg is the supreme interpreter of the European Union Law,<sup>104</sup> the notion of the judge in charge of presenting preliminary ruling under the current Article 267 of the Treaty on the Functioning of the European Union (“TFEU”),<sup>105</sup> must be defined by the competent bodies of the European Union Law. It cannot be established by national bodies on their own accord. The CJEU must assess if the Constitutional Courts can or cannot be judges that present preliminary rulings, since the Court of Luxembourg is the ultimate interpreter of the European Union Law.<sup>106</sup>

In relation to this point, the jurisprudence of the Court of Luxembourg was, and is, decisively constant. The CJEU has been drawing up a series of criteria that enable it to assess if a

<sup>102</sup> S.T.C. 265/1994, Oct. 3, FJ 2.

<sup>103</sup> Since I attended the speech by Mr Jiménez de Parga pronounced at the Royal Academy of Moral and Political Sciences (Full member and Chairman of the Constitutional Court until June 2004) due to the closing ceremony of the 25th anniversary of the Spanish Constitution series, entitled “De la Constitución de España a la Constitución de Europa” (published by the Academy itself), I am convinced we must face a more united European future with enthusiasm.

<sup>104</sup> Which no one doubts, including the Spanish Constitutional Court.

<sup>105</sup> Treaty on the Functioning of the European Union art. 267, Sep. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU].

<sup>106</sup> Francesco Sementilli, *Brevi note sul rapporto tra la Corte costituzionale italiana e la Corte di giustizia delle Comunità Europee*, in GIURISPRUDENZA COSTITUZIONALE 4771 (2004); I. Viarengo, *Diritto comunitario e valori fondamentali tra sindacato di costituzionalità e controllo di validità della Corte di giustizia*, 33 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATO PROCESUALE 393 (1997).



preliminary ruling has been correctly presented by a national judge. For example, in case *Standesamt Stadt Niebüll*,<sup>107</sup> the CJEU stated that “to assess if the issuing body has the requirements to be considered a judiciary body according to Article 234 EU Treaty,<sup>108</sup> which is an exclusively European Union Law matter, the Court takes into account a group of elements, such as the legal origin of the body, its permanent character, the compulsory character of its jurisdiction, the contradictory nature of the procedure, the fact that the body applies juridical regulations and that it is independent.”<sup>109</sup> The CJEU stated repeatedly that it is solely responsible for elucidating the legal capacity of the judge issuing the preliminary ruling, as it is considered a European Union matter, and not a national law matter. So, it can be inferred from the study of the criteria established by the Court of Luxembourg, the judge of the Union has tended (and tends) to interpret in a wide sense<sup>110</sup> the notion of jurisdictional body of Article 231 EU Treaty (Article 267 TFEU). To such point, the advocate generals, who are worried about the overload of pending preliminary rulings in Luxembourg, have tried to introduce more restrictive notions in order to limit the access to the CJEU.<sup>111</sup>

In any case, from the European Union Law point of view, there is no doubt that Constitutional Courts, such as the Spanish one, are included in the notion of judiciary body and drawn within the criteria of the CJEU. On the other hand, there have been preliminary rulings presented before the CJEU on behalf of the Constitutional Courts of other member States, and the CJEU has not hesitated in admitting them. But this, because of its relevance, must be considered as an independent argument, which will be discussed later in this article.

Third, the CJEU not only considers the constitutional courts of Member States empowered to propose a preliminary matter but also, in exceptional events, it could declare an EU member responsible if its constitutional justice institution does not initiate the already mentioned preliminary ruling.

It is worth noting how recent judgments of CJEU, related to the responsibility of member states of the EU because of transgression of the EU Law, have supposed a relevant push in this sense. The wide jurisprudence mine opened by the *Francovich Judgment*<sup>112</sup> which recognized, for the first time, the right of individuals to be compensated for transgression of the EU Community duties, has been lately enriched by some cases that deserve to be highlighted in this context. These cases referred to the events of damages caused by jurisdictional institution's behavior and mainly related to the lack of use of the preliminary ruling.

Within the Community jurisprudence, the leading case in this sense is the judgment CJEU of 30 September 2003, *affair Gerhard Köbler v. Republic of Austria*.<sup>113</sup> In this occasion, the CJEU had the opportunity to explain thoroughly how the principles of civil responsibility of

---

<sup>107</sup> Case C-96/04, *Niebüll*, 2006 EUR-Lex CELEX LEXIS (Apr. 27, 2006). *See also* Case C-54/96, *Dorsch Consult*, 1997 E.C.R. I-4961; *Joined Cases C-110-147/98, Gabalfrija et al.*, 2000 E.C.R. I-1577; Case C-178/99, *Salzmann*, 2001 E.C.R. I-4421; Case C-182/00, *Lutz GmbH et al.*, 2002 E.C.R. I-547.

<sup>108</sup> TFEU art. 267.

<sup>109</sup> Case C-96/04, *Niebüll*, 2006 EUR-Lex CELEX LEXIS (Apr. 27, 2006).

<sup>110</sup> *See* Case C-43/95, *Forsberg v. MSL Dynamics, Ltd.*, 1996 E.C.R. I-4661.; Case C-54/96, *Dorsch Consult*, 1997 E.C.R. I-4961 (the opinion of Advocate General Tesauo, who doubted of the jurisdictional nature of the body that had put forward the preliminary ruling); Case C-17/00, *Coster v. Watermael-Boitsfort*, 2001 E.C.R. I-9445 (the restrictive opinion of Advocate General Ruiz-Jarabo Colomer.

<sup>111</sup> So far, the advocate generals have not had success in trying to introduce more restrictive notions).

<sup>112</sup> *Joined Cases C-6 & 9/90, Francovich et al. v. Italian Republic*, 1991 E.C.R. I-5357. *See also* *Judgments of the CJEU of 5 March 1996, Joined Cases C-46 & 48/93, Brasserie du Pêcheur SA v. Bundesrepublik Deutschland, Factortame Ltd. et al.*, 1996 E.C.R. I-1029.

<sup>113</sup> Case C-224/01, *Köbler v. Republic of Austria*, 2003 E.C.R. I-10239.

a State, when transgressing Community Law, are also applicable in case of harm caused by a judicial activity, in particular a last resort judge decision.<sup>114</sup> Consequently, non-fulfillment of the preliminary referral is one of the criteria to be considered in order to determine the existence of a clear infringement of the EU Law that can be attributed to a supreme judicial institution. This reason must be added to those already established by the CJEU in the *Brasserie du Pêcheur* and *Factortame* Judgments, as well as the following jurisprudence related to the State's legal responsibility due to the legislator or the Public Administration.

Although the Community jurisprudence has been quite moderate in this sense,<sup>115</sup> a subsequent CJEU decision highlighted the extension of responsibility derived from European Union Law transgression. The *Köbler* jurisprudence surpasses the narrow limits settled by the Italian Law with regard to the civil responsibility of the magistrates, which will be hardly criticized by the CJEU and considered doubtful compatibles with the Community principles). In CJEU 13 June, 2006, C-173/03, *affair Traghetti del Mediterraneo SpA c. Italian Republic*, the CJEU declared about the compatibility between the Italian Law and the European Union Law in terms of civil responsibility of judges contained in the *Köbler* judgment.<sup>116</sup>

Fourth, having a look at the comparative law, it is noticeable that the idea of a justice institution<sup>117</sup> starting preliminary matters is expanding. Nevertheless, it is also certain that the

---

<sup>114</sup> Naturally, the CJEU establishes some restrictive conditions that must concur in order for the damage caused by the Judges to be recoverable in the light of European Law. In particular, it is stated that if the damage is recoverable when the rule of Community Law that has been violated attributes rights to individuals, the violation must be sufficiently characterized and a direct causal link between the violation and the damaged suffered by the affected parties. More precisely, in the case of damage caused by a jurisdictional decision, by violation of "sufficiently characterized" Community Law, the violation is known to be "of manifest character." The *Köbler* judgment numbers as examples hypotheses that could be considered as manifest violation of Community Law (paragraphs 53 and 56) and among these it numbers the non-compliance of the obligation of putting forward a preliminary ruling for judges of final instance in Article 234.3 of ECJ. Section 55 of the *Köbler* judgment, specified that we must take into account, in particular, "the degree of clarity and precision of the violated rule, the intentional nature of the infringement, the excusable or inexcusable nature of the Law error, the position, in this case, adopted by a Community institution, as well as the non-compliance by the jurisdictional body when it has the obligation of putting forward preliminary ruling in compliance with Article 234 CE, paragraph 3." Case C-224/01, *Köbler v. Republic of Austria*, 2003 E.C.R. I-10239.

<sup>115</sup> The CJEU Judgment revisited in Case C-154/08 presents a threefold interest: on one hand, it seemed, at a certain point, that the Commission considered that Spain had not complied with the obligation of putting forward a preliminary ruling. On the other hand, it was a case in which the Commission requested the declaration of responsibility by the Spanish State, not derived from a regulation dictated legislatively or executively, but as a consequence of a Judgment rendered by the Supreme Court. But above all, we perceive that normally in the case of not complying with the Community Law, it is the Commission that takes action due to the non-compliance of the merits of the case, for not having presented preliminary ruling. The matter of discussion was the Spanish regulation that considered that the services rendered to an Autonomous Community by the Land Registrars, in their condition as clearing bearers of a clearing office, were not subject to VAT.

<sup>116</sup> In the scope of a complex and very long process which confronted the company *Traghetti del Mediterraneo* with *Tirrenia* for abuse of its dominant position and of State aids, the CJEU was called upon to solve by means of preliminary ruling presented by the Genoa Court to clarify if the principle of extracontractual responsibility of the Member States regarding individuals could tolerate case-law such as Italy's, that excludes the judges from that responsibility, in relation with the activity of interpreting judicial regulation and in order to evaluate the act and the evidence carried out in the jurisdictional field. This limited the responsibility only when the judge committed fraud or a serious offence. More precisely, the Genoa Court demanded the CJEU examine the problem of the damaged caused to individuals, caused by the judge of last instance for not having presented preliminary ruling, that, according to Italian case-law, were not recoverable.

<sup>117</sup> Such kind of institution not only guarantees the Constitution, but also controls the adequate running of the political system. In this sense, in the Spanish doctrine, see J. DE ESTEBAN & PEDRO J. GONZÁLEZ-TREVIJANO,

Constitutional Court of Germany (“FCFa”) and the Constitutional Council of France (“CCF”)<sup>118</sup> are reluctant, but, on the other hand, the Constitutional Court of Austria (“TCa”),<sup>119</sup> the Belgian Constitutional Court (“TCb”), when still named the Belgian Arbitration Court,<sup>120</sup> the Lithuanian

---

TRATADO DE DERECHO CONSTITUCIONAL III 141-44 (Servicio de publicaciones de la Facultad de Derecho de la Universidad Complutense de Madrid, 1ª edición 1994).

<sup>118</sup> In France, the CCF has developed in recent years a jurisprudence that completes itself in its Decision of 30 November 2006, that is confirmed by another on 19 June 2008, and pursuant to which the Council applies Community Law to control the adequacy of a law determined by the development of a directive that aims to develop, and as long as the contradiction is manifest. This doctrine is based in Article 88.1 of the French Constitution, that states the Republic participates in the European Communities, and contains the following notes:

1) It does not clarify if it is possible the control of any rule, not only acts, regarding any rule of the EU legal system.  
 2) The article refers only to the manifested contradiction because, being the closing date to decide of 8 or 30 days, there is no time to submit the case to the Court of Justice of the European Communities. The act establishing the internal preliminary ruling and the control of constitutionality on promulgated acts do not cause any changes in this sense. The closing date to decide will be three months, so the Conseil will continue to consider it as too short timing. Some authors have proposed an intermediate solution. The court could submit the preliminary ruling but not to wait for the Court to answer. The response would be applied to the *a quo* judge later, so it could give rise to contradictory decisions and the need for a dialogue among judges.

<sup>119</sup> SSTJCCEE November 8, 2001, Case C-143/99, *Adria-Wien Pipeline GMBH, Wietersdorfer & Peggauer Zementwerke GmbH v. Finanzlandesdirektion für Kärnten*, 2001 E.C.R. 8365 (which deals with a petition to the Court of Justice of the European Communities pursuant to Article 177 TCE, by *Verfassungsgerichtshof* (Austria), in order to obtain a preliminary ruling about the interpretation of Article 92 TCE to be applied in the pending cases *Adria-Wien Pipeline GmbH, Wietersdorfer & Peggauer Zementwerke GmbH y Finanzlandesdirektion für Kärnten*); Case C-171/01, *Wählergruppe Gemeinsam Zajedno v. Birlitke Alternative, Grune GewerkschafterInnen v. UG*, 2003 E.C.R. I-4301 (which deals with a petition to the Court of Justice of the European Communities pursuant to Article 234 CE, by *Verfassungsgerichtshof* (Austria), in order to obtain a preliminary ruling about the interpretation of Article 10.1 of Decision n. 1/80, September 19, 1980, related to the Agreement of Association between the European Community and Turkey, in order to be applied by the *Verfassungsgerichtshof* in a case filed before the Court by *Wählergruppe «Gemeinsam Zajedno/Birlikte Alternative und Grüne GewerkschafterInnen/UG»*, en el que intervienen: *Bundesminister für Wirtschaft und Arbeit, Kammer für Arbeiter und Angestellte für Vorarlberg, Wählergruppe «Vorarlberger Arbeiter- und Angestelltenbund (ÖAAB) - AK-Präsident Josef Fink»*, *Wählergruppe «FSG - Walter Gelbmann - mit euch ins nächste Jahrtausend/Liste 2»*, *Wählergruppe «Freiheitliche und parteifreie Arbeitnehmer Vorarlberg - FPÖ»*, *Wählergruppe «Gewerkschaftlicher Linksblock»* y *Wählergruppe «NBZ - Neue Bewegung für die Zukunft»*); *Joined Cases C-465/00, C-138-39/01, Rechnungshof v. Österreichischer Rundfunk et al., Christa Neukomm v. Österreichischer Rundfunk, Joseph Lauer mann v. Österreichischer Rundfunk*, 2003 E.C.R. I-5014 (which deal with three petitions to the Court of Justice of the European Communities pursuant to 234 CE by *Verfassungsgerichtshof* (case C-465/00) and *Oberster Gerichtshof* (Supreme Court) (cases C-138/01 y C-139/01) (Austria), respectively, in order to obtain a preliminary ruling about the interpretation of Directive 95/46/CE, the Data Protection Directive, of the European Parliament and European Council, on October 24, 1995 (DO L 281, p. 31), to be applied in the pending cases *Rechnungshof* (case C-465/00) y *Österreichischer Rundfunk* (Austrian broadcasting company), *Wirtschaftskammer Steiermark* (Austrian Chamber of Commerce), *Marktgemeinde Kaltenleutgeben*, *Land Niederösterreich*, *Österreichische Nationalbank* (Austrian National Bank), *Stadt Wiener Neustadt*, *Austrian Airlines*, *Österreichische Luftverkehrs-AG*, versus *Christa Neukomm* (case C-138/01), *Joseph Lauer mann* (case C-139/01) and *Österreichischer Rundfunk*).

<sup>120</sup> Case C-93/97, *Fédération Belge des Chambres Syndicales de Médecins ASBL*, 1998 E.C.R. I-4837 (in the pending case before TCb between *Fédération belge des chambres syndicales de médecins ASBL* (on one hand) and *Vlaamse regering, Gouvernement de la Communauté française and Conseil des ministres* (on the other hand) requesting preliminary ruling about the interpretation of the article 31 Directive 93/16/CEE; May 24, 2008, C- 212 / 06, submitted pursuant to Article 234 CE, by the Belgium *Cour d'arbitrage*, currently called *Cour constitutionnelle* (Belgium), in a case whose parties were the Governments of the French and Walloon Communities, on the one hand, and the Flemish Government, on the other); Case C-303/05, *Advocaten voor de Wereld*, 2007 E.C.R. I-3633 (preliminary ruling submitted by the *Arbitragehof* (Belgium)); Case C-305/05, *Ordre des barreaux francophones et germanophones et al.* (submitted pursuant to Article 234 CE, by the *Cour d'arbitrage*, currently called *Cour constitutionnelle* (Belgium), in a case whose parts were the *Ordre des barreaux francophones et germanophone*,

Court (“TCLi”)<sup>121</sup> and the Constitutional Court of Italy (“TCi”)<sup>122</sup> have already posed preliminary matters. Further, the Portuguese Court<sup>123</sup> seems to be inclined to this possibility. It is worth mentioning, the “conversions” of the TCi during the latest years, which was traditionally unwilling to pose preliminary matters, and the first experience of the TCb in setting out a preliminary ruling of validity.<sup>124</sup>

Having positively stated that the Spanish Constitutional Court can be forced to state a preliminary issue. The next step is to specify under which circumstances. Supposing that the circumstances could be identified, the circumstances will constitute additional support to back the favorable trend to this preliminary ruling. Moreover, once the facts are determined, the Spanish Constitutional Court would be able to pose a preliminary ruling, not just in its capacity as a guarantor of rights, but also as the guarantor of the constitutional provisions about institutions and powers.

With regard to rights, it is worth discussing the contents of the Organic Act 1/2008<sup>125</sup> and Article 6 of the Treaty of Lisbon.<sup>126</sup> Indeed, the referred organic act of July 30, 2008, which authorized the ratification by Spain of the Treaty of Lisbon, states in its second article, “Charter of Fundamental Rights of the European Union,” that “according to the [second] paragraph of Article 10 of the Spanish Constitution and article 1, section 8, of the Treaty of Lisbon, the norms related to fundamental and civil rights recognized by the Constitution will be interpreted according to the Charter of Fundamental Rights.”<sup>127</sup> On the other hand, Article 6, section 1 of the

Ordre français des avocats du barreau de Bruxelles, Orde van Vlaamse balies, Nederlandse Orde van advocaten bij de balie te Brussel against Conseil des ministres).

<sup>121</sup> Case C-239/07, Julius Sabatauskas et al.

<sup>122</sup> ATCi 103-2008, on February 13. Conclusions by Advocate General, Ms. Juliane Kokott were presented on July 9, 2009. The case was decided by Case C-169/08, *Presidente del Consiglio dei Ministri v. Regione Sardegna*, (preliminary ruling submitted by the Italian Corte costituzionale).

<sup>123</sup> S.T.C. 654/1999, Dec. 7; S.T.C. 240/2000, Apr. 11, S.T.C. 278/2000, May 16.

<sup>124</sup> Preliminary ruling by the Cour constitutionnelle (Belgium) on July 31, 2009, *I.B./Conseil des ministres*, (Asunto C-306/09) (2009/C 233/19): «1. Is a European arrest warrant issued for the purposes of the execution of a sentence imposed in absentia, without the convicted person having been informed of the date and place of the hearing, and against which that person still has a remedy, to be considered to be, not an arrest warrant issued for the purposes of the execution of a custodial sentence or detention order within the meaning of Article 4(6) of the Council Framework Decision of 13 June 2002 on the European arrest warrant and the surrender procedures between Member States, (1) but an arrest warrant for the purposes of prosecution within the meaning of Article 5(3) of the Framework Decision?; 2. If the reply to the first question is in the negative, are Article 4(6) and Article 5(6) of the Framework Decision to be interpreted as not permitting the Member States to make the surrender to the judicial authorities of the issuing State of a person residing on their territory who is the subject, in the circumstances described in the first question, of an arrest warrant for the purposes of the execution of a custodial sentence or detention order, subject to a condition that that person be returned to the executing State in order to serve there the custodial sentence or detention order imposed by a final judgment against that person in the issuing State?; 3. If the reply to the second question is in the affirmative, do the articles in question contravene Article 6(2) of the Treaty on European Union and, in particular, the principles of equality and non-discrimination?; 4. If the reply to the first question is in the negative, are Articles 3 and 4 of the Framework Decision to be interpreted as preventing the judicial authorities of a Member State from refusing the execution of a European arrest warrant if there are valid grounds for believing that its execution would have the effect of infringing the fundamental rights of the person concerned, as enshrined by Article 6(2) of the Treaty on European Union?» (DO L 190, p. 1).

<sup>125</sup> LEY ORGÁNICA, 1/2008 LOREG.

<sup>126</sup> Treaty of Lisbon art. 6, Dec. 13, 2007, 2007 O.J. (C 306) 1. The Treaty of Lisbon was signed on December 13, 2007, modifying the Treaty on European Union and the Treaty establishing the European Community (the title of the latter is replaced by “Treaty on the Functioning of the European Union”).

<sup>127</sup> Charter of Fundamental Rights of the European Union, Dec. 14, 2007, 2007 O.J. (C 303) 1. *See also* C.E. Art. 10 (Fundamental rights and duties). “2. Provisions relating to the fundamental rights and liberties recognized by the

Treaty on European Union, as noted by the Treaty of Lisbon, dictates that “[t]he Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000 as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.”<sup>128</sup>

Therefore, if the fundamental rights of the Spanish Constitution must be interpreted according to the Charter of Fundamental Rights of the European Union and also with the Court of Luxemburg,<sup>129</sup> it is quite believable and plausible that sooner or later some differences will appear between the Spanish Constitution and the European Union Law in the understandings of fundamental rights.

Concerning the organic part of the Constitution, it is possible to consider a new interpretation of Article 93<sup>130</sup> and 96<sup>131</sup> CE, in order to make them accomplish the function carried out by Article 117 of the Italian Constitution, which opens the door to posing of preliminary questions. It is relevant to point out that Article 117.1 of the Italian Constitution, following the May 30, 2003 amendment, states, “[l]egislative power belongs to the state and the regions in accordance with the Constitution and within the limits set by European Union law and international obligations.”<sup>132</sup> Since then, invoking this rule, entails invoking the European Union Law which implies setting out unconstitutionality matters. There is no such Article in the

Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by Spain.” *Id.*

<sup>128</sup> Consolidated Version of the Treaty on European Union and the Treaty Establishing the European Community art. 6, sec. 1, Dec. 12, 2006, 2006 O.J. (C 321) 1. “The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties” and “the rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.” *Id.*

<sup>129</sup> This is not a novelty all in all. The doctrine of the Court of Justice of the European Communities about indirect sexual discrimination has been adopted by the Constitutional Court. The STC 240/1999, Dec. 20, FJ 6 recalls and summarizes this doctrine, arguing that “this Court has had chance to repeat in several decisions that the specific prohibition of sexual discrimination as declared in the 14 CE, contains both a right and a mandate against discrimination (STC 41/1999), not only the direct one, this is the differentiate legal treatment against a person on grounds his or her sex, but also the indirect one, this is, a formally neutral or non-discriminatory treatment from which comes, because of several factual condition between workers of both sexes, an impact against one of these. S.T.C. 198/1996, Dec. 3, FJ 2. *See also* S.T.C. 145/1991, July 1, S.T.C. 286/1994, Oct. 27, S.T.C. 147/1995, Oct. 16, and S.T.C. 3/2007, Jan. 15. The concept of indirect gender discrimination has been elaborated by the Court of Justice of the European Communities by deciding several cases about part-time jobs on the grounds that Article 119 EEC Treaty (currently Article 141 TCE) and some Directives which prohibit gender discrimination. A repeated assertion by the Court in several cases may summarize its approach: “As the Court has stated on several occasions, it must be ascertained whether the statistics available indicate that a considerably smaller percentage of women than men is able to satisfy the condition of two years’ employment required by the disputed rule. That situation would be evidence of apparent sex discrimination unless the disputed rule were justified by objective factors unrelated to any discrimination based on sex” (See, among others, SSTJCE on June 27, 1990; case Kowalska; on February 7, 1991, case Nimz; on June 4, 1992, case Bötél; on February 9, 1999, case Seymour- Smith and Laura Pérez).

<sup>130</sup> *See infra* note X(2 below) and accompanying text.

<sup>131</sup> C.E. Art. 96.

1. Validly concluded international treaties, once officially published in Spain, shall be part of the internal legal system. Their provisions may only be repealed, amended or suspended in the manner provided for in the treaties themselves or in accordance with the general rules of international law. 2. The procedure provided for in section 94 for entering into international treaties and agreements shall be used for denouncing them.

<sup>132</sup> Art. 117 Costituzione (It.).

Spanish Constitution.<sup>133</sup> Nevertheless, some voices have proposed the Spanish Constitutional Court to make a similar use of the constitutional precept that rules Spain's access to the European Union. Article 93 CE declares:

Authorization may be granted by an organic act for concluding treaties by which powers derived from the Constitution shall be transferred to an international organization or institution. It is incumbent on the Cortes Generales or the Government, as the case may be, to ensure compliance with these treaties and with resolutions originating in the international and supranational organizations to which such powers have been so transferred.<sup>134</sup>

However and so far, and as explained, the Spanish CC has refused to make such interpretation of the aforementioned article.

---

<sup>133</sup> In addition to giving rise to the application of the Union Law as a parameter of constitutionality: STC 349/2008, Dec. 15.

<sup>134</sup> C.E. Art. 93.

# RELIGION AND THE ALIEN TORT STATUTE

*Chad G. Marzen\**

## INTRODUCTION

The Alien Tort Statute, 28 U.S.C. § 1350,<sup>1</sup> stands as one of the most unique laws of the United States. It provides that the “district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>2</sup> It has been referred to in the past by Judge Henry Friendly as a “kind of legal Lohengrin; although it has been with us since the first Judiciary Act, § 9, 1 Stat. 73, 77 (1789),<sup>3</sup> no one seems to know whence it came.”<sup>4</sup> The legal “Lohengrin” of the Alien Tort Statute has been extended by courts to provide jurisdiction over tort claims covering the violations of a number of norms of international law – for example, the prohibition against torture,<sup>5</sup> the prohibition against genocide,<sup>6</sup> war crimes,<sup>7</sup> crimes against humanity,<sup>8</sup> the prohibition against racial discrimination,<sup>9</sup> and terrorism.<sup>10</sup> However, not all torts have been found by courts to be actionable under the Alien Tort Statute, including fraud,<sup>11</sup> conversion<sup>12</sup> conspiracy to murder,<sup>13</sup> and the “right to life” and “right to health.”<sup>14</sup>

With the advent of an increased number of cases filed involving the Alien Tort Statute, Alien Tort Statute cases which relate to religious concerns generally are likely to become more common. This Article, following a brief introduction of the Alien Tort Statute, will summarize and examine several developments concerning religion and the Alien Tort Statute, most prominently the recent injection of the Alien Tort Statute into the crisis in the United States concerning sexual abuse by Roman Catholic priests.

---

\* Attorney, Engles, Ketcham, Olson & Keith, P.C., Omaha, Nebraska; J.D., Certificate in International and Comparative Law, Saint Louis University, 2008; B.A., Grinnell College, 2005. The author would like to thank Katherine Stevens of the Creighton University School of Law, who invited me to present this essay. He would also like to thank his parents, Dennis and Salud Marzen of Dougherty, Iowa, and his younger brother Christopher and Ryan for their kind, unending support, encouragement, and sacrifices to help make this essay possible. The author remains solely responsible for all in this essay and for any errors which occur. The author can be reached at marzen@alumni.grinnell.edu.

<sup>1</sup> 28 U.S.C. § 1350 (2006).

<sup>2</sup> 28 U.S.C. § 1350.

<sup>3</sup> 1 Cong. Ch. 20, 1 Stat. 73, 77 (2003).

<sup>4</sup> *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2nd Cir. 1975).

<sup>5</sup> *Filartiga v. Peña-Irala*, 630 F.2d 876, 884 (2nd Cir. 1980) (“Having examined the sources from which customary international law is derived the usage of nations, judicial opinions and the work of jurists, we conclude that official torture is now prohibited by the law of nations. The prohibition is clear and unambiguous, and admits of no distinction between treatment of aliens and citizens.”).

<sup>6</sup> *Kadic v. Karadzic*, 70 F.3d 232, 242 (2nd Cir. 1995).

<sup>7</sup> *Kadic*, 70 F.3d at 243.

<sup>8</sup> *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193, 1202 (9th Cir. 2007).

<sup>9</sup> *Id.* at 1209. (“Acts of racial discrimination are violations of jus cogens norms.”).

<sup>10</sup> *Almog v. Arab Bank, PLC*, 471 F. Supp. 2d 257, 284 (E.D.N.Y. 2007).

<sup>11</sup> *Arndt v. UBS AG*, 342 F. Supp. 2d 132, 140 (E.D.N.Y. 2004).

<sup>12</sup> *Bigio v. Coca-Cola Co.*, 448 F.3d 176 (2nd Cir. 2006).

<sup>13</sup> *Rzayeva v. U.S.*, 492 F. Supp. 2d 60, 86-87 (D. Conn. 2007) (quoting *Flores v. S. Peru Copper Corp.* 414 F.3d 233, 249 (2nd Cir. 2003)).

<sup>14</sup> *Flores v. S. Peru Copper Corp.*, 406 F.3d 65 (2nd Cir. 2003).

First, this Article will examine the notable law review article written by Lucien Dhooge concerning international instruments which include a prohibition of discrimination against religion,<sup>15</sup> and discuss the fact that there is not an international convention or treaty which contains provisions concerning a prohibition of discrimination against religion which would be actionable under the Alien Tort Statute. Second, this Article will briefly examine a recent case involving alleged religious harassment against a group of detainees at the U.S. Naval Base at Guantanamo Bay, Cuba and their claims under the Alien Tort Statute.<sup>16</sup>

Finally, this Article will examine the recent claims brought in the United States District Court for the Central District of California in *Juan Doe I v. Cardinal Roger Mahony*.<sup>17</sup> The claims concern the crisis involving sexual abuse by Roman Catholic priests, an area that, until recently, had not yet involved an Alien Tort Statute claim.

This Article will contend that while this area may see more claims involving the Alien Tort Statute in the near future, such claims are likely to be unsuccessful as they may be unable to identify a norm of international law which would be recognized to constitute an actionable norm under the Alien Tort Statute.

## I. INTERNATIONAL TREATIES AND CONVENTION CONCERNING A PROHIBITION OF DISCRIMINATION AGAINST RELIGION

In a 2006 law review article, Professor Lucien Dhooge outlined a number of international instruments which include a prohibition of discrimination against religion.<sup>18</sup> He discussed a number of international documents, including the following main conventions and treaties:

- A. *International Covenant on Civil and Political Rights*: This document requires each State, in Article 2(1), to undertake “to respect and to ensure all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as ... religion.”<sup>19</sup> However, Dhooge states that the provisions in this covenant are not obligatory, and thus not actionable, under the Alien Tort Statute, due to their non-self-executing nature.<sup>20</sup>
- B. *International Convention on Economic, Social, and Cultural Rights*: The Convention states in Article 2(2) that States are to “undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to ... religion.”<sup>21</sup> Just as is the case with the ICCPR, Dhooge notes that this provision has not been ratified by the U.S., and is thus not actionable under the Alien Tort Statute.<sup>22</sup>
- C. *Geneva Convention IV and Protocol II*: Geneva Convention IV, in Article 27, provides that all protected persons under the Convention are “entitled to ‘respect’ for their

---

<sup>15</sup> Lucien J. Dhooge, *Lohengrin Revealed: The Implications of Sosa v. Alvarez-Machain for Human Rights Litigation Pursuant to the Alien Tort Claims Act*, 28 LOY. L.A. INT’L & COMP. L. REV. 393 (2006).

<sup>16</sup> *Rasul v. Myers*, 512 F.3d 644 (D.C. Cir. 2008).

<sup>17</sup> See Complaint, *Juan Doe I. v. Cardinal Roger Mahony*, No. CV 10-02902 (C.D. Cal. April 20, 2010), available at <http://andersonadvocates.com/Files/60/Juan-Doe-1-Complaint-against-Cardinal-Mahoney-Cardinal-Rivera-and-The-Diocese-of-Tehuacan> (last visited March 19, 2011).

<sup>18</sup> Dhooge, *supra* note 16, at 481-83.

<sup>19</sup> *Id.* at 481 (citing International Covenant on Civil and Political Rights, G.A. Res. 2200A (XXI), art. 2(1), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966)).

<sup>20</sup> *Id.* at 482.

<sup>21</sup> *Id.* (citing International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 2(2), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966)).

<sup>22</sup> *Id.*



religious practices and convictions,”<sup>23</sup> and Protocol II extends this protection to victims of a non-international armed conflict.<sup>24</sup> Dhooge remarks that both of these conventions lack the requisite degree of specificity to be actionable under the Alien Tort Statute.<sup>25</sup>

Overall, there is likely not a current international convention or treaty to date that contains protection from religious discrimination which would be actionable under the Alien Tort Statute. As Dhooge concludes, “unlike racial discrimination, discrimination on the basis of religious beliefs or practices has not been deemed to be *jus cogens*.”<sup>26</sup>

## II. *RASUL V. MYERS* AND ALLEGED DISCRIMINATION AGAINST RELIGION

Despite the fact that there is not a current international convention or treaty to date that contains protection from religious discrimination that would be actionable under the Alien Tort Statute, Plaintiffs have still not hesitated to bring forth claims of religious discrimination under the Alien Tort Statute.

In *Rasul v. Myers*,<sup>27</sup> the Plaintiffs, four citizens of the United Kingdom, claimed they were in Afghanistan in 2001 to provide humanitarian relief.<sup>28</sup> They were captured by the Northern Alliance in 2001 then placed in United States custody and taken for incarceration at Guantanamo Bay, Cuba.<sup>29</sup>

The Plaintiffs alleged that they were tortured systematically and repeatedly while incarcerated at Guantanamo by being “beaten, shackled in painful stress positions, threatened by dogs, subjected to extreme temperatures and deprived of adequate sleep, food, sanitation, medical care and communication.”<sup>30</sup> In addition, they claimed harassment and discrimination while practicing their religion, “including forced shaving of their beards, banning or interrupting their prayers, denying them copies of the Koran and prayer mats and throwing a copy of the Koran in a toilet bucket.”<sup>31</sup>

The United States Court of Appeals for the Federal Circuit upheld the federal district court’s dismissal of the claims under the Alien Tort Statute concerning religious discrimination.<sup>32</sup> The district court concluded “that pursuant to the Westfall Act, the plaintiffs’ claims were cognizable only under the FTCA [Federal Tort Claims Act] because the defendants’ alleged conduct occurred within the scope of their office/employment” and that the court lacked subject matter jurisdiction because the plaintiffs failed to exhaust administrative remedies under the Federal Tort Claims Act (“FTCA”).<sup>33</sup>

While resting their dismissal of the Plaintiffs’ claims concerning religious discrimination under jurisdictional grounds, it is likely that because there is not a current international convention or treaty that contains protection from religious discrimination which would be

<sup>23</sup> *Id.* at 483 (citing Geneva Convention Relative to the Protection of Civil Persons in Time of War art. 27, October 21, 1950, 6 *U.S.T.* 3516, U.N.T.S. 287).

<sup>24</sup> *Id.* (citing Protocol Additional to the Geneva Convention Relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), art. 4(1), June 8, 1977, 1125 U.N.T.S. 609).

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 486.

<sup>27</sup> 512 F.3d 644 (D.C. Cir. 2008).

<sup>28</sup> *Rasul v. Myers*, 512 F.3d 644, 650 (D.C. Cir. 2008).

<sup>29</sup> *Rasul*, 512 F.3d at 650.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 661.

<sup>33</sup> *Id.* at 654.

actionable under the Alien Tort Statute, that such claims could be dismissed under this ground as well.

### III. THE ALIEN TORT STATUTE AND THE CRISIS OF SEXUAL ABUSE WITHIN THE ROMAN CATHOLIC CHURCH

Cases involving religion and the Alien Tort Statute have not only addressed allegations of religious discrimination – they have extended into the realm of the crisis concerning sexual abuse within the Roman Catholic Church. In April 2010, a 25-year old Mexican man filed suit in the United States District Court for the Central District of California, alleging that Cardinal Roger Mahony, the Archdiocese of Los Angeles, Cardinal Roberto Rivera Carrera of Mexico City, and the Diocese of Tehuacan conspired to hide a priest’s longstanding history of child sexual abuse for violations committed both in the United States and abroad in Mexico.<sup>34</sup>

The Complaint contained the following allegations which included the following:

1. That the Defendants conspired to misrepresent, conceal or fail to disclose information relating to the sexual misconduct of Father Nicholas Aguilar Rivera, the priest accused of sexual abuse;
2. By failing to report information relating to the sexual misconduct of Father Aguilar; and
3. That these actions violated norms of international law and norms.<sup>35</sup>

This case is the first known to date to plead violations of the Alien Tort Statute for alleged sexual violations committed abroad by members of the clergy.<sup>36</sup> As the above allegations indicate, the Plaintiffs generally plead a theory of conspiracy against the Defendants alleging that they conspired to conceal a known history of sexual abuse of Fr. Aguilar and failed to report this history to law enforcement immediately.

Upon examination of prior case law involving the Alien Tort Statute, the Plaintiffs’ claim is likely to fail for two reasons. First, there is precedent, which holds that pleading conspiracy to commit murder as an offense to universal human values is not actionable under the Alien Tort Statute as a violation of the “law of nations.”<sup>37</sup> If conspiracy to commit murder is not actionable under the Alien Tort Statute, conspiracy to conceal a known history of sexual abuse would not be actionable.

In addition, the recent case of *Kiobel v. Royal Dutch Petroleum Co.*<sup>38</sup> would also support a finding that the Archdiocese of Los Angeles and Diocese of Tehuacan would not incur any liability under the Alien Tort Statute.<sup>39</sup> In *Kiobel*, the Plaintiffs, residents of Nigeria, brought claims against Dutch, British, and Nigerian corporations engaged in oil exploration and

---

<sup>34</sup> Complaint, *Juan Doe I. v. Cardinal Roger Mahony*, No. CV 10-02902 (C.D. Cal. April 20, 2010), available at <http://andersonadvocates.com/Files/60/Juan-Doe-1-Complaint-against-Cardinal-Mahoney-Cardinal-Rivera-and-The-Diocese-of-Tehuacan> (last visited March 19, 2011); Carol J. Williams, *Suit Alleges Cardinal Mahony Conspired to Hide Priest’s Sexual Abuse of Children*, L.A. TIMES, April 20, 2010, <http://articles.latimes.com/print/2010/apr/20/local/la-me-church-sex-abuse-20100421>.

<sup>35</sup> Complaint, *supra* note 17, at ¶¶ 88-90.

<sup>36</sup> Williams, *supra* note 36.

<sup>37</sup> *Rzayeva v. U.S.*, 492 F. Supp. 2d 60, 86-87 (D. Conn. 2007) (“In this case, even though Plaintiffs allege that Defendants’ violation of Plaintiffs’ civil rights and their conspiracy to commit murder offended universal human values, the Complaint does not allege either a violation of a treaty or a violation of customary international law.”).

<sup>38</sup> 621 F.3d 111 (2nd Cir. 2010).

<sup>39</sup> *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 111 (2nd Cir. 2010).

production and alleged that they aided and abetted the government of Nigeria in committing violations of the law of nations.<sup>40</sup> These claims included: “1) extrajudicial killing; 2) crimes against humanity; 3) torture or cruel, inhuman and degrading treatment; 4) arbitrary arrest and detention; 5) violation of the rights to life, liberty, security, and association; 6) forced exile; and 7) property destruction.”<sup>41</sup>

The Second Circuit dismissed the claims on the basis that although while customary international law has imposed individual liability for a limited number of international law (which include war crimes, crimes against humanity, genocide, and torture), “international law has steadfastly rejected the notion of *corporate* liability for international crimes, and no international tribunal has ever held a corporation liable for a violation of the law of nations.”<sup>42</sup> The Court reasoned that it did not view the absence of corporate liability under customary international law as blanket “immunity” for corporations, but rather a “recognition that the States of the world, in their relations with one another . . . have determined that moral and legal responsibility for heinous crimes should rest on the individual whose conduct makes him or her “*hostis humani generis*, an enemy of all mankind.”<sup>43</sup>

Thus, since the Archdiocese of Los Angeles and Diocese of Tehuacan are corporations, liability would not be incurred under the statute. Claims in the area of clergy sexual abuse involving the Alien Tort Statute are likely to be unsuccessful in the future as it is likely Plaintiffs will be unable to identify a norm of international law in this area which would be sufficiently specific, universal and obligatory to constitute an actionable norm under the Alien Tort Statute.

## CONCLUSION

Although the Plaintiffs in *Juan Doe I v. Cardinal Roger Mahoney*,<sup>44</sup> will likely not successfully plead their claim of conspiracy under the Alien Tort Statute, cases involving religion and the Alien Tort Statute are not likely to cease. The legal “Lohengrin” which Judge Friendly refers to is not likely to fall to the realm of operas, but into an era in which the statute remains utilized to bring to light many of the modern day violations of the law of nations, including perhaps violations concerning religious discrimination in the future, in a complex and ever-changing, globalized world.

---

<sup>40</sup> *Kiobel*, 621 F.3d at 117.

<sup>41</sup> *Id.* at 123.

<sup>42</sup> *Id.* at 120 (emphasis added).

<sup>43</sup> *Id.* at 149 (emphasis added).

<sup>44</sup> Complaint, *Juan Doe I. v. Cardinal Roger Mahony*, No. CV 10-02902 (C.D. Cal. April 20, 2010), available at <http://andersonadvocates.com/Files/60/Juan-Doe-1-Complaint-against-Cardinal-Mahoney-Cardinal-Rivera-and-The-Diocese-of-Tehuacan> (last visited March 19, 2011); Carol J. Williams, *Suit Alleges Cardinal Mahony Conspired to Hide Priest's Sexual Abuse of Children*, L.A. TIMES, April 20, 2010, <http://articles.latimes.com/print/2010/apr/20/local/la-me-church-sex-abuse-20100421>.

# OWNERSHIP OF UNDERWATER CULTURAL HERITAGE IN THE AREA

*Liu Lina*\*

## I. INTRODUCTION

This article addresses the ownership of Underwater Cultural Heritage (“UCH”) on the ocean floor outside of any nation’s jurisdiction (“the Area”),<sup>1</sup> which was discussed, but not settled, in the two main international marine conventions:<sup>2</sup> the 1982 United Nations Convention on the Law of the Sea (“1982 UNCLOS”) and the United Nations Educational, Scientific and Cultural Organization (“UNESCO”) Convention on the Protection of the Underwater Cultural Heritage (“2001 Convention”). After analyzing the relevant provisions of Articles 136, 149, and 303 in the 1982 UNCLOS and Article 12(6) in the 2001 Convention, two approaches were designed to settle ownership issues in the Area: the principle of common heritage of mankind as the general approach and the preferential right to the concerned “state of origin” as the *Lex specialis* approach. This article addresses the ownership of UCH in the Area by analyzing the substantial criteria of these two approaches.

Part two introduces the two approaches originally used to settle the tough ownership issue of property, then analyzes why the two approaches were expressed too vaguely to be efficiently applied to the ownership disputes, specifically, because of the drafting process and the nature of the term “state of origin.” Part three describes my own approach to the substantial criterion of the *Lex specialis* approach. This Article tries to explore the effective link between the relative UCH and the state of origin. I conclude cultural identity is a substantial criterion of *Lex specialis* approach, and is part of the legal and jurisprudential basis of the cultural identity and the application of the cultural identity in the current international legal system. Part four is a broader consideration of the substantive criterion of the general approach. The general goal is not only to preserve UCH for mankind as a whole, but, more importantly, to encourage contracting parties or specific international organizations to cooperate in the recovery and protection of UCH, while respecting the principles of non-commercial exploitation and “*in situ*” preservation as a preferred option.

---

\* PhD student, School of Law, Xi’an Jiaotong University, P.R.China; Visiting research student, School of Law, Vienna University, (Liulina223@gmail.com , tel no. 0086 13679176466). The author wishes to acknowledge her thanks to Prof. Steven L. Willborn in University of Nebraska College of Law for his review and support on this article, and to Prof. Sienho Yee in Wuhan University Institute of International Law (China) for reading and commenting a previous version of this article. All errors are the author’s.

<sup>1</sup> “Area” means the seabed and ocean floor and subsoil thereof, beyond the limits of national jurisdiction. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, at art. 1.

<sup>2</sup> There was once another notable draft convention of protection UCH in 1980’s, Draft European Convention on the protection of the Underwater Cultural Heritage (1985). The Turkish government refused the adoption by the council of Europe of the draft European Convention in 1985, there was never officially adopted as convention. See ANASTASIA STRATI, THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA, 87 (1995).

## II. THE THORNY PATH TOWARDS THE OWNERSHIP OF UNDERWATER CULTURAL HERITAGE IN THE AREA IN INTERNATIONAL LAW

The United Nations Educational, Scientific and Cultural Organization (“UNESCO”) estimates that over three million ship wrecks are spread across ocean floors around the planet.<sup>3</sup> They remain unique mysterious codes of human civilizations, which are preserved better than similar items found on land, especially before the rapid development of the diving technology and seabed excavation technology development over the last 50 years, which provides the possibility of the salvage and treasure hunting in the ocean.<sup>4</sup>

With the enthusiasm of human exploration of the deep ocean As a result of human enthusiasm for deep ocean exploration, the looting and pillaging of shipwrecks now takes place underwater. Maritime disputes are not only for claims to extend the continental shelf or appropriation of the seabed mineral resources, such as gas or polymetallic nodules; but also for acquiring historical and archaeological assets—Underwater Cultural Heritage (“UCH”), such as shipwrecks and associated artifacts. Most UCH disputes occur near the coasts so coastal states have the jurisdiction to settle the dispute through bilateral agreements between dispute parties, such as: the *V.O.C shipwreck Batavia* 1972,<sup>5</sup> the *CSS Alabama* 1989,<sup>6</sup> the *La Belle* wreck 2003<sup>7</sup> and the shipwreck of *RMS Titanic* 2004 (United States, United Kingdom and Canada).<sup>8</sup> A new case in the United States, *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*<sup>9</sup> shows a new phenomenon in UCH disputes concerning unidentified shipwrecks located in “international water.”<sup>10</sup>

<sup>3</sup> Famous shipwrecks such as the Armada of Philip II of Spain, the Titanic, the fleet of Kublai Khan, the China Nanhai NO.1, etc.

<sup>4</sup> Invention of the aqualung by Jacques-Yves Cousteau and Emille Gangan made it possible to reach greater sea depths in 1942. Side Scan Sonar technology was used in salvage of UCH after 1950’s. Remotely Operated Vehicles (ROV) made the wrecks more accessible after 1960’s. Submarines can dive to the record depth of 10,911 meters as of 1995.

<sup>5</sup> Historic Shipwrecks Act 1976, 1976 Austl. Acts No. 190, SCHEDULE 1 (Agreement between the Netherlands and Australia concerning old Dutch shipwrecks) *available at* [http://www.austlii.edu.au/au/legis/cth/consol\\_act/hsa1976235/sch1.html](http://www.austlii.edu.au/au/legis/cth/consol_act/hsa1976235/sch1.html). Art.1: “The Netherlands, as successor to the property and assets of the V.O.C., transfers all its right, title and interest in and to wrecked vessels of the V.O.C. lying on or off the coast of the State of Western Australia and in and any articles thereof to Australia which shall accept such right, title and interest.” *Id.*

<sup>6</sup> Agreement concerning the wreck of the CSS Alabama, U.S.- Fr., Oct. 30, 1989, T.I.A.S. No. 11687. The CSS *Alabama*, a Confederate warship, was sunk by the USS *Kearsarge* in battle off Cherbourg, France, 1864. The government of the United States of American was entitled as the owner of the wreck, the French Association CSS Alabama as the authorized operator who have the responsibility for its actions on, to, and from the CSS *Alabama* wreck site.

<sup>7</sup> Agreement Regarding the Wreck of *la belle*, U.S.-Fr., Mar. 31, 2003. See also FU KUNCHENG AND SONG YUXIANG: INTERNATIONAL LEGAL PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: INTRODUCTION OF THE CONVENTION ON THE PROTECTION OF UNDERWATER CULTURAL HERITAGE 297 (2006); Legal Press China, 297. La Salle Research Project, THE TEXAS HISTORICAL COMMISSION, <http://www.thc.state.tx.us/belle/> (last visited Mar. 2, 2011).

<sup>8</sup> Agreement Concerning The shipwrecked vessel RMS Titanic, U.S.-U.K.-Can.-Fr., Foreign & commonwealth office website, *available at* [http://www.fco.gov.uk/resources/en/pdf/pdf7/fco\\_pdf\\_titanicagreementenglish](http://www.fco.gov.uk/resources/en/pdf/pdf7/fco_pdf_titanicagreementenglish).

<sup>9</sup> No. 8:07-CV-614-SDM-MAP, 2009 U.S. Dist. LEXIS 119088 (M.D. Fla. June 3, 2009). Spanish shipwreck, *Nuestra Senora de las Mercedes*, discovered by Odyssey in international waters about 100 miles west of the Straits of Gibraltar in 2007. *Id.* at \*5. Judge Mark Pizzo recommended that Odyssey, as the substitute custodian, directly return the *res* to Spain. *Id.* at \*59. The judge believed the court lacked jurisdiction in the case and recommended

## A. THE LEGAL ISSUE OF THE OWNERSHIP OF UCH IN THE AREA

The international law doctrine of freedom of the high seas provides that activities related to cultural property found in the Area are to be governed by the flag state. The flag state of a vessel is the state under whose laws the vessel is registered. However, the flag state does not effectively control its vessels to protect UCH, even if it had appropriate national heritage laws and regulations applicable in the Area.<sup>11</sup> The underwater archeological technology to dispose or preserve underwater relics is difficult to regulate. Further, it is hard for the flag state to prohibit the flag of third states from destroying or illegally salvaging relics. All of these situations make enforcement of national legislation bewildering. However, after analyzing the relevant provisions of Articles 136, 149 and 303 from the 1982 United Nations Convention on the Law of the Sea (“1982 UNCLOS”) and Article 12(6) from the UNESCO Convention on the Protection of the Underwater Cultural Heritage (“2001 Convention”), two contemporary legal approaches, both new and meaningful, can be used to settle the ownership issue of UCH in the Area: the general approach—the principle of common heritage of mankind<sup>12</sup> and the *Lex specialis* approach—the preferential right to the concerned state of origin.<sup>13</sup>

---

Spain’s motion to dismiss be granted. *Id.* at \*3. Additionally, the site of the treasure find was indeed that of the Mercedes, which is subject to sovereign immunity. *Id.* at\*21.

<sup>10</sup> The phrase of “the international water” in the case is not a legal term. But from the jurisdiction point of view, this term means that no state may purport to subject part of it to its sovereignty, which can be comprehended as the same meaning as the legal term “the Area,” a site where it is beyond any national jurisdiction. Therefore, this Article will analyze the ownership of UCH in the Area.

<sup>11</sup> See generally Abandoned Shipwreck Act of 1987, 43 U.S.C. §§ 2101–2106 (2006); Archaeological Resources Protection Act 1979, 16 U.S.C. §§ 470aa–470mm (2006); *Historic Shipwrecks Act 1976* (Austl.); Regulations of the People’s Republic of China Concerning the Administration of the Work for the Protection of Underwater Cultural Relics (promulgated by the State Council of the People’s Republic of China, Oct. 20, 1989, effective Oct. 20, 1989), <http://tradeinservices.mofcom.gov.cn/en/b/1989-10-20/18580.shtml> (China); Protection of Wrecks Act, 1973, c. 33 (Eng.); Act No. 89-874 of 1 December 1989 concerning Maritime Cultural Assets and amending the Act of 27 September 1941 Regulating Archaeological Excavations of 1 December 1989 (France) <http://www.un.org/Depts/los/LEGISLATIONANDTREATIES/STATEFILES/FRA>. Law on the Spanish Historical Heritage (B.O.E. 1985, 16-1985) (Spain); the Cultural Monuments Act (1988:950) (Sweden) [http://ec.europa.eu/taxation\\_customs/resources/documents/cgoods\\_sv\\_en.pdf](http://ec.europa.eu/taxation_customs/resources/documents/cgoods_sv_en.pdf) (or, <http://www.culturalpolicies.net/web/sweden.php?aid=533> in Eng version); the Cultural Heritage Preservation Law 1982 (Taiwan, China) <http://www.glin.gov/view.action?search=&searchDetails.queryType=BOOLEAN&searchDetails.queryString=subterm%3Aequals%28%22en+Architecture%22%29&searchDetails.sortOrder=reverseChron&searchDetails.showSummary=true&searchDetails.searchAll=true&searchDetails.activeDrills=&searchDetails.offset=290&glinID=198015&summaryLang=zh-tw&fromSearch=true>.

<sup>12</sup> United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter 1982 UNCLOS]. “Common heritage of mankind: The Area and its resources are the common heritage of mankind.” *Id.* at art. 136. ; “All objects of an archaeological and historical nature found in the Area shall be preserved or disposed of for the benefit of mankind as a whole...” *Id.* at art. 149; “The Coordinating State shall act for the benefit of humanity as a whole, on behalf of all States Parties.” United Nations Convention on the Protection of the Underwater Cultural Heritage, Nov. 2, 2001, 41 I.L.M. 40, at art. 12 [hereinafter 2001 Convention].

<sup>13</sup> “All objects of an archaeological and historical nature found in the Area... particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.” 1982 UNCLOS, Dec. 10, 1982, 1833 U.N.T.S. 397, at art. 149. “Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.” *Id.* at art. 303(3). “Particular regard shall be paid to the preferential rights of States of cultural, historical or archaeological origin in respect of the underwater cultural heritage concerned.” 2001 Convention, Nov. 2, 2001, 41 I.L.M. 40, at art. 12.

1. *The General Approach: The Principle of Common Heritage of Mankind*

The principle of the common heritage of mankind first came from the Chairman of the International Law Commission (“ILC”), Georges Scelle, in 1950: “[t]he continental shelf has an importance for mankind in general,”<sup>14</sup> which was strongly refused by ILC. In its Preamble, the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict<sup>15</sup> expressed the idea 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.”<sup>16</sup>

The ambassador of Argentina, Aldo Armando Cocca, further developed and applied this idea in 1967 when he proposed the following language for the Agreement Governing the Activities of States on the Moon and Other Celestial Bodies:

[T]he exploration and use of the moon shall be the province of all mankind and shall be carried out for the benefit and in the interests of all countries, irrespective of their degree of economic or scientific development.<sup>17</sup>

In the same year, Malta’s United Nations Representative, Arvid Pardo, proposed that seabed and ocean floors beyond national jurisdiction be reserved exclusively for peaceful purposes and the resources be declared “the common heritage of mankind.”<sup>18</sup> Later, the same idea was adopted by the United Nations General Assembly through the Declaration of Principles Governing the Sea-bed and the Ocean Floor, and the Subsoil thereof, Beyond the Limits of National Jurisdiction (“Declaration of 1970”).<sup>19</sup>

The Third UN Law of the Sea Conference adopted the principle of common heritage of mankind to protect UCH. This was codified in part XI, Article 149, to respect the Declaration of 1970 that “resources in the Area should be organized on behalf of mankind as a whole.”<sup>20</sup>

The drafting history of the general approach demonstrates that it was initially used to protect the natural resources outside the jurisdiction of every state. However, cultural heritage is quite different than natural resources, which are always associated with a given people. Therefore, there should be a *Lex specialis* approach to UCH: the preferential right to the concerned state of origin, putting aside the general approach in the Area as an exception under some circumstances.

<sup>14</sup> Summary Records of the 79th Meeting, [1950] 1 Y.B. Int’l L. Comm’n 305, U.N. Doc. A/CN.4/SR.79, available at [http://untreaty.un.org/ilc/documentation/english/a\\_cn4\\_sr79.pdf](http://untreaty.un.org/ilc/documentation/english/a_cn4_sr79.pdf).

<sup>15</sup> United Nations 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 215.

<sup>16</sup> *Id.*

<sup>17</sup> Agreement Governing the Activities of States on the Moon and Other Celestial Bodies, G.A. Res. 34/68, U.N. Doc. A/RES/34/68, art. 4, (Dec. 5, 1979).

<sup>18</sup> “Common heritage of mankind: The Area and its resources are the common heritage of mankind.” 1982 UNCLOS, Dec. 10, 1982, 1833 U.N.T.S. 397, at art. 136.

<sup>19</sup> GA Res. 2749(XXV), U.N. Doc. A/RES/2749 (January 1, 1970), (with 108 votes in favor, none against and 14 abstentions).

<sup>20</sup> “All objects of an archaeological and historical nature found in the Area... particular regard being paid to the preferential rights of the State or country of origin, or the State of cultural origin, or the State of historical and archaeological origin.” 1982 UNCLOS, Dec.10, 1982, 1833 U.N.T.S. 397, at art.149; GA Res. 2749(XXV), U.N. Doc. A/RES/2749 (January 1, 1970), at art.1 <http://daccess-dds-ny.un.org/doc/RESOLUTION/GEN/NR0/350/14/IMG/NR035014.pdf?>

2. *The Lex Specialis Approach: The Preferential Right to the Concerned State of Origin*

The idea of a preferential right to the concerned state of origin first came from Iceland's proposal in the Geneva Conference 1958 about preferential fishery rights as follows:

Where, for the purpose of conservation, it becomes necessary to limit the total catch of a stock or stocks of fish in an area of the high seas adjacent to the territorial sea of a coastal State, any other States fishing in that area should collaborate with the coastal State to secure just treatment of such situation, by establishing agreed measures which shall recognize any preferential requirements of the coastal State resulting from its dependence upon the fishery concerned while having regard to the interests of the other States.<sup>21</sup>

Until the second Conference was held in Geneva in 1960, studies showed that two concepts, the preferential fishing right and the fishery zone, were widely accepted by bilateral or multilateral agreements, and had since crystallized as customary law. The fishery zone extends to the twelve mile limit between the territorial sea and the high seas; the preferential fishing right is the exclusive fishing rights in favor of the coastal state where there is special dependence on its fisheries.<sup>22</sup>

However, the nature of the preferential right in question was not settled in the second Conference. Specifically, the question whether the preferential right, under certain circumstances, should extend beyond the limit of the twelve mile fishing zone to assert an exclusive fisheries jurisdiction was left unanswered.<sup>23</sup>

In 1974, The International Court of Justice ("ICJ") discussed this question in the *Fisheries Jurisdiction Case*.<sup>24</sup> In this case, the Court first stated its opinion of the very new notion of preferential fishery rights for the coastal State: "in a situation of special dependence, though it implied a certain priority, could not imply the extinction of the concurrent rights of other States."<sup>25</sup> Then, the Court analyzed Iceland's claims and took into account the existing rules of international law and the Exchange of Notes of 1961 (between them), because the court law could not render judgment *sub specie legis ferendae* about preferential right or anticipate the law before the legislature had laid it down.<sup>26</sup> Finally, the Court indicated that "the fact that Iceland was entitled to claim preferential rights did not suffice to justify its claim unilaterally to exclude British fishing vessels from all fishing beyond the limit of 12 miles agreed to in 1961."<sup>27</sup>

The scope of the preferential right can be gleaned from the ICJ's ruling in *Fisheries Jurisdiction Case*. First, the preferential right is an actual kind of priority. Second, countries must negotiate in order to define or delimit the extent of preference operation. Third, the preference right operates in the shadow of other law, such as other legal rights according to bilateral agreement or international law.

<sup>21</sup> Fisheries Jurisdiction Case (U.K. v. Ice.), Judgment, ¶ 49–78 (Jul. 25, 1974), available at <http://www.icj-cij.org/docket/files/55/5979.pdf>.

<sup>22</sup> *Id.*

<sup>23</sup> Fisheries Jurisdiction Case (U.K. v. Ice.), Judgment, ¶ 19–48 (Jul. 25, 1974), available at <http://www.icj-cij.org/docket/files/55/5979.pdf>.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.*



The preferential right was finally deliberated and codified in Article 149 of the 1982 UNCLOS and Article 12(6) of the 2001 Convention. These agreements link the right with the state of origin so they have authority concerning UCH. Article 303(3) of the 1982 UNCLOS preserves the *Lex specialis* approach, stating in the text that: "nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges."<sup>28</sup> Both major approaches are present in international law to settle disputes of ownership of UCH in the Area.

### 3. *The Congenital Deficiency of Two Approaches*

Ostensibly, the two approaches are the "trump cards" for the issue of ownership of UCH in the Area, and they are expressed in a similar way in the two conventions. The general approach in the 1982 UNCLOS is the benefit of mankind as a whole, and in the 2001 Convention as the "benefit of humanity as a whole." The *Lex specialis* approach of a preferential right to the state of origin in the 1982 UNCLOS is regulated in the Article 149 as three closely-related categories: (a) "the State or country of origin," (b) "the State of cultural origin," or (c) "the State of historical and archaeological origin." But, in the 2001 Convention, the Article 12(6) provides two categories: (a) States of cultural origin or (b) states of historical or archaeological origin, which are the same categories as (b) and (c) in the 1982 UNCLOS.

The contents of the two approaches are actually far from effective and feasible as substantive criteria to settle disputes of the ownership of UCH in the Area.

The common heritage of mankind is a relatively new principle and three forms of "states of origin" are emerging as concepts in current international legal terminology. In addition, neither of the two conventions explain the meaning of the general international principle of cultural heritage of mankind, nor did they distinguish differences among the categories of "state of origin." Under what circumstances does the principle of common heritage of mankind apply as an exception to the *Lex specialis* approach? When there is a conflict between the doctrine of the freedom of the high seas (first-find-first-observe) and the approach of the preferential right, who has the right to claim the removal and acquisition of UCH in the Area: the finder, the flag state, or the state of origin? What kinds of conditions can a Member State apply within the "state of origin?" Or under what circumstances does a Member State have a priority right for the UCH in the Area: when one claims as "the State of historical and archaeological origin," and the other claims as "the State of cultural origin?" None of these answers can be found in the current conventions.

Therefore, many scholars criticized the provisions of Articles 136, 149 and 303(c) of the 1982 UNCLOS and Article 12 of the 2001 Convention as a potential trigger for many ownership disputes of UCH in the Area, even when Member States have each adopted both conventions.

## B. THE INEVITABILITY AND RATIONALITY OF TWO APPROACHES

The two above international marine conventions respond to the essential issue of ownership of UCH with vague and obscure approaches. The reason could be that the national experts during conventions drafting negotiation neglect this complicated ownership issue, or they

---

<sup>28</sup> 1982 UNCLOS, Dec. 10, 1982, 1833 U.N.T.S. 397, at art. 303(3).

purposely incorporate the vague language because this ownership issue is another political compromise among great powerful nations.

The two approaches were well discussed in the Conferences on the Law of the Sea (“UNCLOS I, UNCLOS II, UNCLOS III”) during 1958 to 1982 and the subsequent 2001 Convention. There are two perspectives from which to answer this question: the process used to draft the two conventions and the nature of the three terms used to define “state of origin.”

### 1. *The Drafting Process of the Two Conventions*

The 1982 UNCLOS involved time-consuming negotiations with more than 160 participating nations, which discussed two controversial issues relating to ownership of UCH in the Area.

The first issue related to how to define the term “state of origin.” In Sub-Committee I of the 1973 session, the Turkish and Greek delegations first proposed ownership of UCH in the Area by discussing the term of “state of origin.” It appeared as “State of the country of origin” in the Turkish proposal, which gave preference to the State that exercises sovereignty over the country of origin of the discovered cultural property.<sup>29</sup> The Greek delegation subsequently made a similar proposal to provide the preferential right only to the “state of cultural origin.” On the other hand, an intersession proposal by the United States suggested deleting all of the relevant articles on archaeological and historical objects found in the Area.<sup>30</sup> Then, in the fourth session in 1976, the relevant paragraphs concerning historic wrecks and dispute settlement in the Area were deleted partly because of the desire of some participating nations to focus only on the salient elements (natural resources) of the article.<sup>31</sup>

The second issue related to the competent international organ to protect UCH in the Area under the principle of cultural heritage of mankind. The International Seabed Authority (“ISA”) was a controversial international body proposed during the drafting of the 1982 Convention.

In 1970, the Secretary General submitted A Report on the Potential Role of the International Machinery to Be Established<sup>32</sup> to the Sea-Bed Committee that proposed a regulatory authority to (1) preserve underwater relics as a portion of the seabed, (2) discover and explore them as a legitimate use of the seabed, and (3) protect them for unusual educational, scientific, or cultural value.<sup>33</sup> Greece and Turkey’s proposals both suggested the ISA as the competent international body to protect the archaeological and historical objects found in the Area as the common heritage of mankind.<sup>34</sup>

A few states, including the United States, intensively objected to the expansion of the powers of the ISA over non-resources-related activities during the negotiations of UNCLOS III.

<sup>29</sup> VI UNITED NATIONS CONVENTION ON THE LAW OF THE SEA 1982: A COMMENTARY 227–228 (Myron H. Nordquist, Satya N. Nandan, Shabtai Rosenne, & Michael W. Lodge eds., 2002).

<sup>30</sup> *Id.* at 229.

<sup>31</sup> *Id.*

<sup>32</sup> 25 UN GAOR Supp. No. 21, UN Doc (A/8021), “The exploration and recovery of sunken ships and lost objects...which might be accompanied by the performance of related functions and powers by international machinery,” 61-123.

<sup>33</sup> As explained, “Perhaps [the wrecks, relics or lost objects lying on the seabed] are not resources or at least non natural resources. Nevertheless, they may fall under the jurisdiction of the machinery if the recovery of such objects is regarded as another use of the seabed.” *Id.* at 96.

<sup>34</sup> More information: Archaeological and Historical Treasures of the Seabed and the Ocean Floor Beyond the Limits of National Jurisdiction. U.N. Doc. A/AC.138/SC.I/L.16 (Aug. 2, 1972); Greece: Draft Article on Protection of Archaeological and Historical Treasures, U.N. Doc. A/AC.138/SC.I/L.25 (Aug. 14, 1973).

In the 1976 New York Session, one paragraph, designating the ISA to implement the proposed activities, was deleted. This modification remained in the Final Text of the 1982 UNCLOS.

Therefore, Professor Anastasia Strati's opinion is correct, there is not a rational explanation for the term of "state of origin" and deletion of the words "by the ISA." Rather, the process itself produced these outcomes. It is extremely difficult to achieve a rational outcome on every discussed issue when the convention uses a consensus process rather than majority vote.

UNESCO considered these two issues after it received the Buenos Aires Draft 2001 Convention on the Protection of the Underwater Heritage prepared by the International Law Association, in 1994. In the following years, UNESCO held several meetings among a group of governmental experts to draw the Draft 2001 Convention.

In the final text of this agreement the 2001 Convention, the ISA was validated as the most appropriate international body to deal with the UCH in the Area regulated in Articles 11 and 12 of the 2001 Convention.<sup>35</sup>

But the other issue, the term of "the state of origin," remained suspended. The participating states determined it "would [be] better not to relate with a thorny issue of property [of UCH]."<sup>36</sup> The 2001 Convention, as a new international agreement entered into force in January 2009, after ratification by 20 contracting parties,<sup>37</sup> as required by Article 27 of the convention.<sup>38</sup> Because none of the permanent members of United Nations Security Council have ratified the 2001 Convention, it is far from a powerful and popular intentional convention. However, it still can be seen as an effective support and international legal subsequence of the 1982 UNCLOS.

After analyzing the above drafting processes of the two conventions, there was a meditated, professional discussion over the ownership issue, but neither Article 149 of the 1982 UNCLOS nor Article 12(6) of the 2001 Convention help clarify the scope of three different articulations of "states of origin."

The remaining question, then, is why there was no resolution of the meaning of the term "state of origin" in the two conventions? The answer lies in the nature of the concept "state of origin."

## 2. *The Nature of the Term "State of Origin"*

---

<sup>35</sup> "States Parties shall notify the Director-General and the Secretary-General of the International Seabed Authority of such discoveries or activities reported to them." UNESCO Convention on the Protection of the Underwater Cultural Heritage, Nov. 6, 2001, 41 I.L.M.40, art. 11(2) [hereinafter 2001 Convention]; the International Seabed Authority shall also be invited to participate in consultations on how to ensure the effective protection of that underwater cultural heritage. 2001 Convention at art. 12(2).

<sup>36</sup> Garabello & Tullio Scovazzi eds., *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: BEFORE AND AFTER THE 2001 UNESCO CONVENTION* 106 (2003).

<sup>37</sup> Until Dec. of 2010, there are 36 State Parties: Panama, Bulgaria, Croatia, Spain, Libyan Arab Jamahiriya, Nigeria, Lithuania, Mexico, Paraguay, Portugal, Ecuador, Ukraine, Lebanon, Saint Lucia, Romania, Cambodia, Cuba, Montenegro, Slovenia, Barbados, Grenada, Tunisia, Slovakia, Albania, Bosnia and Herzegovina, Iran (Islamic Republic of), Haiti, Jordan, Saint Kitts and Nevis, Italy, Gabon, Argentina, Honduras, Trinidad and Tobago, Democratic Republic of the Congo, and Saint Vincent and the Grenadines by the date of deposit of instrument.

<sup>38</sup> "This Convention shall enter into force three months after the date of the deposit of the twentieth instrument referred to in art. 26, but solely with respect to the twenty States or territories that have so deposited their instruments. It shall enter into force for each other State or territories three months after the date on which that State or territory has deposited its instrument." 2001 Convention, art. 27.

The three terms are easily understood by every common person without specialized knowledge. Such as, what is goodwill? What is *ex aequo et bono*? The terms are hardly given the precise definition without consideration of *de facto* circumstances.

The first term, “state or country of origin,” requires a connection between the regulating state or country and the geographic area where the object or product originated. The configuration of a state or country can change over time. For example, can the independent Syria (Syrian Arab Republic) legitimately claim restitution of a cultural property on its territory, which belonged to the United Arab Republic during 1958 to 1961,<sup>39</sup> on assumption that there is a cultural heritage conflict between the two countries?

The second term, “state of cultural origin,” gives emphasis to a cultural link between a cultural object and a state, but it neglects a situation in which several states shared the same culture in the past. For example, the Urtiin Duu (long song) which is a traditional folk song in Mongolia and China,<sup>40</sup> or the Processional Giants and Dragons of Belgium and France.<sup>41</sup> The term cannot avoid potential disputes and conflicts without more explanation.

The third term, “state of historical and archaeological origin,” means that a state has a historical and archaeological link with a specific item. If this term is interpreted in such a simple way, should the Parthenon Marbles (formerly known as the Elgin Marbles) be returned to Greece without further discussion?<sup>42</sup> Do the two historic bronze sculptures sold by Christie's in 2009<sup>43</sup> belong to China, so that China has the preferential right to own it because of their historical and archaeological origin?

It is obvious that the three terms of “state of origin” imply different meanings in different situations so that it is very difficult to define the terms adequately within conventions. Moreover, without explanation, it is impossible to establish a hierarchy among them. Without a hierarchy, one cannot specify who has the preferential right. Without expounding the meaning of preferential right, the 1982 UNCLOS and the 2001 Convention cannot settle the ownership issue of UCH in the Area. All of these interlinking reasons inevitably cause the wording of ownership provisions in the above two conventions to read like a broad-brush outline. This is what most nations expected—that the conventions would leave space for the terms to be developed in the future.

---

<sup>39</sup> The United Arab Republic was a union between Egypt and Syria, which began in 1958 and existed until 1961 when Syria seceded from the union. The United Arab Republic and Syrian Arab Republic share Islamic identity for their Arab roots.

<sup>40</sup> Urtiin Duu - Traditional Folk Long Song, one of the two major forms of Mongolian songs, originated 2,000 years ago, still plays a major role in the social and cultural life of nomads living in Mongolia and in the Inner Mongolia Autonomous Republic, located in the northern part of the People's Republic of China. It is inscribed on the 2008 representative list of the intangible cultural heritage of humanity proposed by China and Mongolia.

<sup>41</sup> They firstly appeared in ritual representations at the end of the fourteenth century and now serve as emblems of identity for certain Belgian and French towns. It is inscribed on the 2008 representative list of the intangible cultural heritage of humanity proposed by Belgium and France.

<sup>42</sup> The Parthenon Marbles have been sojourning at the British Museum for over 150 years, far away from their state of origin. There are continuous negotiations between the Greek government and British government for asking return. JEANETTE GREENFIELD, *THE RETURN OF CULTURAL TREASURES* 42-90 (2d ed. 1996).

<sup>43</sup> It is notably known that the sculptures were looted by French and British troops in 1860, during the Second Opium War when the “invaders burned down the royal garden of Yuanmingyuan in Beijing.” Five of the 12 heads have been recovered and are now displayed in a Beijing museum. *Looted Chinese Relics Sold for 14 Million Euros Each*, CHINA VIEW (Feb. 26, 2009, 3:17 AM), [http://news.xinhuanet.com/english/2009-02/26/content\\_10897892.htm](http://news.xinhuanet.com/english/2009-02/26/content_10897892.htm).

### III. SUBSTANTIVE CRITERION TO IMPLEMENT LEX SPECIALIS APPROACH

Given this analysis, the tough issue for States in implementing the *Lex specialis* approach is to identify the legal basis to claim its interests with discovered Underwater Cultural Heritage (“UCH”) in the Area. This section discusses a possible hierarchy of the three kinds of “state of origin” as substantive criterion for every potential state from the current intentional legal system.

#### A. CULTURAL IDENTITY AS THE EFFECTIVE LINK BETWEEN THE UCH AND THE CONCERNED STATE OF ORIGIN

It is not difficult for disputed parties to find a link of one type or another with concerned UCH as a kind of “state of origin.” But which link has priority over others? The International Court of Justice (“ICJ”) gave a clue in *The Nottebohm Case*<sup>44</sup> through a description of an “effective link.” In this case, the ICJ explained the “effective link” within a nationality dispute: preference should be given to “the real and effective nationality, that which according with the facts, that based on stronger factual ties between the person concerned and one of the States whose nationality is involved.”<sup>45</sup> Hereafter, the ICJ suggested that the “effective link” in the *Nottebohm* case is one of the main substantial criterion to resolve nationality disputes. When two or more states claim certain links with the *res*, “the real and effective connection” or “stronger factual ties” could be the core of substantial criterion.

What can be “the real and effective connection” or “stronger factual ties” with a state of origin and the UCH? The necessary “connection” or “ties” may come from one of several possible sources: specific historical, archeological, or aesthetic facts that provide a sense of belonging to the nations in the claimed state; influence over most individuals in a state in one aspect of their social life or spiritual belief; a kind of national cohesion; or even itself as a symbol of the claimed state. All of these elaborations for the “connection” or “ties” are just alternative descriptions for cultural identity. Professor Stuart Hall defines “the cultural identity in terms of one, shared culture, a sort of collective ‘one true self,’ hiding inside the many other, more superficial or artificially imposed ‘selves,’ which people with a shared history and ancestry hold in common.”<sup>46</sup> Cultural identity defines us as “one people,” and gives a sense of identity and belonging to a group or culture and valuing cultural diversity. As a result, cultural identity, as evidence of a state’s spirit code, can be the substantial criterion to authorize the interested state of origin to claim the *res* (UCH).

#### B. THE LEGAL AND JURISPRUDENTIAL BASIS FOR APPLYING CULTURAL IDENTITY AS SUBSTANTIAL CRITERION OF LEX SPECIALIS APPROACH

---

<sup>44</sup>Nottebohm Case (Liech. v. Guat.), 1955 I.C.J. 4 (April 6), available at <http://www.icj-cij.org/docket/files/18/2674.pdf>. In this case, Nottebohm is a person who forfeited his German nationality and thus only had the nationality of Liechtenstein. *Id.* at 13. Then, the question arose as to who had the power to grant Nottebohm diplomatic protection. *Id.*

<sup>45</sup>*Id.* at 22. Since then, it can be seen as the “effective nationality or the *Nottebohm* principle” where the national must prove a meaningful connection to the state in question. *Id.*

<sup>46</sup>Stuart Hall, *Cultural Identity and Diaspora*, 223, available at <http://www.lwbooks.co.uk/ReadingRoom/public/IdentityDiaspora.pdf>.

The idea of cultural identity as the substantial criterion comes from the fundamental norms in international law: the human rights and national self-determination principle.

1. *Cultural Identity Underlies the Human Rights of Culture, Which is a Fundamental Universal Aspect of Human Rights in Human Rights Conventions*

According to the Universal Declaration of Human Rights 1948, “[e]veryone has the right to freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.”<sup>47</sup> This notion can also be gleaned from the practices of regional organizations and their human rights conventions. The underlying objective for establishing the European Court of Human Rights (“ECHR”) included “raising consciousness about and developing the European cultural identity,”<sup>48</sup> which is the same aim of the Council of Europe to promote the emergence of a genuine European cultural identity.<sup>49</sup> The Organization of African Unity made treaties to protect human rights of culture;<sup>50</sup> the Asian Human Rights Charter also respects the right to cultural identity.<sup>51</sup> This idea is later reflected in the United Nations Convention on the Rights of the Child for children’s cultural rights.<sup>52</sup>

At the same time, the idea of cultural identity as an inherent requirement to justify the human rights of culture is passionately advocated in recent regional and international cultural conventions. The preamble of the European Convention for the protection of Audiovisual Heritage states, “Europe’s heritage reflects the cultural identity and diversity of its peoples.”<sup>53</sup> In the 2003 United Nations Education, Scientific and Cultural Organization (“UNESCO”) Convention for the Safeguarding of the Intangible Cultural Heritage, the definition of “intangible heritage” indirectly describes the importance of promoting the protection of intangible cultural heritage because of how it interacts with history and sense of identity.<sup>54</sup> The 2005 Convention on the Protection and Promotion of the Diversity of Cultural Expression has an objective expression in Article 1 to “deal with the need to recognize that cultural goods and services convey identity, values and meaning.”<sup>55</sup> Obviously, with respect to the fundamental human rights of culture,

<sup>47</sup> Universal Declaration of Human Rights, G.A. res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), at art. 27.

<sup>48</sup> STRASBOURG.INFO, <http://www.strasbourg.info/echr/> (last visited Mar. 7, 2011).

<sup>49</sup> 36 YEARBOOK OF THE EUROPEAN CONVENTION ON THE HUMAN RIGHTS 397 (Martinus Nijhoff Publishers 1993).

<sup>50</sup> See African (Banjul) Charter on Human and Peoples’ Rights, Jun. 27, 1981, 21 I.L.M. 58 (1982). “All peoples shall have the right to their economic, social and cultural development with due regard to their freedom and identity and in the equal enjoyment of the common heritage of mankind.” *Id.* at art. 22.

<sup>51</sup> See Asian Human Rights Charter, May 17, 1998, available at <http://www.unhcr.org/refworld/docid/452678304.htm>. “They (cultural identities) are the source of pride and security.” *Id.* at art. 6.1.

<sup>52</sup> G.A. Res. 44/25, annex 44 U.N. GAOR Supp. No. 49, U.N. Doc. A/44/49, art.29(c) “[t]he development of respect for the child’s parents, his or her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he or she may originate, and for civilizations different from his or her own.” at 167 (1989), entered into force Sept. 2 1990.

<sup>53</sup> European Convention for the Protection of the Audiovisual Heritage, Nov. 8, 2001, [2001] COETS 6, available at <http://www.worldlii.org/int/other/COETS/2001/6.html>.

<sup>54</sup> Convention for the Safeguarding of the Intangible Cultural Heritage art. 2, Oct. 17, 2003, 2368 U.N.T.S 3. “This intangible cultural heritage, transmitted from generation to generation, is constantly recreated by communities and groups in response to their environment, their interaction with nature and their history, and provides them with a sense of identity and continuity, thus promoting respect for cultural diversity and human creativity.” *Id.*

<sup>55</sup> Convention on the Protection and Promotion of the Diversity of Cultural Expressions, art. 1, Oct. 20, 2005, 2440 U.N.T.S. 311.

cultural identity as a substantial core right can be considered as internal cohesive to authorize the interested state of origin to claim the relative UCH. Professor Lyndel Prott also argued that the formulation of this right (rights of culture) was primarily intended to shore up the restitution of movable cultural property.<sup>56</sup>

## 2. *Cultural Identity is an Internal Impetus For the Implementation of the National Self-Determination Principle in Contemporary International Law*

Cultural identity particularly manifests the right to cultural self-determination in a proper way. In 2007, the UN General Assembly finally adopted a landmark declaration on the Rights of Indigenous Peoples after more than 20 years of negotiation between nation-states and Indigenous Peoples. The right of cultural self-determination, in essence, takes shape around the right of “cultural identity,” crystallized in Article 2,<sup>57</sup> Article 13,<sup>58</sup> and Article 33<sup>59</sup> of the Declaration.<sup>60</sup> There are more than 5,000 ethnic groups located in about 192 states in the world.<sup>61</sup>

During the nineteenth century, nations recognized the need to respect the cultural identity of each ethnic minority as a requirement for territorial integrity and political unity of every multinational country. The unification of Germany and Italy during the nineteenth century were justified by the principle of national self-determination within Europe.<sup>62</sup> Many new states were created after the Treaty of Versailles 1919: Finland, Latvia, Lithuania, Poland, Czechoslovakia, Austria, Hungary etc. in central Europe,<sup>63</sup> on the basis of national self-determination from ten of Wilson’s Fourteen Points.<sup>64</sup> In modern society, recognition of the cultural identity of ethnic minorities is adopted as a fundamental state policy. Vladimir Ilyich Lenin advocated the right of self-determination for minorities and their cultural identity as a basic principle of the Party,<sup>65</sup>

<sup>56</sup> Lyndel V. Prott, *Cultural Rights as People’s Rights in International Law*, in *The Rights of Peoples* 100 (James Crawford ed., 1988).

<sup>57</sup> United Nations Declaration on the rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007). “Indigenous peoples and individuals are free and equal to all other peoples and individuals and have the right to be free from any kind of discrimination, in the exercise of their rights, in particular that based on their indigenous origin or identity.” *Id.* at art. 2.

<sup>58</sup> “Indigenous peoples have the right to revitalize, use, develop and transmit to future generations their histories, languages, oral traditions, philosophies, writing systems and literatures, and to designate and retain their own names for communities, places and persons.” *Id.* at art. 13.

<sup>59</sup> “Indigenous peoples have the right to determine their own identity or membership in accordance with their customs and traditions. This does not impair the right of indigenous individuals to obtain citizenship of the States in which they live.” *Id.* at art. 33.

<sup>60</sup> Patrick Thornberry, *Self-Determination, Minorities, Human Rights: A Review of International Instruments*, 38 *Int’l & Comp. L.Q.* 867, 880 (1989).

<sup>61</sup> Doyle, *By the Numbers: Ethnic Groups in the World*, *SCIENTIFIC AMERICAN MAGAZINE*, September 1998, available at [http://www.sciamdigital.com/index.cfm?fa=Products.ViewIssuePreview&ARTICLEID\\_CHAR=839E9D9D-4973-4975-B697-959C1126F16](http://www.sciamdigital.com/index.cfm?fa=Products.ViewIssuePreview&ARTICLEID_CHAR=839E9D9D-4973-4975-B697-959C1126F16).

<sup>62</sup> REALISM RECONSIDERED: THE LEGACY OF HANS J. MORGENTHAU IN INTERNATIONAL RELATIONS 150 (Michael C. Williams, ed. 2007).

<sup>63</sup> Jackson J. Spielvogel, *WESTERN CIVILIZATION, ALTERNATE VOLUME: SINCE 1300* 799 (7th ed. 2009).

<sup>64</sup> Self-determination for the peoples, which meant the right of nations to rule themselves, was point ten of Wilson’s Fourteen Point. <http://www.johndclare.net/EA6.htm> (last visited March 7, 2011).

<sup>65</sup> Zhang Yunxiang, *Discussion on the Lenin theory of National Structure in Multinational Countries*, 37, *THEORY J.*, No.6 Ser. No.94 (1999); see also Yves Plasseraud, *How to solve cultural identity problems: choose your own nation*, *GLOBAL POLICY FORUM*, (May 2000) available at <http://www.globalpolicy.org/component/content/article/173-sovereign/30380.html>.

which later had an impressive influence on socialist countries. The Chinese government adopted regional autonomy for ethnic minorities with respect for their cultural identity, such as in the Tibet Autonomous Region and in the XinJiang Uygur Autonomous Region. The Philippines are another example, Lumads (indigenous people) policy in Mindanao<sup>66</sup> and Moro self-determination are found in the Philippines as instances confirming the significance of cultural identity.<sup>67</sup> On the other hand, not all federal systems were adopted as a response to national cultural identity, but it is at least a mechanism for respecting cultural identity by granting a degree of autonomy that can prove two or more nationalities can coexist under a single government. No matter which ideology a nation adheres to, capitalist or socialist, and no matter what kind of national structures is adopted, the unitary state or the federal state, respect and recognition of cultural identity of homogenous population reinforces the integrity of the sovereignty state.

On the contrary, when dominant groups (especially in possession of political power) ignore the needs of minority peoples for cultural identity, exploit the rights of cultural self-determination of minority peoples, or attempt to impose assimilation policy against minority peoples, violence, riots, or armed conflicts will occur. In multinational countries such as the Soviet Union and Yugoslavia, collapse was followed by ethnic conflicts, violence, and civil war. These conflicts involved secessionist movements. When the Sri Lankan government denied the Tamil people equal expression of their distinct identity in 1970, armed confrontation and a war of secession began<sup>68</sup> and lasted for 25 years until May 2009. Another example is the Lebanese Civil War (1975-1990), which resulted in an estimated 130,000 civilian fatalities. The antecedents of this war can be traced back to conflicts between Muslims and Christians, and an intricate constitutional compromise between them. The Rwandan Civil war between the majority Hutu and minority Tutsi resulted in more than one million dead and three million refugees, and tore the state apart into ethnic division. In the post-Cold War period, cultural identity policy played a key role in regional peace, even world security, large-scale violence still escalated sometimes when the majority ignored the cultural identity of the minority, such as the situation in Kosovo and Afghanistan and the conflicts between Israel and Palestinian.

---

<sup>66</sup> "Thirty-four percent of the 300,000 sq km total land area of the Philippines is in Mindanao. . . . Particular to Mindanao is the existence of three types of people: the Lumads (indigenous people), the Filipinos (Christians) and the Moros (Islamised Lumads)." *Extracts from "We Feel The Pain Of Our Mountain..." the report of the 1996 International Fact Finding Mission to Mindanao*, SOLIDARITY PHILIPPINES AUSTRALIA NETWORK, <http://cpcabrisbane.org/Kasama/1997/V11n3/Mindanao.htm> , 'Cagayan de Oro Declaration,'(2008), the 200 tribal leaders asserted their rights to their ancestral domain and cooperation by respect cultural identity in this way: "we commit to strengthen our unity to enable us to fully protect and preserve our rights to self-determination through peaceful dialogues with our Muslim and Christian brethren." [http://www.tebtebba.org/index.php?option=com\\_docman&task=doc\\_download&gid=268&Itemid=27](http://www.tebtebba.org/index.php?option=com_docman&task=doc_download&gid=268&Itemid=27), see also Ma. Cecilia L. Rodriguez, *Are Lumads left out in the Quest for Peace in Mindanao?* (Sept. 19, 2008) [http://rightsreporting.net/index.php?option=com\\_content&task=view&id=1426&Itemid=130](http://rightsreporting.net/index.php?option=com_content&task=view&id=1426&Itemid=130); Levita Duhaylungsod, *Ancestral domain, cultural identity and self-determination: the case of the lumads* (1993) available at (CONFERENCE PAPER) [http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1181/Ancestral\\_Domain%2c\\_Cultural\\_identity.pdf?sequence=1](http://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1181/Ancestral_Domain%2c_Cultural_identity.pdf?sequence=1).

<sup>67</sup> Rizal Buendia, *Looking into the Future of Moro Self-Determination in the Philippines*, 29 PHILIPPINE POL. SCI. J. 52, 1-24 (2008).

<sup>68</sup> Report of The International Conference of Experts, Nov. 21-27, 1998, *The Implementation of the Right to Self-Determination as a Contribution to Conflict Prevention*, UNESCO, (1999), available at <http://www.unpo.org/downloads/THE%20IMPLEMENTATION%20OF%20THE%20RIGHT%20TO%20SELF.pdf>



The treatment of over 370 million indigenous people in the world is illegal, morally condemnable, and socially unjust.<sup>69</sup> The reasons multiethnic or multinational countries are plagued by violence, persistent ethnic conflict, or genocide are fueled by many factors, such as civilization clashes, tribalism, resource scarcity, and overpopulation.<sup>70</sup> One predominant factor for this is the absence of effective political instruments to implement the national self-determination and respect the needs of cultural identity of minorities.

Therefore, cultural identity provides a powerful rationale to freely participate in the cultural life of the community, and internal power for a nation to entitle their self-determination within a state. In light of the discussion above, cultural identity possesses a sufficient legal standing as a primary substantial criterion for a state of origin to claim a UCH in question based on the human rights of culture and national right of cultural self-determination.

### C. THE APPLICATION OF CULTURAL IDENTITY AS SUBSTANTIAL CRITERION OF THE LEX SPECIALIS APPROACH IN CURRENT INTERNATIONAL LEGAL SYSTEMS

Current international law shows some dimensions of cultural identity as a substantial criterion of the *Lex specialis* approach. According to Article 38 of the Statute of the International Court of Justice,<sup>71</sup> problems arise from three sources: international cultural heritage conventions, relevant international custom and general principles, and international organizations' practices and national juridical practices.

#### 1. *International Cultural Heritage Conventions*

Ridha Fraoua argues that as a precondition to the right to cultural self-determination, all people should have the right to reclaim their cultural heritage.<sup>72</sup> The following significant regional and international cultural heritage conventions<sup>73</sup> show cultural identity as the substantive criterion of ownership issue.

<sup>69</sup> The United Nations General Assembly adopted the Declaration on the Rights of Indigenous Peoples with 143 votes in favour, 4 negative votes cast (Canada, Australia, New Zealand, United States) and 11 abstentions. United Nations Declaration on the rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007) available at <http://www.treatycouncil.org/PDFs/final%20adopted%20version%20of%20the%20UNDRIP.pdf>.

<sup>70</sup> Samuel P. Huntington, *The Clash of Civilizations?*, 72 FOREIGN AFFAIRS 3, 22-49 (1993).

<sup>71</sup> The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, art. 38, available at <http://www.icj-cij.org/documents/index.php?p1=4&p2=2&p3=0>.

<sup>72</sup> Ridha Fraoua, *Le trafic illicite des biens culturels et leur restitution-analyse des réglementations nationales et internationales, critiques et propositions*, FRIBOURG: EDITIONS UNIVERSITAIRES 279, (1985).

<sup>73</sup> There are some other international cultural heritage conventions, but no provisions refer to ownership issue, such as the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict 1954; Convention concerning the Protection of the World Cultural and Natural Heritage 1972; the Convention for the Safeguarding of the Intangible Cultural Heritage 2003.

- a. United Nations Educational Scientific and Cultural Organization Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property of 1970

[Cultural property] belonging to the following categories form part of the cultural heritage of each State: Cultural property created by the individual or collective genius of nationals of the states concerned, cultural property of importance to the state concerned created within the territory of that state by foreign nationals or stateless persons resident with such territory.<sup>74</sup>

This clause properly explains the relationship among territories of a state, creators, and cultural heritage. Cultural heritage here is closer and more significant to its territory than its creators—the “foreign nationals or stateless persons resident within such territory,” because cultural identity plays a significant role in this situation.

Cultural heritage is different from an invention or patent in intellectual property law, because culture is nourished within its relevant society. Different societies cultivate different culture, following an ancient Chinese proverb: the same seed grows up orange south of Huai River, but trifoliate orange north of Huai River.<sup>75</sup> The proverb emphasizes that the unique feature of a local environment always gives special characteristics to plants. This proverb is also understood by Chinese to mean that different areas breed different cultures and people.<sup>76</sup> The dragon provides another example. It can symbolize the Chinese race itself and is portrayed as nobility, heroism, power, excellence, perseverance, and divinity. On the other hand, it can symbolize a terrifying evil monster in the West.

“As a ‘historical reservoir,’ culture is an important factor in shaping identity.”<sup>77</sup> Therefore, historical and geographical elements have more effective power than creators during a process of generating new cultural heritage to justify the ownership of cultural heritage in this circumstance based on social cultural identity.

- b. Convention on the Protection of the Archaeological, Historical and Artistic Heritage of the American Nations (Convention of San Salvador) 1976

This famous regional convention begins with the reason why such looted and plundered native cultural heritage should be returned: “[t]hat such acts of pillage have damaged and reduced the archeological, historical and artistic wealth, through which the national character of their peoples is expressed.”<sup>78</sup>

“[T]he archeological, historical, and artistic wealth” of cultural heritage is seen as the spirit of a nation. Each State Party has a responsibility to effectively prevent any illegal acts—such as unlawful excavation or plundering of other State Party’s cultural heritage and destruction of their national “archeological, historical, and artistic wealth.”<sup>79</sup>

<sup>74</sup> UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S 231, art. 4 [hereinafter 1970 Convention].

<sup>75</sup> 《晏子春秋》：“橘生淮南则为橘，生于淮北则为枳。”

<sup>76</sup> 一方水土养育一方人。

<sup>77</sup> Pratt Nicola, *Identity, Culture and Democratization: The Case of Egypt*, 27 *Journal of New Political Science* 69, (2005).

<sup>78</sup> Convention on the Protection of the Archaeological, Historical, and Artistic Heritage of the American Nations (Convention of San Salvador), Jun. 16, 1976, 15 I.L.M. 1350.

<sup>79</sup> *Id.*

This clause means excavating or plundering other states' cultural heritage is prohibited. Because of the "archeological, historical, or artistic wealth" link with its nation or its people, the state can be justified as the state of origin on this legal basis of cultural identity. So, an archeological, historical, or artistic wealth link is an indirect clue for the substantial criterion of ownership of UCH in the Area.

c. UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995

The UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects 1995 is intended to facilitate the restitution and return of stolen or illegally exported cultural objects. In Article 5, this Convention applies to claims of the return of an illegally exported cultural object, if:

[T]he requesting State establishes that the removal of the object from its territory significantly impairs one or more of the following interests: (a) the physical preservation of the object or of its context; (b) the integrity of a complex object; (c) the preservation of information of, for example, a scientific or historical character; (d) the traditional or ritual use of the object by a tribal or indigenous community, or establishes that the object is of significant cultural importance for the requesting State.<sup>80</sup>

Conditions (a) through (d) enumerate the merits of returning a cultural object. These legal bases can be the substantial criterion to justify the ownership of cultural heritage in this circumstance.

2. *Customary International Law and General Principle*

The issue of who owns sunken warships and state-owned vessels can be solved based on the UCH's inevitable cultural identity. One doctrine of customary international law, "freedom of the high seas," cannot be applied in the situation of warships and state-owned vessels sunk in the Area when a State or country of origin does not forfeit their ownership rights, and instead stands on their absolute status to own identifiable public property of States, which complies with the general principle of "*Lex specialis derogat legi generali.*"

a. The Freedom of the High Seas Excludes the Situation of Warships and State-Owned Vessels

Under current customary international law, the principle of "freedom of the high seas" provides that the high seas are open to all States. The principle of freedom of the high seas may therefore apply to all ocean activities, even research or excavating UCH in the Area, which is not specifically mentioned in the 1982 United Nations Convention on the Law of the Sea ("1982 UNCLOS").<sup>81</sup> At the same time, the flag State has jurisdiction to regulate its nationals or ships as part of its territories when operating on the high sea, even when salvaging UCH, because the ship flies that State's flag. This easily leads to a "first come, first serve" approach to acquire

---

<sup>80</sup> UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Jun. 24, 1995, <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm>.

<sup>81</sup> See United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397, at art. 87–88.

UCH by the flag state when cultural items are accidentally discovered by exploration of seabed resources near the site of sunken vessels. However, the priority of the flag state will not be applied to identifiable UCH, such as warships and state-owned vessels.

b. A State Has Exclusive Sovereignty of Its Identifiable Warships and State-Owned Vessels in the Area

The flag state has the authority and sole applicable jurisdiction over the vessels under its flag. Some scholars incorrectly explain sunken vessels lose the legal basis to claim the exclusive jurisdiction by their flag state, because sunken vessels cannot qualify as a “ship” due to their inability to navigate when lying on the bottom of the seabed.<sup>82</sup> This is an absurd and mechanical explanation. The legal reason is that the Law of Finds, which should apply to abandoned shipwrecks, states that warships and state-owned vessels in the Area should be returned to their identifiable state. It is difficult to prove warships and other state-owned vessels are abandoned, so that the identifiable UCH undoubtedly belongs to its identifiable states with respect of the sovereignty principle, wherever the location. The warships and state-owned vessels can be considered as a patrimonial right of identifiable state or country of origin, and present significant value to their states.

Finally, international custom, codified in the 1982 UNCLOS states “warships and state-owned or operated vessels, used only on government non-commercial service, enjoy complete immunity from the jurisdiction of any state other than the flag state on the high seas.”<sup>83</sup> This principle is also reflected in the 2001 Convention in similar language.<sup>84</sup>

The agreement between the U.S. and France of the *La Belle* wreck (2003)<sup>85</sup> can be seen as the best national practice. The *La Belle* is a French ship sunk in 1686 in Matagorda Bay, near the United States’ state of Texas. In this agreement, Article 1 states: “The French Republic has not abandoned or transferred title of the wreck of *La Belle* and continues to retain title to the wreck of *La Belle*.”<sup>86</sup> Therefore, the identifiable sunken State vessel was titled to the sovereign states unless expressly abandoned.

3. *International Organizations’ Practices and National Juridical Practices*

a. The United Nations and UNESCO Acknowledge This Substantial Criterion in Its Resolutions, Conventions, and Conferences

UNESCO’s Intergovernmental Committee for Promoting Return of Cultural Property to its Countries of Origin or its Restitution in the Case of Illicit Appropriation stated that “the cultural property that should be returned is: ‘that which is particularly representative of the

<sup>82</sup> See ANASTASIA STRATI, *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA*, 237 n.36 (1995).

<sup>83</sup> 1982 UNCLOS PART VII ART.96.

<sup>84</sup> Compare 1982 UNCLOS Part VII art. 95-96 (stating warships and state owned ships have “complete immunity from jurisdiction of any state other than the flag state.”) with 2001 Convention art.12 (7) (stating “No State Party shall undertake or authorize activities directed at State vessels and aircraft in the Area without the consent of the flag State”).

<sup>85</sup> Agreement between the Government of the United States of America and the Government of the French Republic Regarding the Wreck of *la belle*, U.S.-Fr., Mar. 31, 2003.

<sup>86</sup> *Id.* at art. 1(2).

cultural identity of a specific people” and “the country of origin” is defined as “to whose cultural tradition the object is linked.”<sup>87</sup> Salah Stétié, the Chairman of the first three sessions of the UNSECO Intergovernmental Committee, said cultural property should be returned with the consideration that, “the extent that the absence or withdrawal of a particular item would constitute an irreparable deprivation, and an irreplaceable loss in the chain of actions and interactions which go to make up a living culture.”<sup>88</sup>

Article 7 of the Resolution on the Restitution or Return of Cultural Property to the Countries of Origin (“Resolution”) states that the U.N. General Assembly: “[a]lso invites Member States engaged in seeking the recovery of cultural and artistic treasures from the seabed, in accordance with international law, to facilitate by mutually acceptable conditions the participation of States having a historical and cultural link with those treasures.”<sup>89</sup>

Without providing directly for the return of discovered underwater cultural treasures to its state of origin, the Resolution properly provides another confirmation of cultural identity—the essential criterion to justify that a state of origin is the historical and cultural link with the recovered property.

The Athens International Conference on the “Return of Cultural Property to its Country of Origin”<sup>90</sup> in 2008 was the first in a series of international gatherings organized by UNESCO and its Member States to foster awareness and provide for reflection and exchange on the issue of the return of cultural property. This conference concluded that “the return of cultural objects is directly linked to the rights of humanity (preservation of cultural identity and preservation of world heritage.)”<sup>91</sup>

In April 2010, at the Cairo Conference, countries united for repatriation of looted cultural heritage artifacts. Twenty-two attendant countries were advised to submit their lists with “top priority” antiquities designated. These top priority antiquities were those that they sought to be returned because they were a piece of the country’s history and national identity. For instance, the Parthenon Marbles are a “top priority” for Greece. Cultural tradition can be understood as the social, artistic, and historical value that is the core of cultural identity. The return of cultural property to the state of origin should be of spiritual, cultural, or historical significance to a state’s social realization or aesthetic appreciations.

---

<sup>87</sup> Intergovernmental Committee for Promoting the Return of Cultural Property to its Countries of Origin or Its Restitution in Case of Illicit Appropriation, Rep. on its 4th Sess., 4, Apr. 2-5, 1985, available at <http://unesdoc.unesco.org/images/0006/000632/063270eo.pdf>.

<sup>88</sup> *Id.*

<sup>89</sup> Return or restitution of cultural property to the countries of origin, GA Res. 48/15, U.N. GAOR, 47th Sess., Supp. No. 49 at 19, U.N. Doc. A/48/49 (Nov. 2, 1993).

<sup>90</sup> *Athens International Conference on the “Return of Cultural Property to its Country of Origin*, UNESCO (2008), [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=36430&URL\\_DO=DO\\_PRINTPAGE&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=36430&URL_DO=DO_PRINTPAGE&URL_SECTION=201.html).

<sup>91</sup> Conclusion of the Athens International Conference on the Return of Cultural Objects to their Countries of Origin (Mar. 17–18, 2008), [http://www.unesco.org/culture/laws/pdf/Conclusions\\_Athens\\_en.pdf](http://www.unesco.org/culture/laws/pdf/Conclusions_Athens_en.pdf).

## b. United States Practices This Substantial Criterion Within Its Judicial System

The abandoned shipwrecks, embedded in submerged lands of a state, are simultaneously transferred to United States in accordance with United States legislation.<sup>92</sup> The situation changes when it happens in the Area.

The United States returned an Egyptian Mummy after a CT scan of the mummy taken in 1999 revealed that the mummy was Egypt's King Ramses I. Emory University's Michael Carlos Museum returned the mummy to Egypt, and it is now exhibited in Egypt's Luxor Museum. Peter Lacovara, an Egyptologist and curator of ancient art at the Michael C. Carlos Museum said, "[t]here was never any question about whether the mummy would be returned to Egypt if it proved to be a royal."<sup>93</sup> This emphasizes the great importance of the national identity of cultural heritage.

Judge Mark Pizzo championed this substantial criterion in *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*<sup>94</sup> stating "[t]he debris field's location, coins, cannons, and artifacts persuasively match the *Mercedes's* historical record. I find the evidence as to the *res's* identity so one-sided that Spain would prevail as a matter of law."<sup>95</sup>

Thus, when cultural identity is an inherent element to give common ground to a people's "being," or an internal impetus to implement national rights of cultural self-determination, or even a precondition to resuscitate the most significant cultural objects of patrimony, cultural identity stands as a sufficient legal basis as the substantial criterion of the preferential right to "state of origin" to justify the effective link by its historical, cultural, and archeological nature.

## IV. BROADER CONSIDERATIONS: SUBSTANTIVE CRITERIA TO THE GENERAL APPROACH

Since the beginning of the twenty-first century, the international community has been concerned about the protection of all kinds of cultural heritage.<sup>96</sup> The same is true of salvage operations by individual states or persons in the Area. While the *Lex specialis* approach cannot settle all Underwater Cultural Heritage ("UCH") ownership disputes in the Area, the general approach, the principle of common heritage of mankind, applied for the efficient protection of UCH under some circumstances. For example, when an "effective link" fails to be established through current technology between UCH and certain states, it is classified as an unidentifiable item (or *bona vacantia*). According to the United Nations Educational, Scientific and Cultural Organization ("UNESCO") Convention on the Protection of the Underwater Cultural Heritage ("2001 Convention") and its Annex, the International Seabed Authority ("ISA") and UNESCO

<sup>92</sup> See generally 43 U.S.C. §2105 (2006), "The United States asserts title to any abandoned shipwreck that is (1) embedded in submerged lands of a State;(2) embedded in coralline formations protected by a State on submerged lands of a State."

<sup>93</sup> Hillary Mayell, *U.S. Museum to Return Ramses I Mummy to Egypt*, NATIONAL GEOGRAPHIC NEWS (Apr. 30, 2003), [http://news.nationalgeographic.com/news/2003/04/0430\\_030430\\_royalmummy.html](http://news.nationalgeographic.com/news/2003/04/0430_030430_royalmummy.html).

<sup>94</sup> No. 8:07-CV-614-SDM-MAP, 2009 U.S. Dist. LEXIS 119088 (M.D. Fla. June 3, 2009).

<sup>95</sup> *Odyssey Marine Exploration, Inc. v. The Unidentified Shipwrecked Vessel*, No. 8:07-CV-614-SDM-MAP, 2009 U.S. Dist. LEXIS 119088, at \*21 & n.10 (M.D. Fla. June 3, 2009), available at <http://docs.justia.com/cases/federal/district-courts/florida/flmdce/8:2007cv00614/197978/209/0.pdf>.

<sup>96</sup> The Convention of the Protection of the Underwater Cultural Heritage (2001); the Convention for the Safeguarding of the Intangible Cultural Heritage (2003); the Convention on the Protection and Promotion of the Diversity of Cultural Expressions (2005).

were required to provide notice of such discoveries to Member States according to the Article 11 notification obligation. Then, the ISA could authorize a Member State or a specific international organization to contractually salvage and operate protection issue. Finally, the ISA may keep the artifacts in an underwater museum or other designated museum belonging to the ISA or to the UN.

To regulate the principle in a convention is one thing, but legal practice in a national system is another thing. The ownership issue of unclaimed wrecks found in extraterritorial waters is a great challenge for legal systems to balance commercial exploitation under the salvage law and the greatest possible protection of the UCH under the general approach.

The *RMS Lusitania* case provides a good example. The *RMS Lusitania* was an ocean liner, and the property of Cunard Steamship Company Ltd. at the time of its sinking in 1915. The insurers paid the owners the total loss and subsequently acquired legal title to the ship. In 1982, salvage operations were performed on the wreck, and approximately ninety-four items were salvaged.<sup>97</sup> Then, American entrepreneur Gregg Bemis bought the wreck of the *RMS Lusitania* from insurers in 1982 and went to England's courts to ensure his ownership was legally in force. Justice Sheen in an English court first admitted "[t]here was a lacuna in the provisions for the disposal of 'extraterritorial wrecks' if unclaimed by the owner."<sup>98</sup> Then, the English court stated that the salvager could formerly received a salvage reward, but "the Crown would have asserted *a droit* of Admiralty."<sup>99</sup> In the *RMS Lusitania* case, "the Crown had no right to unclaimed wrecks and chattels found in extraterritorial waters"<sup>100</sup> in 1982. The *Lusitania* torpedoed in 1915, now belonged to the finders, who are able to "[assert] a finder's title or alternatively, [seek] out the true owner and claiming salvage."<sup>101</sup>

In *Bemis v. The RMS Lusitania*, the United States Court of Appeals for the Fourth Circuit denied "a salvage award and prevented the salvor from taking artifacts from the wreck with "its scientific, historical and archeological significance,"<sup>102</sup> because the salvor did not use "good archeological practice or due diligence."<sup>103</sup> In 2007, after Bemis received a five-year exploration license, he planned to dive and recover artifacts and evidence in the wreck that could help piece together the story of what happened to the ship. First, the Underwater Archaeology Unit ("UAU") with the National Monuments Service, which manages Ireland's Heritage, joined the survey team "to ensure that the research was carried out in a non-invasive manner."<sup>104</sup> Then, Bemis promised any items found would be given to museums and belong to the British government to analyze. A salvaged four-blade propeller is now on exhibit in Merseyside

<sup>97</sup> *Pierce v. Bemis*, [1986] Q.B. 384 (Eng.).

<sup>98</sup> ANASTASIA STRATI, *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA*, 258 (1995).

<sup>99</sup> Lillington, S.D., *Wreck or wrecuum maris?: Lloyd's Maritime and Commercial Law Quarterly* (1987), 272.

<sup>100</sup> See ANASTASIA STRATI, *THE PROTECTION OF THE UNDERWATER CULTURAL HERITAGE: AN EMERGING OBJECTIVE OF THE CONTEMPORARY LAW OF THE SEA*, 227 (1995).

<sup>101</sup> Lillington, S.D., *Wreck or wrecuum maris?: Lloyd's Maritime and Commercial Law Quarterly* (1987), 272.

<sup>102</sup> ART AND CULTURAL HERITAGE: LAW, POLICY, AND PRACTICE 284 (Barbara T. Hoffman ed. 2006), *Cambridge University Press*.

<sup>103</sup> *Id.*

<sup>104</sup> Eithne Shortall, *Riddle of Lusitania sinking may finally be solved*, THE TIMES, Jul. 20, 2008, <http://www.timesonline.co.uk/tol/news/world/ireland/article4364701.ece>.

Maritime Museum, Albert Dock in Liverpool, UK.<sup>105</sup> Any fine art recovered, such as paintings, would remain in the ownership of the Irish Government.

The above national legal practice elucidated the salvage doctrine and did not apply to the ownership issue of the *bona vacantia* UCH in the Area. The UCH with national identity should be returned to its state.

Therefore, the substantive criteria of the general approach are not only just to entitle UCH to mankind as a whole. But, more importantly, it is to recognize the significance for the contracting parties or specific international organizations to cooperate in the recovery and protection of UCH, in accordance with the principle of non-commercial exploitation and the principle “*in situ*” preservation as a preferred option. Only in so doing can the outstanding universal value of UCH be maximized.

## V. CONCLUSION

Although the 1982 United Nations Convention on the Law of the Sea, the 2001 United Nations Educational, Scientific and Cultural Organization, and the Convention on the Protection of the Underwater Cultural Heritage provide some rules of the Underwater Cultural Heritage (“UCH”) ownership in the Area, the rules lack “teeth” to settle the claim of ownership of UCH in the Area. After the above analysis, cultural identity provides a sufficient legal base to be deemed a substantive criterion of the *Lex specialis* approach to justify the claimed UCH in the Area for a state of origin. The International Seabed Authority should adopt the general approach: the principle of common heritage of mankind for protection UCH when UCH is classified as unidentifiable items. The two approaches need more national or international judicial practices and should be crystallized in more international conventions as the evidence of *opinio juris* in the future so it can be used better to protect the UCH in the Area and effectively settle the relevant disputes.

<sup>105</sup>

Merseyside Maritime Museum,  
<http://www.liverpoolmuseums.org.uk/maritime/collections/liners/lusitania/propeller.aspx> (last visited, Mar. 25, 2011).



# A NEW CLASS OF PERSONS: INTERCOUNTRY ADOPTEES AND POSTCOLONIAL THEORIES OF CULTURAL HYBRIDITY

*George Waddington* \*

## INTRODUCTION

The recent earthquake in Haiti thrust the debate over intercountry adoption into the mainstream media. The *Associated Press* reported that before the earthquake devastated Haiti on January 12, 2010, there were 380,000 parentless Haitian children.<sup>1</sup> Estimates reported in the *New York Times* suggest that the earthquake orphaned hundreds of thousands of additional Haitian children who are now in need of adoptive families.<sup>2</sup> The fact that vast numbers of children lost their families during the earthquake in Haiti has reinvigorated debate over the merits and dangers associated with intercountry adoption.<sup>3</sup> Further, the actions of the Baptist missionaries, whom the Haitian government charged with human trafficking after they seized thirty-three Haitian children and attempted to bus them to the Dominican Republic, have intensified the bitter debate over western political, economic, and cultural influence in developing countries.

This Article explores the cultural and political narratives that underlie the frequently fraught debate over intercountry adoption. It argues that despite the vast economic disparities manifested in the intercountry adoption process, intercountry adoption does not constitute a contemporary form of western cultural imperialism. Using the postcolonial theory of cultural hybridity as a critical framework, this Article claims that the practice of intercountry adoption exemplifies the process of linguistic, technical, material, and artistic exchange that has traditionally shaped world cultures and facilitated their advancement. This Article situates “culture” as a series of multifaceted relationships—relationships that cannot be reduced to core elements or rooted in a specific physical location—to suggest that cultural identity is neither lost nor found, but rather is modified and developed through cultural interaction. Intercountry adoption exemplifies the process of cultural and intellectual exchange that has traditionally led to growth and prosperity and resists the conventional notion that individuals belong to a single cultural community.

This Article maintains that attempts to restrict intercountry adoption to insulate developing nations from western cultural influences perpetuate imperial notions of cultural identity as these notions assume cultures exist within a specific geographical and social context. Specifically, attempts to curb intercountry adoption out of fear that the practice devalues and depletes poorer countries’ cultural resources operate within the same intellectual and social paradigms that perpetuated European notions of racial and cultural superiority throughout the

---

\* George Waddington received his Ph.D. in English from the University of Texas at Austin and is currently enrolled as a third-year student at the University of Maryland School of Law. He has published articles on British imperialism and on postcolonial theory in peer-reviewed journals.

<sup>1</sup> Lisa Orkin Emmanuel, *Americans Rush to Adopt Orphaned Kids From Haiti*, ASSOCIATED PRESS, January 21, 2010, [http://www.blackamericaweb.com/?q=articles/news/moving\\_america\\_news/15799/2&page=121](http://www.blackamericaweb.com/?q=articles/news/moving_america_news/15799/2&page=121).

<sup>2</sup> The Editors, *Haiti’s Children and the Adoption Questions*, N.Y. TIMES, Feb. 1, 2010, <http://roomfordebate.blogs.nytimes.com/2010/02/01/haitis-children-and-the-adoption-question/?scp=1&sq=haiti's%20children%20and%20the%20adoption%20question&st=cse> [hereinafter *Haiti’s Children*].

<sup>3</sup> *Id.*

colonial era. Arguments in favor of “protecting” indigenous cultures in developing nation states from the influences of a dominant western culture are paternalistic: they underestimate the resilience of non-western cultures and these cultures’ ability to survive (and even flourish) in the face of western cultural hegemony. In contrast, the postcolonial paradigm for intercountry adoption challenges scholars and policy-makers to establish new practices that will nourish the hybrid identities of children who are adopted by foreign families.

This Article is divided into six Parts. First, this Article situates intercountry adoption as an increasingly popular option for couples living in the United States and other western countries who wish to establish a family. Second, this Article documents the resistance among sending countries and non-government institutions to remove children from their birth cultures. Third, this Article examines how imperial conceptions of culture as “authentic” and “pure” inform opponents and advocates’ views of intercountry adoption. Fourth, this Article discusses how postcolonial theory reveals and ultimately complicates some of the cultural assumptions that inform the debate over intercountry adoption—namely that individuals possess an essential, unique cultural identity that is anchored to a particular geographic location. Fifth, this Article suggests how postcolonial theories of cultural hybridity might manifest themselves in the context of intercountry adoption and how the postcolonial paradigm for intercountry adoption promises to accommodate, and ultimately to validate, the adopted child’s multifaceted, or hybrid cultural identity as this identity continues to defy easy categorization within our society.

Before this Article critiques intercountry adoption, several scholarly terms whose meanings have been obscured through popular use deserve clarification. The words “imperial” and “colonial” are used repeatedly and often interchangeably throughout this Article, but not without respect for their different definitions. Imperialism is an ideological concept that supports one country’s economic, political, and military control over another.<sup>4</sup> Colonialism, on the other hand, is a form of imperialism and involves the settlement of a new territory by a group of people.<sup>5</sup> In this context, Edward Said’s definition of imperialism as “an act of geographical violence through which virtually every space in the world is explored, charted, and finally brought under control”<sup>6</sup> is more applicable to colonialism than to imperialism. Both “imperialism” and “colonialism” denote aggressive systems of economic and cultural control; colonialism has, however, a more tangible application than imperialism. Also, this Article uses the term “postcolonial” to refer to the critical and artistic movement founded, in large part, on the work of the literary and cultural critic, Edward Said, and that seeks to undo the binary categories that characterized European imperial thought and discourse.

## I. THE INCREASING SIGNIFICANCE OF INTERCOUNTRY ADOPTION

Intercountry adoption traditionally straddled disparate national and economic interests. It emerged in the mid-twentieth century as a response to the devastation in Europe during the Second World War. The U.S. Committee for the Care of European Children spearheaded a humanitarian effort that brought approximately 300 children to the United States from countries as diverse as Poland, Germany, and Italy.<sup>7</sup> The Korean War also prompted a wave of

---

<sup>4</sup> JOHN MCLEOD, *BEGINNING POSTCOLONIALISM* 7 (2000).

<sup>5</sup> *Id.*

<sup>6</sup> Edward Said, *Yeats and Decolonization*, in *NATIONALISM, COLONIALISM, AND LITERATURE* 69, 77 (Terry Eagleton et al. eds., 1990).

<sup>7</sup> Notesong Srisopark Thompson, Note, *Hague is Enough?: A Call for more Protective, Uniform Law Guiding*

intercountry adoptions by American families who adopted several thousand Korean children left parentless by the war.<sup>8</sup> Most contemporary intercountry adoptions still involve the placement of parentless children from poor, developing countries with families living in prosperous, western countries like the United States. Today, the United States is the principal receiving country for intercountry adoptees<sup>9</sup> and China is the principal sending country.<sup>10</sup> As the surging interest in adopting children left parentless by the earthquake in Haiti reveals,<sup>11</sup> intercountry adoption continues to function as a response by western nations to crises abroad.

Intercountry adoption represents a small, but increasing percentage of the total number of U.S. adoptions. Most parents in so-called developed countries select domestic adoption; for example, intercountry adoption only accounts for approximately one-sixth of all adoptions in the United States.<sup>12</sup> Despite recent declines in the annual number of intercountry adoptions orchestrated by families in the United States,<sup>13</sup> long-term patterns indicate that the number of intercountry adoptions is steadily increasing. Elizabeth Bartholet observed that the overall trend reveals that the number of children who arrive in the United States from other countries increased over recent years.<sup>14</sup> Similarly, Notesong Thompason claimed, “international adoptions have gained enormous popularity and the momentum for going overseas to find an adoptable child continues to build.”<sup>15</sup> For example, the number of intercountry adoptions completed by couples in the United States in 2006 (20,679) remains significantly higher than the 16,369 intercountry adoptions completed by U.S. couples in 1999.<sup>16</sup>

The interest in intercountry adoption is likely to increase in the foreseeable future as demand for children, particularly infants, increases among families in the United States and other western countries. Advances in contraception, the legalization of abortion, and the increased tendency of single parents to raise their biological children have, in combination, dramatically reduced the number of children available for adoption in the United States and other western countries.<sup>17</sup> At the same time, the number of parents who want to adopt remains high.<sup>18</sup> Bartholet observed that the increasing acceptance of adoption within the United States combined

---

*International Adoptions*, 22 WIS. INT’L L.J. 441, 445 (2004).

<sup>8</sup> Jena Martin, *The Good, the Bad & the Ugly? A New Way of Looking at the Intercountry Adoption Debate*, 13 U.C. DAVIS J. INT’L L. & POL’Y 173, 177 (2007).

<sup>9</sup> Erika Lynn Kleiman, *Caring for Our Own: Why American Adoption Law and Policy Must Change*, 30 COLUM. J.L. & SOC. PROBS. 327, 365 (1997). See also Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUMS. RTS. L. REV. 151, 166 (2007) (“The United States has long been the major receiving country in the world, with some two-thirds of all internationally adopted children coming to the U.S.”); *id.* at 164 (noting that the United States provides about 20,000 homes for international adoptees compared with 10,000 homes in other receiving countries).

<sup>10</sup> Martin, *supra* note 9, at 177.

<sup>11</sup> See Jennifer Ludden, *Haiti’s Quake Orphans Will Stay Put, for Now*, NATIONAL PUBLIC RADIO: ALL THINGS CONSIDERED (Jan. 21, 2010), <http://www.npr.org/templates/story/story.php?storyId=122815179>.

<sup>12</sup> Jacqueline Bhabha, *The Future of International Regimes: Organizations and Practices: Moving Babies: Globalization, Markets, and Transnational Adoption*, 28 FLETCHER F. WORLD AFF. 181, Summer 2004, at 189 (2004). See also Kleiman, *supra* note 10, at 328 (noting that some studies estimate intercountry adoptions constitute sixteen percent of all non-relative adoptions in the United States).

<sup>13</sup> Bartholet, *supra* note 10, at 158 (reporting that the number of international adoptions in 2006 decreased by 2,205 from 2004 when the total number of international adoptions reached 22,884).

<sup>14</sup> *Id.*

<sup>15</sup> Thompason, *supra* note 8, at 446.

<sup>16</sup> Bhabha, *supra* note 13, at 188.

<sup>17</sup> Thompason, *supra* note 8, at 446.

<sup>18</sup> *Id.*

with rising infertility rates (she approximated 6.1 million or ten percent of future parents are infertile) has created “a large population of prospective international adoptive parents” within the United States.<sup>19</sup> Further, the Hague Convention on Protection of Children and Co-Operation in Respect of Intercountry Adoption identifies intercountry adoption as a means of benefitting orphaned children throughout the globe.<sup>20</sup> The Convention recognized “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”<sup>21</sup> The large number of individuals and couples in the western world who wish to adopt will likely increase the frequency of intercountry adoption and ensure that intercountry adoption continues to assume a significant role within future discussions of family and international law.

## II. INSULATING THE DEVELOPING WORLD AGAINST THE AFFECTS OF WESTERN CULTURE AND SOCIETY

Despite the general increase in the number of intercountry adoptions taking place throughout world, the recent decline in the number of children available for adoption from traditional supply nations like China and Russia<sup>22</sup> suggests a growing unease with, and even opposition to, the practice of intercountry adoption. As of 2003, almost half of the forty countries that appeared within the last fifteen years on the top-twenty list of countries sending children to the United States for adoption closed, or effectively closed, their intercountry adoption programs.<sup>23</sup> Recent declines in the number of foreign-born children adopted by American families also suggest developing nations’ growing resistance to supplying children for international adoption.<sup>24</sup> Many sending countries in the developing world have refused to facilitate intercountry adoption.<sup>25</sup> For example, India passed legislation that radically reduced the number of children available for intercountry adoption<sup>26</sup> and Russia’s new regulations will make adopting a child from Russia more difficult for American parents.<sup>27</sup>

The international laws governing intercountry adoption indicate that the international community harbors major concerns regarding the cultural displacement that seemingly occurs as part of the intercountry adoption process. For example, the United Nation’s Convention on the Rights of the Child prefers in-country institutional care to intercountry adoption; it “recognizes”

---

<sup>19</sup> Barholet, *supra* note 10, at 164. *See also* Thompson, *supra* note 8, at 446 (“American citizens, in particular, are seeking to adopt children overseas in ever increasing numbers because [sic] the reduction in children available for adoption in the United States.”).

<sup>20</sup> Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, Hague Convention, May 29, 1993, available at <http://www.hcch.net/upload/conventions/txt33en.pdf>.

<sup>21</sup> *Id.* at Ch. 33, Introduction.

<sup>22</sup> Martin, *supra* note 9, at 186 (noting that China and Korea have recently bowed to internal pressure to curb intercountry adoption and that in 2006 Russia placed a ban in intercountry adoptions). *See also* Clifford J. Levy, *Russia Seeks Ways to Keep Its Children*, N.Y. TIMES, April 15, 2010, at A4 (reporting that Russia aims to eliminate international adoption and provide domestic programs that will care for parentless children).

<sup>23</sup> Barholet, *supra* note 10, at 153.

<sup>24</sup> *Id.* at 153–54.

<sup>25</sup> Martin, *supra* note 9, at 175. *See also* Bhabha, *supra* note 13, at 195 (noting that at “varying times, countries as different in their political systems as Romania, South Korea, and India have denounced foreign adoptions and defended state ownership of the nation’s children.”).

<sup>26</sup> Barholet, *supra* note 10, at 193 (explaining that India’s Parliament passed a law that requires fifty percent of all adoptions in India to be in-country adoptions; given the low level of adoption within Indian society, the law will severely limit the number of Indian children available to foreign adoptive parents).

<sup>27</sup> Clifford J. Levy, *Russian Official Says U.S. Adoptions Have Not Been Halted*, N.Y. TIMES, May 5, 2010, at A6.

intercountry adoption as “an alternative means of child’s care, if the child cannot be placed in a foster or an adoptive family or cannot in any suitable manner be cared for in the child’s country of origin.”<sup>28</sup> The Convention entered into force in September 1990 and has been ratified by every country in the international community except for the United States and Somalia.<sup>29</sup> Additionally, the Hague Convention—the leading international agreement on intercountry adoption—prioritizes domestic adoption over placing an orphaned child with foreign adoptive parents: “intercountry adoption may offer the advantage of a permanent family to a child for whom a suitable family cannot be found in his or her State of origin.”<sup>30</sup> The Convention also stated that sending countries should “give due consideration to the child’s upbringing and to his or her ethnic, religious and cultural background.”<sup>31</sup> In this respect, the Convention reflected the emphasis many countries place on cultural and national identity<sup>32</sup> and marginalizes the influence and effect of cross-cultural exchange.<sup>33</sup> Finally, in 1995 the Permanent Bureau of the Hague Convention issued guidelines for intercountry adoption that reinforced the popular notion that actors associated with intercountry adoption should prioritize and preserve the adopted child’s cultural heritage. The guidelines suggested that sending countries may wish to limit intercountry adoptions to countries that share “close cultural links” such as “a common language.”<sup>34</sup>

The United Nations Children’s Fund (UNICEF) and the European Union (EU) both advocated for restricting intercountry adoption. UNICEF consistently opposed intercountry adoption except in the most dire of circumstances.<sup>35</sup> The organization considered intercountry adoption “a very exceptional measure” and supports limiting the practice to children “for whom no suitable care can be identified and arranged in his or her country of origin.”<sup>36</sup> UNICEF also claims domestic solutions are preferable to solutions that involve other countries and that intercountry adoption is “subsidiary” to programs that provide permanent family-based solutions within the child’s native country.<sup>37</sup> The European Union assumed a similarly skeptical view of international adoption: Romania ended its intercountry adoption program as a prerequisite for

---

<sup>28</sup>Convention on the Rights of the Child art. 21(b), Office of the High Commissioner for Human Rights, Sept. 2, 1990. See also Bartholet, *supra* note 10, at 171–72 (observing “Article 21 . . . places international adoption lower on the hierarchy than in-country foster care, and apparently even lower than institutional care that might be deemed ‘suitable.’”).

<sup>29</sup> Convention on the Rights of the Child, *supra* note 29, at Frequently Asked Questions. [http://www.unicef.org/crc/index\\_30229.html](http://www.unicef.org/crc/index_30229.html)

<sup>30</sup> Hague Convention, *supra* note 21, at Introduction. See also The Permanent Bureau, *Guide to Good Practice Under the Hague Convention of May 29, 1993* 73 (August 2005) (hereinafter *Guide to Good Practice*) (“The child should ideally be raised in his or her family of birth. If that is not possible, then a family should be sought in his or her country of origin. When that is also not possible, then intercountry adoption may provide the child with a permanent, loving home.”).

<sup>31</sup> Hague Convention, *supra* note 21, at art. 16(1)(b). See also Martin, *supra* note 9, at 193–94 (noting that sending countries were determined to establish that intercountry adoption was contingent on the availability of a domestic placement: “Again and again, during the debates surrounding the drafting of the Convention, sending countries emphasized the idea that intercountry adoption must occur only after corresponding measures at home proved fruitless.”).

<sup>32</sup> Martin, *supra* note 9, at 192.

<sup>33</sup> *Id.* at 200.

<sup>34</sup> *Guide to Good Practice*, *supra* note 31, at 100.

<sup>35</sup> Thompson, *supra* note 8, at 453 (“UNICEF . . . strongly opposes severing a child’s native ties with their country of origin through international adoption.”).

<sup>36</sup> UN Children’s Fund, *Guidance Note on Intercountry Adoption in the CEE/CIS Baltics Region*, Feb. 2003. [http://www.unicef.org/ceecis/Guidance\\_note\\_Intercountry\\_adoption.pdf](http://www.unicef.org/ceecis/Guidance_note_Intercountry_adoption.pdf)

<sup>37</sup> *Id.*

admission into the EU.<sup>38</sup> The reluctance of organizations like UNICEF and governing bodies like the EU to embrace intercountry adoption suggests both a growing skepticism regarding the benefits of intercountry adoption and a trend toward cultural isolationism within developing nations, many of which were former European colonies.

### III. INTERCOUNTRY ADOPTION AS LOSS OF “AUTHENTIC” CULTURAL IDENTITY

Both opponents and advocates of intercountry adoption assume intercountry adoption displaces the adopted child’s birth heritage and therefore compromises the child’s “authentic” cultural identity. Opponents charge that intercountry adoption constitutes an attack on indigenous cultures. They argue that intercountry adoption forces the adopted child to assimilate into western society in a manner that is reminiscent of colonial attempts to indoctrinate indigenous peoples into European values and learning. Advocates acknowledge that the adopted child loses an essential aspect of the child’s identity by being removed from his or her birth country. However, advocates argue that the benefits associated with intercountry adoption counterbalance the child’s loss of cultural identity. Although some advocates question the extent to which intercountry adoptees experience a “loss” of cultural identity, they accept the premise that the adopted child’s birth culture constitutes the child’s primary and “authentic” cultural identity and that this identity is somehow displaced by intercountry adoption.

#### A. PERPETUATING THE IMPERIAL PARADIGM

The attempt by Laura Silsby and her fellow Baptist missionaries to remove Haitian children to the Dominican Republic illustrates how the imperialist narrative continues to frame intercountry adoption. Some statements made by Silsby reflect the same Eurocentric assumptions regarding morality and culture that prompted European missionaries to travel throughout the colonized regions of South Asia, Africa, and the Americas. Silsby explained, “God wanted us to come here to help children.”<sup>39</sup> She also commented that she “wanted to give them [Haitian children] lives of joy and dignity in God’s love.”<sup>40</sup> Ms. Silsby’s statements evoke the example of “the Clapham evangelist,”<sup>41</sup> Charles Grant, who established a series of missionary schools in Bengal in the late eighteenth century for the “improvement” of the indigenous population. Grant wrote: “The Hindoos err, because they are ignorant; and their errors have never fairly been laid before them. The communication of our light and knowledge to them, would prove the best remedy for their disorders.”<sup>42</sup> The Baptist missionaries’ enterprise in Haiti all-too-closely paralleled attempts by Grant and other Christian missionaries during the colonial era to displace indigenous customs and traditions and convert native peoples to Christianity.

The actions of the Baptist missionaries in Haiti prompted critics of intercountry adoption to reaffirm their position in favor of increased regulation of intercountry adoption so the practice

---

<sup>38</sup> Martin, *supra* note 9, at 187.

<sup>39</sup> Ginger Thompson, *Case Stokes Haiti’s Fear for Children, and Itself*, N.Y. TIMES, Feb. 1, 2010, at A1.

<sup>40</sup> *Id.*

<sup>41</sup> Badri Raina, *A Note on Language, and the Politics of English in India*, in *RETHINKING ENGLISH: ESSAYS IN LITERATURE, LANGUAGE, HISTORY* 265, 273 (Svati Joshi ed., 1994).

<sup>42</sup> CHARLES GRANT, *OBSERVATIONS ON THE STATE OF SOCIETY AMONG THE ASIATIC SUBJECTS OF GREAT BRITAIN* 83 (1792).

does not operate as a form of human trafficking.<sup>43</sup> David Smolin is a long time critic of intercountry adoption and has consistently advocated for a deliberate approach toward intercountry adoption. Speaking to the crisis in Haiti, Smolin warned that “illicit schemes” like children trafficking can thrive in the chaos that plagued Haiti in the immediate aftermath of the earthquake.<sup>44</sup>

The concern over human trafficking in connection with intercountry adoption reflects a broader fear of exploiting people from poor nations to benefit affluent adoptive parents living in the United States and Europe.<sup>45</sup> Bhabha argued that the market for children who have been approved for adoption by foreign parents and the human trafficking market are not separate entities, and she warns that these markets increasingly overlap.<sup>46</sup> Critics of intercountry adoption claim that the process of taking children from their native countries is subject to rampant abuse and risks encouraging the unsavory practice of baby stealing and selling.<sup>47</sup>

The debate over human trafficking in relation to intercountry adoption reveals sending countries’ deep-rooted misgivings about western power and imperial aspirations.<sup>48</sup> Twila Perry observed how intercountry adoption presented a “troubling dilemma” because western families’ access to international children for adoption relies on the continued impoverishment of women in developing countries.<sup>49</sup> Critics of intercountry adoption regularly argue that the power imbalance between sending and receiving nations evokes imperialist and paternalistic narratives of subordination and even genocide.<sup>50</sup> Smolin comments that international adoption has

---

<sup>43</sup> See generally Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the United Nations Convention against Transnational Organized Crime, 160, Nov. 15, 2000 (defining human trafficking as “the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation.”).

[http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_documents\\_2/convention\\_%20traff\\_eng.pdf](http://www.uncjin.org/Documents/Conventions/dcatoc/final_documents_2/convention_%20traff_eng.pdf)

<sup>44</sup> *Haiti’s Children*, *supra* note 3.

<sup>45</sup> Nicole Bartner Graff, Note, *Intercountry Adoption and the Convention of the Rights of the Child: Can the Free Market in Children be Controlled?*, 27 SYRACUSE J. INT’L L. & COM. 405, 405 (2000) (“While such adoptions might work out well for the adoptive parents, it is doubtful that the practice is nearly as positive, across the board, for the children and birth mothers involved.”).

<sup>46</sup> Bhabha, *supra* note 13, at 184. See also Bartholet, *supra* note 10, at 161–62 (noting that the stoppage of intercountry adoptions from Romania in 2000 was “triggered by . . . concerns about payments allegedly made to birth parents in connection with international adoption.”).

<sup>47</sup> Solangel Maldonado, *Discouraging Racial Preferences in Adoptions*, 39 U.C. DAVIS L. REV. 1415, 1448, 1445 (2006) (commenting that “one of the most serious risks surrounding international adoption is the possibility that the child was stolen or sold” and noting that the United States and the United Kingdom “recently banned adoptions from Cambodia after learning that scouts and adoption agencies were paying birth parents for their children”).

<sup>48</sup> Martin, *supra* note 9, at 204 (“[C]ulture and cultural exploitation underlies many of the pros and cons on intercountry adoption. There is much acrimony inherent in the process because of the cultural differences between sending and receiving countries and the historical involvement of receiving countries in the domination and exploitation of sending countries.”).

<sup>49</sup> Twila Perry, *Transracial and International Adoption: Mothers, Hierarchy, Race, and Feminist Legal Theory*, 10 YALE J.L. & FEMINISM 101, 105 (1998). See also Kleiman, *supra* note 10, at 338 (noting that many blacks harbored “[a]n overarching concern of . . . white imperialism” prior to the acceptance of transracial adoption).

<sup>50</sup> Martin, *supra* note 9, at 179. See also Sara Dillon, *Making Legal Regimes for Intercountry Adoption Reflect Human Rights Principles: Transforming the United Nations Convention on The Rights of the Child with the Hague Convention on Intercountry Adoption*, 21 B.U. INT’L L.J. 179, 187 (2003) (noting that “many organizations that work for children’s interests tend to see the issue of intercountry adoption in the contexts of colonialism and imperialism”); Shani King, *Challenging Monohumanism: An Argument for Changing the Way We Think About Intercountry Adoption*, 30 MICH. J. INT’L L. 413, 435 (2009) (quoting Howard Alstein & Rita J. Simon,

frequently been criticized as “child trafficking or as a neo-colonialist child grab.”<sup>51</sup> Another critic of intercountry adoption analogizes adopting foreign-born children to securing a mail-order bride:

Mail-order brides and intercountry adoptions are both by-products of Western/U.S. colonial and imperial activities in Asia and enduring Orientalism within U.S. culture. Differentiating between mail-order brides and intercountry adoptions obscures the imperialism and commodification underlying intercountry adoptions . . . . Mail-order brides make explicit what is implicit in intercountry adoptions—the purchase of Third World citizens to complete the families of a (former) colonial and imperial power.<sup>52</sup>

Intercountry adoption evokes powerful emotional and fearful responses from (sending) countries<sup>53</sup> as well as from legal scholars who are concerned intercountry adoptions represent another form of western economic and political hegemony.<sup>54</sup>

Critics’ concerns regarding economic and political exploitation within the context of intercountry adoption evoke popular and historical opposition to western *cultural imperialism*.<sup>55</sup> In “Imperialism, Culture, and International Adoption,” Perry observed “colonialism is not simply military and economic—it also has a cultural component.”<sup>56</sup> Citing to Said’s early work on cultural imperialism,<sup>57</sup> Perry explained that imperial discourse labeled the people living in subjected countries as inferior and exploited this perceived inferiority in order to justify European colonial dominion and expansion.<sup>58</sup> Perry concluded, the “conception of poor, third-world countries as subordinate nations fits very comfortably with the practice of international adoption.”<sup>59</sup> More recently, Martin characterized intercountry adoption as a form of reverse imperialism: instead of imposing cultural values from outside of a particular community, intercountry adoption immerses the adoptive child in a new, seemingly superior culture, which it expects the child to embrace.<sup>60</sup> Opponents charge that intercountry adoption facilitates the loss of the adopted child’s cultural heritage and that this loss facilitates the loss of the child’s identity,

INTRODUCTION TO INTERCOUNTRY ADOPTION: A MULTINATIONAL PERSPECTIVE 1, 2 (Howard Alstein & Rita J. Simon eds., 1991)) (“[W]hat the West has generally viewed as charitable, humane—even noble—behavior, developing countries have come to define as imperialistic, self-serving, and a return to a form of colonialism in which whites exploit and steal natural resources.”).

<sup>51</sup> *Haiti’s Children*, *supra* note 3. See also Barthelet, *supra* note 10, at 153 (“[M]any see international adoption as one of the ultimate forms of human exploitation, with the rich, powerful and white taking children from poor, powerless members of racial and other minority groups.”).

<sup>52</sup> Ryiah Lilith, Article, *Buying a Wife but Saving a Child: A Deconstruction of Popular Rhetoric and Legal Analysis of Mail-Order Brides and Intercountry Adoptions*, 9 BUFF. WOMEN’S L.J. 225, 228–29 (2000-2001).

<sup>53</sup> See Margaret Lui, *International Adoptions: An Overview*, 8 TEMP. INT’L & COMP. L.J. 187, 195 (1994) (“Citizens of developing countries who also oppose international adoption do so as a result of their history of colonialism. ‘First you want our labor and raw materials; now you want our children,’ is a common response of developing nations to the practice of international adoption.”).

<sup>54</sup> Dillon, *supra* note 51, at 187 (expressing sympathy for the position that intercountry adoption is an imperial endeavor).

<sup>55</sup> Martin, *supra* note 9, at 204 (claiming “culture and cultural exploitation underlies many of the pros and cons on intercountry adoption” and that the “acrimony inherent in the process” largely derives from “the historical involvement of receiving countries in the domination and exploitation of sending countries.”).

<sup>56</sup> Perry, *supra* note 50, at 134.

<sup>57</sup> *Id.* (quoting from Edward Said’s first book-length critique of European imperialism entitled *Orientalism*).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* at 135.

<sup>60</sup> Martin, *supra* note 9, at 185.



sense of self, and self-worth.<sup>61</sup> Finally, for many opponents of intercountry adoption the prospect of losing one's cultural heritage is enough to outlaw intercountry adoption altogether.<sup>62</sup>

#### B. ACCOMMODATING THE IMPERIAL PARADIGM

Advocates of intercountry adoption insist that the "benefits" associated with intercountry adoption outweigh the "loss" of the adopted child's birth heritage, as the terms in quotation marks are subject to interpretation and debate. Bartholet, for example, argued that parentless children are best raised by loving families instead of in "harmful" and "damaging" institutions, such as orphanages, that can care for children in their native countries.<sup>63</sup> She suggests that the risk of abuse or other harms increases when parentless children are not placed for adoption; consequently, countries that claim to protect children by restricting or outlawing intercountry adoption are in fact placing children at greater risk.<sup>64</sup> Similarly, Thompson argued that intercountry adoption promises to solve the global problem of homeless children by placing children, for whom domestic adoption is not a viable option, within a loving and stable family.<sup>65</sup> Advocates prioritize the child's need for a loving and stable family; they are willing to compromise the child's possible attachment to his or her birth heritage to ensure the child will be raised by a family rather than an institution.

In addition to emphasizing the benefits of raising the adopted child within a family setting, advocates of intercountry adoption question the extent to which the adopted child is affected by the "loss" of his or her birth heritage. Bartholet, a self-identified proponent of international adoption,<sup>66</sup> suggested that most parentless children do not benefit from remaining within their birth culture. She believed children who grow up in institutions or on the streets of their native countries do not have meaningful access to their cultural heritage.<sup>67</sup> Further, Bartholet argued that adopted children hardly suffer for being adopted by parents who have a different racial and/ or cultural background. She wrote:

While almost everyone tends to assume that children should be placed with birth parents of similar cultural and ethnic background, the issue has been examined fairly extensively in the area of domestic transracial adoption within the U.S., and there is not a shred of evidence in the entire body of social science studies . . . that any harm comes to children from being raised by parents of a different racial or ethnic background.<sup>68</sup>

---

<sup>61</sup> *Id.* at 203. See also Linda J. Olsen, Comment, *Live or Let Die: Could Intercountry Adoption Make the Difference?*, 22 PENN ST. INT'L L. REV. 483, 510 (2004) ("Opponents of intercountry adoption argue that rather than promoting a child's identity, the practice strips it away and replaces it with a name and identity chosen by the adoptive parents."); *Haiti's Children*, *supra* note 3 (including an editorial by Professor Cynthia Mabry who cautions that Haitian children who are adopted by families in the United States risk losing their racial and national identities: "they will be placed with people who do not share their race, culture, heritage or language.").

<sup>62</sup> Martin, *supra* note 9, at 203.

<sup>63</sup> Bartholet, *supra* note 10, at 180 (emphasizing "how devastatingly harmful institutional life is for children" and commenting that "[r]esearch on children who started their early life in institutions demonstrates vividly the damage such institutions do even when the children are lucky enough to escape the institutions at relatively early ages.").

<sup>64</sup> *Haiti's Children*, *supra* note 3.

<sup>65</sup> Thompson, *supra* note 8, at 442. See also Martin, *supra* note 9, at 181 (arguing intercountry adoption "literally save[s] children from such fates as child pornography, prostitution, or forced labor.").

<sup>66</sup> Bartholet, *supra* note 10, at 178 ("I place myself at the most enthusiastic end of the spectrum of supporters. I find it overwhelmingly clear that international adoption serves the best interests of existing children in need of homes.").

<sup>67</sup> *Id.* at 180-81.

<sup>68</sup> *Id.* at 192. See also Martin, *supra* note 9, at 203 (noting that many advocates of intercountry adoption claim that

Thus, advocates generally accept that intercountry adoption displaces the child's birth heritage, but argue that the affects of this displacement on the adopted child are minimal.

Some advocates challenge the assumption that intercountry adoption severs the child's ties with his or her birth heritage and thus requires the adopted child to forfeit his or her cultural heritage. Olsen, for example, claimed that adoption proponents support efforts by intercountry adoptive families to affirm a child's cultural heritage,<sup>69</sup> and that most families encourage their adopted child to embrace his or her birth heritage.<sup>70</sup> Similarly, Bartholet suggested that intercountry adoption may increase cultural awareness and sensitivity by facilitating exchanges across national, socio-economic, and racial boundaries.<sup>71</sup> From this perspective, intercountry adoption does not engender the loss of cultural identity, but rather inspires interest in foreign cultures and peoples.

Despite Bartholet's claim that intercountry adoption facilitates greater cultural awareness, most attempts to label intercountry adoption as a vehicle for cultural exchange are tempered by concerns over cultural authenticity and belonging. Martin, for example, questioned whether adopted children will ever be able to reconnect with their cultural heritage:

Many in favor of intercountry adoption believe that it is important to expose the child to the cultural aspects of the place of his or her birth. But what does that mean exactly? Since the child will have moved to a new country, the parent inevitably exposes the child to these cultural aspects through a Western perspective.<sup>72</sup>

Martin's comment illustrates how the discussion of cultural identity in the context of intercountry adoption overwhelmingly focuses on restoring the child's "authentic" or "genuine" cultural identity, which was supposedly compromised during intercountry adoption.<sup>73</sup> According to Martin, attempts to facilitate cultural exchange after the adoption is finalized will likely never rekindle the child's attachment to the cultural community of his or her birth; rather, it will reinforce the child's sense of loss and, more importantly, compromise the child's ability to come to terms with his or her (hybrid) identity as it encompasses, rather than straddles, a minimum of two cultural spheres.

#### IV. INTERCOUNTRY ADOPTION AND POSTCOLONIAL CRITIQUES OF EMPIRE

##### A. BEGINNING TO INTEGRATE POSTCOLONIAL THEORY INTO THE DEBATE OVER INTERCOUNTRY ADOPTION

---

the transition between cultures has little affect on the adopted child's wellbeing).

<sup>69</sup> Olsen, *supra* note 62, at 510.

<sup>70</sup> *Id.* at 511. See also Bhabha, *supra* note 13, at 193 ("Parents of transnationally-adopted children frequently emphasize the links to the child's country of origin in a search for closure or authenticity, through education, travel, and associational activities.").

<sup>71</sup> Bartholet, *supra* note 10, at 153.

<sup>72</sup> Martin, *supra* note 9, at 203. See also Bhabha, *supra* note 13, at 193 (arguing that "[c]hildren, adopted at or shortly after birth and brought up in a developed country, are not really 'returning' to a 'home' culture, but rather encountering a reified and essentialized construct . . . the country of origin is a distant, foreign land, not 'home' in any meaningful sense;" elaborating to note that "[s]uch travel can emphasize the adoptee's sense of displacement and hybridity, rather than confirming any feeling of belonging.").

<sup>73</sup> See Susan Sterett, *Special Issue on NonBiological Parenting: Introductory Essay*, 36 LAW & SOC'Y REV. 209, 222 (2002) (explaining that "incorporating facets of diverse cultures in the way [foreign-born adopted] children are reared never erases the fact that these children do not quite feel they belong where they are.").

In her recent discussion of “monohumanism” and a child’s right to be raised within his or her birth culture, Shani King exposed some damaging stereotypes in the debate over intercountry adoption.<sup>74</sup> Drawing from Edward Said’s reading of Empire in *Orientalism*,<sup>75</sup> King argued that (western) proponents of intercountry adoption engage in the same process of cultural and racial “othering” as European scholars employed to discount the worth of non-European peoples and to justify European colonial expansion throughout the nineteenth century.<sup>76</sup> She wrote:

the picture of the ‘international child’ accepted by Western society . . . is the picture that we have painted to suit our own needs, a picture that does not always reflect the true needs of the sending countries or uncover the children who are truly most in need of parents.<sup>77</sup>

For example, King argued that the “rescue narrative” often evoked by advocates to support intercountry adoption is a gross distortion:<sup>78</sup> it unfairly denigrates the competency of foreign governments and perpetuates the false impression that all children in the so-called “third world” are in desperate need of being rescued.<sup>79</sup> For King, the process of exposing western stereotypes about the “other” promises to locate contentious debate over the merits of intercountry adoption within the broader, more robust debate over how best to care for parentless children throughout the world as this debate addresses issues like the distribution of domestic resources and the impact of foreign investment and aid on developing countries.<sup>80</sup>

King’s assertion that children have a right to be raised within the culture into which they were born<sup>81</sup> comes dangerously close to mimicking the assumptions regarding culture and cultural development that informed European colonial expansion during the nineteenth and early twentieth centuries. Her insistence that the adopted child’s birth culture should act as a counterweight to the influence of the adoptive parents’ cultural identity, contradicts postcolonial theories of cultural hybridity, which posit cultures are interrelated and develop, not in isolation, but through interaction. Her assumption that cultures can be compared and contrasted perpetuates the notion of an “authentic” and essential cultural identity, which perpetuates the oppositional paradigms—us/ them, black/ white, center/ periphery, colonizer/ colonized (the child’s cultural identity/ the parent’s cultural identity) that shaped imperial discourse.<sup>82</sup>

<sup>74</sup> King, *supra* note 51, at 470 (asserting that our present failure to “to come to terms with our imperialist orientation toward the world” has led to grievous violations of children’s rights).

<sup>75</sup> EDWARD W. SAID, CULTURE AND IMPERIALISM 41 (1993) (explaining that he wrote *Orientalism* “to show the dependence of what appeared to be detached and apolitical cultural disciplines upon a quite sordid history of imperialist ideology and colonialist practice.”).

<sup>76</sup> King, *supra* note 51, at 414–15 (“The narrative of identity that accompanies MonoHumanism subscribes both universality and superiority to Western knowledge and discourse, which effectively results in the exclusion and displacement of the knowledge and discourse of historically oppressed peoples.”).

<sup>77</sup> *Id.* at 425.

<sup>78</sup> *Id.* at 439.

<sup>79</sup> *Id.* See also *id.* at 440 (debunking the common assumption that all sending countries are impoverished: “China and Russia, the two leading ‘sending’ countries, have recently experience consistent economic growth . . . . China, the largest sending country, has been described as an economic powerhouse.”); Martin, *supra* note 9, at 205 (noting that the Hague Convention defines family in terms of the western nuclear family and imposes this definition on sending countries, many of whom define family in broad terms).

<sup>80</sup> King, *supra* note 51, at 463.

<sup>81</sup> *Id.* at 470 (arguing, “the right of a child to be raised in the context of her family and her culture is essential to pulling us back from the simplistic and ethnocentric notion that it is always in the best interest of a child to be raised in a more affluent and formally educated family”).

<sup>82</sup> SAID, *supra* note 76, at xxv.

King's self-identified postcolonial critique proves the difficulty, but also the importance, of extracting scholarly discourse from the imperial principles that have informed academic disciplines for well over two hundred years. Her article highlighted the imperial underpinnings of the present debate over intercountry adoption only to rely on the "binary opposition[s]" that, by King's own account, assumes the "hierarchical inferiority of the previously colonized populations."<sup>83</sup> This Article takes a different approach. It affirms the "obvious"<sup>84</sup> relevance of postcolonial theory to the debate over intercountry adoption and the need for increased self-reflection and scrutiny on behalf of legal scholars to avoid inadvertently perpetuating cultural stereotypes. It resists, however, assuming that cultural identity is anchored to a specific geographic location as this assumption automatically and permanently associates intercountry adoption with the loss of cultural identity and perpetuates theories of cultural difference.

#### B. POSTCOLONIAL THEORIES OF CULTURE: EDWARD SAID AND CULTURAL HYBRIDITY

In *Culture and Imperialism*, Edward Said argued that traditional conceptions of "national culture" inherently involve a sense of difference:

You read Dante or Shakespeare in order to keep up with the best that was thought and known, and also to see yourself, your people, society, and tradition in their best lights. In time, cultures come to be associated, often aggressively, with the nation or the state; this differentiates 'us' from 'them,' almost always with some degree of xenophobia. Culture in this sense is a source of identity, and a rather combative one at that.<sup>85</sup>

Said observed that the "us/ them" opposition was the hallmark of European imperial discourse:<sup>86</sup> European colonists simultaneously differentiated and exulted their traditions and values from and over the indigenous cultures they came into contact with and frequently conquered. As Europe's colonial empires became more established during the nineteenth century, imperial discourse became increasingly dominated by binary paradigms that elevated the colonizer above the colonized.

European imperialists and academics manipulated the historical and scholarly record to perpetuate the notion of European cultural superiority and consequently to facilitate colonial expansion.<sup>87</sup> In *Orientalism*, Said explained how writers and academics from a variety of disciplines "accepted the basic distinction between East and West as the starting point for elaborate theories . . . and political accounts concerning the Orient, its people, [and] customs."<sup>88</sup> According to Said these "theories" and "political accounts" allowed Western powers to control and ultimately restructure the histories and cultures of the Orient.<sup>89</sup> For example, in *Black Athena* Martin Bernal explained how classicists traditionally privileged cultural isolation over cultural integration: they required proof of contact between different peoples and societies to facilitate an exclusively European conception of Ancient Greece.<sup>90</sup> Bernal explained that early

<sup>83</sup> King, *supra* note 51, at 426.

<sup>84</sup> *Id.* at 428.

<sup>85</sup> SAID, *supra* note 76, at xiii.

<sup>86</sup> *Id.* at xxv.

<sup>87</sup> King, *supra* note 51, at 414 n.2 (acknowledging that European scholars during the colonial era frequently substituted their view of indigenous cultures for the view supported by the historical and cultural record).

<sup>88</sup> EDWARD W. SAID, *ORIENTALISM* 2-3 (1978).

<sup>89</sup> *Id.* at 3.

<sup>90</sup> MARTIN BERNAL, *BLACK ATHENA: THE AFROASIATIC ROOTS OF CLASSICAL CIVILIZATION (VOLUME III: THE LINGUISTIC EVIDENCE)* 2 (2006).

classicists and historians minimized the significance of the “profound cross-cultural influences”<sup>91</sup> and “close contacts”<sup>92</sup> between Egypt and Ancient Greece to justify the racist and anti-Semitic attitudes of colonial Europe.<sup>93</sup> Thus, European scholars invented and edited historical narratives to add credence to imperial ideas of cultural difference and superiority. As Terence Ranger explained, colonial administrators in Africa fabricated traditions to cement their authority over considerable numbers of African peoples.<sup>94</sup> Colonialists employed these fabricated traditions to define and justify their positions of authority over local African populations and to encourage subservience to European colonial rule.<sup>95</sup> Notions of a “unique” cultural identity informed and facilitated the European imperial enterprise as it sought to justify colonial expansion in terms of European cultural and racial superiority.

Ironically, despite the fact that colonial administrators perpetuated ideas of cultural difference to justify the colonial enterprise, the colonial encounter facilitated a large-scale exchange of values and technical know-how. Discussing Britain and France’s colonial forays in the “New World,” Jonathan Hart noted that actions ranging from kidnapping to interpretation, translation, trade, and marriage resulted in Native Americans having a considerable cultural impact on the first European settlers in North America.<sup>96</sup> Similarly, early European trade with India resulted in a dialogue that involved both goods and ideas: “the silks and spices imported into Europe’s mercantile economy were accompanied by less tangible cultural commodities which found their way into Europe’s intellectual economy.”<sup>97</sup> European colonial expansion involved a tremendous exchange of goods and knowledge that took place under the myth of European cultural superiority, as this myth prized cultural purity over cultural hybridity.

Later attempts to “educate” colonialists in western ideas and beliefs facilitated the comingling of cultures in defiance of imperial paradigms that distinguished between European and indigenous cultures. Despite Lord Macaulay’s rigorous, if wholly misguided, efforts to establish “a class of [Indian] persons”<sup>98</sup> that embraced English culture and learning, British colonial exploits, like the exploits of other European colonial powers, failed to fully assimilate the colonized into the colonizer’s culture. In reality, the imperial curriculum created a class of persons born into native customs and beliefs, but schooled in the European intellectual tradition.<sup>99</sup> Describing her upper-middleclass Egyptian family, Leila Ahmed wrote, “[w]e were intended . . . to be the brokers of the knowledge and expertise of the West, brokers between the two cultures, raised within the way of our own people yet at ease with the intellectual heritage of

---

<sup>91</sup> *Id.* at 3.

<sup>92</sup> *Id.* at 2.

<sup>93</sup> *Id.* at 3 (observing, “earlier classicists and ancient historians not only operated in racist and anti-Semitic societies but were sometimes pioneers of these unsavory movements.”).

<sup>94</sup> Terrence Ranger, *The Invention of Tradition in Colonial Africa*, in *THE INVENTION OF TRADITION* 211 (Eric Hobsbawm & Terrence Ranger eds., 1992).

<sup>95</sup> *Id.*

<sup>96</sup> JONATHAN HART, COLUMBUS, SHAKESPEARE AND THE INTERPRETATION OF THE NEW WORLD 9 (2003).

<sup>97</sup> Jonathan Burton, “A Most Wily Bird:” *Leo Africanus, Othello and the Trafficking of Difference*, in *POST-COLONIAL SHAKESPEARES* 43, 59 (Loomba & Orkin eds. 1998).

<sup>98</sup> Thomas Babington Macaulay, *Macaulay’s Minute on Indian Education*, in *THE GREAT INDIAN EDUCATION DEBATE: DOCUMENTS RELATING TO THE ORIENTALIST-ANGLICIST CONTROVERSY* 161, 161-173 (Zastoupil & Moir eds., 1999).

<sup>99</sup> *Id.* See also SVATI JOSHI, *RETHINKING ENGLISH: ESSAYS IN LITERATURE, LANGUAGE, HISTORY* 125 (1991) (noting that “[t]hrough the introduction of Shakespeare and Milton . . . British education policy aimed at . . . creating a class which could be ideologically incorporated” into British society).

Europe.”<sup>100</sup> British attempts “to convince the natives that colonialism came to lighten their darkness”<sup>101</sup> created a hybridized class or community of persons within colonized society, the existence of which complicated European theories of cultural difference.

Said acknowledged the devastating effects of imperial narratives of European cultural and intellectual hegemony; however, he insisted colonialism facilitated the rapid, massive, and permanent integration of all major world cultures. European colonialism did not initiate the process of cultural exchange, but it did dramatically increase the rate and intensity of the cultural exchanges that scholars like Bernal suggested routinely occurred throughout the course of human history. Said asserted that empire is significantly responsible for the hybridization of all major world cultures and permanently undermined the imperial conception of culture as singular and monolithic.<sup>102</sup> Thus, Said argued that European efforts to separate the colonizer from the colonized failed: European colonization was “insidious and fundamentally unjust” but also a shared experience that profoundly affected colonizer and colonized alike.<sup>103</sup>

Despite concerted attempts by European countries like Great Britain and France to indoctrinate colonized peoples into European traditions, values, and learning, indigenous peoples never fully submitted to the yoke of European conquest. Indigenous peoples resisted European colonialism with sufficient force to have a profound affect on their colonial masters: “to ignore or otherwise discount the overlapping experience of Westerners and Orientals, the interdependence of cultural terrains in which colonizer and colonized co-existed and battled each other . . . is to miss what is essential about the world in the past century.”<sup>104</sup> Said did not suggest cultural differences do not exist; rather, he emphasizes the similarities between cultures as these similarities result from millennia of exchanges between diverse peoples. From Said’s perspective, postcolonial theory represents a fundamental shift away from imperial conceptions of culture as the unique product of a specific nation or people and toward an understanding of culture that accounts for the many cultural interactions that have occurred throughout history.

The formal divisions within imperial discourse obscured the existence of the types of cultural exchange that have informed and shaped world cultures for thousands of years. As Said observed, the notion of an authentic or essential cultural identity is an imperial fiction rather than an empirical truth.<sup>105</sup> Ironically, European cultural imperialism was itself not a pure product of European thought and imagination:

The discursive forms and ideological configurations of colonialism are not produced monolithically but inevitably in the mesh of collusion and contradiction between the colonizers and the colonized. It is important to recognize this in order to see not only differences and opposition but also affiliations and overlaps between colonial and indigenous interests and perceptions as they have a significant bearing on our subsequent history and cultural formation.<sup>106</sup>

<sup>100</sup> LEILA AHMED, *A BORDER PASSAGE: FROM CAIRO TO AMERICA—A WOMAN’S JOURNEY* 152 (2000).

<sup>101</sup> FRANTZ FANON, *THE WRETCHED OF THE EARTH* 210-11 (1963).

<sup>102</sup> SAID, *supra* note 76, at xxv.

<sup>103</sup> *Id.* at xxi–xxii. See also ANIA LOOMBA & MARTIN ORKIN, *POST-COLONIAL SHAKESPEARES* 7, 146-47 (1998) (defining hybridity as “the range of psychological as well as physiological mixings generated by colonial encounters” to argue that “every culture can be seen to be hybrid—in fact even ‘authentic’ identities are the result of ongoing processes of selection, cutting and mixing of cultural vocabularies. In practice, hybridity and authenticity are rarely either/ or positions”).

<sup>104</sup> SAID, *supra* note 76, at xx.

<sup>105</sup> *Id.* at 15.

<sup>106</sup> JOSHI, *supra* note 100, at 10.

The formal divisions within colonial society masked the intensity of the cultural exchange that occurred during the colonial era and continues to impact how former colonizer and colonized nations define themselves today.

Despite the rise of multiculturalism, or cultural hybridity, in western and non-western countries, Said cautioned that colonial paradigms continue to both influence academic discussions and discourse and shape common perceptions of culture.<sup>107</sup> Said acknowledged, for example, that hybridity has become a defining aspect of American culture: “the United States contains . . . many histories” that should be embraced rather than “feared since many of them were always there, and out of them *an* American society and politics . . . were in fact created.”<sup>108</sup> He cautioned, however, that the practice of differentiating between peoples and cultures continues to influence scholarship both in the western world and in nations that continue to resist the cultural and economic encroachments of Europe and the United States.<sup>109</sup> Although Said celebrated the end of colonial exploitation, he warned of the continued influence of imperial paradigms on contemporary thought.

## V. DEVELOPING THE POSTCOLONIAL PARADIGM OF INTERCOUNTRY ADOPTION

Postcolonial attempts to redefine the paradigms and codifications<sup>110</sup> that characterize imperial discourse support intercountry adoption, even as they re-imagine the process of adopting children from abroad as a lateral cultural exchange in which no one culture dominates. Thomas Cartelli described postcolonial theory as a “fertile and creative” area of contemporary scholarship that intersects European and indigenous cultures and removes any suggestion that one culture is superior to another.<sup>111</sup> Similarly, Franciose Lionnet claimed postcolonial theories of cultural hybridity provide for pluralistic and democratic scholarly exploration by pointing to lateral, as opposed to hierarchical, connections between cultures and their common histories.<sup>112</sup> The dismantling of colonial paradigms by postcolonial theorists allows legal scholars to re-imagine intercountry adoption as emblematic of the cultural hybridization that these theorists argue has occurred for centuries.

The postcolonial paradigm for intercountry adoption supports programs that attempt to integrate the multiple cultural influences that inform the adopted child’s unique sense of personal identity. It rejects the “love conquers all” approach to intercountry adoption, as this approach marginalizes the significance of the adopted child’s birth heritage and emphasizes assimilation over cultural hybridity.<sup>113</sup> The postcolonial paradigm accommodates the adopted child’s right to

<sup>107</sup> SAID, *supra* note 76, at xxv.

<sup>108</sup> *Id.* at xxvi. See also AHMED, *supra* note 101, at 131 (“Now, in the wake of immigrations that came with the ending of the European empires, tens of thousands of Muslims are growing up in Europe and America, where they take for granted their right to think and believe whatever they wish.”).

<sup>109</sup> SAID, *supra* note 76, at xxv. See also FRANCOISE LIONNET, AUTOBIOGRAPHICAL VOICES: RACE, GENDER, SELF-PORTRAITURE 5–6 (1991) (“We can be united against hegemonic power only by refusing to engage that power on its own terms, since to do so would mean becoming ourselves a term within that system of power. We have to articulate new visions of ourselves, new concepts that allow us to think *otherwise*, to bypass the ancient symmetries and dichotomies that have governed the ground and the very condition . . . of Western philosophy.”).

<sup>110</sup> BARBARA HARLOW, RESISTANCE LITERATURE xix (1987).

<sup>111</sup> THOMAS CARTELLI, REPOSITIONING SHAKESPEARE: NATIONAL FORMATIONS, POSTCOLONIAL APPROPRIATIONS 13 (1999).

<sup>112</sup> LIONNET, *supra* note 110, at 7.

<sup>113</sup> Ruth-Arlene W. Howe, *Redefining the Transracial Adoption Controversy*, 2 DUKE J. GENDER L. & POL’Y 131,

know his or her cultural identity;<sup>114</sup> however, it construes this right as a means of nurturing and enhancing the adopted child's multicultural identity rather than merely recovering a specific cultural identity somehow lost during the process of intercountry adoption.<sup>115</sup> The paradigm frames cultural exchange as a horizontal rather than vertical motion; it celebrates cultural diversity while resisting imperial notions of cultural difference in which one cultural identity is prized above another cultural entity.

Postcolonial theory embraces individual families' efforts to develop ties with their adopted child's native country as well as domestic and international efforts to provide adoptees and their families with institutional support. It resists, however, the common perception of culture as an exclusive entity, as this perception emphasizes cultural differences rather than similarities. The postcolonial paradigm challenges the common practice of equating culture with geographical location since this equation perpetuates the idea that nation-states have a monopoly on cultural identity and authenticity. Instead, the paradigm encourages adoptees to explore their multifaceted cultural identities without confining this exploration to the relatively tidy (and immovable) parameters of geographic space. Finally, the theory of cultural hybridity encourages adoptive parents to identify and critique their cultural assumptions, and to better integrate their cultural values with the values manifest in the child's birth culture.

Postcolonial approaches to intercountry adoption identify the formal and informal cultural exchanges that occur within the context of intercountry adoption as an important first step toward establishing a more open-ended and pluralistic cultural narrative. As Bartholet noted, adoption agencies often encourage prospective intercountry adoptive parents to raise their child with an understanding of his or her cultural heritage.<sup>116</sup> Bartholet also commented that strong social and economic bonds frequently develop between the adoptive family and the child's native country.<sup>117</sup> Further, some sending nations have introduced formal measures designed to encourage cultural exchange. For example, many sending countries require prospective adoptive parents stay in the sending country for period of time—ranging from a few weeks to a few months—before the adoption can be finalized.<sup>118</sup> These types of private and governmental initiatives should be supported because they foster greater cultural exchange and awareness between the families and nations in an intercountry adoption.

The postcolonial paradigm for intercountry adoption facilitates a cultural exchange founded on principles of inclusivity rather than difference. The paradigm refuses to conflate culture with country as the concept of the "nation state" is a product of imperial discourse and the antiquated perspective that cultures are distinguishable (and, in turn, easily conquered). To this end, the postcolonial paradigm for intercountry adoption encourages sending countries to establish a presence in prominent receiving countries, such as the United States, and provide cultural resources and information to adopted children and their parents. By establishing a cultural presence in the receiving country, the sending country literally locates its cultural heritage beyond the physical boundaries of the nation state. This cultural presence provides an

---

133–34 (1995) ("Advocates for transracial adoption who naively espouse a 'Love conquers all' philosophy may represent an assault on the Black family and Black community").

<sup>114</sup> Martin, *supra* note 9, at 210.

<sup>115</sup> LIONNET, *supra* note 110, at 243 (identifying postcolonial theory as an attempt to establish "a reality that emphasizes relational patterns over autonomous ones . . . [and] interconnectedness over independence").

<sup>116</sup> Bartholet, *supra* note 10, at 196.

<sup>117</sup> *Id.* (noting adoption agencies and adoptive parents often donate money to orphanages in foreign countries and that parents of adopted children assume a responsibility for the "children left behind" in their child's native country).

<sup>118</sup> Kleiman, *supra* note 10, at 332.



alternative location of cultural insight and authority that, although the location is state-sponsored, shows cultures frequently transgress national borders. Sending countries could and should draw from existing resources in the receiving country—museums, universities, even restaurants—to highlight previous cultural transgressions and foster the idea that cultures can and do function in partnership with one another.

Further, the postcolonial paradigm for intercountry adoption advocates that families and adoption agencies forge individual and cooperative alliances with non-government organizations, such as cultural organizations and social groups that may serve as alternative locations of cultural meaning for adopted children and their families. Although local resources may not be as extensive as those available within and throughout the sending country, local resources have the practical advantage of being relatively easy to access and can avail themselves to families in multiple ways. For example, Families with Children from China is a non-profit organization with local chapters in the United States, Canada, and the United Kingdom; these chapters sponsor events celebrating Chinese festivals and holidays and provide Chinese language and culture classes for families who adopted a child from China.<sup>119</sup> Similarly, Families for Russian and Ukrainian Adoption (FRUA), a Virginia-based organization, hosts cultural events and an annual education conference for families who adopted a child from Russia or from a former Soviet-bloc country. FRUA also provides financial support for orphanages in Russia and the Ukraine.<sup>120</sup> The fact that these organizations serve as cultural resources for parents who have adopted a foreign-born child undermines the assumption that nation-states are the primary and exclusive source of authentic cultural meaning by integrating foreign cultural traditions and ideas into the adoptive family's immediate community.

Cooperation between local cultural organizations and parents who have foreign-born adopted children may be limited to merely facilitating communication between different sets of adoptive parents. For example, the Eastern European Adoption Coalition manages a number of list serves that allow families who have adopted a child from Russia or a country in Eastern Europe to locate other families who adopted a child from the same region.<sup>121</sup> Communication between members may be limited to sharing information about upcoming programs and exhibits; alternatively, communication may facilitate close personal relationships that serve as viable locations of cultural and personal meaning as this meaning is not always easily parceled into distinct national categories.

Encouraging parents who adopted children from foreign countries to seek out alternative locations of cultural meaning, however informal these locations prove to be, has the added benefit of reinforcing the idea that culture is both diverse and dynamic. The wide-spread prevalence of non-government cultural institutions and organizations in receiving countries like the United States reveals the integration of many non-western cultures into western society and, subsequently, demonstrates how seeming disparate cultures merge to produce new, hybrid sources of cultural identity. Local cultural organizations and programs, particularly those established by immigrant communities, may offer families a rare opportunity to learn about their adopted child's birth heritage and how cultures develop through exposure to outside influences.

---

<sup>119</sup> FAMILIES WITH CHILDREN FROM CHINA, <http://fwcc.org/> (last visited July 22, 2010). See also, OUR CHINESE DAUGHTER FOUNDATION, <http://www.ocdf.org/> (last visited July 22, 2010) (providing cultural resources—language classes, internships, newsletters, Chinese-culture publications—and scholarships for American families who have adopted a child from China).

<sup>120</sup> FAMILIES FOR RUSSIAN AND UKRAINIAN ADOPTION, <http://www.frua.org/our-work/our-mission> (last visited July 22, 2010).

<sup>121</sup> EASTERN EUROPEAN ADOPTION COALITION, INC., <http://eeadopt.org/> (last visited July 22, 2010).

For example, a local Chinese cultural organization may be able to introduce an American family who adopted a daughter from China to Chinese and Chinese-American culture, as the latter embodies aspects to two major world cultures. In this respect, non-government cultural organizations promise to teach families about their adopted child's birth culture and help parents integrate their cultural values with the values manifest in their child's birth heritage.

On a more subjective level, the postcolonial paradigm for intercountry adoption demands that parents examine their cultural assumptions and beliefs at the same time that they attempt to understand, appreciate, and accommodate their adopted child's cultural heritage. The postcolonial paradigm requires adoptive parents to question their cultural assumptions in much the same way that critical race theory insists white Americans identify the privileges that accompany "whiteness" in our society.<sup>122</sup> Barbara Flagg described "whiteness" as "a social location of power, privilege, and prestige"<sup>123</sup> that shapes our personal and social identities,<sup>124</sup> but that hides its influence "behind structures of silence, obfuscation, and denial."<sup>125</sup> In this sense, "whiteness" represents an invisible yet repressive force within American culture. For Flagg, "whiteness" is dangerous because it defines what is "normal" within American culture without acknowledging that it operates within a race-specific context.<sup>126</sup> She concluded that the choice not to be a racist requires white Americans to engage in meaningful antiracist activities<sup>127</sup> by taking responsibility for and dismantling the transparent value structures that perpetuate white privilege. Similarly, the postcolonial paradigm for intercountry adoption encourages parents to reflect upon their cultural mores as these mores commonly assume the appearance of universal norms and therefore elude being easily identified with a specific cultural context.

Finally, adoption agencies and sending countries should create and maintain guidance and counseling programs that help parents to become more aware of the cultural contexts in which they live. Parents' intimate knowledge of their own cultural background will likely make them conscious of the gaps or inconsistencies within their cultural identity; these "gaps" are significant in so far as they make parents more receptive to new cultural influences (that promise to fill the gaps) and encourage parents to embrace their adopted child's unique cultural and personal needs. The cultural interrogation facilitated through specialized counseling programs

---

<sup>122</sup> See Barbara Flagg, *Forward: Whiteness as Metaprivilege*, 18 WASH. U. J.L. & POL'Y 1, 2 (2005) (describing "whiteness" as "a largely transparent construction that constitutes the dominant site of power and privilege."); Thomas Ross, *Whiteness After 9/11*, 18 WASH. U. J.L. & POL'Y 223, 223 (2005) ("Race is not a natural, self-evident, or timeless idea. It exists as a social construction. Its primary work is to express two parallel and intertwined conceptions—the inferiority of the non-White and the always corresponding superiority of the White race."); Stephanie M. Wildman, *The Persistence of White Privilege*, 18 WASH. U. J.L. & POL'Y 245, 247 (2005) (claiming that the "conflation of privilege with the societal norm" makes the privilege invisible and therefore elusive).

<sup>123</sup> Flagg, *supra* note 123, at 1.

<sup>124</sup> *Id.* at 2 ("The first metaprivilege of Whiteness is the ability to control the social construction of racial identity. Whiteness has the authority not only to define who is and is not White, but also to delineate the boundaries of non-White racial identities.")

<sup>125</sup> Flagg, *supra* note 123, at 6. See also Wildman, *supra* note 123, at 256 ("The maintenance of whiteness, the re-creation of that community, remains unseen.").

<sup>126</sup> Flagg, *supra* note 123, at 6. See also Russell G. Pearce, *White Lawyering: Rethinking Race, Lawyer Identity, and Rule of Law*, 73 FORDHAM L. REV. 2081, 2083 (2005) (criticizing the legal community for tending to both "treat whiteness as a neutral norm or baseline, and not a racial identity, and . . . view racial issues as belonging primarily to people of color").

<sup>127</sup> Flagg, *supra* note 123, at 11. See also Wildman, *supra* note 123, at 264–65 (arguing that white Americans need to "pay more attention" to and to become "more self-conscious" of the "socio-cultural patterns and the material conditions that maintain the white privilege reality" even as this process evokes considerable discomfort within whites).

will help parents take control of their cultural identity; it will help parents to separate their seemingly cohesive national identity into its various parts and manipulate these parts to accommodate the nuances of their adopted child's hybrid cultural identity. The mastery of careful self-critique and reflection will help parents to integrate their cultural values with the values manifested in the adopted child's birth heritage and, consequently, to foster the adopted child's hybrid cultural identity.

## CONCLUSION

As King suggested, postcolonial theory challenges legal scholars to question their assumptions regarding culture and cultural identity to engage in expansive and transparent discussions of the challenges facing intercountry adoption. Postcolonial theories of cultural hybridity promise to displace the protectionist and paternalistic attitudes toward sending nations that inform contemporary critiques of intercountry adoption. Postcolonial theory also promises to reverse the trend toward cultural isolation and resist attempts to restrict intercountry adoption based on nationalist fears of western imperialism. Further, the postcolonial paradigm for intercountry adoption will likely facilitate debate over pressing issues such as how national pride<sup>128</sup> or different conceptions of family<sup>129</sup> affect intercountry adoption, as these issues are frequently overshadowed by concerns over western imperialism. Overall, postcolonial theories of cultural hybridity have the potential to reanimate the debate over intercountry adoption, which has become highly polarized and intellectually entrenched.<sup>130</sup> Postcolonial critiques of European colonialism, as they reject the imperial perception of culture as monolithic, encourage—even authorize—legal scholars to venture beyond the confines of imperial discourse to examine how, within the context of intercountry adoption, cultures are best shared and explored, rather than confined to geographically-determined places.

---

<sup>128</sup> Bartholet, *supra* note 10, at 152. See also Martin, *supra* note 9, at 186 (“Internally, many sending countries have increasingly shied away from intercountry adoption, demonstrating a deep-seated, fundamental discomfort with the notion. For these countries, intercountry adoption is a source of shame that highlights their limited resources.”).

<sup>129</sup> Martin, *supra* note 9, at 198 (noting “advocates, primarily from developing countries, tend to view children with non-traditional family ties as abandoned, instead of examining whether other, more expansive caretaking roles are fulfilling the child’s need for a family.”).

<sup>130</sup> *Id.* at 179 (emphasizing the current debate over intercountry adoption is characterized by “sides” and the “rhetoric on these two sides allows little room for accommodation.”). See also *id.* at 174 (“[F]ocusing on the positives or negatives in the debate amounts to a stand-off in which neither side is willing to compromise any ground, a perpetual lose-lose situation.”).

# POLITICS, LEVERAGE, AND BEAUTY: WHY THE COURTROOM IS NOT THE BEST OPTION FOR CULTURAL PROPERTY DISPUTES

Nicole Bohe\*

## I. INTRODUCTION

A museum's acquisition of antiquities and cultural property creates sensitive issues that should be carefully considered.<sup>1</sup> Cultural property is at risk of being destroyed because of pillaging and looting of ancient art.<sup>2</sup> Countries can protect their cultural property through international agreements, such as the Convention for the Protection of Cultural Property in the Event of Armed Conflict ("1954 Hague Convention") or the United Nations Educational, Scientific, and Cultural Organization's ("UNESCO") Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property ("1970 UNESCO Convention").<sup>3</sup> Furthermore, according to the International Council of Museums ("ICOM"), museums should conform to such international agreements when acquiring pieces for their collection.<sup>4</sup> If a country claims a museum illegally obtained cultural property, legal action may ensue.<sup>5</sup>

This Article will first discuss the concepts of cultural property and the restitution of such objects to their country of origin.<sup>6</sup> Next, different international agreements will be discussed to present some of the options countries have to protect their cultural property.<sup>7</sup> Further, museums' acquisition guidelines, as set forth by professional associations, will be examined.<sup>8</sup> Then, a dispute between Peru and Yale University, as well as a separate dispute between Italy and the J. Paul Getty Museum, will be discussed to show how countries resort to legal actions in

---

\* 2010–11 Associate Staff Writer for the Creighton International and Comparative Law Journal; B.A., Art History, University of Maryland, 2006; Candidate for M.S., Negotiation and Dispute Resolution, Creighton University, 2012; Candidate for J.D., Creighton University, 2012.

<sup>1</sup> Association of Art Museum Directors, *Art Museums and the International Exchange of Cultural Artifacts* (2001), available at [http://www.aamd.org/papers/documents/CulturalProperty\\_000.pdf](http://www.aamd.org/papers/documents/CulturalProperty_000.pdf).

<sup>2</sup> *Id.*

<sup>3</sup> See generally *Convention for the Protection of Cultural Property in the Event of Armed Conflict – 1954*, UNESCO (last updated Nov. 24, 2008, 3:02 PM), [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=35744&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=35744&URL_DO=DO_TOPIC&URL_SECTION=201.html) (providing provisions on protecting cultural property during armed conflicts); Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 [hereinafter 1970 UNESCO Convention], available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html) (providing provisions on preventing illicit transfer of cultural property). UNESCO stands for the United Nations Education, Scientific, and Cultural Organization. See generally UNESCO, <http://www.unesco.org/new/en/unesco/> (last visited Mar. 18, 2011).

<sup>4</sup> CODE OF ETHICS § 7 (2006), [http://icom.museum/fileadmin/user\\_upload/pdf/Codes/code2006\\_eng.pdf](http://icom.museum/fileadmin/user_upload/pdf/Codes/code2006_eng.pdf).

<sup>5</sup> See generally *Original Complaint Republic of Peru v. Yale Univ.*, No. 1:2008cv02109 (D.C. Dist. Dec. 5, 2008), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008cv02109/134251/1/> (detailing Peru's claim against Yale University for the return of objects, artifacts, and antiquities); Elisabetta Povoledo, *Italy Presses Its Fight for a Statue at the Getty*, N.Y. TIMES, Jan. 15, 2010, <http://www.nytimes.com/2010/01/16/arts/design/16bronze.html> (noting the latest court battle between Italy and the Getty was whether the museum acted in good faith when it purchased the "Victorious Youth" statue).

<sup>6</sup> See *infra* notes 12–16 and accompanying text.

<sup>7</sup> See *infra* notes 17–61 and accompanying text.

<sup>8</sup> See *infra* notes 62–78 and accompanying text.

demanding the return of their cultural property.<sup>9</sup> This Article argues while legal action is available for repatriation cases, it is not the most effective option.<sup>10</sup> Additionally, given the international nature of repatriation actions, this Article argues cooperation and respect are vital in avoiding legal battles and obtaining private agreements to resolve the parties' disputes.<sup>11</sup>

## II. BACKGROUND

A definition of cultural property can be found in the United Nations Educational, Scientific, and Cultural Organization's ("UNESCO") Convention to stop unlawful transfer of cultural property.<sup>12</sup> In this Convention, cultural property is property designated as being important to a state's history, archaeology, science, and art.<sup>13</sup> This includes archaeological discoveries, antiquities, and historical monuments.<sup>14</sup> It also includes objects of artistic interest, like drawings, paintings, sculptures, and statues.<sup>15</sup> Many countries accepted or ratified the UNESCO Convention, so this description provides a generally acceptable definition to use for further discussion in this area of law.<sup>16</sup>

### A. THE 1954 HAGUE CONVENTION, 1970 UNESCO CONVENTION, AND 1995 UNIDROIT CONVENTION REPRESENT EXAMPLES OF INTERNATIONAL EFFORTS TO PROTECT CULTURAL PROPERTY AND PROMOTE COOPERATION IN THE RETURN OF OBJECTS

The Convention for the Protection of Cultural Property in the Event of Armed Conflict ("1954 Hague Convention") was adopted in 1954 at The Hague in response to mass destruction of cultural property during World War II.<sup>17</sup> The 1954 Hague Convention states that damage to a particular country's cultural property is damage to mankind's cultural heritage.<sup>18</sup> The contracting parties ("Parties") agreed that cultural heritage should receive international protection, and such protection would not be effective unless countries began organizing

---

<sup>9</sup> See *infra* notes 79–143 and accompanying text.

<sup>10</sup> See *infra* notes 144–202 and accompanying text.

<sup>11</sup> See *id.*

<sup>12</sup> See UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, art. 1 [hereinafter 1970 UNESCO Convention], available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html) (defining cultural property for the purposes of the 1970 UNESCO Convention).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at art. 1(a)–(k).

<sup>15</sup> *Id.* at art. 1(g)(i)–(iv).

<sup>16</sup> See generally UNESCO, *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property*, LEGAL DOCUMENTS <http://portal.unesco.org/la/convention.asp?KO=13039&language=E> (last visited Mar. 18, 2011) (listing the parties and dates of deposit, signing or ratification of the 1970 UNESCO Convention).

<sup>17</sup> *Convention for the Protection of Cultural Property in the Event of Armed Conflict – 1954*, UNESCO (last updated Nov. 24, 2008, 3:02 PM), [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=35744&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=35744&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>18</sup> Convention for the Protection of Cultural Property in the Event of Armed Conflict pmbl., May 14, 1954, 249 U.N.T.S. 215, [hereinafter 1954 Hague Convention], available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html).

protective measures in time of peace.<sup>19</sup> The 1954 Hague Convention emphasized the importance of national and international cooperation in protecting cultural property.<sup>20</sup>

The 1954 Hague Convention intended to apply its provisions when war or any armed conflict arose between two or more of the Parties.<sup>21</sup> The Parties are to safeguard their own cultural property and prepare to care for that property during an armed conflict.<sup>22</sup> The 1954 Hague Convention also applied in scenarios of partial or total occupation of a Party, by a Party.<sup>23</sup> Throughout any occupation of another Party, the occupying Party is obligated to provide support to safeguard and preserve cultural property.<sup>24</sup> During times of peace, the Parties are to foster a spirit of respect by its militia for all cultural property.<sup>25</sup>

A Second Protocol<sup>26</sup> to the Convention was adopted in 1999, elaborating on the instructions for safeguarding a country's cultural property.<sup>27</sup> For example, it defines when cultural property could receive enhanced protection.<sup>28</sup> Furthermore, it instructs Parties to establish criminal offenses under their domestic law for any violation of the Protocol.<sup>29</sup> The 1954 Hague Convention was not replaced by the Second Protocol—instead, Parties have a basic level of protection under the 1954 Hague Convention along with increased protection under the Second Protocol.<sup>30</sup> The United States is a Party to the 1954 Hague Convention but not the Second Protocol.<sup>31</sup>

In the 1960s, the pillaging of cultural property concerned many countries worldwide, as critical cultural information was irretrievably lost as objects were taken from the countries.<sup>32</sup> For example, Mayan monuments in Belize, Mexico, and Guatemala were disassembled and sold, usually to museums in the United States.<sup>33</sup> In response to such concerns, UNESCO adopted the Convention on the Means of Prohibiting and Preventing the Illicit Import, Export, and Transfer of Ownership of Cultural Property (“1970 UNESCO Convention”) to address issues regarding the transfer of cultural property.<sup>34</sup> Specifically, UNESCO wanted to protect knowledge that

---

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at art. 18.

<sup>22</sup> *Id.* at art. 3.

<sup>23</sup> *Id.* at art. 18.

<sup>24</sup> *Id.* at art. 5.

<sup>25</sup> *Id.* at art. 7.

<sup>26</sup> The Second Protocol of the Hague Convention for the Protection of Cultural Property in the Event of Armed Conflicts, Mar. 26, 1999, 38 I.L.M. 769 [hereinafter Second Protocol], available at [http://portal.unesco.org/en/ev.php-URL\\_ID=15207&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=15207&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>27</sup> *The Second Protocol to the Hague Convention*, UNESCO (last updated May 28, 2010, 8:59 AM), [http://portal.unesco.org/culture/en/ev.php-URL\\_ID=35815&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/culture/en/ev.php-URL_ID=35815&URL_DO=DO_TOPIC&URL_SECTION=201.html).

<sup>28</sup> See generally Second Protocol, *supra* note 26, at art. 10 (stating cultural property may receive enhanced protection if it is of great importance for humanity, is adequately protected by domestic measures, and is not used for military purposes).

<sup>29</sup> See generally *id.* at art. 15–21 (providing provisions on criminal responsibility and jurisdiction).

<sup>30</sup> *The Second Protocol to the Hague Convention*, *supra* note 27.

<sup>31</sup> See generally *Convention for the Protection of Cultural Property in the Event of Armed Conflict – 1954*, *supra* note 17 (providing links to official texts and parties of the 1954 Hague Convention, First Protocol, and Second Protocol).

<sup>32</sup> *Background: U.S. Implementation of the 1970 UNESCO Convention*, U.S. DEP'T OF STATE BUREAU OF EDUC. AND CULTURAL AFFAIRS, <http://exchanges.state.gov/heritage/culprop/background.html> (last visited Oct. 7, 2010).

<sup>33</sup> NEIL BRODIE, JENNY DOOLE, & PETER WATSON, *STEALING HISTORY: THE ILLICIT TRADE IN CULTURAL MATERIAL* 19 (2000), [http://www.mcdonald.cam.ac.uk/projects/iarc/research/illicit\\_trade.pdf](http://www.mcdonald.cam.ac.uk/projects/iarc/research/illicit_trade.pdf).

<sup>34</sup> 1970 UNESCO Convention, *supra* note 12, at pmbl.

might be obtained from the scientific study of the objects.<sup>35</sup> The 1970 UNESCO Convention stated that cultural property constituted basic elements of civilization and culture, and every nation should protect its cultural property against theft and unlawful excavation or export.<sup>36</sup> Furthermore, it said nations have a moral obligation to respect not only their own cultural heritage, but also that of other nations.<sup>37</sup>

The 1970 UNESCO Convention called for nations to draft laws and regulations, establish a national inventory of protected property, supervise archaeological excavations, and protect its cultural heritage.<sup>38</sup> The goal was to adopt appropriate measures to prevent museums and other institutions from acquiring cultural property illegally exported from another nation.<sup>39</sup>

The United States consented to the 1970 UNESCO Convention in 1972.<sup>40</sup> However, since the Convention was not based in United States law, it required special legislation for implementation in the United States.<sup>41</sup> The legislation, the Convention of Cultural Property Implementation Act<sup>42</sup> (“CPIA”), was passed in 1982 and signed into law in 1983.<sup>43</sup> The CPIA provided authority to carry out the 1970 UNESCO Convention and achieve international cooperation in preserving cultural property and enhancing the international understanding of the world’s heritage.<sup>44</sup>

In the CPIA, the United States implemented the essential obligations of the 1970 UNESCO Convention, such as prohibiting the import of stolen cultural property into the United States.<sup>45</sup> The CPIA also requires the United States to apply import regulations to any objects identified as belonging to a nation whose cultural property is in danger of being pillaged.<sup>46</sup> Furthermore, the CPIA established the Cultural Property Advisory Committee (“Committee”).<sup>47</sup> The Committee reviews requests submitted by foreign governments and provides recommendations about agreements between other countries.<sup>48</sup>

UNESCO recognized the 1970 UNESCO Convention insufficiently addressed the process for actually returning the cultural property to the country of origin.<sup>49</sup> For example, the 1970 UNESCO Convention provided for restitution of illegally exported or stolen objects even if the possessor was a good faith possessor.<sup>50</sup> However, countries approach the property interest between the original owner and the good faith purchaser of the object differently.<sup>51</sup> Common

---

<sup>35</sup> *Background: U.S. Implementation of the 1970 UNESCO Convention, supra* note 32.

<sup>36</sup> 1970 UNESCO Convention, *supra* note 12, at pmb1.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.* at art. 5 (stating provisions to ensure protection of cultural property from illicit transfer).

<sup>39</sup> *Id.* at art. 7.

<sup>40</sup> *Background: U.S. Implementation of the 1970 UNESCO Convention, supra* note 32.

<sup>41</sup> *Id.*

<sup>42</sup> 19 U.S.C. §§ 2601–2613 (2006).

<sup>43</sup> *Background: U.S. Implementation of the 1970 UNESCO Convention, supra* note 32.

<sup>44</sup> S. Rep. No. 97-564, at 1 (1982), available at <http://exchanges.state.gov/heritage/culprop/laws/pdfs/97-564.pdf>.

<sup>45</sup> S. Rep. No. 97-564, at 1 (1982).

<sup>46</sup> *Id.*

<sup>47</sup> *See generally* 19 U.S.C. § 2605 (2006) (explaining the establishment, membership and responsibilities of the Committee).

<sup>48</sup> *Background: U.S. Implementation of the 1970 UNESCO Convention, supra* note 32.

<sup>49</sup> *The 1995 UNIDROIT Convention*, CINOA, <http://www.cinoa.org/page/2298> (last visited Oct. 7, 2010).

<sup>50</sup> Marina Schneider, *UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects: Explanatory Report*, Unif. L. Rev. 2001–3, 476, 478 (2001), available at

<http://www.unidroit.org/english/conventions/1995culturalproperty/1995culturalproperty-explanatoryreport-e.pdf>.

<sup>51</sup> *Id.* at 480.

law countries require a transferor to have valid title before the purchaser acquires valid title.<sup>52</sup> Civil law countries provide greater protection to a purchaser who acquired the stolen property in good faith.<sup>53</sup> The 1970 UNESCO Convention could not overcome the differences in property law in the different countries.<sup>54</sup>

UNESCO turned to the International Institute for the Unification of Private Law (“UNIDROIT”) to develop the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects (“1995 UNIDROIT Convention”) to establish regulations that would apply between contract nations when returning objects.<sup>55</sup> The 1995 UNIDROIT Convention tried to reconcile the positions of protecting good faith purchasers and those wishing to obtain the maximum level of protection for cultural property.<sup>56</sup>

Both the 1970 UNESCO Convention and 1995 UNIDROIT Convention protected owners of stolen objects, but the 1995 UNIDROIT Convention also protected nations who lost cultural property as a result of illegal export.<sup>57</sup> The 1995 UNIDROIT Convention focused on the recovery phase of stolen or illegally exported cultural objects.<sup>58</sup> Under the 1995 UNIDROIT Convention, the owner of the cultural property could bring a claim for stolen objects or those illegally exported.<sup>59</sup> It also implemented time limits on claims, insuring a balance between legal predictability and recovery of the object.<sup>60</sup> The United States has not signed the 1995 UNIDROIT Convention.<sup>61</sup>

#### B. MUSEUMS RECOGNIZE THE RESPONSIBILITY TO MAINTAIN AND PROTECT THE WORLD’S CULTURAL PROPERTY

American museums strive to preserve works of art, including cultural property, and condemn actions that damage objects.<sup>62</sup> As a result, high standards of ethics and professionalism are used when acquiring objects.<sup>63</sup> Many museums have their own checks and balance systems

<sup>52</sup> *Id.*

<sup>53</sup> *Id.*

<sup>54</sup> See generally 1970 UNESCO Convention, *supra* note 12, at art. 13 (discussing measures countries may take in facilitating the return of cultural property, but not defining “rightful owner”).

<sup>55</sup> *The 1995 UNIDROIT Convention*, *supra* note 49. The International Institute for the Unification of Private Law (UNIDROIT) is an independent organization that coordinates private and commercial laws between States. *UNIDROIT: An Overview*, UNIDROIT (2009), <http://www.unidroit.org/dynasite.cfm?dsid=103284>.

<sup>56</sup> Schneider, *supra* note 50, at 480–82.

<sup>57</sup> Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Paris, Fr., June 24, 2005, *UNESCO Information Note: UNESCO and UNIDROIT—Cooperation in the Fight Against Illicit Traffic in Cultural Property*, 2, U.N. Doc. CLT-2005/Conf/803/2 (June 16, 2005), available at <http://unesdoc.unesco.org/images/0013/001399/139969E.pdf>.

<sup>58</sup> *Id.* at 3.

<sup>59</sup> *Id.* at 4.

<sup>60</sup> *Id.* at 5.

<sup>61</sup> See generally *Status of the UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects – Signatures, Ratifications, Accessions*, UNIDROIT, <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm> (last visited Mar. 19, 2011) (providing a link to show the current status of the 1995 UNIDROIT Convention); see also Ricardo J. Elia, *International Approaches to Archaeological Heritage Management II: Plunder and Preservation*, MATRIX, (Oct. 28, 2003, 1:50 PM), [http://www.indiana.edu/~arch/saa/matrix/ael/ael\\_mod08.htm](http://www.indiana.edu/~arch/saa/matrix/ael/ael_mod08.htm) (stating the United States took part in the negotiations, but did not sign the final instrument).

<sup>62</sup> Association of Art Museum Directors, *Art Museums and the International Exchange of Cultural Artifacts*, 1 (2001), available at [http://www.aamd.org/papers/documents/CulturalProperty\\_000.pdf](http://www.aamd.org/papers/documents/CulturalProperty_000.pdf).

<sup>63</sup> *Id.*



for acquiring works of art; for example, trustees, directors, and staff members may evaluate the object and its origins to determine the appropriate course of action for a museum's acquisitions.<sup>64</sup> Museums authenticate works already in their collections, as well as those being considered for acquisition.<sup>65</sup> In examining an acquisition proposal, the museum verifies the seller or donor's good title to the object and verifies it was not illegally imported.<sup>66</sup> Sometimes conclusive proof is unavailable, but museums use utmost caution and respect when acquiring art from other countries.<sup>67</sup>

The Association of Art Museum Directors ("AAMD") reviews professional practices for acquiring and exhibiting works of art.<sup>68</sup> For example, the AAMD recognizes the 1970 UNESCO Convention as defining the pertinent date before which museums need to apply more rigorous standards in acquiring objects for their collections.<sup>69</sup> Therefore, members of the AAMD should not acquire the work unless it was outside its country of origin before 1970 or it was legally exported from that country after 1970.<sup>70</sup>

The AAMD also requires the member museums to thoroughly research the history of the object and obtain written documentation of its history, such as import or export documents.<sup>71</sup> Further, the guidelines encourage full disclosure from sellers and donors and full compliance with all applicable laws.<sup>72</sup> However, the AAMD recommendations are not legally binding, they are only guidelines.<sup>73</sup> Nonetheless, museums understand it may be necessary to go beyond what is required by the law when acquiring artwork—the acquisitions should be responsible and ethical as well as legal.<sup>74</sup>

Another resource for museums is the International Council of Museums' ("ICOM") *Code of Ethics*, which established minimum professional standards for the international museum community.<sup>75</sup> As art professionals realized the problems of pillaging and illicit traffic of objects, many museums adopted the *Code of Ethics*.<sup>76</sup> Pursuant to this Code, museums must comply with all local, national, and international legislation.<sup>77</sup> Such international legislation includes the 1954 Hague Convention and its protocols, the 1970 UNESCO Convention, and the 1995 UNIDROIT Convention.<sup>78</sup>

---

<sup>64</sup> *Id.* at 2.

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Id.*

<sup>68</sup> Willard L. Boyd, *Museums as Centers of Cultural Understanding*, in *IMPERIALISM, ART AND RESTITUTION* 47, 51 (John Henry Merryman ed., 2006).

<sup>69</sup> ASSOCIATION OF ART MUSEUM DIRECTORS, REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART (2008), available at <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf>.

<sup>70</sup> *Id.*

<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> Helen Stoliias, *New Guidelines for US Museums Acquiring Antiquities*, *THE ART NEWSPAPER*, July 24, 2008, <http://www.theartnewspaper.com/articles/New-guidelines-for-US-museums-acquiring-antiquities%20/8635>.

<sup>74</sup> ASSOCIATION OF ART MUSEUM DIRECTORS, *supra* note 69.

<sup>75</sup> CODE OF ETHICS (2006), [http://icom.museum/fileadmin/user\\_upload/pdf/Codes/code2006\\_eng.pdf](http://icom.museum/fileadmin/user_upload/pdf/Codes/code2006_eng.pdf).

<sup>76</sup> UNESCO, PROMOTE: THE RETURN OR THE RESTITUTION OF CULTURAL PROPERTY, available at <http://unesdoc.unesco.org/images/0013/001394/139407eb.pdf>.

<sup>77</sup> CODE OF ETHICS, *supra* 75, at § 7.

<sup>78</sup> *See id.* at § 7.2 (listing international legislations).

C. TWO CURRENT CASES ILLUSTRATE HOW FOREIGN COUNTRIES PURSUE THE RETURN OF CULTURAL PROPERTY FROM MUSEUMS IN THE UNITED STATES

1. *Peru Brought an Action against Yale University in a United States District Court, Demanding Return of Objects Exported from Peru in the Early 20th Century*

Peru brought an action against Yale University (“Yale”) in 2008 to seek return of artifacts, antiquities, and related objects.<sup>79</sup> Peru alleged Yale violated laws in Peru and the United States, and violated the spirit of international conventions, including the 1970 UNESCO and the 1995 UNIDROIT Conventions.<sup>80</sup>

In 1893, Peru enacted a law prohibiting excavation without government permission.<sup>81</sup> In 1911, Hiram Bingham, a Yale employee, arrived at Machu Picchu in Peru for an expedition.<sup>82</sup> The President of Peru approved Bingham’s request for his 1911 expedition to Peru.<sup>83</sup> Before Bingham arrived, the Peruvian government declared ownership of all articles found during excavations and prohibited the exportation of objects having historical and archaeological importance.<sup>84</sup> After his 1911 excavation, Bingham sought permission to return in 1912.<sup>85</sup> In response to his request, the government of Peru enacted a law in 1912 allowing the expedition to proceed, but restricted its scope and conduct.<sup>86</sup> A decree was later issued to reinforce the ban on exporting artifacts, but allowed an exception where the objects could be exported to Yale under specified conditions, which included Peru’s right to demand the return of the objects.<sup>87</sup>

Peru approved a third expedition in 1914–15.<sup>88</sup> Peru issued a new decree in 1916 allowing seventy-four boxes of excavated artifacts to be exported to Yale.<sup>89</sup> The complaint alleged the export request was granted after Yale promised to return the artifacts within eighteen months and send the completed research studies of the objects to Peru.<sup>90</sup> Peru alleged that by 1916, Bingham’s expeditions stripped the area of the important archaeological objects and transported those objects to Yale.<sup>91</sup>

Peru stated that Yale was fully aware at all times that Peru could demand the return of the artifacts and Peruvian law required Yale to return them if such request was made.<sup>92</sup> In 1918 and 1920, Peru requested the return of the objects.<sup>93</sup> Bingham requested an extension for the

<sup>79</sup> See Original Complaint Republic of Peru v. Yale Univ., No. 1:2008cv02109 (D.C. Dist. Dec. 5, 2008), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008cv02109/134251/1/>.

<sup>80</sup> First Amended Complaint at 2 Republic of Peru v. Yale Univ., No. 1:08-cv-02109 (D.C. Dist. Apr. 20, 2009), available at <http://dockets.justia.com/docket/district-of-columbia/dcdce/1:2008cv02109/134251/>.

<sup>81</sup> Original Complaint at 6.

<sup>82</sup> *Id.* at 3.

<sup>83</sup> Amended Complaint at 6.

<sup>84</sup> Original Complaint at 7.

<sup>85</sup> *Id.* at 4.

<sup>86</sup> *Id.*

<sup>87</sup> *Id.* at 8.

<sup>88</sup> *Id.* at 4–5.

<sup>89</sup> *Id.* at 9.

<sup>90</sup> See *id.* (claiming Yale promised to return the artifacts after eighteen months).

<sup>91</sup> *Id.* at 6.

<sup>92</sup> *Id.* at 11.

<sup>93</sup> See Amended Complaint at 32 (alleging the Ambassador of Peru in 1918 demanded the return of the seventy-four boxes of artifacts exported in 1916, and another request was made by the Government of Peru in 1920).

artifacts' return, and Peru then issued another decree to formally extend the time of the artifacts' return.<sup>94</sup>

In 2003, Yale posted an inventory of its Peruvian artifacts on its Peabody Museum website.<sup>95</sup> This prompted Peru to inquire about which artifacts were in Yale's possession and how those objects were obtained.<sup>96</sup> Yale maintained that it returned all the 1914–15 artifacts, but also admitted it kept the artifacts from 1912 even though Peru requested their return.<sup>97</sup> Further, Yale claimed Bingham legally purchased another group of artifacts during his earlier expeditions.<sup>98</sup>

Peru and Yale created a Memorandum of Understanding ("MOU") in 2007 to establish a collaborative relationship for the research of the artifacts excavated by Bingham.<sup>99</sup> Yale agreed to create an exhibition of the artifacts that would travel to various spots in the United States, Canada, and other countries.<sup>100</sup> Peru then agreed to construct a museum in Cuzco, Peru where the artifacts would be transferred after the traveling exhibition.<sup>101</sup> Further, Yale agreed to acknowledge Peru's title in the artifacts, which would terminate Yale's rights in certain objects.<sup>102</sup> In return, Yale would retain specific rights to the objects for ninety-nine years.<sup>103</sup> Nonetheless, the MOU failed because the parties ultimately could not agree on which artifacts should be transferred.<sup>104</sup> Peru then filed its lawsuit against Yale.<sup>105</sup>

In its lawsuit, Peru claimed it never relinquished ownership of any of the excavated objects.<sup>106</sup> Yale responded, arguing that Peru ignored applicable law in force during the Bingham expeditions and claimed Article 522 of Peru's Civil Code of 1852, which was in force during the expeditions, provided any treasures or buried objects with no ascertainable owner belonged to the finder.<sup>107</sup> Yale argued a congressional code trumps executive decrees in Peruvian law.<sup>108</sup> Yale also argued Peru ignored a 1921 decree recognizing Yale's title to duplicate objects from the expedition and requiring Yale to only return unique artifacts.<sup>109</sup> Finally, Yale cited American case law that held Peru does not have a right to artifacts exported from Peru before 1929.<sup>110</sup>

---

<sup>94</sup> Original Complaint at 15.

<sup>95</sup> Amended Complaint at 33.

<sup>96</sup> *Id.* at 33–4.

<sup>97</sup> *Id.* at 34.

<sup>98</sup> *Id.*

<sup>99</sup> Memorandum of Understanding between the Government of Peru and Yale University 1 (Sept. 14, 2007), available at <http://opa.yale.edu/opa/mpi/Machu-Picchu-MOU.pdf>.

<sup>100</sup> *Id.* at § 3(a).

<sup>101</sup> *Id.* at § 3(b).

<sup>102</sup> *Id.* at § 3(d)(i)–(iii).

<sup>103</sup> *Id.* at § 3(d)(iv). A usufructuray right is defined in the MOU as the right to use the objects for academic, curatorial, or scientific purposes that may include the right to restore and exhibit. *Id.* at § 2.

<sup>104</sup> *Case Summary: Peru v. Yale University*, INTERNATIONAL FOUNDATION FOR ART RESEARCH, [http://www.ifar.org/case\\_summary.php?docid=1184620401](http://www.ifar.org/case_summary.php?docid=1184620401) (last visited Oct. 8, 2010).

<sup>105</sup> Amended Complaint at 34.

<sup>106</sup> Original Complaint at 18.

<sup>107</sup> Yale University's Reply to Peru's Opposition to Its Motion to Dismiss, *Republic of Peru v. Yale Univ.*, No. 309CV01332, (D. Conn., Jan. 8, 2010), 2010 WL 1370453.

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *See id.* (citing *Peru v. Johnson*, 720 F. Supp. 810, 813 (C.D. Cal. 1989)).

Over ninety years has passed since the excavations and exportations, which made the statute of limitations an issue in the lawsuit.<sup>111</sup> Peru claimed the Peruvian statute of limitations applied, which had not yet expired.<sup>112</sup> However, the Connecticut statute of limitations ran after three years for tort claims and six for contract claims.<sup>113</sup> Therefore, Yale argued, if Connecticut law applied to Peru's claim, the statute of limitations ran long ago.<sup>114</sup>

Peru once again asked Yale to return the objects by July 7, 2011, which marks the 100<sup>th</sup> anniversary of Machu Picchu rediscovery.<sup>115</sup> In November 2010, Yale resumed negotiations with Peru, realizing a judicial ruling would probably not fully satisfy either party.<sup>116</sup> The parties signed a new Memorandum of Understanding where Yale agreed to send all the objects to Cuzco, Peru.<sup>117</sup> A museum and research center will be built to house the collection in Peru.<sup>118</sup>

## 2. *Italy Pursues the Return of the "Victorious Youth" Bronze Statue from the J. Paul Getty Museum*

Over the last decade, Italy initiated multiple lawsuits against the J. Paul Getty Museum ("Getty") and its curators in courts within the United States and abroad.<sup>119</sup> One of these legal disputes involved a bronze statue, *Victorious Youth*, dating from around the fourth century B.C.<sup>120</sup> In 1964, fishermen discovered the statue in the Adriatic Sea off the coast of Italy.<sup>121</sup> After the statue was sold, Italy instituted criminal charges against the purchasers in 1966 alleging they purchased and concealed stolen property of the Italian State.<sup>122</sup> Yet because the object was not discovered in Italy's territory, it could not be a part of the State's cultural property.<sup>123</sup>

Sometime before 1971 the sculpture was exported to Brazil, then to England, and finally to Germany where the statue came into possession of local art dealers.<sup>124</sup> In 1972, the art dealers offered the statue to Mr. J. Paul Getty.<sup>125</sup> Mr. Getty's lawyers received a legal opinion from the dealers' Italian counsel saying the Italian government did not have a claim to the *Victorious*

<sup>111</sup> David Glenn, *Peru v. Yale: A Battle Rages Over Machu Picchu*, THE CHRONICLE OF HIGHER EDUCATION, Apr. 3, 2009, available at <http://chronicle.com/article/Peru-v-Yale-A-Battle-Rages/13277>; Yale University's Reply to Peru's Sur-Reply to Further Support of Yale's Motion to Dismiss, Republic of Peru v. Yale Univ., No. 3:09-cv-01332 (D. Conn., Jun. 4, 2010) 2010 WL 2647315.

<sup>112</sup> Yale University's Reply to Peru's Sur-Reply to Further Support of Yale's Motion to Dismiss.

<sup>113</sup> *Id.*; Glenn, *supra* note 111.

<sup>114</sup> Yale University's Reply to Peru's Sur-Reply to Further Support of Yale's Motion to Dismiss.

<sup>115</sup> Isabel Guerra, *Peru Asks Yale University to Return Artifacts before July 7, 2011*, LIVING IN PERU, Sept. 28, 2010, <http://www.livinginperu.com/news-13233-culture-history-peru-asks-yale-university-return-artifacts-before-july-7-2011>.

<sup>116</sup> Diane Orson, *Yale Returns Machu Picchu Artifacts To Peru*, NPR, Dec. 15, 2010, <http://www.npr.org/2010/12/15/132083890/yale-returns-machu-picchu-artifacts-to-peru>.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> Michael J. Reppas II, *Empty "International" Museums' Trophy Cases of Their Looted Treasures and Return Stolen Property to the Countries of Origin and the Rightful Heirs of Those Wrongfully Dispossessed*, 36 DENV. J. INT'L L. & POL'Y 93, 109 (2007).

<sup>120</sup> Elisabetta Povoledo, *Italy Presses Its Fight for a Statue at the Getty*, N.Y. TIMES, Jan. 15, 2010, available at <http://www.nytimes.com/2010/01/16/arts/design/16bronze.html>.

<sup>121</sup> Memorandum from the Ronald L. Olson & Luis Li to the Delegation from the Italian Ministry of Culture, 5 (Nov. 20, 2006), available at [http://www.getty.edu/news/press/center/getty\\_italy\\_bronze\\_112006.pdf](http://www.getty.edu/news/press/center/getty_italy_bronze_112006.pdf).

<sup>122</sup> *Id.* at 5–7.

<sup>123</sup> *Id.* at 4.

<sup>124</sup> *Id.* at 8.

<sup>125</sup> *Id.*

*Youth* bronze statue.<sup>126</sup> Apparently, since the Italian government failed to enter an appearance at the criminal trial in 1966, the government had no interest in the statue, and the art dealers were good faith purchasers who held good title that could be sold to Mr. Getty.<sup>127</sup> Mr. Getty eventually acquired the statue from the art dealers in 1977 for \$3.95 million, and subsequently placed it in his museum.<sup>128</sup>

In 2005, the Getty Museum publicly announced half of the objects within its antiquity collection were purchased from dealers suspected of selling objects stolen from Italy.<sup>129</sup> Italy then requested the return of *Victorious Youth* from the Getty in 2006.<sup>130</sup> The *Victorious Youth* statue is considered one of the finest original bronzes from the classical era, which partially explains why the countries continue to dispute its ownership.<sup>131</sup>

Italy brought an action in Italy against the Getty claiming the bronze was smuggled out of the country without appropriate export papers.<sup>132</sup> The Getty asserted it bought the statue with clear title through the appropriate legal channels.<sup>133</sup> It also noted while American case law recognized a foreign state might own artifacts found within its territory, a nation's export restrictions on artifacts does not create a binding declaration of ownership to those objects.<sup>134</sup> As a result, it seemed Italy could not claim ownership to the statue just because it may have passed through Italy and been illegally exported from the country.<sup>135</sup> Further, the Getty emphasized how the statue was not acquired from Italy, but rather the museum acquired it years after it was already (allegedly) illegally exported to the art dealers in Munich.<sup>136</sup>

In 2006, the Getty began negotiations with the Italian Ministry of Culture to reach an agreement concerning the antiquities in the museum's collection.<sup>137</sup> In October 2006, the Italian Ministry of Culture and the Getty signed an agreement where the Getty would return twenty-six objects to Italy, while Italy agreed to renounce claims to six other objects in the museum's collection and also agreed to make significant loans to the Getty.<sup>138</sup> The Getty would also provide Italy with written support for its claim of ownership to the *Victorious Youth* statue.<sup>139</sup> Nonetheless, Italy disavowed the agreement in November 2006 and said it would not reach a final agreement with the Getty if it did not include the return of the *Victorious Youth*.<sup>140</sup>

---

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.* (noting the museum said it purchased the statue through legal channels).

<sup>129</sup> Reppas, *supra* note 119, at 108.

<sup>130</sup> Memorandum from the Ronald L. Olson & Luis Li to the Delegation from the Italian Ministry of Culture, *supra* note 121, at 4.

<sup>131</sup> Povoledo, *supra* note 120.

<sup>132</sup> *See id.* (discussing closing arguments between Italian prosecutors and the Getty lawyers).

<sup>133</sup> *Id.*

<sup>134</sup> Memorandum from the Ronald L. Olson & Luis Li to the Delegation from the Italian Ministry of Culture, *supra* note 121, at 15.

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> *See* Press Release, Michael Brand, director of the J. Paul Getty Museum, The Getty Trust, Object Lesson (Jan.

31, 2007) (on file with author), *available at*

[http://www.getty.edu/news/press/center/wsj\\_brand\\_object\\_return\\_oped013107.html](http://www.getty.edu/news/press/center/wsj_brand_object_return_oped013107.html) (stating the Getty tried to work with the Italian Ministry of Culture for over a year).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.*

<sup>140</sup> *Id.*

In February 2010, an Italian judge ordered the *Victorious Youth* be confiscated from the Getty Museum and returned to Italy.<sup>141</sup> The Italian prosecutor encouraged the Getty to resume negotiations and return the piece to Italy now that the Italian court issued the confiscation order.<sup>142</sup> He further stated that if the United States did not recognize the Italian court order, the case would be brought to an American court.<sup>143</sup>

### III. ARGUMENT

Countries can bring cultural property claims to the courtroom.<sup>144</sup> However, there are other useful tools for addressing such claims.<sup>145</sup> For example, parties can examine the ideas set forth in international conventions, such as the 1954 Hague Convention, the 1970 UNESCO Convention, and the 1995 UNIDROIT Convention.<sup>146</sup> In reviewing cultural property claims, it is also noteworthy that professional associations, such as the International Council of Museums (“ICOM”) and the American Association of Art Directors (“AAMD”), issued guidelines addressing acquisition, restitution, and repatriation policies that give effect to legal and ethical considerations about objects in a museum’s collection.<sup>147</sup> The AAMD guidelines indicate even if a claim is not actionable under United States’ law, the museum should still attempt to reach an

<sup>141</sup> David Ng, *Judge Orders Return of Getty Bronze*, L.A. TIMES, Feb. 11, 2010,

<http://latimesblogs.latimes.com/culturemonster/2010/02/judge-in-italy-orders-confiscation-of-getty-bronze.html>.

<sup>142</sup> Nicole Winfield, *Italian Court Orders Getty Museum to Return Statue*, THE HUFFINGTON POST, Feb. 11, 2010, [http://www.huffingtonpost.com/2010/02/11/italian-court-orders-gett\\_n\\_458481.html](http://www.huffingtonpost.com/2010/02/11/italian-court-orders-gett_n_458481.html).

<sup>143</sup> *Id.*

<sup>144</sup> See generally Elisabetta Povoledo, *Italy Presses Its Fight for a Statue at the Getty*, N.Y. TIMES, Jan. 15, 2010, <http://www.nytimes.com/2010/01/16/arts/design/16bronze.html> (describing the case brought by Italian prosecutors in Italian court against the Getty); Original Complaint Republic of Peru v. Yale Univ., No. 1:2008cv02109 (D.C. Dist. Dec. 5, 2008), available at <http://docs.justia.com/cases/federal/district-courts/district-of-columbia/dcdce/1:2008cv02109/134251/1/> (stating Peru filed the complaint against Yale in a United States District Court).

<sup>145</sup> See generally Memorandum of Understanding between the Government of Peru and Yale University 1 (Sept. 14, 2007), available at <http://opa.yale.edu/opa/mpi/Machu-Picchu-MOU.pdf> (defining the long-term collaborative relationship between Yale University and Peru regarding the artifacts excavated by Bingham); ASSOCIATION OF ART MUSEUM DIRECTORS, REPORT OF THE AAMD TASK FORCE ON THE ACQUISITION OF ARCHAEOLOGICAL MATERIALS AND ANCIENT ART (2008), available at <http://www.aamd.org/newsroom/documents/2008ReportAndRelease.pdf> (quoting the 2008 AAMD President who said acquisitions of antiquities and ancient art should be responsible, ethical, and legal); CODE OF ETHICS § 7 (2006), [http://icom.museum/fileadmin/user\\_upload/pdf/Codes/code2006\\_eng.pdf](http://icom.museum/fileadmin/user_upload/pdf/Codes/code2006_eng.pdf). (stating museums need to follow international and local legislation and treaty obligations).

<sup>146</sup> See generally Convention for the Protection of Cultural Property in the Event of Armed Conflict pmb., May 14, 1954, 249 U.N.T.S. 215, [hereinafter 1954 Hague Convention], available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13637&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13637&URL_DO=DO_TOPIC&URL_SECTION=201.html) (recognizing effective protection of cultural property requires national and international efforts); UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231, pmb. [hereinafter 1970 UNESCO Convention], available at [http://portal.unesco.org/en/ev.php-URL\\_ID=13039&URL\\_DO=DO\\_TOPIC&URL\\_SECTION=201.html](http://portal.unesco.org/en/ev.php-URL_ID=13039&URL_DO=DO_TOPIC&URL_SECTION=201.html) (stating that effective protection of cultural property must be organized on national and international levels); UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, June 24, 1995, 34 I.L.M. 1322 [hereinafter 1995 UNIDROIT Convention], available at <http://www.unidroit.org/english/conventions/1995culturalproperty/main.htm> (providing provisions to prevent transfer of stolen or illegally exported cultural property).

<sup>147</sup> See generally ASSOCIATION OF ART MUSEUM DIRECTORS, *supra* note 145 (quoting the 2008 AAMD President who said acquisitions of antiquities and ancient art should be responsible, ethical, and legal); CODE OF ETHICS, *supra* note 145 (stating museums need to follow international and local legislation and treaty obligations).

equitable settlement with the country seeking repatriation.<sup>148</sup> There are also other legal and ethical concerns museum professionals are encouraged to consider.<sup>149</sup> While these sources and guidelines may not be legally binding throughout the world, the principles are important in moving forward with cultural property disputes.<sup>150</sup>

A. PERU AND ITALY'S CLAIMS ILLUSTRATE HOW A LEGAL SETTING MAY NOT BE THE MOST EFFECTIVE FORUM FOR OBTAINING A REMEDY IN CULTURAL PROPERTY ACTIONS

In its action Peru claimed Yale fraudulently held cultural property objects for decades after being excavated and exported, violating the laws in Peru and the United States.<sup>151</sup> Further it claimed Yale violated the spirit of international conventions and treaties, including the 1970 UNESCO and the 1995 UNIDROIT Conventions.<sup>152</sup> Even if the evidence could support Peru's claim to the artifacts, it still faced a significant hurdle in its lawsuit: the statute of limitations.<sup>153</sup> Yale argued Peru's claims were time-barred because Yale exercised dominion over the artifacts for the last ninety years.<sup>154</sup> Peru tried to move up the statute of limitations by claiming Yale only asserted ownership to the artifacts in 2005 when Yale's Provost wrote a letter to Peru stating Yale had title to the artifacts.<sup>155</sup> Given these arguments, the focus of the case shifted from resolving an issue of ownership to determining whether the claim could even survive in an American court.<sup>156</sup>

The dispute between Yale and Peru illustrates a problem when parties resort to litigation in pursuing the return of cultural property objects—a subsidiary issue, like the statute of limitations, can decide the case rather than a determination of the primary issue of ownership.<sup>157</sup>

---

<sup>148</sup> See Willard L. Boyd, *Museums as Centers of Cultural Understanding*, in IMPERIALISM, ART AND RESTITUTION 47, 55 (John Henry Merryman ed., 2006) (discussing AAMD guidelines recommending museums try to reach an equitable resolution even though U.S. law may not support the claim).

<sup>149</sup> See CODE OF ETHICS, *supra* note 145, at § 7–8 (discussing how museums should operate in both a legal and professional manner).

<sup>150</sup> Compare 1970 UNESCO Convention, *supra* note 146, at art. 20 (stating the Convention is open for accession by all States, but accession will only be effected by depositing certain documents with UNESCO's Director-General), with 1970 UNESCO Convention, *supra* note 146, at pmbl. (noting the importance of cultural property and that it is effectively protected through national and international cooperation); see also 1954 Hague Convention, *supra* note 146, at art. 32 (stating deposit of appropriate instruments with UNESCO's Director-General is required for accession); *About AAMD*, AAMD (last visited Mar. 20, 2011) <http://www.aamd.org/about/#Mission> (defining AAMD's mission for its members, and detailing membership requirements such as museum size and standards of operation to be considered for AAMD membership); International Council of Museums (ICOM), CODE OF ETHICS, *supra* note 145 (stating the *Code of Ethics* reflects generally accepted principles in the international museum community).

<sup>151</sup> First Amended Complaint at 2 Republic of Peru v. Yale Univ., No. 1:08-cv-02109 (D.C. Dist. Apr. 20, 2009), available at <http://dockets.justia.com/docket/district-of-columbia/dcdce/1:2008cv02109/134251/>.

<sup>152</sup> *Id.*

<sup>153</sup> See David Glenn, *Peru v. Yale: A Battle Rages Over Machu Picchu*, THE CHRONICLE OF HIGHER EDUCATION, Apr. 3, 2009, available at <http://chronicle.com/article/Peru-v-Yale-A-Battle-Rages/13277> (stating although Peru's case is favored by the documentary evidence, the lawsuit still faces the severe hurdle with the statute of limitations).

<sup>154</sup> Yale University's Reply to Peru's Opposition to Its Motion to Dismiss, Republic of Peru v. Yale Univ., No. 309CV01332 (D. Conn., Jan. 8, 2010), 2010 WL 1370453.

<sup>155</sup> *Id.*

<sup>156</sup> See generally *id.* (providing arguments as to why Connecticut law time-barred Peru's claims).

<sup>157</sup> See generally Yale University's Reply to Peru's Sur-Reply to Further Support of Yale's Motion to Dismiss, Republic of Peru v. Yale Univ., No. 3:09-cv-01332, (D. Conn., Jun. 4, 2010) 2010 WL 2647315. (arguing Connecticut statutes of limitations apply and bar Peru's claims and addressing why Peruvian statutes of limitation

It is difficult to achieve a mandated return of the cultural objects in dispute.<sup>158</sup> This difficulty means parties often resort to the media and other public outlets hoping to encourage a private settlement that both parties can agree upon and enact.<sup>159</sup>

Peru and Yale created a Memorandum of Understanding in 2007, but it was never enacted because Peru filed its lawsuit instead of proceeding under the agreement.<sup>160</sup> Yale could try to convince the public of its rightful possession of the artifacts and how it could better care for and study the objects, but this fact would not be determinative of the legal issues presented in court.<sup>161</sup> Without an effective methodology to resolve the dispute, litigation continued while the ownership issue subsided to a technical procedural issue.<sup>162</sup>

In the case between Italy and the Getty, the Getty denied any legal or ethical obligation to return the statue, believing it properly acquired the statue and no new facts indicated otherwise.<sup>163</sup> Italy claimed it not only had a legal right to the statue, but there was also an ethical obligation for the Getty to return the statue to Italy.<sup>164</sup> However, Italy may not actually be the country of origin since the statue is actually attributed to a Greek sculptor.<sup>165</sup> Given the statue is actually part of Greek cultural heritage, Italy's claim does not involve the typical ethical considerations for repatriating cultural property to the country of origin.<sup>166</sup>

As of 2010, an Italian judge ordered the statue be returned to Italy.<sup>167</sup> It is unclear how this order will actually be enforced against the Getty in California since a United States court proceeding would be required to enforce the foreign judgment.<sup>168</sup> Further, the Getty said it will

does not apply).

<sup>158</sup> See Isabel Guerra, *Peru Asks Yale University to Return Artifacts before July 7, 2011*, LIVING IN PERU, Sept. 28, 2010, <http://www.livinginperu.com/news-13233-culture-history-peru-asks-yale-university-return-artifacts-before-july-7-2011> (noting a lawsuit was filed and is being carried out under U.S. laws but Peru still made a public demand for the return of the objects by 2011); see also Elisabetta Povoledo, *Italy Presses Its Fight for a Statue at the Getty*, N.Y. TIMES, Jan. 15, 2010, <http://www.nytimes.com/2010/01/16/arts/design/16bronze.html> (acknowledging the Italian judge's order would require enforcement in the United States and the return would not be automatic).

<sup>159</sup> Compare Glenn, *supra* note 153 (providing a timeline showing the parties reached an agreement in 2007 but after Peruvian scholars and activists objected, the agreement collapsed and Peru filed its lawsuit), with Press Release, Michael Brand, director of the J. Paul Getty Museum, The Getty Trust, Object Lesson (Jan. 31, 2007) (on file with author), available at [http://www.getty.edu/news/press/center/wsj\\_brand\\_object\\_return\\_oped013107.html](http://www.getty.edu/news/press/center/wsj_brand_object_return_oped013107.html) (discussing how the Getty was surprised when Italy denied to adhere to the agreement).

<sup>160</sup> Glenn, *supra* note 153 (providing a timeline that shows the parties reached an agreement in 2007 but after Peruvian scholars and activists objected, the agreement collapsed and Peru filed its lawsuit).

<sup>161</sup> See *id.* (reporting how Yale's public statements suggest new technology make studies of the object possible and such studies can be conducted in the United States).

<sup>162</sup> See generally Yale University's Reply to Peru's Sur-Reply to Further Support of Yale's Motion to Dismiss (arguing Connecticut statutes of limitations apply and barred Peru's claims).

<sup>163</sup> See Memorandum from the Ronald L. Olson & Luis Li to the Delegation from the Italian Ministry of Culture, 10 (Nov. 20, 2006), available at [http://www.getty.edu/news/press/center/getty\\_italy\\_bronze\\_112006.pdf](http://www.getty.edu/news/press/center/getty_italy_bronze_112006.pdf) (discussing how the statue was acquired after legal claims to the statue in Italy were dismissed).

<sup>164</sup> See Povoledo, *supra* note 158 (quoting a source that says getting the statue back is a matter of justice because no museum should be allowed to exhibit pieces with illegal provenance and others who say the statue has become part of Italy's culture and folklore).

<sup>165</sup> See Memorandum from the Ronald L. Olson & Luis Li to the Delegation from the Italian Ministry of Culture, *supra* note 163, at 18 (noting Italy has not disputed the statue's Greek origin).

<sup>166</sup> See *id.* (claiming Italy's cultural heritage is not damaged because the statue is representative of Greek civilization, and is not connected to Italy).

<sup>167</sup> Martha Lufkin, *Greek Bronze Will Stay in the Getty Villa*, THE ART NEWSPAPER, Apr. 12, 2010, <http://theartnewspaper.com/articles/Greek-bronze-will-stay-in-the-Getty-Villa%20/20504>.

<sup>168</sup> *Id.*



appeal the Italian decision and would object to any action Italy may pursue in American courts.<sup>169</sup>

Similar to Peru's case, Italy could face a number of legal technicalities in the American legal system that may prevent the ultimate issue of ownership from being resolved.<sup>170</sup> Also, since the history of the object indicates it is from a Greek sculptor, and it was discovered in international waters, Italy's claim to ownership may be diminished.<sup>171</sup> When American courts examine claims for returning artifacts to a foreign country, strong evidence is required in showing the object came from the country instituting the claim.<sup>172</sup> Italy's claim that its export laws were violated may not support a claim of ownership to the statue.<sup>173</sup> The illegal export of an object does not automatically subject the importer to action in an American court.<sup>174</sup> Therefore, it is unclear as to whether an American court will even enforce the Italian judgment.<sup>175</sup>

Contention over the ownership of objects can hinder relationships between the parties.<sup>176</sup> Maintaining and respecting cultural property is an important aspect of international relationships.<sup>177</sup> Pursuing the action in a courtroom does not lead to productive results.<sup>178</sup> Repatriation is not always a necessary or ideal solution to the dispute over cultural property.<sup>179</sup> Parties are often better suited to create private agreements concerning the object in question.<sup>180</sup> Both disputes discussed in this Article tried to create private agreements in returning the cultural

---

<sup>169</sup> *Id.*

<sup>170</sup> Compare Glenn, *supra* note 153 (stating the statute of limitations gives Yale a strong legal case), with Lufkin, *supra* note 167 (saying the claim may be barred by statute of limitations because Italy knew the statue was located at the Getty since at least 1977).

<sup>171</sup> See Memorandum from the Ronald L. Olson & Luis Li to the Delegation from the Italian Ministry of Culture, *supra* note 163 (saying Italy's cultural patrimony cannot be damaged because the object actually represents Greek culture).

<sup>172</sup> See *id.* at 12 (citing Gov't of Peru v. Johnson, 720 F. Supp. 810, 812 (D. Cal. 1989), which dismissed Peru's claim after it could not show the objects came from modern-day Peru and not some other neighboring country).

<sup>173</sup> See *id.* at 15 (noting three sources that claim export restrictions do not create binding ownership on cultural artifacts).

<sup>174</sup> See *id.* (citing four sources in support of arguing an importing nation's law is not violated by bringing in artwork that has been illegally exported from another country).

<sup>175</sup> See Lufkin, *supra* note 167 (commenting on the need for a U.S. court to grant authority to enforce the Italian judgment).

<sup>176</sup> See Povoledo, *supra* note 158 (stating an agreement between the Italian culture minister and the Getty museum was signed only after the parties agreed to set aside the question of the statue's ownership).

<sup>177</sup> Compare 1970 UNESCO Convention, *supra* note 146, at art. 2 (stating illegal transfer of cultural property is a primary cause of impoverishing a culture's heritage and international cooperation can protect cultural property from such danger), with 1970 UNESCO Convention, *supra* note 146, at art. 12 (stating the parties shall respect the cultural heritage of any territories for which they are responsible for their international relations).

<sup>178</sup> Compare Guerra, *supra* note 158 (noting a lawsuit had been filed and carried out under U.S. laws, but Peru still made a public demand for the return of the objects by 2011) with Nicole Winfield, *Italian Court Orders Getty Museum to Return Statue*, THE HUFFINGTON POST, Feb. 11, 2010, [http://www.huffingtonpost.com/2010/02/11/italian-court-orders-gett\\_n\\_458481.html](http://www.huffingtonpost.com/2010/02/11/italian-court-orders-gett_n_458481.html) (stating that Italy wants the Getty resumes negotiations on the statue's return given the court order for the statue's return).

<sup>179</sup> See Alexander A. Bauer, Shane Lindsay & Stephen Urice, *When Theory, Practice and Policy Collide, or Why Do Archaeologists Support Cultural Property Claims?*, in ARCHAEOLOGY AND CAPITALISM: FROM ETHICS TO POLITICS 45, 53 (Y. Hamilakis & P. Duke eds., 2007) (recognizing it is beneficial to circulate cultural materials because it may encourage respect for cultural dynamics and diversity).

<sup>180</sup> Compare Memorandum of Understanding, *supra* note 145 (providing terms of an agreement to create a collaborative relationship focused on education and research of the objects), with Press Release, The Getty Trust, *supra* note 159 (describing the terms of the October 2006 agreement reached between the parties).

property.<sup>181</sup> However, neither agreement was actually completed by the parties.<sup>182</sup> The parties seemed to recognize the importance and power of private agreements arranging for the return of objects, but were simply not willing to compromise on particular issues.<sup>183</sup> However, when they resorted to legal action, other issues, such as the statute of limitations, overshadowed the issue of ownership.<sup>184</sup>

#### B. INTERNATIONAL CONVENTIONS AND PROFESSIONAL GUIDELINES EMPHASIZE THE IMPORTANCE OF RESPECT, COOPERATION, AND COMMUNICATION IN A CULTURAL PROPERTY DISPUTE

Relationships are strained when parties cannot reach an agreement about the return of objects.<sup>185</sup> All parties will be better served if there is open communication and an attempt to build a relationship with the country claiming ownership.<sup>186</sup> These ideals are reflected in guidelines addressing cultural property issues.<sup>187</sup> The AAMD guidelines encourage an equitable response to the claim, even if the claim does not have a basis in American law.<sup>188</sup> ICOM encourages a dialogue between the parties in repatriation actions.<sup>189</sup> Instead of starting a fight in a courtroom or in the media, museums should consider the respect and cooperation encouraged in professional guidelines.<sup>190</sup> Cooperation and respect is critical in such situations because cultural property has recognized importance for all mankind; it should not divide the international community.<sup>191</sup>

There are additional actions countries may take to insure their cultural property is protected while providing a more effective resolution to cultural property ownership.<sup>192</sup> For

---

<sup>181</sup> *Id.*

<sup>182</sup> See generally Glenn, *supra* note 153 (saying the parties reached an agreement in 2007 but Peru filed its lawsuit after Peruvian scholars and activists objected); Press Release, The Getty Trust, *supra* note 159 (claiming the Italian Ministry rejected the agreement when they said no agreement would be reached without the transfer of the statue).

<sup>183</sup> *Id.*

<sup>184</sup> See generally Yale University's Reply to Peru's Sur-Reply to Further Support of Yale's Motion to Dismiss (providing Yale's argument as to why the statute of limitations bars Peru's claim).

<sup>185</sup> See Press Release, The Getty Trust, *supra* note 159 (saying Italy's demand for the statue ended the meeting because there was no room for further discussion); see also Glenn, *supra* note 153 (stating that pressure from activists in Peru led to the collapse of 2007 agreement).

<sup>186</sup> See Willard L. Boyd, *Museums as Centers of Cultural Understanding*, in *IMPERIALISM, ART AND RESTITUTION* 47, 54 (John Henry Merryman ed., 2006) (stating museums should be open and seek a relationship with the nation requesting repatriation).

<sup>187</sup> See CODE OF ETHICS § 6.2, *supra* note 145 (recommending museums prepare for a dialogue about returning an object to its country of origin); 1970 UNESCO Convention, *supra* note 146, at pmb1. (stating the protection of cultural property is effective when nations cooperate).

<sup>188</sup> Boyd, *supra* note 186, at 55.

<sup>189</sup> See CODE OF ETHICS § 6.2, *supra* note 145 (recommending museums prepare for a dialogue about returning an object to its country of origin).

<sup>190</sup> Compare CODE OF ETHICS § 6.2, *supra* note 145 (recommending museums prepare for a dialogue about returning an object to its country of origin), with ASSOCIATION OF ART MUSEUM DIRECTORS, *supra* note 145 (stating museums should respect a country's right to protect its cultural property).

<sup>191</sup> See 1970 UNESCO Convention, *supra* note 146, at pmb1. (stating cultural property is one of civilization's basic elements).

<sup>192</sup> See generally 1954 Hague Convention, *supra* note 146 (providing provisions for countries to protect cultural property during war or occupation); 1970 UNESCO Convention, *supra* note 146 (providing provisions preventing the illegal transfer of stolen cultural property); 1995 UNIDROIT Convention, *supra* note 146 (providing provisions preventing illegal transfer of stolen or illegally exported cultural property).

example, the 1954 Hague Convention provides direction for countries to protect cultural property during war and occupation.<sup>193</sup> The 1970 UNESCO Convention and the 1995 UNIDROIT Convention both represent agreements that can ease the process of remedying the illegal transfer of cultural property.<sup>194</sup> These conventions are available frameworks for countries, but unfortunately many have not yet decided to become signing parties to these agreements.<sup>195</sup> In some cases, countries have signed the 1970 UNESCO Convention, but have not signed its counterpart, the 1995 UNIDROIT Convention.<sup>196</sup> UNESCO presented information on these treaties and encouraged countries to sign both.<sup>197</sup>

Cultural property faces many dangers, including risk of destruction during war or being the subject of illegal transfers.<sup>198</sup> Cultural property provides an opportunity to understand other cultures and formulate relationships with other countries.<sup>199</sup> Nonetheless, museums should not acquire objects removed from their origin illegally or violate some other law.<sup>200</sup> When such claims appear, the courtroom is available for either party, but this may not provide the most effective method of resolution.<sup>201</sup> The claims should be seriously considered, but private agreements are the preferable resolution if the parties can actually execute such agreements.<sup>202</sup>

---

<sup>193</sup> See generally 1954 Hague Convention, *supra* note 146 (providing provisions for countries to protect cultural property during war or occupation).

<sup>194</sup> See Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, Paris, Fr., June 24, 2005, *UNESCO Information Note: UNESCO and UNIDROIT—Cooperation in the Fight Against Illicit Traffic in Cultural Property*, 1, U.N. Doc. CLT-2005/Conf/803/2 (June 16, 2005), available at <http://unesdoc.unesco.org/images/0013/001399/139969E.pdf> (stating both the 1970 UNESCO Convention and the 1995 UNIDROIT Convention fight illicit trade of cultural property).

<sup>195</sup> See *id.* at 2 (recommending both the 1970 UNESCO Convention and 1995 UNIDROIT Convention be considered for ratification at the same time).

<sup>196</sup> Compare 1970 UNESCO Convention, *supra* note 146 (listing the parties to the 1970 UNESCO Convention), with 1995 UNIDROIT Convention, *supra* note 146 (listing the signatures, ratifications, and accessions for the Convention).

<sup>197</sup> See Conference Celebrating the 10th Anniversary of the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects, *supra* note 194, at 2 (recommending UNESCO Member States consider both the 1970 UNESCO Convention and 1995 UNIDROIT Convention for ratification at the same time).

<sup>198</sup> Compare 1954 Hague Convention, *supra* note 146, at pmb1. (stating cultural property is in increasing danger of destruction given the warfare technique developments), with *id.* at 1 (stating that trafficking in cultural property is developing into a universal problem that affects countries and requires international regulation).

<sup>199</sup> See Alexander A. Bauer, Shane Lindsay & Stephen Urice, *supra* note 179 (recognizing it is beneficial to circulate cultural materials because it may encourage respect for cultural dynamics and diversity).

<sup>200</sup> See ASSOCIATION OF ART MUSEUM DIRECTORS, *supra* note 145 (explaining how the AAMD disproves of illicit excavation or theft of any art or archaeological materials).

<sup>201</sup> See generally *Case Summary: Peru v. Yale University*, INTERNATIONAL FOUNDATION FOR ART RESEARCH, [http://www.ifar.org/case\\_summary.php?docid=1184620401](http://www.ifar.org/case_summary.php?docid=1184620401) (last visited Oct. 8, 2010) (providing the case history since 2008); Winfield, *supra* note 178 (noting since the Italian court order has been issued, Italy must still ask for enforcement of the order in the United States while the Getty said it will appeal the Italian court decision).

<sup>202</sup> Compare 1970 UNESCO Convention, *supra* note 146, at pmb1. (stating the protection of cultural property is effective when nations cooperate), with Glenn, *supra* note 153 (saying the parties reached an agreement in 2007 but Peru filed its lawsuit after Peruvian scholars and activists objected), and Press Release, The Getty Trust, *supra* note 159 (saying the agreement was denied in November 2006 after Italy refused to reach a final agreement without the statue's transfer).

## IV. CONCLUSION

This Article discussed cultural property and cases involving the restitution of such objects.<sup>203</sup> Different international agreements were discussed to present the options countries have in protecting their cultural property.<sup>204</sup> The recent disputes between Peru and Yale University and between Italy and the Getty Museum were discussed to show how countries resort to legal action in demanding the return of their cultural property.<sup>205</sup> The Article argued although legal action is available for repatriation cases, it is not the most effective option.<sup>206</sup> Given the international nature of repatriation actions, this Article also argued that cooperation and respect is vital in avoiding legal battles and obtaining private agreements to resolve the parties' disputes.<sup>207</sup>

Cultural property has an important place in both a nation's history as well as in mankind's history. The fight for ownership of an object may stem from pride or be motivated by tourism opportunities and the accompanying revenues. It is a difficult discussion to determine who should be the rightful owner of an ancient object of art or other cultural property. However, as seen with Peru and Italy, resorting to the legal system is not likely to resolve the claim of ownership. There are those cases where the object was illegally obtained that require legal action. However, sometimes the primary purpose of bringing a courtroom action is to create leverage in reaching a settlement for the objects. This may not be an ideal use of the legal system, but it is a valid technique in negotiations. At some point, countries may have to realize the museums properly acquired the objects. They may need to concede the object is surviving in its current location. Nonetheless, as the claim to cultural property is important in defining a nation's history, it seems unlikely we have seen the last of legal actions against museums for repatriation or restitution.

---

<sup>203</sup> See *supra* notes 12–143 and accompanying text.

<sup>204</sup> See *supra* notes 17–61 and accompanying text.

<sup>205</sup> See *supra* notes 79–143 and accompanying text.

<sup>206</sup> See *supra* notes 151–175 and accompanying text.

<sup>207</sup> See *supra* notes 176–202 and accompanying text.

# CAPTAIN OF A SHIP OF FOOLS ON A CRUEL SEA: HOW EUROPEAN UNION LEADERSHIP MAY SINK THE PROPOSED ARMS TRADE TREATY

*Adam Arthur Biggs\**

## I. INTRODUCTION

The past century experienced a marked increase in armed conflict from Europe to the farthest parts of Southeastern Asia.<sup>1</sup> At the heart of modern conflict is a particular class of weaponry—small arms and light weapons.<sup>2</sup> Commentators have noted that small arms and light weapons have become widely used by groups involved in conflict; particularly, groups utilizing asymmetric warfare tactics.<sup>3</sup> For example, small arms and light weapons were utilized in the more than fifty inter-state, intra-state, and insurgent conflicts over the past fifteen years.<sup>4</sup> Notably, 90% of deaths in modern conflicts are attributable to the use of small arms and light weapons.<sup>5</sup> As a consequence of wide utilization, these weapons have destabilized governments and strained economic infrastructure.<sup>6</sup> Moreover, the negative effects also include governmental instability, catastrophic healthcare consequences, and environmental degradation.<sup>7</sup> However, it is imperative to recognize that the current global proliferation of small arms and light weapons did not directly ignite the abovementioned conflict and spur the negative effects, but instead simply acted as a fuel source for the conflict.<sup>8</sup> Commentators estimated there are approximately

---

\* J.D., Creighton University School of Law, 2011; B.A., University of Kentucky, 2008.

<sup>1</sup> See Colonel Stuart W. Risch, *Hostile Outsider or Influential Insider? The United States and the International Criminal Court*, ARMY LAW., MAY 2009, at 61, 62 (2009) (discussing the conflicts during that dominated the last century).

<sup>2</sup> Harold Hongju Koh, *A World Drowning In Guns*, 71 FORDHAM L. REV. 2333, 2334 (2003) (discussing the global elements of small arms and light weapons transfers).

<sup>3</sup> See Hugh Griffiths & Adrian Wilkinson, *Guns, Planes and Ships: Identification and Disruption of Clandestine Arms Transfers*, SE. & E. EUROPE CLEARINGHOUSE FOR THE CONTROL OF SMALL ARMS & LIGHT WEAPONS, Aug. 2007, at i (noting the popularity of small arms and light weapons with groups that do not fight using orthodox principles).

<sup>4</sup> *Id.*

<sup>5</sup> Michael Renner, *Small Arms, Big Impact: The Next Challenge of Disarmament*, 137 WORLDWATCH PAPER 1, 5 (1997) (arguing “[b]ut although the firepower, reach, and precision-targeting of . . . major weapons systems dwarf the capacities of [small arms and light weapons], the hundreds of millions of these low-tech, inexpensive, sturdy, and easy-to-use weapons now spread around the world are the tools for most of the killing in contemporary conflicts—causing as much as 90% of the deaths. Though these weapons are small in caliber, they are big, indeed devastating, in their impact.”).

<sup>6</sup> LARRY KAHANER, AK-47: THE WEAPON THAT CHANGED THE FACE OF WAR 171-72 (2007).

<sup>7</sup> *Id.* “[I]t [has] become[] clear that small arms [are] not just about tribal wars. . . . [small arms] enable drug wars, terrorism, and insurgencies. But small arms did much more long-term damage to countries. They increase[d] the worldwide burden on healthcare systems and allow[] the spread of infectious disease by preventing medical caregivers from entering conflicted areas. Excesses of small arms [led] to severe economic consequences by destabilizing governments and destroying economic infrastructure.” *Id.*

<sup>8</sup> Renner, *supra* note 5, at 8. “The proliferation of small arms is the fuel of conflict, not the starter. Widespread unemployment, poverty, social inequality, and the pressure of environmental degradation and the resource depletion in the presence of large quantities of small arms make a highly combustible combination.” *Id.* Specifically, “[M]ilitary weapons and poverty are proving to be a deadly combination.” *Id.* at 24.

639 million small arms and light weapons worldwide.<sup>9</sup> However, this estimate understates the total number of weaponry because of the tens of millions of unregistered weapons.<sup>10</sup>

Currently, “[t]here is one gun for every ten people on the planet. Yet 8 million small arms and light weapons are manufactured each year.”<sup>11</sup> For instance, each year manufacturers produce enough ammunition to execute each person on earth twice.<sup>12</sup> The major producers and exporters of military grade small arms and light weapons are a diverse group, according to the Small Arms Survey.<sup>13</sup> However, the Small Arms Survey also noted that despite the diversity, the trade is dominated by a very limited number of states, including the United States.<sup>14</sup> Harold Hongju Koh, Professor of international law at Yale Law School and Legal Advisor to the United States Department of State, remarked that the arms industry is almost entirely unregulated.<sup>15</sup>

The current regime that regulates the trade in small arms and light weapons is multifaceted.<sup>16</sup> The facets include arms embargoes, international plans of action, and non-binding agreements regulating the sale and transfer of small arms and light weapons.<sup>17</sup> The European Union (“EU”) has strongly supported arms reform initiatives.<sup>18</sup> For instance, the EU promulgated the European Union Code of Conduct on Arms Exports,<sup>19</sup> an international initiative aimed at governing the conduct of states that export arms.<sup>20</sup> Moreover, in 2010, the global community took the first steps towards creating a legally binding treaty to regulate the arms trade.<sup>21</sup> The EU and ninety-four states provided input to the United Nations about how the treaty should be drafted.<sup>22</sup> In doing so, the EU argued to pattern the proposed arms trade treaty after the EU Code of Conduct.<sup>23</sup>

<sup>9</sup> Koh, *supra* note 2, at 2334.

<sup>10</sup> *Id.*

<sup>11</sup> *The Devil’s Bargain* (Bashiri Films 2008) [hereinafter *DEVIL’S BARGAIN*], available at <http://www.youtube.com/watch?v=WrlxhbeyT34>. “[G]lobal annual production of [small arms and light weapons] currently stands at approximately 4.3 million.” Griffiths, *supra* note 3, at 3.

<sup>12</sup> *Devil’s Bargain*, *supra* note 11.

<sup>13</sup> See GRADUATE INST. OF INT’L & DEV. STUD., SMALL ARMS SURVEY 2009 32 (2009) [hereinafter *SMALL ARMS SURVEY*] (presenting empirical data about the 22 largest producers of military grade small arms and light weapons).

<sup>14</sup> *Id.* at 33.

<sup>15</sup> See Koh, *supra* note 2, at 2333, 2339 (explaining how and why the international community neglected to truly regulate the production and exportation of small arms and light weapons).

<sup>16</sup> *At Gunpoint: The Small Arms and Light Weapons Trade*, BROWN J. WORLD AFF., Spring 2002, at 159, 159 [hereinafter *At Gunpoint*].

<sup>17</sup> See Emanuela-Chiara Gillard, *What’s Legal? What’s Illegal*, in *RUNNING GUNS: THE BLACK MARKET IN SMALL ARMS AND LIGHT WEAPONS* 31-45 (1995) (discussing the sources of the law, which govern the transfer of small arms and light weapons).

<sup>18</sup> ELLI KYTÖMÄKI, PROMOTING DISCUSSION ON AN ARMS TRADE TREATY: EUROPEAN UNION—UNIDIR PROJECT 6 (2010), available at <http://www.unidir.org/pdf/activites/pdf18-act431.pdf>.

<sup>19</sup> 2010 O.J. (C21E).

<sup>20</sup> Nicholas Marsh, *Two Sides of the Same Coin? The Legal and Illegal Trade in Small Arms*, BROWN J. WORLD AFF., Spring 2002, at 217, 219.

<sup>21</sup> Edith M. Lederer, *First Steps Toward an Arms Trade Treaty*, BOSTON GLOBE, Jul. 23, 2010, [http://www.boston.com/news/nation/articles/2010/07/23/first\\_steps\\_toward\\_arms\\_trade\\_treaty/](http://www.boston.com/news/nation/articles/2010/07/23/first_steps_toward_arms_trade_treaty/).

<sup>22</sup> See U.N. Secretary-General, *Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 91-92, U.N. Doc. A/62/278 (Part I) (Aug. 17, 2007) [hereinafter *U.N. Responses II*] (providing the views expressed by the EU pertaining to the proposed Arms Trade Treaty).

<sup>23</sup> *Id.*

This Article proceeds in three sections.<sup>24</sup> First, the Article's Background section will explore the mechanisms associated with the global arms trade.<sup>25</sup> In addition, the Background will examine the ideological principles of the EU, particularly the principles of the European Coal and Steel Community.<sup>26</sup> The Background concludes with a discussion of the EU's Code of Conduct, current open market arms policy, and stance on the proposed arms trade treaty.<sup>27</sup>

Second, this Article's Argument section will articulate two major issues pertaining to the EU and arms trade reform efforts.<sup>28</sup> In doing so, the Article will argue that the Code of Conduct is not a proper model upon which to base the proposed arms trade treaty.<sup>29</sup> Moreover, the Article posits that the EU would not make the best proponent for the proposed arms trade treaty because the EU's current common market approach to the arms trade has actually enabled the spread of small arms and light weapons.<sup>30</sup> In doing so, the common market cuts against the ideological underpinnings of the EU.<sup>31</sup> Third, this Article's Conclusion will briefly discuss how the EU could right the ship and aid in arms reform efforts.<sup>32</sup>

## II. BACKGROUND

### A. SMALL ARMS AND LIGHT WEAPONS

The phrase 'small arms and light weapons' escapes a precise definition.<sup>33</sup> Small arms and light weapons are easily held and transported.<sup>34</sup> As a result, some commentators in the field of arms transfers consider small arms and light weapons to normally include arms that can be utilized by a single combatant.<sup>35</sup> Based on this understanding, small arms include sub-machine guns, assault rifles, and handguns.<sup>36</sup> Light weapons include landmines, light mortars, bazookas, rocket-propelled grenades, light anti-tank missiles, shoulder-fired anti-aircraft missiles, and machine guns.<sup>37</sup> Almost any individual can utilize a small arm or light weapon because of their lightweight nature.<sup>38</sup> For example, children throughout the developing world regularly carry

<sup>24</sup> See *infra* notes 34-292 and accompanying text.

<sup>25</sup> See *infra* notes 34-97 and accompanying text.

<sup>26</sup> See *infra* notes 98-108 and accompanying text.

<sup>27</sup> See *infra* notes 109-88 and accompanying text.

<sup>28</sup> See *infra* notes 188-278 and accompanying text.

<sup>29</sup> See *infra* notes 197-240 and accompanying text.

<sup>30</sup> See *infra* notes 197-240 and accompanying text.

<sup>31</sup> See *infra* notes 241-78 and accompanying text.

<sup>32</sup> See *infra* notes 279-92 and accompanying text.

<sup>33</sup> Renner, *supra* note 5, at 10.

<sup>34</sup> Michael Klare, *The Kalashnikov Age*, 55 THE BULLETIN OF ATOMIC SCIENTISTS, Jan. 1999, at 18, 20 available at <http://bos.sagepub.com/content/55/1/18.full.pdf+html> [hereinafter *AK Age*]. "[Small arms and light weapons] are easy to hide and carry. A single pack-horse can carry a dozen or so rifles through dense jungles over high mountain passes, bypassing government checkpoints; a column of horses can supply a small army." *Id.* at 20-21.

<sup>35</sup> Aaron Karp, *Small Arms – The New Major Weapons*, in LETHAL COMMERCE 17, 23 (Jeffery Boutwell et al eds., 1995).

<sup>36</sup> Michael Klare, *The Global Trade in Light Weapons and the International System in the Post-Cold War Era*, in LETHAL COMMERCE 33 (1995) (explaining the various types of weapons normally considered small arms).

<sup>37</sup> *Id.*

<sup>38</sup> See Koh, *supra* note 2, at 2335 (explaining that small arms and light weapons are widely utilized by both children and adults). For example, the Avtomat Kalashnikova 47 assault rifle, as known as the AK-47, a weapon classified as a small arms and light weapon, weighs only 4.3 Kilograms. See RACHEL J. STOHL ET AL., *THE SMALL ARMS TRADE: A BEGINNER'S GUIDE* xxviii (2007) (providing a graphical breakdown of the statistics boasted by the AK-47).

small arms and light weapons.<sup>39</sup> Consequently, an estimated 250,000 children have fought in modern conflict.<sup>40</sup>

In addition to weight, small arms and light weapons achieved prominence in conflict for a plethora of reasons.<sup>41</sup> These reasons include: low cost, deadly capacities, simplistic design, and resilience.<sup>42</sup> First, small arms and light weapons are cheap and widely available.<sup>43</sup> The current arms trade is influenced only by the principles of supply and demand.<sup>44</sup> For example, the conclusion of the Cold War dumped millions of weapons upon the world market.<sup>45</sup> Developing states, such as Afghanistan, were inundated with a flood of weaponry.<sup>46</sup> Afghanistan is currently the world's leader in unaccounted for weaponry, boasting an estimated 10 million un-accounted for small arms.<sup>47</sup> As a consequence of the supply of small arms in Afghanistan, the price of an AK-47 has plummeted to around \$10.<sup>48</sup> Additionally, portions of Africa are so inundated with small arms that weapons can be purchased for the same price as a sack of corn—around \$15.<sup>49</sup> The low cost makes small arms affordable to a wider range of users, including many non-state groups.<sup>50</sup>

Second, small arms and light weapons are deadly.<sup>51</sup> Annually, small arms and light weapons facilitate the killing of approximately five-hundred thousand people.<sup>52</sup> An assault rifle can discharge hundreds of rounds per minute, making it possible for a low number of combatants to cause massive carnage.<sup>53</sup> Small arms expel ammunition at such a great velocity that any contact with the human body produces death or massive trauma.<sup>54</sup> The 2008 attacks in Mumbai, India illustrate the amount of damage a small group can inflict with small arms.<sup>55</sup> During the attacks, ten assault-rifle toting Pakistani terrorists, associated with *Lashkar-e-Taiba*, were able to

---

<sup>39</sup> *Id.* “Many small weapons are so lightweight and can be assembled and reassembled with such ease that children as young as 10 years old can use them. While the phenomenon of child soldiers is not a new one, the easy availability of lightweight arms in the contemporary era has boosted the ability of children to participate in armed conflicts.” Renner, *supra* note 5, at 11.

<sup>40</sup> Renner, *supra* note 5, at 12; Koh, *supra* note 2, at 2335.

<sup>41</sup> *AK Age*, *supra* note 34, at 20.

<sup>42</sup> Rachel Stohl, *Reality Check: The Danger of Small Arms Proliferation*, 6 *GEO. J. INT’L AFF.* 71, 73 (2005) [hereinafter *Reality Check*].

<sup>43</sup> *AK Age*, *supra* note 34, at 20.

<sup>44</sup> Griffiths, *supra* note 3, at 4 (commenting that as result of the unregulated aspects of the arms trade, the only true regulation lies in market forces).

<sup>45</sup> *AK Age*, *supra* note 34, at 20.

<sup>46</sup> See Koh, *supra* note 2, at 2336 (discussing the global diffusion of small arms and light weapons throughout the world – including Afghanistan).

<sup>47</sup> *Id.* However, the population of Afghanistan is only around 29 million. CIA – THE WORLD FACTBOOK, <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html> (last visited Mar. 16, 2011).

<sup>48</sup> STOHL, *supra* note 38, at 12.

<sup>49</sup> Koh, *supra* note 2, at 2336.

<sup>50</sup> Renner, *supra* note 5, at 11. “For just \$50 million—roughly the cost of a single modern jet fighter—one could equip a small army with some 200,000 assault rifles at today’s ‘fire-sale’ prices.” *Id.*

<sup>51</sup> See Karp, *supra* note 3, at 179 (discussing the global reaction to the enormous loss of life associated with the use of small arms and light weapons).

<sup>52</sup> *Id.*

<sup>53</sup> *AK Age*, *supra* note 34, at 21.

<sup>54</sup> *Id.*

<sup>55</sup> See Mail Foreign Service, *Sentenced to Death, the Baby-Faced Mumbai Gunman Guilty of Massacre that Killed 166 People*, THE DAILY MAIL, <http://www.dailymail.co.uk/news/worldnews/article-1273592/Mumbai-gunman-Mohammad-Ajmal-Kasab-sentenced-death-2008-massacre.html> (last updated May 7, 2010) (describing the event surrounding the event of the November 26th, 2008 terrorist attack in Mumbai).



kill over 166 people in a series of calculated attacks upon hotels, a train station, and a Jewish-center.<sup>56</sup>

Third, small arms and light weapons can be easily operated.<sup>57</sup> Small arms, unlike major weapons systems, do not require substantial upkeep, logistics, support, or instruction.<sup>58</sup> Children understand how to use small arms with sickening ease.<sup>59</sup> Even a five-year-old child understands how to point an assault rifle and pull the trigger.<sup>60</sup>

Fourth, small arms and light weapons are resilient.<sup>61</sup> For example, Colonel David H. Hackworth, United States Army Colonel, once noted he was able to fire thirty rounds from an assault rifle he found buried underground.<sup>62</sup> Despite the fact that the weapon was underground for at least a year, it fired as if recently serviced.<sup>63</sup> Small arms and light weapons last for decades because of their resilient nature.<sup>64</sup> At the end of a conflict, small arms do not become obsolete.<sup>65</sup> The weapons are often transferred or sold by combatants in the concluding conflict to combatants in a fresh conflict.<sup>66</sup> For instance, U.S. weapons left in Vietnam were recycled to conflicts in the Middle East and Central America.<sup>67</sup> The notion that weapons are often transferred from conflict to conflict is illustrated by the New York Times' recent report that Marines in Afghanistan found a *Taliban* gun cache containing western style weapons dating back as far as 1915.<sup>68</sup>

#### B. THE SMALL ARMS AND LIGHT WEAPONS TRADE

Demand for small arms and light weapons is met through different mechanisms.<sup>69</sup> Small arms and light weapons are traded through one of three distinct channels: white market, grey market, and black market transfers.<sup>70</sup> White market transfers involve sales between governments, which conform to international and national law.<sup>71</sup> Normally, these transfers take

<sup>56</sup> *Id.*

<sup>57</sup> Koh, *supra* note 2, at 2335.

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

<sup>61</sup> *Id.* at 2337.

<sup>62</sup> See KAHANER, *supra* note 6, at 52 (noting the story of servicepersons in Vietnam using weapons that were badly soiled).

Colonel David H. Hackworth told the story of bulldozers during a base construction project uncovering a buried Vietcong soldier and his AK. Hackworth yanked the weapons out of the mud and pulled back the bolt. "Watch this," he said. "I'll show you how a real infantry weapon works." With that he fired off thirty rounds as if the rifle had been cleaned that morning instead of being buried for a year.

*Id.*

<sup>63</sup> *Id.*

<sup>64</sup> See Renner, *supra* note 5, at 36-38 (arguing that because of the resilient nature of small arms and light weapons weaponry can circumnavigate the globe jumping from on conflict to another).

<sup>65</sup> See *id.* (noting the recycling of weapons after conflict to other conflicts).

<sup>66</sup> See *id.* (discussing the life cycle of a small arms and light weapon).

<sup>67</sup> *Id.* at 39.

<sup>68</sup> See C. J. Chivers, *What's Inside a Taliban Gun Locker?*, N.Y. TIMES, Sept. 15, 2010, <http://atwar.blogs.nytimes.com/2010/09/15/whats-inside-a-taliban-gun-locker/> (explaining that weapons found by the Marines dated back to as far as 1915).

<sup>69</sup> See *infra* notes 70-73 and accompanying text.

<sup>70</sup> STOHL, *supra* note 38, at 13.

<sup>71</sup> MIKE BOURNE, *ARMING CONFLICT: THE PROLIFERATION OF SMALL ARMS* 31 (2007).

the form of either government-to-government transfers or commercial sales negotiated by private entities.<sup>72</sup> Commentators remarked that despite the legal nature of white market transfers little data is available pertaining to these transfers.<sup>73</sup>

Grey market transfers are accomplished by exploiting loopholes in international and national law.<sup>74</sup> Grey market transfers involve sales between states and non-states.<sup>75</sup> Grey market transfers begin with groups that can legally transfer arms, and result in unauthorized recipients receiving arms.<sup>76</sup> Transfers from states to insurgent or rebel groups are common forms of grey market transfers.<sup>77</sup> For example, Iran is known to transfer weapons to fuel Kurdish insurgencies.<sup>78</sup> Similarly, Pakistan armed Kashmiri rebels in India.<sup>79</sup> A degree of secrecy is inherent in the nature of grey market transfers.<sup>80</sup> As a result, very little information is known about the grey market.<sup>81</sup>

Black market transfers involve sales of arms in violation of international standards.<sup>82</sup> Brokers, also known as *merchants of death*, supply illegal groups with small arms and light weapons.<sup>83</sup> In exchange for a fee, brokers organize arms transfers among parties.<sup>84</sup> Brokers connect arms-buyers, arms-sellers, and transport companies.<sup>85</sup> Brokers arrange deals especially when the parties to a transaction are separated by culture, political ideology, or geography differences.<sup>86</sup> Basically, brokers serve as the direct link between groups and the international small arms and light weapons market.<sup>87</sup>

Brokers often allow arms transfers to merge and traverse between the legal and illegal market in order to disguise the illegal transfer.<sup>88</sup> Arms brokering is a lucrative business with little risk if a broker is careful to commingle legal arms with illegal arms.<sup>89</sup> Commentators have noted that illegal arms brokering over an extended period of time pays more than smuggling other contraband items, such as drugs, because the risk of getting caught is much less and the

<sup>72</sup> Renner, *supra* note 5, at 32.

<sup>73</sup> See, e.g., *id.* (criticizing the fact that even though white market transfers are legal in nature very little information is made available to researchers and the public at-large to promote transparency and accountability in the field of arms transfers).

<sup>74</sup> STOHL, *supra* note 38, at 13. “Insurgent groups and embargoed governments are often the recipients of grey market transfers. *Id.* The line between white and grey market sales is often blurry. *Id.* For example, covert sales may be government sponsored but nonetheless violate international law, defy UN arms embargoes, or ignore national policy.” *Id.*

<sup>75</sup> BOURNE, *supra* note 71, at 31; STOHL, *supra* note 38, at 13.

<sup>76</sup> STOHL, *supra* note 38, at 13.

<sup>77</sup> *Id.*

<sup>78</sup> Renner, *supra* note 5, at 33.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 32.

<sup>81</sup> *Id.*

<sup>82</sup> BOURNE, *supra* note 71, at 31.

<sup>83</sup> Kathi Austin, *Illicit Arms Broker: Aiding and Abetting Atrocities*, BROWN J. WORLD AFF., Spring 2002, at 203, 204; see also Denise Garcia, *Arms Transfers beyond the State-To-State Realm*, 10 INT’L STUD. PERSP. 151, 151 (2009) (discussing weapons transfers to non-state groups throughout the world).

<sup>84</sup> Brian Wood & Johan Peleman, *Making the Deal and Moving the Goods—the Role of Shippers and Brokers*, in RUNNING GUNS: THE GLOBAL BLACK MARKET IN SMALL ARMS 129, 129 (Lora Lumpe ed. 2000).

<sup>85</sup> *Id.*

<sup>86</sup> *Id.*

<sup>87</sup> BOURNE, *supra* note 71, at 115.

<sup>88</sup> Griffiths, *supra* note 3, at ii.

<sup>89</sup> *Id.*

same transit procedures used for illegal arms can be used to transport legitimate goods.<sup>90</sup> In addition to mixing legal weapon transfers with illegal weapons, brokers often disguise illegal weapons as innocent items.<sup>91</sup> For example, brokers hid weapons intended for guerilla fighters in Columbia amongst a shipment of produce.<sup>92</sup> Grenades were codenamed pineapples, ammunition codenamed food, and money for payment codenamed lettuce.<sup>93</sup> Along the same lines, brokers utilized aid shipments to Africa to hide illegal arms.<sup>94</sup> This tactic in particular has exacerbated the problems associated with the militarization of refugee camps—a pressing issue facing the global community.<sup>95</sup> Brokers understand that if they follow well-established practices they will likely not be noticed by authorities.<sup>96</sup> Nevertheless, brokers understand that if apprehended the likelihood of being prosecuted is minimal.<sup>97</sup>

### C. THE EUROPEAN UNION: A UNION CREATED TO COMBAT ARMS PROLIFERATION

In the aftermath of World War II, Europeans were resolute to avert such killing and destruction in the future.<sup>98</sup> In 1949, several Western European States formed the Council of Europe.<sup>99</sup> In addition, six states, under the Schuman plan, cooperated further and began the formation of the European Coal and Steel Community.<sup>100</sup> The underlying purpose of the Coal and Steel Community was the collective management of the heavy industries of coal and steel.<sup>101</sup> The Coal and Steel Community was aimed at regulating the materials necessary to create weaponry; as a result no single state could unilaterally create weapons to turn against the others.<sup>102</sup>

In 1951, the states formally created the European Coal and Steel Community.<sup>103</sup> The Community was viewed as a bold step forward in the realm of cooperative international governance.<sup>104</sup> Subsequently, in February 1953, the common market for coal and steel began.<sup>105</sup> The transition marked the first time highly complex modern national economies voluntarily merged.<sup>106</sup> The transition resulted in six states ceding large parts of their sovereignty in order to

---

<sup>90</sup> See *id.* (arguing that the mixing of legal and illegal arms make any regulation effort almost impossible).

<sup>91</sup> STOHL, *supra* note 38, 19.

<sup>92</sup> *Id.*

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> See ROBERT MUGGAH, NO REFUGEE: THE CRISIS OF REFUGEE MILITARIZATION IN AFRICA 15-20 (2006) (discussing the problems pertaining to refugees in African conflict zones gaining small arms and light weapons). “[I]n too many refugee camps there are people with guns. The mere presence of guns turns refugee camps from safe havens in oppressive centers for persecution, as well as for impressing and recruiting child soldiers.” Koh, *supra* note 2, at 2339.

<sup>96</sup> Griffiths, *supra* note 3, at ii.

<sup>97</sup> *Id.*

<sup>98</sup> *The History of the European Union*, EUROPA.EU, [http://europa.eu/abc/history/1945-1959/index\\_en.htm](http://europa.eu/abc/history/1945-1959/index_en.htm) [hereinafter *History of the European Union*] (last visited March 11, 2011).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* These states were the Netherlands, France, Italy, Germany, Belgium, and Luxembourg. *Id.*

<sup>101</sup> *Id.*

<sup>102</sup> See *id.* (noting that the states that formed the Coal and Steel Community sought to prevent one nation again from arming and plunging the entire continent back into war).

<sup>103</sup> Heinz L. Kerkeler, *European Integration*, 47 AM. SOC'Y INT'L L. PROC. 166, 166 (1953).

<sup>104</sup> W. Freidmann, *The European Steel and Coal Community*, 10 INT'L J. 12, 17 (1954).

<sup>105</sup> Kerkeler, *supra* note 103, at 166.

<sup>106</sup> *Id.*

combat a common problem.<sup>107</sup> The ultimate goal of the Coal and Steel Community was to stop the proliferation of weaponry, which could enable one state to again plunge the continent back into war.<sup>108</sup>

#### D. THE EUROPEAN UNION'S APPROACH TO THE ARMS TRADE

##### 1. *The European Union's Common Market Approach to the Arms Trade*

The creation of a common market of goods within Europe is one underlying principle of the European Union ("EU").<sup>109</sup> Later, the EU expanded the notion of the common market to include people, services, and capital.<sup>110</sup> Collateral to the common market, the EU adopted policies aimed at liberalizing world trade.<sup>111</sup> The EU set out to eradicate any item it equated to a trade barrier in order to liberalize external trade.<sup>112</sup> During the liberalization process, the European Commission proposed a directive to simplify arms transfers between Member States.<sup>113</sup> Defense products, including small arms and light weapons, are among the items that freely move within the EU.<sup>114</sup>

The EU utilized a two-tiered approach in order to eradicate all hindrance to the transfer of arms within the EU.<sup>115</sup> First, to simplify intra-community transfers, the EU encouraged the use of general and global licenses for small arms and light weapons.<sup>116</sup> The approach entailed certifying individuals who deal in small arms and light weapons, which eradicated the need for multiple licensing requirements.<sup>117</sup> Second, in order to harmonize EU transfer policy, the directive required the establishment of a general licensing system for transfers to the armed forces of the member States and to certain companies.<sup>118</sup> As a result of this directive many

<sup>107</sup> *Id.* at 167; *History of European Union*, *supra* note 98.

<sup>108</sup> *History of European Union*, *supra* note 98.

<sup>109</sup> *See id.* (articulating that "[community members eventually] sign[ed] the Treaty of Rome, creating the European Economic Community (EEC), or 'common market'. The idea [was] for people, goods and services to move freely across borders.").

<sup>110</sup> *See* Consolidated Version of the Treaty on the Functioning of the European Union art. 26, Sept. 5, 2008, 2008 O.J. (C 115) 59 [hereinafter *TFEU*] (stating, "The internal market shall comprise an area without internal frontiers in which the free movement of goods, persons, services and capital is ensured in accordance with the provisions of the Treaties.").

<sup>111</sup> *External Trade*, EUROPA.EU, [http://europa.eu/pol/comm/index\\_en.htm](http://europa.eu/pol/comm/index_en.htm) [hereinafter *EU External Trade*] (last visited March 11, 2011).

<sup>112</sup> *See TFEU* art. 34 (stating, "Quantitative restrictions on imports and all measures having equivalent effect shall be prohibited between member states."); *see also TFEU* art. 35 (stating, "Quantitative restrictions on exports, and all measures having equivalent effect, shall be prohibited between member states.").

<sup>113</sup> SMALL ARMS SURVEY, *supra* note 13, at 77.

<sup>114</sup> *Id.*; *See generally* Kristin Ashley Tessman, *A Bright Day For The Black Market: Why Council Directive 2008/51/EC Will Lose The Battle Against Illicit Firearm Trade In The European Union*, 38 GA. J. INT'L & COMP. L. 237 (2009) (discussing how the liberalization of the firearms trade within the EU has exacerbated the problems associated with the black market trade in firearms).

<sup>115</sup> SMALL ARMS SURVEY, *supra* note 13, at 77. "First, in order to simplify intra-community transfers, [the EU] encourages the use of general and global licences [sic] for transfers of defense products . . . . Second, in order to harmonize EU transfer policies, the directive requires states to establish general licensing systems for transfers to the armed forces of EU member states and to certified companies in other EU countries." *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

Member States eliminated all forms of transfer licensing for other Member States.<sup>119</sup> For instance, several Scandinavian states exempt *all* transfers to EU or North Atlantic Treaty Organization Member States from *all* export licensing requirements.<sup>120</sup>

## 2. *The European Union Code of Conduct on Arms Exports*

The European Union Code of Conduct on Arms Exports<sup>121</sup> (“Code of Conduct”) is an international scheme to control the conduct of arms exporters.<sup>122</sup> First, the Code of Conduct requested that Member States make export decisions based upon eight criteria.<sup>123</sup> Second, the Code of Conduct requested that Member States communicate with one another to ensure real time information is available during the export license decision-making process.<sup>124</sup>

The Code of Conduct’s first criterion suggested that the Member States consider if weapons transfers would violate any current international obligations.<sup>125</sup> For instance, the Code of Conduct instructed Member States that transfers should be refused if a transfer violates a United Nations arms embargo.<sup>126</sup> Member States should refuse a transfer if the transfer violates one of the many weapons non-proliferation treaties the European Union (“EU”) signed.<sup>127</sup>

The second criterion suggested the Member State to assess the recipient state’s human rights condition.<sup>128</sup> The EU desired Member States to deny all transfers that would likely result in oppression in the importing state.<sup>129</sup> The Member State should consider whether the following items are present when assessing the human rights condition: torture, other cruel, inhuman and degrading treatment or punishment, arbitrary executions, disappearances, irrational detentions, and other major human rights violations.<sup>130</sup>

<sup>119</sup> See, e.g., *Id.* at 78 (providing an example of Member States that exempt arm transfers from export licensing, including Spain, Bulgaria, and the Czech Republic).

<sup>120</sup> See *id.* (explaining that some states exempt transfers from regulation based upon the importer or end-use).

<sup>121</sup> Union Code of Conduct on Arms Exports, 2010 OJ (C 21E) [hereinafter Code of Conduct] available at [http://ec.europa.eu/external\\_relations/cfsp/sanctions/codeofconduct.pdf](http://ec.europa.eu/external_relations/cfsp/sanctions/codeofconduct.pdf).

<sup>122</sup> Marsh, *supra* note 20, at 219.

<sup>123</sup> Code of Conduct, *supra* note 121.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 3.

Respect for the international commitments of EU Member States, in particular the sanctions decreed by the UN Security Council and those decreed by the Community, agreements on non-proliferation and other subjects, as well as other international obligations. An export licence [sic] should be refused if approval would be inconsistent with, inter alia:

- a) the international obligations of Member States and their commitments to enforce UN, OSCE and EU arms embargoes;
- b) the international obligations of Member States under the Nuclear Non-Proliferation Treaty, the Biological and Toxin Weapons Convention and the Chemical Weapons Convention;
- c) the commitments of Member States in the framework of the Australia Group, the Missile Technology Control Regime, the Nuclear Suppliers Group and the Wassenaar Arrangement;
- d) their commitment of Member States not to export any form of anti-personnel landmine.

*Id.* at 3.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> Marsh, *supra* note 20, at 220.

<sup>129</sup> See *Code of Conduct*, *supra* note 121, at 4 (articulating that Member States must determine if the weapons may possibly be used for repressive purposes).

<sup>130</sup> *Id.*

The third and fourth criteria requested the exporting Member State to examine any armed conflict present in the recipient state.<sup>131</sup> The Code of Conduct desired Member States to deny exports to states embroiled in armed conflict.<sup>132</sup> Moreover, if the recipient state was likely to use the weapons to destabilize the region or incite conflict, then the Member State should deny the transfer.<sup>133</sup> When considering the risk of regional instability, the Member State must consider whether the recipient acted aggressively towards regional neighbors in the past.<sup>134</sup> Also, the Member State must determine if the weapons will be used by the recipient for legitimate national security and defense.<sup>135</sup>

The fifth criterion suggested that Member States consider how the transfer affects allies of the Member State.<sup>136</sup> Member States must consider whether the export comports with their allies' defense and security interests.<sup>137</sup> In doing so, Member States should consider if the weapons, could at some point, be used against an ally.<sup>138</sup>

The sixth criterion suggested that Member States examine a recipient state's attitude towards terrorism.<sup>139</sup> In doing so, the Member State should conduct an investigation into the behavior of the buyer.<sup>140</sup> Along the same lines, criterion six also asked Member States to examine the recipient state's dedication towards non-proliferation and disarmament.<sup>141</sup> Moreover, the Member States should note the recipient state's compliance with international humanitarian law.<sup>142</sup>

---

<sup>131</sup> Marsh, *supra* note 20, at 220.

<sup>132</sup> *Code of Conduct*, *supra* note 121, at 4.

<sup>133</sup> *Id.* at 5.

<sup>134</sup> *Id.*

When considering these risks, Member States will take into account inter alia:

- a) the existence or likelihood of armed conflict between the recipient and another country;
- b) a claim against the territory of a neighbouring [sic] country which the recipient has in the past tried or threatened to pursue by means of force;
- c) whether the equipment would be likely to be used other than for the legitimate national security and defence [sic] of the recipient;
- d) the need not to affect adversely regional stability in any significant way.

*Id.*

<sup>135</sup> *Code of Conduct*, *supra* note 121, at 4-5.

<sup>136</sup> *Id.* at 5-6.

<sup>137</sup> *See id.* (discussing that the exporting nation should consider the security interests of allies before authorizing a transfer).

<sup>138</sup> *Id.*

<sup>139</sup> *Id.* at 6.

Member States will take into account inter alia the record of the buyer country with regard to:

- a) its support or encouragement of terrorism and international organized crime;
- b) its compliance with its international commitments, in particular on the non-use of force, including under international humanitarian law applicable to international and non-international conflicts;
- c) its commitment to non-proliferation and other areas of arms control and disarmament, in particular the signature, ratification and implementation of relevant arms control and disarmament conventions referred to in sub-para b) of Criterion One.

*Id.*

<sup>140</sup> *See id.* (explaining the multifaceted investigation process that must be undertaken in order to make a determination, as to the attitudes of the buyer).

<sup>141</sup> *Id.*

<sup>142</sup> *Id.*

The seventh criterion requested that Member States assess the potential risk that the weapons may be diverted inside the recipient state to undesirable end-users.<sup>143</sup> Member States must consider if the recipient state has effective controls to keep weapons from objectionable end-users.<sup>144</sup> The Member State must also consider the recipient state's capability to use the technology.<sup>145</sup> In particular, the Member State should carefully consider the export of anti-terrorist technologies.<sup>146</sup>

Finally, the eighth criterion suggested that Member States consider whether the proposed weapons export would seriously obstruct the sustainable development of the recipient state.<sup>147</sup> The Member State must look at the economic and technological development of the state.<sup>148</sup> Member States can accomplish this through analyzing data provided by the International Monetary Fund, United Nations Development Programme, and World Bank.<sup>149</sup> Member States should consider the desirability of the recipient state to achieve their legitimate needs of security and defense against the risk of weapons diversion.<sup>150</sup>

The Code of Conduct is a non-binding agreement.<sup>151</sup> The EU has articulated that the Code of Conduct must not jeopardize any Member State's ability to transfer weapons.<sup>152</sup> As

---

<sup>143</sup> *Id.* at 7.

The existence of a risk that the equipment will be diverted within the buyer country or re-exported under undesirable conditions. In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered:

- a) the legitimate defence [sic] and domestic security interests of the recipient country, including any involvement in UN or other peace-keeping activity;
- b) the technical capability of the recipient country to use the equipment;
- c) the capability of the recipient country to exert effective export controls;
- d) the risk of the arms being re-exported or diverted to terrorist organisations [sic] (anti-terrorist equipment would need particularly careful consideration in this context).

*Id.*

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *Id.* The concern of diversion is paramount when dealing with anti-terrorism technologies. *Id.*

<sup>147</sup> *Id.*

The compatibility of the arms exports with the technical and economic capacity of the recipient country, taking into account the desirability that states should achieve their legitimate needs of security and defence [sic] with the least diversion for armaments of human and economic resources Member States will take into account, in the light of information from relevant sources such as UNDP, World Bank, IMF and OECD reports, whether the proposed export would seriously hamper the sustainable development of the recipient country. They will consider in this context the recipient country's relative levels of military and social expenditure, taking into account also any EU or bilateral aid.

*Id.*

<sup>148</sup> *Id.*

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> Alexandra Boivin, *Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons*, 87 INT'L REV. OF THE Red Cross 467, 486 (2005) (describing how the Code of Conduct is only politically binding); Marsh, *supra* note 20, at 220.

<sup>152</sup> See *Code of Conduct*, *supra* note 121, at 7 (noting that the Code of Conduct was not meant to usurp the abilities of the states to make transfers).

such, the Code of Conduct does not delineate *any* punishments for a violation.<sup>153</sup> Moreover, the Code of Conduct does not curtail the defense industry of Member States.<sup>154</sup>

#### E. THE ARMS TRADE TREATY

The European Union (“EU”) is not the only institution to promulgate regulatory schemes to restrain the proliferation of arms.<sup>155</sup> Specifically, the global community’s major focus has been preventing the spread of chemical, nuclear, and biological weapons.<sup>156</sup> In order to regulate major weapons systems, the global community engaged in discourse to establish regulatory and reform schemes.<sup>157</sup> Small arms and light weapons were absent from the resulting control framework.<sup>158</sup>

In the 1990s, a focus upon micro-disarmament supplemented major weapons regulation.<sup>159</sup> Micro-disarmament concentrated on the reduction of readily available, cheap, and highly lethal weapons that kill thousands of people every day.<sup>160</sup> Originally, micro-disarmament focused only on curtailing the use and manufacture of anti-personnel landmines.<sup>161</sup> However, slowly the global community, along with non-governmental organizations, took aim at the current proliferation of small arms and light weapons.<sup>162</sup>

Recently, many states recommended the abandonment of the current structure and advocated for the establishment of a framework of controls built upon a universal set of factors, which would be consistent with international law.<sup>163</sup> In December 2006, the United Nations General Assembly proposed a binding framework to help stem the problems associated with small arms and light weapons.<sup>164</sup> The United Nations, in initiating the process, called for the convening of governmental experts to discuss the feasibility of an arms trade treaty.<sup>165</sup>

The United Nations requested the perspectives of Member States on the scope, feasibility, and possible parameters of an arms trade treaty.<sup>166</sup> The United Nations requested Member States

<sup>153</sup> See *id.* (providing no repercussions for the violation of the Code of Conduct).

<sup>154</sup> See *id.* (Acknowledging the wish of “EU Member States to maintain a defence [sic] industry as part of their industrial base as well as their defence [sic] effort.”).

<sup>155</sup> See Gillard, *supra* note 17, at 31-39 (noting the various institutions that institute prohibitions upon arms transfers).

<sup>156</sup> *Id.*

<sup>157</sup> *Id.*

<sup>158</sup> See STOHL, *supra* note 38, at 39 (discussing the former legal regimes, which neglected small arms).

<sup>159</sup> *At Gunpoint*, *supra* note 16, at 159.

<sup>160</sup> *Id.*

<sup>161</sup> See Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction art. 5, Dec. 3, 1997, 2056 U.N.T.S. 211 (articulating the aims of micro-disarmament, specifically the eradication of landmines).

<sup>162</sup> See STOHL, *supra* note 38, at 39 (explaining how non-governmental organizations and the United Nations have shifted their focus from major weapons systems towards small arms and gun control since 1997).

<sup>163</sup> See David Kopel, ET. AL., *The Arms Trade Treaty: Zimbabwe, the Democratic Republic of the Congo, and the Prospects for Arms Embargoes on Human Rights Violators*, 114 PENN. ST. L. REV. 891, 893-94 (2010) (discussing the road leading up to the proposal of the Arms Trade Treaty).

<sup>164</sup> See G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 6, 2006) (describing the UN’s commitment to forging a workable standard for small arms and light weapons transfers).

<sup>165</sup> *Id.* at 2.

<sup>166</sup> U.N. Secretary-General, *Towards an Arms Trade Treaty: Establishing Common International Standards for the Import, Export and Transfer of Conventional Arms*, 3, U.N. Doc. A/62/278 (Part I) (Aug. 17, 2007) [hereinafter *U.N. Responses I*].



reflect on the features that might contribute to the development and acceptance of an arms trade treaty.<sup>167</sup> Subsequently, the EU, along with ninety-four states, tendered views to the United Nations.<sup>168</sup>

The EU noted it was receptive to the possibility of a legally binding arms trade treaty.<sup>169</sup> The EU articulated that the treaty was of “great importance.”<sup>170</sup> However, the EU conceded the United Nations was the only forum capable of producing a universal instrument.<sup>171</sup> The EU continued its response by sharing its opinions on a proposed arms trade treaty.<sup>172</sup>

First, the EU articulated the feasibility and urgent need for an arms treaty.<sup>173</sup> The EU also stated that, as a result of current responsibilities of Member States under international law, solid ground existed for the creation of such a treaty.<sup>174</sup> The EU noted that the absence of a framework contributes to conflicts, dislocation of people, and terrorism.<sup>175</sup> In the EU’s opinion, the lack of workable framework undermined peace, understanding, security, stability, and development.<sup>176</sup>

The EU articulated that the arms trade treaty should integrate many of the aspects featured in the Code of Conduct.<sup>177</sup> According to the EU, the treaty must provide clear definitions of the weapons and transactions within the arms trade treaty’s purview.<sup>178</sup> For example, the EU noted that the European Union Common Military List contained weapons ranging from small arms to components specially engineered for military use.<sup>179</sup> Additionally, the EU wanted to include equipment and technology for the production of arms.<sup>180</sup>

Moreover, The EU expressed that an arms trade treaty should include a thorough set of criteria that an arms exporter must consider before a transfer is authorized.<sup>181</sup> The criteria would guide export-licensing officials.<sup>182</sup> Amongst the criteria were respect for United Nation’s sanctions, respect for human rights in the country of end-use, critical inquiry into the political environment in the country of end-use, promotion of peace, the state’s legitimate security

---

<sup>167</sup> *Id.*

<sup>168</sup> *Id.*; see also *A Global Arms Trade Treaty: What States Want*, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/document.php?lang=e&id=ENGPOL340042007> (last visited Mar. 22, 2011) (noting that the global community desires and needs a “legally binding instrument”), *Arms Trade Treaty: What We Want*, CONTROLARMS, <http://www.controlarms.org/en/arms-trade-treaty> (last visited Mar. 22, 2011) (articulating that in order to ensure global peace the Arms Trade Treaty Must be “a legally binding international instrument, which will draw together and consolidate states’ current obligations under international law”).

<sup>169</sup> *U.N. Responses II, supra* note 22.

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Id.*

<sup>173</sup> *Id.* “The European Union feels that a binding universal instrument is not only feasible, but urgently needed.” *Id.*

<sup>174</sup> *Id.*

<sup>175</sup> *Id.* at 92.

<sup>176</sup> *Id.* at 91-92.

<sup>177</sup> See *id.* at 92 (arguing for the adoption of the Code of Conduct and listing the provisions of the Code).

<sup>178</sup> See *id.* (noting “[i]n order to be effective, an international instrument needs clear definitions of the goods and transactions to be covered.”).

<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> See *id.* (describing the EU’s proposal to have a detailed set of criteria provide guidance to import and export officials).

<sup>182</sup> *Id.*

interests, the buyer's behavior, and the risk of diversion.<sup>183</sup> The EU contended that these criteria did not deprive national governments of the ultimate ability to import or export weaponry.<sup>184</sup>

In closing, the EU's response noted a commitment to future participation and consultation in the process leading to an arms trade treaty.<sup>185</sup> The EU also called upon other Member States of the United Nations to participate in the negotiation of an arms trade treaty.<sup>186</sup> Finally, the EU noted that an international weapons export control framework can have a major impact on stability, security, and sustainable development.<sup>187</sup>

### III. ARGUMENT

In the coming years, the global community plans to draft an arms trade treaty to regulate the small arms and light weapons trade.<sup>188</sup> The European Union ("EU") has noted that it would like to continue to participate in the consultation process to produce the proposed treaty.<sup>189</sup> During the preliminary drafting process, the EU tendered its views about the treaties possible parameters.<sup>190</sup> The EU proposed patterning the treaty's parameters after the European Union Code of Conduct on Arms Exports<sup>191</sup> ("Code of Conduct").<sup>192</sup> The EU's proposals and policies are problematic for two reasons.<sup>193</sup> First, patterning the proposed arms trade treaty after the Code of Conduct would produce an ineffective document because the Code of Conduct is analytically feeble.<sup>194</sup> Second, allowing the EU to steer the drafting process is problematic because the EU's current common market policy, pertaining to small arms and light weapons, has encouraged weapons proliferation.<sup>195</sup> As a result, applying common market principles to the transfer of weapons is in direct contradiction to the underlying principles of the EU aimed at curtailing the illegal arms trade.<sup>196</sup>

---

<sup>183</sup> *Id.* at 92.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 93.

<sup>186</sup> *Id.* "We reiterate our call upon all States Members of the United Nations to actively engage in the negotiations for an arms trade treaty." *Id.*

<sup>187</sup> *Id.*

<sup>188</sup> See G.A. Res. 61/89, U.N. Doc. A/RES/61/89 (Dec. 6, 2006) (noting the commitment of the global community to produce a binding instrument to regulate the arms trade).

<sup>189</sup> *U.N. Responses II, supra* note 22, at 92.

<sup>190</sup> *Id.* at 90.

<sup>191</sup> Union Code of Conduct on Arms Exports, 2010 OJ (C 21E) [hereinafter Code of Conduct] available at [http://ec.europa.eu/external\\_relations/cfsp/sanctions/codeofconduct.pdf](http://ec.europa.eu/external_relations/cfsp/sanctions/codeofconduct.pdf).

<sup>192</sup> See *id.* at 92 (detailing that the only parameters put forward by the EU were parameters from the EU Code of Conduct on Arms Exports).

<sup>193</sup> See *infra* notes 188-278 and accompanying text.

<sup>194</sup> See *infra* notes 197-240 and accompanying text.

<sup>195</sup> See *infra* notes 241-78 and accompanying text.

<sup>196</sup> See *infra* notes 241-78 and accompanying text.

A. THE PROPOSED ARMS TRADE TREATY SHOULD NOT BE PATTERNED AFTER THE EUROPEAN UNION CODE OF CONDUCT BECAUSE THE CODE OF CONDUCT IS AN ANALYTICALLY FEEBLE DOCUMENT

The proposed arms trade treaty should not be patterned after the European Union Code of Conduct on Arms Exports<sup>197</sup> (“Code of Conduct”) because the Code of Conduct is weak and unworkable.<sup>198</sup> First, the Code of Conduct is weak because it is only a non-binding agreement.<sup>199</sup> As a consequence, Member States are under no obligation to follow the principles set forth in the document.<sup>200</sup> Second, the Code of Conduct is weak because it sets out no repercussions for the violation of the criteria.<sup>201</sup> Third, the Code of Conduct defers to a Member States’ ability to make transfers.<sup>202</sup> Fourth, the notion that each transfer should be judged on a case-by-case basis has led states to rely upon assurances by importers.<sup>203</sup> In previous instances, false assurances led to weapons being used in human rights violations.<sup>204</sup> Fifth, the Code of Conduct is weak because the criteria are vague and open to interpretation and manipulation by each Member State.<sup>205</sup> As one author noted, the Code of Conduct is “well-intentioned legislative feebleness.”<sup>206</sup>

1. *Criterion Two*

The second criterion is flawed because export officials cannot be expected to make a finely tuned determination of the human rights condition in an importing state.<sup>207</sup> The second criterion requests the Member State to gauge the importing state’s human rights condition.<sup>208</sup> In

<sup>197</sup> Union Code of Conduct on Arms Exports, 2010 OJ (C 21E) [hereinafter Code of Conduct] available at [http://ec.europa.eu/external\\_relations/cfsp/sanctions/codeofconduct.pdf](http://ec.europa.eu/external_relations/cfsp/sanctions/codeofconduct.pdf).

<sup>198</sup> See *infra* notes 199-240 and accompanying text.

<sup>199</sup> Compare *A Global Arms Trade Treaty: What States Want*, AMNESTY INTERNATIONAL, <http://www.amnestyusa.org/document.php?lang=e&id=ENGPOL340042007> (last visited Mar. 22, 2011) (noting that the global community desires and needs a “legally binding instrument”), and *Arms Trade Treaty: What We Want*, CONTROLARMS, <http://www.controlarms.org/en/arms-trade-treaty> (last visited Mar. 22, 2011) (articulating that in order to ensure global peace the Arms Trade Treaty must be “a legally binding international instrument, which will draw together and consolidate states’ current obligations under international law”), with Alexandra Boivin, *Complicity and Beyond: International Law and the Transfer of Small Arms and Light Weapons*, 87 INT’L REV. OF RED CROSS 467, 486 (2005) (describing how the Code of Conduct is only politically binding).

<sup>200</sup> See *Code of Conduct, supra* note 121, at 7 (articulating that the Code of Conduct is a set of guidelines and does not compel Member States to perform any task).

<sup>201</sup> Compare *Code of Conduct, supra* note 121 (articulating no punishment mechanism to punish violators of the Code of Conduct), with Austin, *supra* note 83, at 205 (arguing that black market arms brokers “[u]ndaunted by fear of prosecution or retribution . . . will continue to thrive.”), and Griffiths, *supra* note 3, at ii (discussing that the brokers who enable illicit arms sales are emboldened because they know that if they are caught, then the punishment will be lacking).

<sup>202</sup> *U.N. Responses II, supra* note 22, at 93.

<sup>203</sup> Marsh, *supra* note 20, at 220.

<sup>204</sup> *Id.*

<sup>205</sup> See Gillard, *supra* note 17, at 43 (arguing that the Code of Conducts criteria are ambiguous and have been open to manipulation by Member States).

<sup>206</sup> Marsh, *supra* note 20, at 220.

<sup>207</sup> See *infra* note 240 and accompanying text.

<sup>208</sup> *Code of Conduct, supra* note 121, at 3-4.

Having assessed the recipient country’s attitude towards relevant principles established by international human rights instruments, Member States will: (a) not issue an export licence [sic] if

doing so, the Code of Conduct suggested that the Member State analyze the importer's human rights record.<sup>209</sup> However, the Code of Conduct sets no threshold level for what constitutes an acceptable human rights record.<sup>210</sup> The Code of Conduct is unrealistic to recommend that such a finely calibrated determination could be made in every situation.<sup>211</sup> For instance, pertinent information may not be available to gauge the exact human rights record of each state because human rights regulation is reactionary.<sup>212</sup> Thus, the second criterion is flawed because export officials cannot be expected to make a correct determination of the human rights condition in *all* importing states.<sup>213</sup>

## 2. *Criteria Three & Four*

The third and fourth criteria are flawed because they request Member States to focus upon the political stability of only the importing state, while ignoring the political stability of the importer's regional neighbors.<sup>214</sup> The third and fourth criteria request the exporting Member State to examine political conflict present in the recipient state.<sup>215</sup> These criteria miss the mark because the criteria fail to consider that illegal groups or embargoed states many times receive weapons *via* diversion.<sup>216</sup> The exchange of weaponry between Libya and Liberia illustrated this

---

there is a clear risk that the proposed export might be used for internal repression. [sic] (b) exercise special caution and vigilance in issuing licences [sic], on a case-by-case basis and taking account of the nature of the equipment, to countries where serious violations of human rights have been established by the competent bodies of the UN, the Council of Europe or by the EU.

*Id.*

<sup>209</sup> *Id.*

<sup>210</sup> *See id.* (listing the provisions of the Code of Conduct; however, absent from the Code of Conduct is any notion of what constitutes a suitable human rights situation).

<sup>211</sup> *Compare Country Reports on Human Rights Practices 2009*, UNITED STATES DEPARTMENT OF STATE, <http://www.state.gov/g/drl/rls/hrrpt/2009/index.htm> (last visited Feb. 23, 2011) (listing the 197 different human rights situations being monitored by the United States Department of State), *with Code of Conduct*, *supra* note 121, at 3-4 (expressing that an export official, on a case-by-case basis, must make an export decision based upon the human rights situation of the importing state).

<sup>212</sup> *See* Ann-Louise Colgan, *A Tale of Two Genocides: The Failed U.S. Response to Rwanda and Darfur*, PEACEWORK Oct. 2006, available at <http://www.peaceworkmagazine.org/tale-two-genocides-failed-us-responses-rwanda-and-darfur> (noting the fact that theoretically many human rights abuses go undisturbed until the act is complete).

<sup>213</sup> *Compare Code of Conduct*, *supra* note 121 (listing the provisions of the Code of Conduct; however, the Code of Conduct is standard-less as to what constitutes an acceptable human right situation), *and Country Reports on Human Rights Practices 2009*, UNITED STATES DEPARTMENT OF STATE, available at <http://www.state.gov/g/drl/rls/hrrpt/2009/index.htm> (last visited Mar. 22, 2011) (listing the 197 different human rights situations being monitored by the United States Department of State), *with Code of Conduct*, *supra* note 121, at 3-4 (requesting that export officials examine the human rights situations in each importing state).

<sup>214</sup> *See infra* note 221 and accompanying text.

<sup>215</sup> *Code of Conduct*, *supra* note 121, at 4-5. Criterion three articulated that “[t]he internal situation in the country of final destination, as a function of the existence of tensions or armed conflicts Member States will not allow exports which would provoke or prolong armed conflicts or aggravate existing tensions or conflicts in the country of final destination.” *Id.* Further, criterion four articulated that “Member States will not issue an export licence [sic] if there is a clear risk that the intended recipient would use the proposed export aggressively against another country or to assert by force a territorial claim.” *Id.*

<sup>216</sup> *Compare Code of Conduct*, *supra* note 121, at 4-5 (requesting that export officials examine the political environments of the importing states, not the environments of the surrounding states), *with BOURNE*, *supra* note 71, at 144-48 (displaying the regional facilitation that occurs when states field arms to their non-state and state neighbors).

point.<sup>217</sup> In that instance, states in Eastern Europe sent small arms and light weapons to Libya, a state that possessed the right to purchase arms.<sup>218</sup> However, once the small arms and light weapons reached Libya they were diverted to Liberia, a state under an arms embargo.<sup>219</sup> Later, Charles Taylor, the embargoed leader of Liberia, armed Ivorian rebels in order to destabilize West Africa.<sup>220</sup> Thus, the third and fourth criteria are flawed because they request Member States to focus upon the political stability of only the importing state, while ignoring the political stability of the importer's regional neighbors.<sup>221</sup>

### 3. Criterion Six

Criterion six is subjective and vague because no universally accepted definition of terrorism exists.<sup>222</sup> The sixth criterion suggests that Member States examine a recipient state's attitudes towards terrorism.<sup>223</sup> However, it is unclear what definition of terrorism is used in conducting this analysis.<sup>224</sup> The problem lies in fact that the definition of terrorism is dependent upon a state's perspective.<sup>225</sup> For instance, after the Soviet invasion of Afghanistan in 1979, the United States supplied millions of dollars worth of small arms and light weapons to the *Mujahedeen*, an Afghan group aimed at repelling the Soviets.<sup>226</sup> To the United States, determined to repel communism, the *Mujahedeen* were freedom fighters.<sup>227</sup> However, thirty-two years later the United States included the *Mujahedeen* on the Foreign Terrorist Organization List.<sup>228</sup> Without a threshold standard to determine what groups constitute a terrorists group, the sixth criterion is impossible to implement in reality.<sup>229</sup>

<sup>217</sup> See STOHL, *supra* note 38, at 32 (discussing how two hundred tons of small arms and ammunition were diverted from Europe via Libya, Nigeria and France to Liberia, a nation under arms embargo).

<sup>218</sup> *Id.* at 18.

<sup>219</sup> See *id.* (discussing the diversion process from Europe to Liberia, a nation under an arms embargo).

<sup>220</sup> *Id.* at 32.

<sup>221</sup> Compare STOHL, *supra* note 38, at 32 (noting that legal importers, France, Nigeria, and Libya, later facilitated another embargoed state), with *Code of Conduct*, *supra* note 121, at 4-5 (explaining that the export official should examine the stability just the importing state – ignoring the other states that can be regionally destabilized via diversion).

<sup>222</sup> See *infra* notes 229 and accompanying text.

<sup>223</sup> *Code of Conduct*, *supra* note 121, at 6. "Member States will take into account inter alia the record of the buyer country with regard to: . . . its support or encouragement of terrorism and international organized crime." *Id.*

<sup>224</sup> See *id.* (requesting that arms transfer not be sent to terrorist groups; however, devoid from the criterion is a definition of whom constitutes a terrorist group).

<sup>225</sup> Garcia, *supra* note 83, at 151 (noting that "a non-state actor may be a freedom fighter or a terrorist depending on different perspectives.").

<sup>226</sup> See STOHL, *supra* note 38, at 71 (noting that the majority of the aid to the Afghan rebellion came from United States because of fear of the Soviets).

<sup>227</sup> See *id.* at 70 (explaining the United States' support for the Afghan resistance; including, the their motivation as both, "visceral—pay-back for Vietnam—and pragmatic—damaging the Soviet war machine.").

<sup>228</sup> Foreign Terrorist Organizations, OFFICE OF THE COORDINATOR FOR COUNTERTERRORISM <http://www.state.gov/s/ct/rls/other/des/123085.htm> (last visited Mar. 23, 2011).

<sup>229</sup> Compare Garcia, *supra* note 83, at 151 (explaining that one man's terrorist is another man's freedom fighter), Garcia, *supra* note 83, at 154 (noting that Hamas, a terrorist group to the Israel, receives arms from Egypt, Saudi Arabia, Iran, Jordan, and Lebanon), and Garcia *supra* note 83, at 155 (detailing the Chinese support for the Viet Cong during the American Vietnam War), with *Code of Conduct*, *supra* note 121, at 6 (asking export officials to examine importing states' record pertaining to the supply of arms to terrorist without providing any standard for who constitutes a terrorist).

#### 4. *Criterion Seven*

In similar fashion to criterion six, criterion seven is unworkable because it is standard-less as to who constitutes an improper end-user.<sup>230</sup> Criterion seven suggested Member States to assess the risk that small arms and light weapons will be diverted to improper end-users.<sup>231</sup> The criterion is silent as to which perspective a state must utilize in making the determination.<sup>232</sup> In doing so, criterion seven is vague and subjective because the Code of Conduct does not shed any light upon who qualifies as an improper end-user.<sup>233</sup> Criterion seven is standard-less as to who constitutes an improper end-user, as a result the criterion is unworkable.<sup>234</sup>

The proposed arms trade treaty must not be patterned after the Code of Conduct because the Code of Conduct is an analytically feeble document.<sup>235</sup> The second criterion is flawed because export officials cannot be expected to make a correct determination of the human rights condition in *all* importing states.<sup>236</sup> Further, the third and fourth criteria are unsound because they request Member States to focus upon the political stability of only the importing state, while ignoring the political stability of the importer's regional neighbors.<sup>237</sup> The sixth criterion is troublesome because it is standard-less towards who constitutes a terrorist.<sup>238</sup> Finally, criterion

---

<sup>230</sup> See *infra* note 234 and accompanying text.

<sup>231</sup> *Code of Conduct*, *supra* note 121, at 7. "In assessing the impact of the proposed export on the importing country and the risk that exported goods might be diverted to an undesirable end-user, the following will be considered: (a) the legitimate defence [*sic*] and domestic security interests of the recipient country, including any involvement in UN or other peace-keeping activity; (b) the technical capability of the recipient country to use the equipment; (c) the capability of the recipient country to exert effective export controls; (d) the risk of the arms being re-exported or diverted to terrorist organizations (anti-terrorist equipment would need particularly careful consideration in this context)." *Id.*

<sup>232</sup> See *Code of Conduct*, *supra* note 121, at 7 (explaining the requirement that exporting states should examine if the weapons will likely be diverted to improper end-users; however, providing no way to determine who constitutes an improper end-user).

<sup>233</sup> Compare *Code of Conduct*, *supra* note 121, at 7 (articulating that a state must determine if an export may be diverted to an undesirable end-user), with *Code of Conduct*, *supra* note 121, at 7 (providing no guidance on what a state should consider when making a determination of an undesirable end-user).

<sup>234</sup> Compare *Code of Conduct*, *supra* note 121, at 7 (requesting states to examine if arms will be used by improper end-user; however, the Code does not explain who is a proper or improper end-user), with Garcia, *supra* note 83, at 159 (noting that "[s]tates transfer arms to groups they deem legitimate knowing that these groups are likely to misuse these weapons.").

<sup>235</sup> See *infra* notes 236-39 and accompanying text.

<sup>236</sup> Compare *Code of Conduct*, *supra* note 121 (listing the provisions of the Code of Conduct; however, the Code of Conduct is standard-less as to what constitutes an acceptable human right situation), *Country Reports on Human Rights Practices 2009*, UNITED STATES DEPARTMENT OF STATE, available at <http://www.state.gov/g/drl/rls/hrrpt/2009/index.htm> (last visited Mar. 22, 2011) (listing the 197 different human rights situations being monitored by the United States Department of State), with *Code of Conduct*, *supra* note 121, at 3-4 (requesting that export officials examine the human rights situations in each importing state).

<sup>237</sup> Compare STOHL, *supra* note 38, at 32 (noting that legal importers, France, Nigeria, and Libya, later facilitated another embargoed state), with *Code of Conduct*, *supra* note 121 at 4-5 (explaining that the export official should examine the stability just the importing state – ignoring the other states that can be regionally destabilized via diversion).

<sup>238</sup> Compare Garcia, *supra* note 83, at 151 (explaining that one man's terrorist is another man's freedom fighter), Garcia, *supra* note 83, at 154 (noting that Hamas, a terrorist group to the Israel, receives arms from Egypt, Saudi Arabia, Iran, Jordan, and Lebanon), and Garcia *supra* note 83, at 155 (detailing the Chinese support for the Viet Cong during the American Vietnam War), with *Code of Conduct*, *supra* note 121, at 6 (asking export officials to examine importing states' record pertaining to the supply of arms to terrorist without providing any standard for who constitutes a terrorist).

seven is standard-less as to who constitutes an improper end-user.<sup>239</sup> The Code of Conduct should not form the basis for a new arms trade treaty because it fails to provide concrete guidance to Member States.<sup>240</sup>

#### B. THE COMMON MARKET FOR SMALL ARMS AND LIGHT WEAPONS V. THE ROOTS OF THE EUROPEAN UNION

The European Union (“EU”) should not steer the drafting process of the proposed arms trade treaty because the EU’s common market policy, pertaining to small arms and light weapons, has perpetuated the proliferation of weaponry.<sup>241</sup> The free movement of goods, people, services, and capital amongst Member States is one of the underlying principles of the EU.<sup>242</sup> The common market is the nucleus of today’s EU.<sup>243</sup> In recent years, the EU developed a no-nonsense common market approach to small arms and light weapons regulation between Member States.<sup>244</sup> The common market approach to weapons is contradictory to the underlying principles of the EU and detrimental to the global community.<sup>245</sup>

In the pursuit of the common market, the EU attempted to eradicate all internal barriers to trade.<sup>246</sup> To eradicate barriers substantial legislation was needed to remove the technological, regulatory, legal, and ceremonial barriers that muffled the free movement of goods, people, and services.<sup>247</sup> Additionally, the EU attempted to liberalize world trade whenever possible.<sup>248</sup> As Member States removed barriers to trade, internally and externally, they also reconciled tariffs amongst Member States on goods imported from non-member States.<sup>249</sup>

On December 16, 2008, the Council of the European Union and the European Parliament promulgated a directive allowing the free movement of defense products, including small arms and light weapons, amongst Member States.<sup>250</sup> The European Commission recommended the directive to simplify transfers between Member States based upon the results of a study that

<sup>239</sup> Compare *Code of Conduct*, *supra* note 121, at 7 (requesting states to examine if arms will be used by improper end-user; however, the Code does not explain who is a proper or improper end-user), with Garcia, *supra* note 38, at 159 (noting that “[s]tates transfer arms to groups they deem legitimate knowing that these groups are likely to misuse these weapons.”).

<sup>240</sup> See *supra* notes 235-239 and accompanying text.

<sup>241</sup> See *infra* notes 242-78 and accompanying text.

<sup>242</sup> *Activities of the European Union*, EUROPA.EU, [http://europa.eu/pol/comm/index\\_en.htm](http://europa.eu/pol/comm/index_en.htm) (last visited November 19, 2010).

<sup>243</sup> *Id.*

<sup>244</sup> See *SMALL ARMS SURVEY*, *supra* note 13, at 77 (detailing the EU’s attempts to eradicate all barriers to the trade of small arms and light weapons).

<sup>245</sup> Compare *SMALL ARMS SURVEY*, *supra* note 13, at 77 (noting that the “risk of diversion for arms exports, raises questions about the desirability of the . . . market liberalization”), and Marsh, *supra* note 20, at 219 (explaining that the provisions of the Code of Conduct are open to interpretation by the Member States; hence, repressive regimes have received arms under the Code of Conduct), with *The History of the European Union*, *supra* note 98 (explaining that the European Coal and Steel Community, the predecessor of the EU, was founded upon the principles of collective management of the heavy industry – consequently, the European Coal and Steel Community was formed to stop arms proliferation).

<sup>246</sup> See Kristin Ashley Tessman, *A Bright Day for the Black Market: Why Council Directive 2008/51/EC Will Lose the Battle Against Illicit Firearm Trade in the European Union*, 38 Ga. J. INT’L & COMP. L. 237, 238 (2009) (explaining the short-comings of the current system in the EU).

<sup>247</sup> *Internal Market*, EUROPA.EU, [http://europa.eu/pol/singl/index\\_en.htm](http://europa.eu/pol/singl/index_en.htm) (last visited Mar. 23, 2011).

<sup>248</sup> *External Trade*, *supra* note 111.

<sup>249</sup> *Id.*

<sup>250</sup> *SMALL ARMS SURVEY*, *supra* note 13, at 77.

claimed that internal barriers, to the transfer of small arms and light weapons, impaired trade.<sup>251</sup> Based upon the study, the EU concluded that the various licensing requirements imposed by Member States were an uneven administrative burden disconnected from the actual control needs.<sup>252</sup> The study reached this conclusion because transfers, between Member States, were seldom rejected.<sup>253</sup>

The EU noted that the initiative meant to benefit European defense firms and other arms exporters.<sup>254</sup> The initiative aimed to increase the European defense industry's competitiveness.<sup>255</sup> The concern was if better collaboration and assimilation were not promoted, then European defense firms would cease to compete on the world level.<sup>256</sup> The EU reasoned that the repercussions would not simply be economic but also security-based because the barriers would hamper the pursuit of EU defense and security policy.<sup>257</sup> This notion would benefit Member States substantially because six of the fifteen largest exporters of small arms and light weapons are Member States of EU.<sup>258</sup>

The elimination of safeguards on the transfer of small arms and light weapons caused the EU to become unmoored from its roots established under the European Coal and Steel Community.<sup>259</sup> As aforementioned, the roots of the EU began in the aftermath of World War II.<sup>260</sup> The European Coal and Steel Community aimed to cooperatively manage heavy industry in order to prevent the creation and spread of weapons.<sup>261</sup> However, the recent removal of due process apparatuses, meant to curb the transfer of small arms and light weapons, is in direct contradiction to the founding principle of non-proliferation.<sup>262</sup> The current system sacrificed the goal of stopping the spread of small arms and light weapons upon the altar of economic gain.<sup>263</sup> The current system advocates the spread of weaponry with a disregard for both the tremendous impact small arms and light weapons have upon the global community and the founding principles of the EU.<sup>264</sup>

---

<sup>251</sup> *Id.*

<sup>252</sup> *Id.*

<sup>253</sup> *Id.* However, several transfers have been rejected intended for Baltic States. *Id.*

<sup>254</sup> *Id.*

<sup>255</sup> *Id.* The directive was promulgated with intention to promote the European defense industry – the EU was concerned that the industry would cease to be competitive on the world level without the directive. *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> Compare *Industrial Production*, SMALLARMSURVEY.ORG, <http://www.smallarmssurvey.org/weapons-and-markets/producers/industrial-production.html> (last visited Nov. 5, 2010) (listing the fifteen largest producers or small arms and light weapons, including Italy, Germany, France, Belgium, Austria, the United Kingdom, and Spain), with *SMALL ARMS SURVEY*, *supra* note 13, at 77 (explain that the directive passed by the EU was aimed at making the trade of small arms easier).

<sup>259</sup> See *infra* notes 241-78 and accompanying text.

<sup>260</sup> *The History of the European Union*, *supra* note 98.

<sup>261</sup> *Id.*

<sup>262</sup> Compare *The History of the European Union*, *supra* note 98 (discussing how the Coal and Steel Community was formed to eliminate the spread and accumulation of weaponry and prevention of further global conflict), with *SMALL ARMS SURVEY*, *supra* note 13, at 77 (noting that the liberalization of the defense market would likely exacerbate the problems associated with diversion and other aspects of proliferation), *SMALL ARMS SURVEY*, *supra* note 13, at 77 (explaining that EU promoted the liberalization of the arms trade because it would benefit the defense industry).

<sup>263</sup> Compare *SMALL ARMS SURVEY*, *supra* note 13, at 77 (explaining that the liberalization of the defense market, including the lower of trade barriers, would likely promote arms proliferation), with *SMALL ARMS SURVEY*, *supra* note 13, at 77 (explaining that EU promoted the liberalization of the arms trade because it would help European defense companies to economically compete on the world level).

<sup>264</sup> Compare *The History of the European Union*, *supra* note 98 (discussing how one of the major reasons the Coal



Additionally, the problems associated with the lowering of barriers will be obvious if Serbia gains Member State status.<sup>265</sup> Serbia, an EU candidate country, has a track record of conflict.<sup>266</sup> Also, Serbia is a diversion point for small arms and light weapons earmarked for global conflict.<sup>267</sup> The transfers from Serbia to Libya, which were promptly diverted to Charles Taylor, the embargoed leader of Liberia, illustrates this point.<sup>268</sup> If Serbia gains acceptance and utilizes the common market policy on weapons, then Serbia would likely serve as a conduit for the flow of weaponry to conflict worldwide.<sup>269</sup> The common market approach contradicts the underlying principles of the EU and is detrimental to the global community because it promotes the proliferation of small arms and light weapons.<sup>270</sup>

The eradication of safeguards surrounding small arms and light weapons transfers within the EU not only allows for the proliferation of such arms within the Member States but also encourages global arms to spread.<sup>271</sup> Most states within the EU have the monetary and political power to fight the adverse effects of an accumulation of small arms and light weapons.<sup>272</sup> On the other hand, poorer, less stable, and more geographically remote Member States will not be able to fight the detrimental effects of a small arms and light weapons surplus.<sup>273</sup> For instance, the

---

and Steel Community was formed was to eliminate the spread and accumulation of weaponry and prevention of further global conflict), with *SMALL ARMS SURVEY*, *supra* note 13, at 77 (explaining EU directives articulating that barriers to the transfer of small arms and light weapons must be eliminated to ensure the economic property of defense firms within the EU and to promote the common market principle).

<sup>265</sup> *SMALL ARMS SURVEY*, *supra* note 13, at 77. For example:

[t]he European Union has grown considerably in recent years, with ten new Member States admitted in 2004 and two in 2007. Three countries are awaiting admission: Croatia, the former Yugoslav Republic of Macedonia, and Turkey. Many of these new candidate countries are exporters of small arms and other conventional weapons. Clearly, whatever the sophistication of their export control systems, these states do not have the same experience as older EU members in implementing the Code of Conduct. This, plus the acknowledged risk of diversion for small arms exports, raises questions about the desirability of the proposed market liberalization.

*Id.*

<sup>266</sup> See *Serbia*, EUROPA.EU, [http://europa.eu/about-eu/member-countries/countries/other-countries/serbia/index\\_en.htm](http://europa.eu/about-eu/member-countries/countries/other-countries/serbia/index_en.htm) (last visited Mar. 23, 2010) (detailing Serbia's status as a potential candidate country to the EU); MICHAEL KELLY, NOWHERE TO HIDE: DEFEAT OF THE SOVEREIGN IMMUNITY DEFENSE FOR CRIMES OF GENOCIDE AND THE TRIALS OF SLOBODAN MILOSEVIC AND SADDAM HUSSEIN 91-92 (2005) (detailing the history of war and genocide perpetrated in Serbia).

<sup>267</sup> See STOHL, *supra* note 38, at 18 (noting that "When Liberia . . . [was] under a UN arms embargo, arms brokers relied on corrupt governments and officials to transfers arms. Traffickers used false end-user certificates to ship weapons from Eastern Europe to Liberia through countries such as Libya and Nigeria. Between May and August 2002, two hundred tons of guns and ammunition were shipped to Monrovia from Belgrade using false Nigerian end-user certificates.").

<sup>268</sup> See *id.* (explaining how the diversion process works; particularly, in the Balkan states, which have served to source some of the worse human rights abusers in history).

<sup>269</sup> Compare STOHL, *supra* note 38, at 18 (noting that Serbia has a track record for supplying arms to conflict), with *SMALL ARMS SURVEY*, *supra* note 13, at 77 (explaining the EU directive allowing liberalized trade in arms).

<sup>270</sup> Compare *SMALL ARMS SURVEY*, *supra* note 13, at 77 (noting that the "risk of diversion for arms exports, raises questions about the desirability of the . . . market liberalization"), Marsh, *supra* note 20, at 219 (explaining that the provisions of the Code of Conduct are open to interpretation by the Member States; hence, repressive regimes have received arms under the Code of Conduct), with *The History of the European Union*, *supra* note 98 (explaining that the European Coal and Steel Community, the predecessor of the EU, was founded upon the principles of collective management of the heavy industry – consequently, the European Coal and Steel Community was formed to stop arms proliferation).

<sup>271</sup> *SMALL ARMS SURVEY*, *supra* note 13, at 77.

<sup>272</sup> See Renner, *supra* note 5, at 50.

<sup>273</sup> See *id.* (listing the failed attempts of Nicaragua, El Salvador, Mozambique, Somalia, and Cambodia to manage a

former Soviet bloc states still deal with huge Soviet stockpiles of small arms and light weapons left after the Cold War.<sup>274</sup> These stockpiles were looted and weapons diverted to conflict.<sup>275</sup> Weapons from these stockpiles helped source and facilitate civil wars, genocide, and crime throughout the world.<sup>276</sup> Thus, the spread of small arms and light weapons through lowered internal standards will simply allow brokers to dump small arms and light weapons into former bloc states, already saturated with weapons, in the hopes of later diverting the small arms and light weapons.<sup>277</sup> As a consequence of the EU's hypocritical policies, which perpetuate the spread of small arms and light weapons, the EU should not steer the drafting process of the proposed arms trade treaty.<sup>278</sup>

#### IV. CONCLUSION

The European Union ("EU") attached vast importance to the drafting of a legally binding arms trade treaty to govern weapons transfers.<sup>279</sup> The EU expressed that an arms trade treaty is not simply feasible—but is needed without delay.<sup>280</sup> In doing so, the EU proposed that the arms trade treaty be patterned after the European Union Code of Conduct on Arms Exports<sup>281</sup> ("Code of Conduct").<sup>282</sup> However, allowing the Code of Conduct to serve as the blueprint for the proposed arms trade treaty is ill advised because the Code of Conduct is a feeble document.<sup>283</sup> First, the Code of Conduct is a non-binding document that provides no repercussions for a violation.<sup>284</sup> Second, criterion two is flawed because export officials will likely not be able to correctly assess the human rights circumstance in all importing states.<sup>285</sup> Third, criteria three and four are imperfect because they do not consider the role that diversion plays in illicit sourcing of weapons.<sup>286</sup> Fourth, criterion six is defective because it is standard-less in the call to assess the impact of an arms transfer on terrorism.<sup>287</sup> Fifth, criterion seven is problematic because it, like criterion six, is standard-less in its request to determine if improper end-users receive arms.<sup>288</sup>

---

surplus of small arms and light weapons).

<sup>274</sup> See *id.* at 33-39 (describing the instances of arms depot looting that are pervasive throughout the former block states of the former Soviet Union).

<sup>275</sup> *Id.*

<sup>276</sup> See *id.* at 39 (explaining that small arms and light weapons leaked from depots have "allegedly ended up in the hands of either governments or armed opposition groups of far flung places . . . [including] rebel groups in Angola and Nicaragua.>").

<sup>277</sup> See *SMALL ARMS SURVEY*, *supra* note 13, at 77 (noting a concern for diversion because many new member states have little or no experience dealing with the Code of Conduct).

<sup>278</sup> See *supra* notes 241-78 and accompanying text.

<sup>279</sup> *U.N. Country Responses II*, *supra* note 22, at 91.

<sup>280</sup> *Id.*

<sup>281</sup> Union Code of Conduct on Arms Exports, 2010 OJ (C 21E) [hereinafter Code of Conduct] available at [http://ec.europa.eu/external\\_relations/cfsp/sanctions/codeofconduct.pdf](http://ec.europa.eu/external_relations/cfsp/sanctions/codeofconduct.pdf).

<sup>282</sup> See *Code of Conduct*, *supra* note 281, at 92 (expressing that the UN should utilize the criteria of the Code of Conduct).

<sup>283</sup> See *supra* notes 197-240 and accompanying text.

<sup>284</sup> See *supra* notes 199-201 and accompanying text.

<sup>285</sup> See *supra* note 213 and accompanying text.

<sup>286</sup> See *supra* note 221 and accompanying text.

<sup>287</sup> See *supra* note 229 and accompanying text.

<sup>288</sup> See *supra* note 234 and accompanying text.

As a result of the flaws contained in the Code of Conduct, the pattern of the proposed arms trade treaty would undermine global security.<sup>289</sup>

Further, allowing the EU to steer the drafting process would also be problematic because the EU's current common market policy aided the proliferation of small arms and light weapons.<sup>290</sup> The common market policy is in direct contradiction to the underlying principles of the EU; particularly, the principles of the European Steel and Coal Community, a community with the underlying purpose of stopping the proliferation of arms.<sup>291</sup> Allowing the EU to direct the proposed arms trade treaty draft would be challenging because of the EU's contradictory views on global trade.<sup>292</sup>

The global community is in dire need of a binding arms trade treaty to curb armed violence, human rights abuses, and the undermining of sustainable development. While the EU desires to a driving force during the drafting of the proposed arms trade treaty, a more appropriate place for the EU would be in an auxiliary role. It must be conceded that the EU does have a place within the drafting process. However, the EU has not demonstrated the competence or consistency on small arms and light weapons reform to enable it to be an effective leader. As a result, the EU would better serve the world community by providing copious amount of aid to developing states to cure the inherent social issues that lead to armed violence.<sup>293</sup>

---

<sup>289</sup> See *supra* notes 235-39 and accompanying text.

<sup>290</sup> See *supra* notes 241-78 and accompanying text.

<sup>291</sup> See *supra* notes 241-78 and accompanying text.

<sup>292</sup> See *supra* notes 241-78 and accompanying text.

<sup>293</sup> This Article is dedicated to Arthur Louis Biggs Jr. & Andrew Paul Biggs—two guiding forces in my life. During the writing process a passage from the Bhagavad-Gita constantly ran through my mind. “Now, I am become Death, the destroyer of worlds.” This line plagued me because it is this line that must truly encapsulates the experience of child-soldiers when they wield a small arm for the first time. This illustrates the need for arms reform efforts—efforts to ensure that no child ever again must have this heartrending revelation.