ILSA JOURNAL OF INTERNATIONAL & COMPARATIVE LAW
NOVA SOUTHEASTERN UNIVERSITY
SHEPARD BROAD LAW CENTER

Volume 19 | Fall 2012 | Number 1

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EDITOR'S NOTE

Sadly, 2012 has left our world with many unanswered questions and great instability. The elections in the United States were fraught with platitudes about hope but bereft of meaningful solutions. Our world stands at the edge of a dangerous precipice—the Arab Spring may be in its historical infancy, but it can be debated whether this is the democracy that President Obama envisioned when he delivered his speech in Cairo in 2009. Economic indicators leave us searching for answers in Greece, Spain, and the U.S. where youth unemployment numbers continue to rise. Despite any number of issues, the *ILSA Journal of International & Comparative Law* asked our academic contributors to discuss one necessity—water. Two different pieces provide legal perspectives on how this human necessity can (or perhaps cannot) become a legally enforceable global concern. Equally, a sociological perspective discusses not only the biological necessity of water but also how water as a commodity can serve to oppress the disenfranchised.

Assistant Professor Rhett B. Larson, in his "Water, Worship, and Wisdom: Indigenous Traditional Ecological Knowledge and the Human Right to Water" has recognized the legal impediment of access to water as a basic human right. However, Professor Larson posits that indigenous peoples may protect their water resources through claims of international human rights. Professor Larson advances the notion that policy-makers must look to religion and culture to protect the most basic human necessities.

Professor Nan Palmer Ph.D. ACSW/LMSW, in "Water Adequacy as an Essential Element for Empowering People," brought a biological and sociological perspective to the water discussion. Professor Palmer painted a bleak picture of the psychological pitfalls of water deprivation, including but not limited to short-term memory loss, confusion, and anger. Further, her portrayal of withholding water from the marginalized, impoverished, and disenfranchised populations was sobering. Water deprivation has been used as a tool of oppression in cases of domestic abuse and political terror, something that might have escaped our readership.

Professor Doug Donoho, in his "Some Critical Thinking About a Human Right to Water," discussed in great depth that our global population will likely be nine billion in the next forty years. Implicit in Professor Donoho's staggering population statistics is the greater need for sufficient water access. However, Professor Donoho asserted that no matter how essential a human need, this does not establish a legally enforceable right to water. Though Professor Donoho was skeptical about a global, legally

enforceable right to water, he does hope for a collective moral obligation in the future.

Additionally, this edition focuses on student contributors. Our student contributors inherit this complex world, and it is incumbent upon them to meaningfully participate in the legal discussion. Dominique Venetsanopohlos, in her "The Trillion-Dollar Question: Can Greece be Saved?," discussed in detail how Greece fell off the fiscal cliff. Further, Ms. Venetsanopohlos conducted a thorough analysis of the efficacy of Greece's potential departure from the EU. Tal Harari channeled George Orwell in her "Facebook Frenzy Around the World: The Different Implications Facebook has on Law Students, Lawyers, and Judges." Ms. Harari discussed how Facebook can control bar admission for law students.

Lastly, the winning Memorial Briefs and Compromis from the 2012 Philip C. Jessup International Moot Court Competition complete this volume.

On behalf of the *ILSA Journal of International & Comparative Law*, I would like to thank the remarkable scholars who contributed to the issue. We are grateful to them for allowing us to edit and subsequently publish years of collective research.

A Journal is a sum of its parts. I am extremely lucky to have an Executive Editorial Board who spent all hours producing this product for which we are all proud: Hillary Rosenzweig, Jennifer Valiyi, Rina Feld, and Sylvia Cano are to be commended for their commitment. Further, the rest of our Senior Staff and Junior Staff committed to this process from its inception and never looked back. Additionally, our faculty advisors, Professor Doug Donoho and Professor Roma Perez were wonderful mentors.

I would personally like to thank my own family for their love, support, and for allowing me to go on this intellectual adventure. My sincere hope is that our readership finds this work as socially important as the *Journal* does.

Todd Wise
Editor-in-Chief, 2012–2013

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TABLE OF CONTENTS

2012 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION DISTINGUISHED BRIEFS

FACEBOOK FRENZY AROUND THE WORLD: THE DIFFERENT IMPLICATIONS FACEBOOK HAS ON LAW STUDENTS, LAWYERS, AND JUDGES

Tal Harari[*]

I. INTRODUCTION

Over the last decade the use of social networking sites has swept the nation by providing users with the ability to "interact, connect, reconnect, communicate, and collaborate in various ways—such as through audio, words, pictures, or video—with friends, family, acquaintances, professional colleagues, and others."[1] Consequently, this new interactive way to communicate with others by posting personal information about one's self on the Internet has made for a substantial impact on individuals working in the legal profession.[2] "As the relationship between social networking and

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* Tal Harari is currently a second year law student at Nova Southeastern University. She holds a Bachelor of Arts degree in Sociology and Judaic Studies from the University of Miami. She would like to thank her family and friends for their continuous and incredible support. Additionally, she would like to thank the members of *ILSA Journal of International and Comparative Law* for their hard work and Professor Olympia Duhart for her tremendous support, encouragement, and guidance.

1. Kathleen Elliot Vinson, *The Blurred Boundaries of Social Networking in the Legal Field: Just "Face" It*, 41 U. MEM. L. REV. 355, 358 (2010).

2. *Id*. at 356.

members of the legal community continues to evolve, the boundaries between personal and professional worlds are often blurred, creating legal and ethical minefields."[3] Although the use of social networking offers an array of benefits for members of the legal community, it poses a huge risk for those who do not modify their use to comply with the ethical standards of the legal profession.[4] Individuals enter the legal community the moment they enter law school, and from that very moment they must be cautious and aware of the negative implications social networking sites can have on their careers. Individuals born and raised in the Internet age are the ones who face the most risk since the use of social networking is second nature for those individuals.

In 2007, "60% of Internet users report[ed] that they [were] not worried about how much information about them is available online."[5] One can only imagine how difficult it would be to alert Internet users in 2012 of the consequences of their actions on social networking sites. This article focuses on alerting individuals entering the legal world of the implications that one of the most popular social networking sites, Facebook, can have on their careers.

Part I of this article will address the different ways in which Facebook affects law students, lawyers, and judges in the State of Florida as they work their way through the legal field. Part II of this Article will provide a brief history of the growth of Facebook and all the site has to offer several million users worldwide.[6] Part III will examine the two most important ways in which Facebook can impact the life of a law student.

Part III will first discuss Facebook's effect on a law student's admission to the Florida Bar. Next, Part III will address the negative impact Facebook has on future employment opportunities for law students. Part IV will then discuss the new risks that Facebook presents once law students transition into practicing attorneys.

Part IV will first analyze privacy right issues and free speech issues that attorneys face when using Facebook. It will distinguish the ways in which attorneys can assert those fundamental constitutional rights, depending on whether the attorney works for the state government in the public sector, or whether the attorney works for a firm in the private sector. The second half of part IV will discuss how the use of Facebook has made

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3. *Id*. at 357.

4. *Id*.

5. Dina Epstein, *Have I Been Googled?: Character and Fitness in the Age of Google, Facebook, and Youtube*, 21 GEO. J. LEGAL ETHICS 715, 724 (2008).

6. Vinson, *supra* note 1, at 361.

it more difficult for attorneys to adhere to the Model Rules of Professional Conduct, and will specify some of the rules attorneys should be aware of.

Part V of the article will addresses the implications Facebook has on judges in Florida; specifically, there are issues that arise when judges become Facebook friends with practicing attorneys. Part VI of the article will expand beyond the scope of Florida and briefly discuss the international view on the use of social networking sites in the legal profession and practice. Part VI will focus on the Canadian legal profession's outlook on the use of Facebook by lawyers in Canada.

Part VII of the article will offer advice to members of the legal community on how to balance their use of Facebook with their legal careers so as to avoid any negative repercussions.

II. THE FACEBOOK PHENOMENON

From all the social media sites available to Internet users, such as MySpace, LinkedIn, and Twitter,[7] Facebook has by far become the most popular site, with currently over 500 million users.[8] Founder and Chief Executive Officer of Facebook, Mark Zuckerberg, initially launched the site in 2004[9] with a "mission [] 'to share and make the world more open and connected.'"[10] The site allowed for college students to create pages on which they could list information about their personal lives, including their name, age, sex, relationship status, employment history, and education.[11] In 2005, the site expanded to include high school students, and by 2006, anyone over the age of thirteen could become a Facebook member.[12] Facebook's impact is not solely concentrated in the United States but rather it has gone global.[13] Facebook has been "[t]ranslated into more than seventy languages, with 70% of user access occurring outside of the United States."[14]

Facebook members can utilize the site to "view and post content on other users' profiles, send messages, establish and join networks and

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7. Vinson, *supra* note 1, at 359.

8. *Id*. at 361.

9. *Id*.

10. *Id*. at 362 (quoting *About*, FACEBOOK, *available at* http://www.facebook.com/facebook?v=info (last visited July 29, 2012)).

11. Amy-Kate Roedger, Commentary, *Wall Posts, Status Updates, and the Bar: How Social Networking Impacts Character and Fitness Requirements*, 35 J. LEGAL PROF. 145, 145 (2010).

12. Vinson, *supra* note 1, at 361.

13. *See* Karen Tanenbaum, Note, *Should the Default be "Social"? Canada's Pushback Against Over-Sharing By Facebook*, 40 GA. J. INT'L & COMP. L. 275, 277 (2011).

14. *Id*.

groups, invite members to events, and search for other members."[15] In order to connect, users must first send friend requests to other Facebook members who then may accept the request before being able to view and post content on the other's profile page.[16] Once the users become "Facebook friends," they can look through each other's pictures, "tag" one another in other users' photos, write messages on each other's "wall," and get each other's attention by using the "poking" feature.[17] They can even post article links[18] and YouTube clips on each other's page. Friends also leave "comments" or "like" certain photos and wall posts that appear on each other's profile page.

Facebook can be used as a means to present your thoughts and feelings on the Internet; "[a]dditionally, Facebook users can maintain an ongoing commentary about their own emotional and psychological state by constantly updating their Facebook 'status.'"[19] For example, a user can vent to the world about her horrible job by updating her status to the following: 'what an awful day at work! In much need of cocktail!'

As Facebook continued to expand, so did its features such as the amount of personal information available about its users.[20] These settings expose the details of a member's online activity. Facebook also allows users to protect themselves by utilizing privacy settings to regulate what personal information is visible to the public.[21] For example, users can restrict anyone from finding them on Facebook, prevent anyone who is not their "friend" from viewing any of their wall posts and pictures, or even restrict their actual "friends" from posting any content on their page.[22]

Unfortunately, individuals who grew up with Facebook "are less likely to question the appropriateness of their conduct because of a 'reduced sense of personal privacy.'"[23] Consequently, young attorneys are unaware of the risks that they are exposed to when allowing the public to view their

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15. *Id*. at 360–61.

16. Angela O'Brien, *Are Attorneys and Judges One Tweet, Blog, or Friend Request Away From Facing a Disciplinary Committee?*, 11 LOY. J. PUB. INT. L. 511, 513 (2010).

17. Samuel Vincent Jones, *Judges, Friends, and Facebook: The Ethics of Prohibition*, 24 GEO. J. LEGAL ETHICS 281, 284 (2011).

18. Jonathan Sabin, Comment, *Every Click You Make: How the Proposed Disclosure of Law Students' Online Identities Violates Their First Amendment Right to Free Association*, 17 J. L. & POL'Y 699, 708 (2009).

19. *Id*.

20. Vinson, *supra* note 1, at 369.

21. *Id*. at 367.

22. *Id*. at 368.

23. O'Brien, *supra* note 16, at 529.

personal information, and the repercussions it might have on their careers. Although Facebook offers privacy settings for users to control what others see, it is not an absolute shield against exposing information that individuals may not want the world to see. Even if an inappropriate post or picture is deleted from Facebook, it does not mean that it is not still lurking on the Internet.[24] For that very reason, members of the legal community must be extremely cautious with how they utilize Facebook and be aware of the negative implications it might have on their futures.

III. THE BEGINNING OF THE END: FACEBOOK AFFECTING LAW STUDENTS

Just a few years ago, a law student's chief concerns were succeeding in the classroom and passing the state Bar exam. In 2012, times have changed. Although Facebook can benefit those law students who utilize it in a productive manner, such as a networking tool with other lawyers,[25] Facebook can also cause students substantial harm. "The use of social networking sites, [specifically Facebook] combined with the permanence and accessibility of the Internet, raises issues about the content that law students post on the Internet, as well as the character they display in doing so."[26] Even though students may filter their Facebook pages and delete inappropriate pictures, comments, or posts, there is still the possibility that the public will be able to access what has been deleted.[27] Consequently, one of the first things students in today's generation hear during law school orientation is to be wary of their facebook posts.

This vital warning ensures that law students realize that "their legal career and their reputations begin in law school, not when they graduate."[28] Facebook can thus have negative implications on their future.[29] As such, law students are well-advised to remove any and all inappropriate posts or pictures from their respective Facebook accounts.[30] When a student acts inappropriately by posting statuses, comments, and pictures involving drugs, alcohol, and sex,[31] it can be "interpreted to mean that [the] individual cannot be trusted with confidential matters, or that he or she lacks the

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24. Vinson, *supra* note 1, at 376.

25. *Id*. at 376.

26. Roedger, *supra* note 11, at 145.

27. Vinson, *supra* note 1, at 376.

28. *Id*. at 381–82.

29. *Id*. at 376.

30. *See* Roedger, *supra* note 11, at 151.

31. Vinson, *supra* note 1, at 377.

proper judgment to make sophisticated legal decisions."[32] Therefore, admonishments given to law students are proper because of the potential damaging effects on their future admission to the Bar.[33]

A. The Florida Bar as an Example

Students must go through a crucial application process before they can be admitted to the Florida Bar. For years, American society has been skeptical of the legal profession and its reputation.[34] To address this societal concern about individuals admitted to work in the legal profession, the American Bar Association recommends character and fitness requirements that each applicant should meet.[35]

> [T]he 'character and fitness' screening is intended to evaluate the [character] elements as they 'relate to the practice of law' and is meant for 'protection of the public and the system of justice' so that those admitted are 'worthy of the trust and confidence clients may reasonably place in their lawyer.'[36]

Essentially, the purpose of setting forth such character and fitness requirements is to protect future clients from hiring attorneys who display a history of careless and unethical behavior.[37] The American Bar Association is confident that when states look into each applicant's past contacts and conduct, the states could prevent individuals who are not 'trustworthy, honest, diligent, and reliable' from becoming members of the legal profession.[38] Upon completion, those deemed to have poor character will not satisfy the character and fitness requirements and shall be denied admission.[39]

Today, the character and fitness portion of the Bar application provides law students the opportunity to be open and honest with the Bar examiners, and disclose any and all past misconduct and immoral behavior.[40] However, one of the biggest concerns for law students in the Internet age is that they will now have to additionally disclose information

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32. Epstein, *supra* note 5, at 726.

33. Roedger, *supra* note 11, at 145–46.

34. Epstein, *supra* note 5, at 717.

35. *Id*.

36. Roedger, *supra* note 11, at 147.

37. *Id*.

38. *Id*. at 148.

39. *Id*.

40. *Id*.

pertaining to their online activity.[41] Students are concerned that Bar examiners could potentially be allowed to search through an applicant's information on Facebook. With that information, the applicant might be denied admission to the Bar.[42]

Those who are proponents of the disclosure of all online aliases view all Internet activity as public.[43] These proponents assert that since such activity is public, the public—which includes Bar examiners—should have the right to view and evaluate the activities as they see fit.[44] The Florida Board of Bar Examiners (FBBE) incorporated this view to some extent in their 2009 Facebook Policy.[45] The Policy "require[s] investigation into social networking use of certain 'red flag' Bar applicants"[46] in order to determine if those applicants display the proper character for Bar admission.

It is important to note that this investigation, which gives the FBBE access to sites like Facebook, is limited to only red flag applicants. However, whether an applicant is labeled as "red flag" is determined on a case-by-case basis.[47] Red flag applicants, whom the FBBE have deemed problematic,[48] generally fall within the following categories:

> a) Applicants who are required to establish rehabilitation under Rule 3-13 'so as to ascertain whether they displayed any malice or ill feeling towards those who were compelled to bring about the proceeding leading to the need to establish rehabilitation';
> b) Applicants with a history of substance abuse/dependence 'so as to ascertain whether they discussed or posted photographs of any recent substance abuse';
> c) Applicants with 'significant candor concerns' including not telling the truth on employment applications or resumes; Applicants with a history of unlicensed practice of law (UPL) allegations;

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41. Roedger, *supra* note 11, at 148.

42. *Id*.

43. *See id*. at 149.

44. *See id*.

45. *See id*. at 152.

46. Roedger, *supra* note 11, at 152.

47. Jan Pudlow, *On Facebook? FBBE may be planning a visit*, THE FLORIDA BAR NEWS, Sept. 1, 2009, *available at* https://www.floridaBar.org/DIVCOM/JN/JNNews01.nsf/8c9f13012b96736985256aa900624829/d288355844fc8c728525761900652232?OpenDocument (last visited Oct. 4, 2012).

48. Roedger, *supra* note 11, at 153.

> d) Applicants who have worked as a certified legal intern, reported self-employment in a legal field, or reported employment as an attorney pending admission 'to ensure that these applicants are not holding themselves out as attorneys; or
> e) Applicants who have positively responded to Item 27 of the Bar application disclosing 'involvement in an organization advocating the overthrow of a government in the United States to find out if they are still involved in any related activities.'[49]

This new policy has faced much criticism from those who believe that the FBBE gains no advantage from investigating an applicant's Facebook page. Applicants are aware that they have been labeled as red flags because they have already disclosed the information regarding their improper activity.[50] Knowing that their Facebook page would then be investigated, red flag applicants would remove from their profiles any questionable pictures, posts, and statuses, thus making the investigation itself useless and a waste of time.[51] Consequently, to require Facebook access would discriminate between red flag applicants and the rest of the applicants.[52]

Critics of the policy further suggest that by having access to one's Facebook page, the FBBE could come across private, personal information regarding "religious affiliation and sexual orientation."[53] It would further allow Bar examiners the ability to view information about non-red flag applicants if they were to somehow appear on a red flag applicant's Facebook page.[54] This would put applicants who are friends with red flag applicants at risk of having the activity on their Facebook page scrutinized.

The most just and logical approach to dealing with the Florida Bar's Facebook Policy would be to follow the view of the critics and eliminate the policy altogether. If the FBBE is looking into an applicant's Facebook page, it is because they have already determined the applicant falls below the character and fitness requirements. If the applicant falls within one of the categories listed above, the investigation as to whether he or she meets the requirements for admission should stop right there.

There is no need to further inquire into the way one uses his or her Facebook account because once the applicant has reached that point of

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49. Pudlow, *supra* note 47.

50. *See* Roedger, *supra* note 11, at 153.

51. *Id*.

52. *Id*. at 153–54.

53. *Id*. at 154.

54. *Id*.

investigation, it is clear that the FBBE finds the applicant problematic and will likely deny admission. It is therefore only putting other applicants in jeopardy because of their affiliation with red flag applicants.

Even if eliminating the policy altogether is not possible, then at least Bar examiners should not be allowed to consider any information that an applicant has under his or her privacy settings, or any information that is impossible to place within a privacy filter. Despite this logical notion, the FBBE still adheres to the 2009 Facebook Policy, indicating that an applicant's admission to the Florida State Bar is threatened by what may be lurking on Facebook. Unfortunately, students do not have a say as to what Bar examiners will deem socially unacceptable behavior found on Facebook; therefore, students must remain cautious at all times with what they post or with what is posted about them. Posting pictures and comments about drug use and alcohol may seem cool to a student at the time, but it is not worth the risk because the Bar examiners might view this as questionable character.

> No law student wants to wake up one morning, after spending three years and over one hundred thousand dollars pursuing a law degree, to find that their actions have, unbeknownst to them, ruffled too many feathers of the character and fitness committee members and jeopardized or precluded their admission to the Bar.[55]

B. Employment Opportunities

Law students must be aware that although they have grown up with Facebook and thus "have a reduced sense of personal privacy," they are entering the legal world which is based on much more conservative and ethical principles.[56] Most students do not realize that when they post personal details about their life on Facebook, they are essentially creating a permanent record of all their past indiscretions.[57] In addition to the possibility of not getting admitted to the Bar, law students today must be extra cautious that what is on Facebook will not harm future employment opportunities.

Because the use of Facebook has become a part of everyday life, it is becoming more common for employers to look into a job applicant's

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55. Epstein, *supra* note 5, at 718–19.

56. Vinson, *supra* note 1, at 376.

57. Sabin, *supra* note 18, at 701.

Facebook page during the decision-making process.[58] In fact, there have even been reports of students being questioned during employment interviews about inappropriate pictures found on their Facebook page.[59] Employers are not only looking at what the job applicant makes available to the public on his or her Facebook page, but some employers are even requesting that prospective employees actually hand over their Facebook passwords.[60] Facebook's Chief Privacy Officer, Erin Egan, issued a statement regarding Facebook's opinion on this shocking practice by employers:

> As a user, you shouldn't be forced to share your private information and communications just to get a job. And as the friend of a user, you shouldn't have to worry that your private information or communications will be revealed to someone you don't know and didn't intend to share with just because that user is looking for a job. That's why we've made it a violation of Facebook's State of Rights and Responsibilities to share or solicit a Facebook password. We don't think employers should be asking prospective employees to provide their passwords because we don't think it's the right thing to do.[61]

Based on what an individual posts on Facebook and what others post about him or her, employers can gauge the overall reputation of the individual. This might determine if he or she falls within the core values of the firm.[62] Although many states prohibit employers from considering non-employment related activity they see on social media sites such as Facebook,[63] the restriction may not apply in every situation, such as where an applicant has pictures posted involving excessive drinking.[64]

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58. *See* Carlo Longino, *Law Students Say Messages Board Postings Are Costing Them Job Offers*, TECHDIRT (Mar. 7, 2007, 11:57 AM), http://www.techdirt.com/articles/20070307/103126.shtml; *see also* Sabin, *supra* note 18, at 701 ("[O]ver twenty-five percent of hiring managers perform Internet searches when vetting job applicants.").

59. Epstein, *supra* note 5, at 725.

60. Pauline T. Kim, *Electronic Privacy and Employee Speech*, 87 CHI.-KENT L. REV. 901, 914 (2012).

61. Memorandum from Erin Egan, Protecting Your Passwords and Your Privacy (Mar. 23, 2012) (http://www.facebook.com/notes/facebook-and-privacy/protecting-your-passwords-and-your-privacy/326598317390057).

62. Robert Sprague, *Invasion of the Social Networks: Blurring the Line Between Personal Life and the Employment Relationship*, 50 U. LOUISVILLE L. REV. 1, 4–5 (2011).

63. Carolyn Elefant, *The "Power" of Social Media: Legal Issues & Best Practices for Utilities Engaging Social Media*, 32 ENERGY L. J. 1, 15 (2011).

64. *Id*. at 16.

The rationale behind this suggests that since posts and pictures on an individual's Facebook page are potentially a true reflection of his or her character, any provocative photos publicly displayed on Facebook could indicate the applicant's lack of discretion.[65] Consequently, it could suggest to the employer that the potential applicant may not be the best choice for employment.[66]

Even though it is increasingly common for employers to browse through a job applicant's Facebook profile when making hiring decisions, employers must also be cautious with what they take into account for their own sake.[67] What is available on a job applicant's Facebook page could include information regarding the individual's "race, family status, drug use, poor work ethic, or negative feelings about previous employers."[68] Such personal details of an applicant's life would normally not be accessible to employers when evaluating a prospective employee's application.[69] In fact, most employers are aware that "federal law prohibits expression of hiring preferences based on gender, race, national origin, religion, or age . . . ."[70]

Although there is no telling whether an employer took into account such impermissible factors when choosing not to hire a prospective employee, the employer nonetheless runs the risk of violating discrimination laws when searching through an applicant's Facebook page.[71] For example, an employer who looks through an applicant's Facebook page "merely to satisfy curiosity about an applicant's race or marital status could open the company up to liability."[72] This is simply not a risk employers should be willing to take.

Unfortunately for law students, a 2010 survey by The Microsoft Corporation revealed that seventy percent of hiring professionals rejected job applicants based on information discovered online.[73] It is a chilling thought to process that what a student does during his or her spare time could subsequently be exposed to the public via Facebook pictures, posts, and status updates, and could consequently jeopardize employment opportunities.

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65. *Id*. at 15.

66. *Id*.

67. *See id*. at 14.

68. Elefant, *supra* note 63, at 13.

69. *Id*. at 14.

70. *Id*. at 12.

71. *Id*. at 14.

72. *Id*. at 16.

73. Sprague, *supra* note 62, at 5.

Although what students post on Facebook may give off a certain impression to potential employers, it is not fair to say that what an individual displays on Facebook is always an accurate depiction of his or her character.[74] Students often use Facebook as a way to vent about a hard day or be silly with fellow classmates and friends. Therefore, the content that students may often display on Facebook could merely be a "misrepresentation[] of themselves or [an] attempt[] to be humorous."[75] There is no way for employers to be one-hundred percent confident that what they see on Facebook is a true reflection of character. Several photos of a student holding an alcoholic drink does not mean that he or she is less qualified for a position and is likely too vast of an inferential leap for employers to take. Accordingly, employers should not be allowed to browse through a job applicant's Facebook page to decide whether the applicant is right for the job.

Even if the prospective employee consents to a Facebook search, no employer should ever be allowed to request to look beyond what is available to the public eye. A main feature of Facebook is the ability to send private messages to other users. As such, gaining access to an individual's password would give employers access to private messages. This is analogous to an employer searching through an applicant's private email account, demonstrative of an abuse of power over the applicant and a clear invasion of privacy. Nevertheless, law students will not know when potential employers will choose to browse through their Facebook and must therefore always be cautious with what is posted about them. After all, law firms do not want to hire individuals who would attract controversy.[76]

IV. WHEN THE BALL KEEPS ROLLING: FACEBOOK AFFECTING LAWYERS

As law students transition into practicing attorneys their concerns regarding Facebook shift from attaining employment and admission to the Bar to whether or not something on their Facebook page could result in a disciplinary action and possible termination of employment. It is a universal concept that all employers want to ensure that their companies and firms maintain a positive reputation, and therefore, employers monitor their employees' behavior.[77]

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74. Vinson, *supra* note 1, at 377.

75. *Id*.

76. Longino, *supra* note 58.

77. Kim, *supra* note 60, at 913.

Technological advancements have enabled employers a new way to observe the behavior of their employees.[78] An increasingly popular way for employers to do this is to check social networking pages.[79] Since Facebook has become increasingly popular, employers have become more concerned with what their employees are sharing on Facebook.[80] This has led some employers to utilize a Facebook monitoring software program called Social Sentry.[81] Although it may seem invasive, this behavior monitoring ensures that nothing embarrassing to the firm is leaked onto the Internet.[82]

Not only have employers begun to monitor employees' Facebook accounts, but they have asked current and prospective employees for their Facebook passwords.[83] Facebook, as a company, stresses that such an intimate request "undermines the privacy expectations and the security of both the user and the user's friend" and is a violation of its "Statement of Rights and Responsibility."[84] Facebook explains the reason for this policy: "[i]f you are a Facebook user, you should never have to share your password, let anyone access your account, or do anything that might jeopardize the security of your account or violate the privacy of your friends."[85] Granting an employer access to an employee's Facebook password is a huge risk to employees. This could potentially reveal personal and private information that would otherwise not be exposed to the employer. This practice has led to hundreds of recorded complaints to the National Labor Relations Board from employees that were fired due to posts on social networking sites.[86] Many terminations have resulted from posts inside the confines of an employee's own home.[87]

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78. S. Elizabeth Wilborn, *Revisiting the Public/Private Distinction: Employee Monitoring in the Workplace*, 32 GA. L. REV. 825, 826 (1998).

79. *See* Kim, *supra* note 60, at 913.

80. Vinson, *supra* note 1, at 390.

81. Joshua Brustein, *Keeping a Closer Eye on Employees' Social Networking*, NYTIMES.COM (Mar. 26, 2010, 6:51 PM) http://bits.blogs.nytimes.com/2010/03/26/keeping-a-closer-eye-on-workers-social-networking/.

82. *Id*.

83. Egan, *supra* note 61.

84. *Id*.

85. *Id*.

86. Kim, *supra* note 60, at 913.

87. *Id*. at 902.

A. The Right to Privacy and the Right to Free Speech

When an employer searches through an attorney's Facebook profile and when an attorney is disciplined for what is posted on Facebook, two fundamental rights are called into question: 1) the right to privacy; and 2) the right to free speech.

The right to privacy, rooted in the Fourth Amendment,[88] includes an individual's "freedom from unwarranted and unreasonable intrusions into activities that society recognizes as belonging to the realm of individual autonomy."[89] Society has long valued the right to privacy and accordingly has considered it a fundamental right.[90] When employers use intrusive methods to monitor an employee's behavior, they essentially compromise the employee's right to privacy.[91] Furthermore, the right to free speech, rooted in the First Amendment,[92] affords individuals "the liberty to discuss publicly and truthfully all matters of public concern without restraint or fear of subsequent punishment."[93]

This has been addressed by the Supreme Court; "[t]he Supreme Court has long recognized that 'it is a prized American privilege to speak one's mind,' although not always with perfect good taste, on all public institutions [including the judiciary]."[94] Despite this language by the Court, an individual is not beyond reproach for expressing himself or herself through speech, and cannot always be shielded by the protection of the First Amendment. Accordingly, the extent to which an attorney can assert the right to privacy and the right to free speech depends on whether the attorney is working for a private law firm or for the state government.[95]

1. Public Sector Employment

Individuals employed in the public sector work for "local, state, or national government departments and their agencies."[96] Actions of employers working for the state government constitute state action and the

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88. *See* U.S. CONST. amend. IV.

89. Wilborn, *supra* note 78, at 833.

90. *Id*.

91. *See id*. at 835.

92. U.S. CONST. amend. I.

93. Amicus Brief of the American Civil Liberties Union of Florida in Support of Respondent Sean William Conway at 8, Florida Bar v. Conway, 996 So. 2d 213 (Fla. 2008) (No. SC08-326) [hereinafter ACLU Amicus Brief].

94. *Id*. at 2–3.

95. *See* Wilborn, *supra* note 78, at 828.

96. *Id*. at 865.

Federal Constitution affords protection to individuals against state action.[97] As such, employees working for the state can bring an action against their employer if their employer's actions interfere with their constitutional rights.[98]

Consider first the right to privacy for attorneys working in the public sector and take for example the following scenario: An employer is searching through an employee's Facebook account, browsing through whatever is available, including wall posts, pictures, and comments. Generally, the employee will be able to challenge the employer by arguing that such conduct "violate[s] constitutional provisions protecting the right to privacy."[99] However, such a challenge will be conditioned upon whether the conduct by the employer is an interference with an expectation of privacy that society has recognized as reasonable.[100] Unfortunately, Facebook posts made available to the public make it difficult to assert an expectation of privacy.[101] Therefore, even though an attorney working for the state has the right to privacy, it will most probably not protect him or her from an employer who decides to invoke disciplinary action based on what was viewable on Facebook.

Next, consider the right to free speech as it pertains to attorneys working for the state. Although the First Amendment affords individuals the right to free speech,[102] a court will balance the interest of a public sector employee against the states' interest to serve the public.[103] Specifically, the extent to which public employees can assert free speech rights depends on the context of what was said.[104] Since courts are part of the government, any speech involving court proceedings is considered "political speech."[105] When an attorney speaks about a judge or something involving a pending case, that speech is protected under the First Amendment.[106] Thus, an

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97. *Id*. at 828.

98. *See id*.

99. *Id*. at 866.

100. Kim, *supra* note 60, at 905.

101. Paul M. Secunda, *Blogging While (Publicly) Employed: Some First Amendment Implications*, 47 U. LOUISVILLE L. REV. 679, 685 (2008).

102. U.S. CONST. amend. I.

103. Secunda, *supra* note 101, at 686.

104. *See id*. at 687.

105. Erwin Chemerinsky, *Silence Is Not Golden: Protecting Lawyer Speech Under the First Amendment*, 47 EMORY L. J. 859, 863 (1998).

106. *Id*.

employer can only restrict such speech if he or she can prove that it is "necessary to achieve a compelling purpose."[107]

The constitutional right of free speech under the First Amendment is not an absolute shield for attorneys working for the state.[108] A public employer may still be able to "discharge [an employee] for inappropriate conduct or speech that damages or interferes with workplace relationships."[109] Although what an employee posts on Facebook might ostensibly be his or her own business, employers nonetheless have the right to interfere and even terminate their employment.[110] However, this will often be utilized only when the speech is directly work-related.[111] When the speech is both non work-related and done during non-working hours, it is usually protected.[112] As a general rule, public employees are afforded free speech protection. However, when the speech is correlated to the work, the speech is afforded less protection.[113]

2. Private Sector Employment

On the other end of the spectrum are individuals who work in the private sector.[114] Since the Constitution does not provide protection to individuals from actions by private entities,[115] such employees are "immune to constitutional considerations."[116] Unfortunately, employees in the private sector do not have free speech protection.[117] At most, private sector employees have protections from invasions of privacy.[118] Even so, the invasion of privacy must be outrageous to a reasonable person.[119] To avoid such an invasion, it is becoming increasingly common for private sector employers to attach policy forms to employee contracts that explain that employers can monitor or choose to terminate employment based on

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107. *Id*. at 881.

108. Elefant, *supra* note 63, at 18.

109. *Id*.

110. *Id*.

111. *See* Secunda, *supra* note 101, at 685.

112. *Id*. at 688.

113. *Id*. at 692.

114. Wilborn, *supra* note 78, at 865.

115. *Id*. at 829.

116. *Id*. at 865.

117. Secunda, *supra* note 101, at 679.

118. *Id*. at 681.

119. *Id*.

inappropriate social media use.[120] These policy forms are to ensure that private employees understand that they "have no legitimate expectation of privacy in their phone calls, e-mails, and Internet activities."[121] Consequently, unless faced with an extremely offensive intrusion of privacy, private employees cannot assert any rights if terminated.[122]

B. Model Rules of Professional Conduct

"[A]s early as 1871, the Supreme Court of the United States held that lawyers have an obligation to refrain from making statements attacking the integrity of the judiciary."[123] Although lawyers may feel that the protections afforded to them under the First Amendment allow them to speak openly and criticize other attorneys and judges on Facebook, "[t]heir freedom to gripe is [nonetheless] limited by codes of conduct."[124] Attorneys must still be cautious when dealing with Facebook to ensure that what they write and post will not subject them to violations of the Model Rules of Professional Conduct (Rules).[125] By creating the Rules, the American Bar Association established a "framework for the ethical practice of law."[126] Some of the Rules become a concern for attorneys who use social networking sites such as Facebook.[127]

Model Rule 7.1 states that "[a] lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services."[128] When a lawyer posts information on Facebook about himself or herself and the services he or she offers, it has the potential to be seen by future clients.[129] Once it is seen, these posts constitute lawyer-client communications.[130] Such Facebook posts can subject the lawyer to disciplinary action by the Bar for violating Model Rule 7.1.[131] Consider the

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120. *See id*.

121. *Id*.

122. Secunda, *supra* note 101, at 681.

123. Angela Butcher & Scott Macbeth, *Lawyers' Comments About Judges: A Balancing of Interests to Ensure a Sound Judiciary*, 17 GEO. J. LEGAL ETHICS 659, 661 (2004).

124. John Schwartz, *A Legal Battle: Online Attitude vs. Rules of Bar*, N.Y. TIMES, Sept. 13, 2009, at A1.

125. *See* O'Brien, *supra* note 16, at 514.

126. MODEL RULES OF PROF'L CONDUCT Scope §16 (2010).

127. O'Brien, *supra* note 16, at 529.

128. MODEL RULES OF PROF'L CONDUCT R. 7.1 (2010).

129. Vinson, *supra* note 1, at 393.

130. *Id*.

131. *Id*.

following example: A lawyer updates his or her status on Facebook stating that he or she just won a huge case for his or her client or the status says that the lawyer is guaranteed to win all his cases in front of a particular judge. Such misleading information could influence potential clients into hiring that lawyer and the lawyer would then be in violation of Model Rule 7.1.

Model Rule 3.6(a) states that "[a] lawyer . . . shall not make an extrajudicial statement that the lawyer knows or reasonably should know will be disseminated by means of public communication and will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter."[132] This Rule should caution lawyers from posting information on Facebook about any pending or ongoing cases that could be viewed as influential on court proceedings.[133] By limiting attorneys' speech, the Rule not only protects the "integrity and fairness of [the] judicial system,"[134] but protects attorneys from undesirable situations. For example, an incident occurred where an attorney "posted derogatory comments on Facebook about people from Somalia and a comment about a juror during trial; after the defendant—a Somali man—was convicted of attempted murder, he moved for a new trial on the grounds of prosecutorial misconduct."[135] As a direct consequence of not adhering to the Rule, a new trial was conducted—a clearly undesirable situation.

Model Rule 8.2(a) states that "[a] lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge."[136] Jurisdictions are split as whether to apply this rule to an attorney's speech objectively or subjectively.[137] The subjective standard looks at "whether the lawyer in question knew his statements about the judiciary were false or acted with reckless disregard to their truth."[138] Conversely, the objective standard examines whether a "reasonable attorney" would think the statements were false.[139] The jurisdictions applying the objective standard essentially believe that when attorneys become members of the Bar, their First Amendment rights take a back seat.[140] Those in support of the

132. MODEL RULES OF PROF'L CONDUCT R. 3.6(a) (2010).

133. Vinson, *supra* note 1, at 395.

134. Butcher & Macbeth, *supra* note 123, at 664.

135. Vinson, *supra* note 1, at 395.

136. MODEL RULES OF PROF'L CONDUCT R. 8.2 (2010).

137. Butcher & Macbeth, *supra* note 123, at 668.

138. *Id*.

139. *Id*.

140. *Id*. at 670.

subjective standard, however, endorse the public's right to know about the judiciary over chilling the attorney's right to free speech.[141] This particular Rule caused quite the stir in Florida when an attorney posted negative and derogatory remarks on his blog about a judge he appeared before in court. The attorney was consequently charged for violating the Rule.[142] On the blog, the attorney made remarks referring to the judge as an "'evil unfair witch,' that was 'seemingly mentally ill', [and] possessed an 'ugly, condescending attitude.' [Also,] that 'she is clearly unfit for her position and knows not what it means to be a neutral arbitrator,' and that 'there's nothing honorable about that malcontent.'"[143]

Although the Florida Bar and the Supreme Court of Florida followed the objective standard and sanctioned the attorney for his posts,[144] the American Civil Liberties Union (ACLU) maintained the position that such punishment should not have been rendered.[145] The ACLU urged that the comments made were a matter of "opinion rather than false statements of fact," and thus those opinions fell under the protection of free speech afforded by the Constitution's First Amendment.[146] The ACLU argued that personal opinions are merely ideas that cannot be proven to be true or false;[147] thus, unless the opinion suggests a "false assertion of fact,"[148] it is not punishable.[149] The ACLU's position therefore supports the notion that "[a]ttorney comments are afforded protection when they are clearly the opinion of the speaker."[150]

To become a part of the legal profession is a privilege since "as an officer of the court, a member of the Bar enjoys singular powers that others

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141. *Id*.

142. O'Brien, *supra* note 16, at 521. Posts on a blog are analogous to posts on Facebook because they are essentially just different forms of social media use utilized by lawyers.

143. *Id*.

144. Fla. Bar v. Conway, No. SC08-326, slip op. at 1 (Fla. Oct. 29, 2008) *available at* http://www.floridasupremecourt.org/clerk/dispositions/2008/10/08-326.pdf#xml=http://199.242.69.43/texis/search/pdfhi.txt?query=No.+SC08-326&pr=Florida+Supreme+Court&prox=page&rorder=1000&rprox=1000&rdfreq=500&rwfreq=500&rlead=1000&rdepth=0&sufs=2&order=r&cq=&id=4d370e8e93.

145. ACLU Amicus Brief, *supra* note 93, at 1.

146. *Id*. at 4 (quoting Standing Comm. On Discipline of U.S. District Court for Cent. Dist. of Cal. v. Yagman, 55 F. 3d 1430, 1438 (9th Cir. 1995)).

147. *Id*. at 5.

148. *Id*. at 7.

149. *Id*. at 4.

150. Butcher & Macbeth, *supra* note 123, at 675.

do not possess."[151] As such, practicing attorneys must always conduct themselves in a way that is worthy of remaining within the privileged circle of courts. Despite all the benefits Facebook has to offer, it can also be very damaging for attorneys.[152] Thus, it is becoming increasingly more difficult for attorneys to avoid sanctions.

Attorneys are being disciplined in droves by the American Bar Association and by employers for information posted on Facebook. While it is understandable that employers want to protect their firm's reputation, and even justifiable that firms compel employees to remove compromising information from Facebook, Facebook's power over job security should still be subject to limitations.

If an attorney sets up privacy settings on his or her Facebook page, such information should be protected under an individual's right to privacy. The privacy settings enable an attorney to keep certain information confidential. Therefore, to request an attorney's Facebook password is an intrusive invasion of privacy. This practice takes employee monitoring too far.

On the other hand, any information that can be accessed without "friending" the attorney is essentially open to the public, and thus employers should be allowed to ask attorneys to remove such information if it is detrimental to the firm. There should not be a distinction between attorneys who work for private firms and attorneys who work for the state government. There should be a uniform system of monitoring behavior, protecting both groups' constitutional rights.

Nevertheless, misleading and inappropriate posts and pictures on Facebook are simply not worth the risk of getting fired or sanctioned; therefore, attorneys should do their best to avoid posting any such content that could be viewed by the public. Attorneys should understand that "[b]y choosing to work within the legal system, [they] are held to a higher standard . . ."[153] and must sometimes surrender their constitutional freedoms.[154] Harm to attorneys, judges, and the public could result if an attorney's speech goes unregulated, and consequently "a lawyer's

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151. *Id*. at 662.

152. *See* Vinson, *supra* note 1, at 394–95. For example, a lawyer may not want a client to know she is going on vacation because the client may think that the only reason the lawyer wants the client to settle is to get the case off her desk. Or, if a lawyer is supposed to be preparing a case over the weekend or has a trial on Monday, posts about the lawyer partying all weekend could be viewed negatively.

153. Butcher & Macbeth, *supra* note 123, at 672.

154. *Id*.

obligation to the legal profession [should] at times outweigh his own First Amendment right[s]."[155]

V. IT'S NOT OVER YET: FACEBOOK AFFECTING JUDGES

Essential to our legal system is the role of the judiciary and "the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us."[156] Just as lawyers are required to adhere to the Model Rules of Professional Conduct, judges in Florida are required to conduct themselves ethically according to the standards set forth in the Code of Judicial Conduct (Code).[157] Central to the Code is the principle "that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system."[158] Accordingly, the Code benefits the public by functioning as an ethical guideline for judges, which in turn keeps society confident that justice is being served.[159] The Code consists of seven Canons which establish rules by which judges are obligated to follow.[160] When a judge's actions constitute misconduct, it "has the potential to threaten the prestige and the authority of the judiciary."[161] Therefore, behavior that violates any of the Canons could result in disciplinary action.[162]

Canon 2 states that "[a] [j]udge [s]hall [a]void [i]mpropriety and the [a]ppearance of [i]mpropriety in all of the [j]udge's [a]ctivities."[163] The purpose of this Canon is to ensure the public that the judge is both impartial and unbiased throughout all court proceedings.[164] Canon 2(b) of the Code states that a judge cannot "convey or permit others to convey the impression that they are in a special position to influence the judge."[165]

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155. *Id*. at 662.

156. FLA. CODE OF JUD. CONDUCT pmbl. (2008).

157. *Id*.

158. *Id*.

159. Jones, *supra* note 17, at 286.

160. FLA. CODE OF JUD. CONDUCT pmbl.

161. Jones, *supra* note 17, at 286.

162. FLA. CODE OF JUD. CONDUCT pmbl.

163. *Id*. at Canon 2.

164. Fla. Sup. Ct. Jud. Ethics Advisory Comm., *No. 2010-06*, JUD6.ORG (Mar. 26, 2010), http://www.jud6.org/Legalcommunity/Legalpractice/opinions/2010-06.html. [hereinafter Ethics Advisory Comm. Opinion No. 2010-06].

165. FLA. CODE OF JUD. CONDUCT Canon 2(b).

Questions on whether judges violate this rule come into play when a judge's activity involves the use of Facebook.

As when they were lawyers, the use of Facebook still has the potential of harming a judge's reputation and negatively interfering with his or her public duties.[166] More specifically, controversy arises when judges become Facebook friends with practicing attorneys. The Florida Supreme Court Judicial Ethics Advisory Committee (Committee) issued an opinion on the question of whether a judge, who was Facebook friends with an attorney, was in violation of Canon 2(b).[167]

In opinion No. 2009-20 the Committee advised that a judge who becomes Facebook friends with any attorney that may appear before him or her in court is in direct violation of Canon 2(b). The Committee further notes that this restriction on judges does not apply when a judge chooses to accept as a friend an attorney who does not appear before the judge.[168] The majority of the Committee believed that by accepting an attorney as a Facebook friend, an outside party may get the impression that the attorney may be in a "special position to influence the judge."[169] The opinion emphasized that whether the judge intends to convey this impression of improper influence is irrelevant.[170] The Committee's concern was that the impression nonetheless conveyed and consequently had the potential to influence the public's opinion on whether the judge could be impartial and fair during court proceedings.[171]

It was the majority's belief that the impression was conveyed based on societal understandings of friendships. Friendships can range from intimate, close relationships to mere acquaintances.[172] There is no telling where in that range an attorney listed as a friend on a judge's Facebook page would fall. This ambiguity leaves the possibility that the attorney does in fact have a close relationship with the judge; it could be inferred that an individual judge will show greater favoritism toward his close friends. The mere possibility of this happening is sufficient for the public to question a judge's ability to rule impartially. The chance of

166. Jones, *supra* note 17, at 284–85.

167. Fla. Sup. Ct. Jud. Ethics Advisory Comm., *No. 2009-20*, JUD6.ORG (Nov. 17, 2009), http://www.jud6.org/Legalcommunity/Legalpractice/opinions/2009-20.html. [hereinafter Ethics Advisory Comm. Opinion No. 2009-20].

168. *Id*.

169. *Id*.

170. *Id*.

171. *See id*.

172. Jones, *supra* note 17, at 287.

"compromis[ing] the public['s] confidence in the judiciary"[173] is not a risk the majority of the Committee was willing to take.

Furthermore, to allow judges to become Facebook friends with attorneys who appear before them creates the risk of having clients purposefully hire those attorneys because the prospective clients might infer that the judge will show favoritism towards that attorney.[174] This would not only give an improper benefit to any attorney listed as a Facebook friend with a particular judge but would also indicate "the judge's potential for favoritism and partiality, which [in turn] threatens the public confidence in the judiciary."[175]

The minority of the Committee urges that an attorney who is friends with a judge on Facebook is not necessarily in any "special position to influence the judge."[176] Further, the minority suggests that the term "friend" on a social networking site like Facebook does not hold the same meaning as "friend" within the traditional interpretation of the word.[177] Simply because an attorney is listed as a "friend" on Facebook is in no way indicative of the true relationship he or she has with the particular judge.[178] It is unreasonable to assume that a judge shares a special relationship with each "friend" he or she has on Facebook where the "friend" may have the ability to influence the judge in legal matters. Nearly half a billion people use Facebook and are familiar with its terms.[179] As such, there is a universal understanding that listing an individual as a "friend" on Facebook merely suggests that the individual is a contact or acquaintance.[180]

Accordingly, the minority suggests that reasonable people using the site would understand that a judge listing an attorney as his or her Facebook friend would not mean that the two share a special relationship or that the attorney is any way influential over the judge.[181] Further, there is nothing to suggest that a judge would have a greater bias toward a litigant he or she is friends with on Facebook than he would toward a litigant he or she has known since high school.[182] To allow a judge to engage in social activity

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173. *Id*. at 288.

174. *Id*. at 290.

175. *Id*.

176. Ethics Advisory Comm. Opinion No. 2009-20, *supra* note 167.

177. *Id*.

178. *See id*.

179. *See* Ethics Advisory Comm. Opinion No. 2010-06, *supra* note 164.

180. Ethics Advisory Comm. Opinion No. 2009-20, *supra* note 167.

181. Ethics Advisory Comm. Opinion No. 2010-06, *supra* note 164.

182. *See id*.

such as a friendly tennis match with a lawyer who appears before him in court but not to allow the two to be Facebook friends is an inconsistency.[183] Consequently, the minority of the Committee is of the opinion that a judge who chooses to have an attorney who appears before him as a Facebook friend is not a violation of Canon 2(b) because it does not create the impression that the attorney is in a "special position to influence the judge."[184]

The minority presents a logical opinion that should be adopted in Florida. More likely than not, judges who are friends with attorneys on Facebook have been friends with those attorneys long before they were appointed as judges. To follow the majority opinion essentially requires all judges to go through their list of Facebook friends and remove one by one every attorney that they could potentially see in court. To require this not only places an undue burden on judges, but also assumes that these judges would show favoritism towards those attorneys if in fact they did appear in front of the judge. In that sense, the judiciary is not placing confidence in its own system and in its own officials. All judges were either appointed or elected because the electorate or the person appointing them believed the judge was capable of acting impartially. Therefore, until there is any misconduct that would suggest otherwise, the Committee should not prevent judges from having lawyers as their Facebook friends to prevent future misconduct.

VI. INTERNATIONAL VIEWS ON SOCIAL NETWORKING IN THE LEGAL FIELD

The impact of online social networking on the legal profession has expanded far beyond the State of Florida and reached international levels.[185] The International Bar Association is comprised of over 45,000 lawyers and 200 Bar associations and law societies worldwide.[186] They too have addressed social networking; "[i]n March 2011, the International Bar Association's (IBA) Legal Projects Team, based in London, took up an important global initiative to examine the presence and role of online social networking within the legal profession and practice."[187] The Legal Projects Team of the IBA surveyed sixty of their international Bar associations from

183. *See id*.

184. *Id*.

185. International Bar Association, *The Impact of Online Social Networking on the Legal Profession and Practice*, IBANET.ORG, (Feb. 2012), http://www.ibanet.org/Committees/Divisions/Legal_Practice/Impact_of_OSN_on_LegalPractice/Impact_of_OSN_Home.aspx. [hereinafter International Bar Association].

186. *Id*.

187. *Id*.

forty-seven legal jurisdictions[188] on their views concerning topics, including but not limited to:

> a) The interactions between lawyers, judges, and jurors on online social networks;
> b) The posting of comments or opinions on online social networks by lawyers, judges, jurors and journalists about one another or the causes in which they are involved;
> c) The public perception of lawyers and judges and whether such is negatively affected by their use of online social networking; and
> d) The consideration by legal employers of the information found on online social networking pages in evaluating future candidates.[189]

Although most countries took part in the survey, there were some that declined because the impact of social networking as it effects the legal profession has not yet arisen in their jurisdiction.[190] Most of Europe, Asia, and Africa agreed that there are several negative implications that social networking has on those involved in the legal field.[191] For instance, those in Europe explain that the use of social networking sites can often conflict with ethical legal practices.[192] Further, the East Africa Law Society reasoned that these implications arise because "the law is primarily a reflection of the social values of any society, and social networking also brings along with it aspects of communication, sharing information, etc. which the legal profession must understand."[193]

The IBA survey provides a global view on issues pertaining to judges and social networking. As in Florida, where controversy arose on the issue of whether judges could be friends with lawyers on social networking sites like Facebook, opinions on this matter are also split internationally.[194] When asked whether it was acceptable for lawyers and judges to be social networking friends, seventy percent of respondents in the survey said 'yes';[195] therefore, the majority of countries participating in the IBA survey

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188. *Id*.

189. International Bar Association, *supra* note 185.

190. *Id*.

191. *See id*.

192. *Id*.

193. *Id*.

194. International Bar Association, *supra* note 185.

195. *Id*.

agreed with the minority opinion of Florida's Judicial Ethics Advisory Committee.

More specifically, half of those who answered 'yes' also affirmed that the conduct would be acceptable even if the lawyer was going to appear in front of that particular judge.[196] The Law Society of Scotland argues that to not allow lawyers to be social networking friends with judges would "automatically assume that skilled professionals such as lawyers and judges would not strictly adhere to professional codes of conduct . . . ."[197] While the majority of Florida's Judicial Advisory Committee feels otherwise, the international community such as those in Indonesia and South Australia feel that a lawyer's use of social networking sites "does not necessarily or automatically impact the public perception of the legal profession."[198]

The IBA survey next addresses concerns that attorneys face as active users on social networking sites. As previously discussed, attorneys should be cautious with what they post on their social networking sites, especially when posting comments about judges that they appear before. On an international scale, nearly ninety percent of the countries surveyed agreed that such conduct by attorneys is inappropriate and unacceptable.[199] So while befriending a judge may not violate professionalism, posting comments about judges on sites like Facebook "would amount to a clear breach of professional codes of conduct and also bring the legal profession into disrepute, particularly during live proceedings."[200]

Lastly, the survey provides insight as to the international view on whether Bar associations should take into account information found on the social networking profiles of applicants when deciding whether to admit them to the Bar.[201] The Tanganyika Law Society and the Japan Federation of Bar Associations agree with Florida that such information may be examined by the admissions board when it relates to the character and fitness of the applicant.[202] Such practices thus appear to be ones that cross international borders and law students must be cautious of what they post on social networking sites. Additionally, students must be cautious that what they post will not jeopardize potential employment opportunities. Seventy percent of the countries surveyed also noted that it is acceptable for

196. *Id*.

197. *Id*.

198. *Id*.

199. International Bar Association, *supra* note 185.

200. *Id*.

201. *Id*.

202. *Id*.

employers to search through social networking profiles when evaluating potential job applicants.[203]

The survey conducted by the IBA affirms that the use of social networking has negative implications for law students, lawyers, and judges. As such, individuals entering the legal profession must remain cautious of what is posted on their social networking sites, specifically Facebook.

A. A Canadian Outlook

The rapid and global spread of Facebook has reached new heights. Among the many countries with Facebook users, Canada remains one of the top, with over seventeen million users.[204] Therefore, it is no surprise that much of the same issues Facebook users in the legal profession face in the United States have now also spilled over into Canada. This section addresses the Canadian view on some of the concerns law students, lawyers, and judges have when using social media sites like Facebook.

Despite an increasing concern for law students in the United States that potential employers may require applicants to hand over their Facebook passwords, "Canadians can rest a bit easier."[205] Legal precedent suggests that Canadian employers cannot generally force job applicants to turn over their Facebook passwords.[206] One Toronto lawyer notes that "[i]n Canada we've always respected privacy rights, which means that the employer does not have, and should not have, access to personal information."[207] As a result, prospective employees in Canada are offered stronger protection against employers requesting Facebook passwords than employees in the United States.[208] However, there is no bright line rule and there are employers in Canada who do look into prospective employees' Facebook accounts; thus, Canadian job applicants need to continuously update their privacy settings and keep their profiles free from personal information.[209]

Although sometimes affording individuals more protection, privacy rights in Canada share a common basis with privacy rights in the United

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203. *Id*.

204. *Canada Facebook Statistics*, SOCIALBAKERS, http://www.socialbakers.com/facebook-statistics/canada (last visited Aug. 28, 2012).

205. Brandon Miller, *Can Canadian Employers Force You to Hand Over Your Facebook Password?*, YOURMONEY.CA (Apr. 09, 2012), http://careers.yourmoney.ca/2012/04/can-canadian-employers-force-you-to-hand-over-your-facebook-password.html.

206. *Id*.

207. *Id*.

208. *Facebook-Snooping Employers Limited in Canada*, CBC NEWS (Mar. 26, 2012), http://www.cbc.ca/news/technology/story/2012/03/26/technology-facebook-job-seekers.html.

209. Miller, *supra* note 205.

States. United States privacy laws emerge from the notion of individual autonomy and freedom from governmental intrusion.[210] The Fourth Amendment protects individuals with a subjective expectation of privacy that society has valued and recognized as reasonable.[211]

Similarly, the "Canadian Charter of Rights and Freedoms (Charter)" affords individuals privacy protection based on a reasonable expectation standard.[212] Furthermore, the Charter "seeks to protect the 'dignity, integrity and autonomy' of its citizens."[213] Specifically, Section Eight of the Charter provides protection for individuals against invasions by the government, and Section Seven provides protection for the security of the individual.[214] Both protections foster the values of dignity, integrity and autonomy, protecting an individual's intimate life from being exposed to others and controlled by the state.[215] Applying this principle to the concept of employers seeking to monitor or pry into the intimate Facebook profiles of prospective employees, it seems that Canadian law will continue to employ strong privacy protection for individuals against such conduct.

An additional concern that individuals in the legal profession face in Canada involves adhering to the Model Rules of Professional Conduct and ensuring the online social networking activity does not interfere with that ethical requirement. Specifically, Canadian lawyers, similar to those in the United States, should be cautious that their use of Facebook does not cause them to violate Rule 4.06, which states that "[a] lawyer shall encourage public respect for and try to improve the administration of justice."[216] This rule emphasizes that the responsibility of a lawyer to the community is greater than that of a private citizen.[217] As such, "[a] lawyer should take care not to weaken or destroy public confidence in legal institutions or authorities by irresponsible allegations."[218] Lawyers must be cautious with

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210. Bryce Clayton Newell, *Rethinking Reasonable Expectations of Privacy in Online Social Networks*, 17 RICH. J.L. & TECH. 1, 4 (2011).

211. *Id*. at 5.

212. *Id*.

213. *Id*. at 40.

214. *Id*. at 41.

215. Newell, *supra* note 210, at 43.

216. Garry J. Wise, *Lawyers' Ethics and Freedom of Speech*, WISE LAW BLOG (Dec. 20, 2007), http://wiselaw.blogspot.com/2007/12/lawyers-and-freedom-of-speech.html.

217. MODEL RULES OF PROF'L CONDUCT R. 4.06 (2000); *see also* Garry J. Wise, *Lawyers' Ethics and Freedom of Speech*, WISE LAW BLOG (Dec. 20, 2007), http://wiselaw.blogspot.com/2007/12/lawyers-and-freedom-of-speech.html.

218. Wise, *supra* note 217.

every post, comment, and status update made on Facebook, especially when those remarks criticize the judicial system and members of the court.

It is vital that what is posted on Facebook for the public eye in no way destroys the confidence the public must maintain in the judicial system. Every attorney has a bad day in court, and, although attorneys have the right to speak freely and voice their opinions to the public, Rule 4.06 provides a balance to attorney speech. It sets forth a custom that encourages lawyers to "avoid criticism that is petty, intemperate, or unsupported by a bona fide belief in its real merit, bearing in mind that in the eyes of the public, professional knowledge lends weight to the lawyer's judgments or criticisms."[219]

Although there is greater controversy surrounding the implications Facebook has on those in the legal profession in the United States, there is nothing to indicate that the controversy will not make its way up north to Canada shortly. Canada has yet to address the issue of judges befriending attorneys on Facebook nor has Canada taken into account Facebook information affecting Bar applications. However, these concerns are likely to expand globally. As such, no matter where individuals choose to practice law, whether in the United States or Canada, individuals should monitor their Facebook accounts.

VII. CONCLUSION

As long as it continues to evolve and become more universal, Facebook will increasingly impact the future of the United States and international legal communities.[220] Unfortunately for law students, lawyers, and judges both in Florida and the international community, "[t]he overall culture of the legal profession, including privacy, confidentiality, and conservatism, conflicts with the disclosure culture of Facebook."[221] It is of great importance that law students, lawyers, and judges honor their roles within the legal profession by taking the appropriate steps to ensure that their Facebook activity does not compromise their ability to enter or remain within the field.

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219. *Id*.

220. Vinson, *supra* note 1, at 405.

221. *Id*. at 376.

WATER ADEQUACY AS AN ESSENTIAL ELEMENT FOR EMPOWERING PEOPLE

Nan Palmer Ph.D. ACSW/LMSW[*]

I. INTRODUCTION

"Water is essential for life."[1] Safe drinking water is so imperative that without it human beings can only survive for just two to four days; even less if compromised by ill health, heat, and other impinging conditions. It is estimated that fourteen to thirty thousand people, primarily "children and the elderly, die each day from water-related diseases."[2] The World Health Organization (WHO) estimates that about 1.1 billion people lack access to a safe water source and twice that many people go without adequate sanitation.[3] The increasing discussion and debate about water as a right has generally focused on access to water "of sufficient cleanliness and

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* Nan Palmer is a professor of social work at Washburn University in Topeka, Kansas. She holds a Master of Social Work and Doctor of Philosophy degree from the University of Kansas and has written many articles on human rights. She is one of the founding faculty members of the MSW Program at Washburn University. She is also a founding member of the Joint Center on Violence and Victims Studies and has taught many summers for the National Victims Assistance Academy Institute. The author wishes to thank Professor Charlene Smith for her thoughtful consultation and Sherrill Robinson, LSCSW for her technical assistance.

1. Barry M. Popkin, Kristen E. D'Anci & Irwin H. Rosenberg, *Water, Hydration, and Health*, 68 NUTRITION REVIEWS 8, 439 (2010).

2. Peter Gleick, *The Human Right to Water*, WATER POLICY 1, 487, 488 (1998), http://webworld.unesco.org/water/wwap/pccp/cd/pdf/educational_tools/course_modules/reference_documents/issues/thehumanrighttowater.pdf (last visited Oct. 3, 2012).

3. Kim Krisberg, *Access to Safe Water a Growing Concern Around the Globe: APHA Annual Meeting Focuses on Water*, THE NATION'S HEALTH, Oct. 2009, http://thenationshealth.aphapublications.org/content/39/8/1.3.full; *See also* Peter H. Gleick, *The Human Right to Water*, PACIFIC INSTITUTE (2007), http://www.pacinst.org/reports/human_right_may_07.pdf (last visited Oct. 3, 2012).

sufficient quantities to meet individual needs."[4] Quantity is described in terms of drinking, cooking, sanitation, bathing, and cleaning.[5] Receiving far less attention and study is the actual role that water plays in health and mental health, which includes cognitive or mental processes. In fact, "it is not fully understood how hydration affects health and well-being, even as it relates to the impact of water intake on chronic diseases."[6]

This presentation looks at what is known thus far as it relates to the actual function of water, hereafter referred to as "water hydration," in the human body and mind. A review of the literature suggests that we are clearly under-informed on these critical needs.[7] It is imperative that a clearer understanding of the role of water in physical and mental health is made in order for a thorough discussion to take place on the right to water. A person's right to water is not sufficient. Right to adequate water is the critical issue. How do we know what adequate is? This examination is offered not by a scientist or a lawyer, but rather from the perspective of social work. Social work considers the person-in-environment, that is, a simultaneous look at both the human individual and that person's inner and outer context. Such an approach often utilizes a biopsychosocial model which looks at the physiological or biological development needs, which include health, health care, and the psychological or emotional needs of individual, family, and kinship systems.[8] Applying the biopsychosocial perspective can be valuable in the legal efforts to define and obtain water for all persons because it incorporates personal need with the contextual, environmental, and political forces at work. For purposes of discussion, this article will look at the following issues:

1) The role and function of water hydration in the human body relating to well-being and biological health;
2) The role and function of water hydration in mental functioning, mental and emotional health, including spiritual well-being; and

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4. WORLD HEALTH ORGANIZATION WATER SANITATION AND HEALTH, *Content of the Human Right to Water*, http://www.who.int/water_sanitation_health/humanrights/en/index2.html (last visited Oct. 3, 2012).

5. *Id*.

6. Popkin et al., *supra* note 1, at 439.

7. Melissa C. Daniels & Barry Popkin, *Impact of Water Intake on Energy Intake and Weight Status: A Systematic Review*, 68 NUTRITION REVIEWS 9, 505 (2010).

8. BRADFORD W. SHEAFOR & CHARLES HOREJSI, TECHNIQUES AND GUIDELINES FOR SOCIAL WORK PRACTICE 7 (Allyn & Bacon eds., 9th ed. 2012).

3) The role and function of water adequacy as part of an essential element in empowering people who are oppressed and without privilege.

II. THE ROLE AND FUNCTION OF HYDRATION RELATING TO BIOLOGICAL WELL-BEING

"Water is essential for life."[9] "From the time that primeval species ventured from the oceans to live on land, a major key to survival has been the prevention of dehydration."[10] Cells in the human body cannot function without hydration; intracellular fluid accounts for fifty-five percent of total body water.[11] Plasma contains about 7.5% of total body water. Generally for infants, water, which is essential for life, comprises approximately seventy-five percent of the body weight. For older adults, water comprises about fifty-five percent of the body weight.[12] In healthy adults, water represents an average of fifty-nine percent for males, and fifty-six percent for females according to body mass.[13]

> Body fluids serve a variety of functions in the human body, including a key role in the digestion, absorption and transportation of other nutrients, formation and stability of cell structure, removal of waste products and toxins, as a solvent for biochemical reactions, thermoregulation of the human body, and lubrication of cavities such as joints.[14]

Concurrently, it is critical to note that hydration or fluid balance must be continually recycled, creating an ongoing need for a lifetime.

Perhaps most familiar to the public in the discussion of water adequacy is the concept of thirst as an indicator of the need for water. As a thermo-regulator, hydration serves as the body's cooling system. While there are some studies concerning dehydration and heat dissipation in athletes, there appears to be a dearth of research examining the working person, much less those living in poverty or on the margins. Research indicates that when the hydration of the cooling system is adequate, "we can work in the heat. However, if not properly replaced, fluid loss under

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9. Popkin et al., *supra* note 1, at 439.

10. *Id*.

11. Stavros A. Kavouras & Costas Anatasiou, *Water Physiology: Essentiality, Metabolism, and Health Implications*, 45 NUTRITION REVIEWS 6S, S27 (2010).

12. Popkin et al., *supra* note 1, at 439.

13. Kavouras & Anatasiou, *supra* note 11, at S28.

14. *Id*.

the form of sweat results in dehydration."[15] Further, those engaging in prolonged exercise (more than ninety minutes to greater than two to three hours), hydration through water is adequate.[16]

Beyond these general thresholds, minerals are needed as well.[17] Few studies have been made of the long-term effects of water deprivation. One limited study in 1944 involved subjecting healthy male soldiers to a six-day period of water and food deprivation.[18] The study noted that the soldiers exhibited lassitude and irritability.[19] Another study of lesser duration noted subjects had a slight change of voice, sunken and pale face, and cyanosed lips.[20] "Although a clear picture of human physiology under chronic and severe dehydration has not been obtained, the aforementioned studies indicate that chronic dehydration represents a threat to body homeostasis and health."[21] Studies of water and hydration in physical activity, particularly athletes and those in the military, reveal that even mild levels will result in reduced endurance, increased fatigue, altered thermoregulatory capability, reduced motivation, and increased perceived effort.[22] Additionally, the indicator of "thirst" is but one variable in determining water adequacy. Much more research must be done.

Children in warm climates may be more susceptible to illness than adults without adequate hydration.[23] Likewise, the elderly are less able to compensate with heat stress and water loss. As such, they have hypodipsia, which can be exaggerated by central nervous system disease and dementia.[24] "Although not consistent, hydration status and fluid intake have been associated with many chronic diseases, including urolithiasis, urinary tract infections, bladder and colon cancer, constipation, bronchopulmonary disorders, hypertension, cerebral infarct, fatal coronary

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15. Francois Peronnet, *Healthy Hydration for Physical Activity*, 45 NUTRITION TODAY 6S, S41 (2010); *See also* F. Bellisle, Simon N. Thornton, P. Hebel, M. Denizeau & M. Tahiri, *A Study of Fluid Intake From Beverages in a Sample of Healthy French Children, Adolescents, and Adults*, 64 EUROPEAN JOURNAL OF CLINICAL NUTRITION 350–55 (2010).

16. *Id*. at S42.

17. *Id*.

18. Kavouras & Anatasiou, *supra* note 11, at S29.

19. *Id*.

20. *Id*.

21. *Id*.

22. Popkin et al., *supra* note 1, at 443.

23. Popkin et al., *supra* note 1, at 442.

24. *Id*.

heart disease, venous thromboembolism, mitral valve prolapsed, diabetic ketoacidosis, dental diseases, gallstones, and glaucoma."[25]

Recently the European Food Safety Authority (EFSA) was asked to revise existing "recommended intakes of essential substances with a physiological effect, including water since this nutrient is essential for life and health."[26] Interestingly, there is no gold standard for hydration. As a consequence, the effects of mild dehydration on the development of several disorders and diseases have not been well-documented.[27] The issue of fluid balance, which is the ability of the human body to maintain adequate hydration over time, continues to be a concern that remains unknown. Recommendations for future research include the examination of water physiology and the association between fluid balance or intake and disease at both molecular and epidemiological levels as well as appropriate methodologies to assess fluid balance and water requirements.[28] Research instruments need to be designed that record only fluid intake and be of such quality as to identify those who under-consume fluid as an "at risk" subgroup in each population.[29] Currently, "there are presently no acceptable biomarkers of hydration status at the population level, and controversy exists about the current knowledge of hydration status among older Americans."[30] Meanwhile, the invisible population of poor, disenfranchised, underserved, and marginalized populations throughout the world lack access to adequate hydration and fluid. This issue will receive further attention in the final section of this narrative.

III. THE ROLE AND FUNCTION OF WATER/HYDRATION IN MENTAL FUNCTIONING AND MENTAL AND SPIRITUAL HEALTH

"It is surprising how little information is available regarding the effects of dehydration on human cognitive function."[31] The absence of an operational definition of cognition creates ongoing challenges to research and study viable to develop a uniform working language. Nonetheless it is essential to continue to explore the implications of dehydration or water

25. Kavouras & Anatasiou, *supra* note 11, at S29.

26. Popkin et al., *supra* note 1, at 439.

27. *Id*.

28. Kavouras & Anatasiou, *supra* note 11, at S31.

29. *See* Laurent Le Bellego et al., *Understanding Fluid Consumption Patterns to Improve Healthy Hydration*, 45 NUTRITION TODAY 6S, S22–26 (2010) (discussing the importance of the quantity and quality of the fluids we drink every day and available recommendations for fluid intake).

30. Popkin et al., *supra* note 1, at 453.

31. Harris R. Liebermann, *Hydration and Human Cognition*, 45 NUTRITION TODAY 6S, S33 (2010) (discussing the importance of hydration for optimal brain function).

insufficiency on human mental performance and health. Although some studies provide vital information, they are limited in scope. It is known that mild dehydration can affect cognitive function such as alertness and short-term memory in children and younger and older adults.[32] Mild to moderate dehydration can impair performance on tasks involving such functions as short-term memory, perceptual discrimination, visuomotor tracking, ability to do math, and psychomotor skills.[33] Mood, fatigue, confusion, and anger can also be more easily manifested when individuals are dehydrated.[34] A study conducted at the Indian Defense Institute of Physiology and Allied Sciences suggested that dehydration levels of two percent or more impair particular functions of short-term memory, reasoning, and hand-eye coordination.[35] One study by Gabor Szinnai, et al. revealed that several reaction time-based responses indicated significant interactions between gender and dehydration. There were prolonged reaction times in women but shorter reaction times in men after water deprivation.[36] This indicates that "dehydration frequently results in delirium as a manifestation of cognitive dysfunction."[37]

Along these lines, the research that has been conducted and the literature that has been reviewed consistently reiterate that "despite its well-established importance, water is often forgotten in dietary recommendations, and the importance of adequate hydration is not mentioned."[38] Consistent themes emerge from what is known. Prolonged dehydration, particularly in children and elderly populations, results in

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32. Popkin et al., *supra* note 1, at 443.

33. *Id*.

34. *Id*.

35. Liebermann, *supra* note 31, at S34; some studies are limited in that they rely on self-report of tiredness and mood. There is some evidence that women are more affected in mood than males with moderate dehydration. *See also* a recent study by the Mayo Clinic 2008, that revealed that mild dehydration corresponding to only 1–2% of body weight loss in adults can lead to a significant impairment in alertness, concentration, and short-term memory. E. Jequier & F. Constant, *Water as an Essential Nutrient: The Physiological Basis of Hydration*, 64 EUROPEAN JOURNAL OF CLINICAL NUTRITION 115, 116–23 (2009), *available at* http://www.nature.com/ejcn/journal/v64/n2/abs/ejcn2009111a.html#aff2 (last visited Oct. 3, 2012) (discussing effects of dehydration).

36. Gabor Szinnai et. al., *Effect of Water Deprivation on Cognitive-Motor Performance in Healthy Men and Women*, 1 AMERICAN JOURNAL OF PHYSIOLOGY 275, 277 (2005), *available at* http://ajpregu.physiology.org/content/289/1/R275.full.pdf (last visited Oct. 3, 2012) (discussing the effect of dehydration on cognitive-motor performance in healthy people).

37. Margaret-Mary G. Wilson & Joseph E. Morley, *Impaired Cognitive Function and Mental Performance in Mild Dehydration*, 57 EUROPEAN JOURNAL OF CLINICAL NUTRITION S2, S24 (2003), *available at* http://ajpregu.physiology.org/content/289/1/R275.full.pdf (last visited Oct. 3, 2012) (discussing how mild dehydration impairs cognitive function and mental performance).

38. *See* Jequier & Constant, *supra* note 35 at 116.

cognitive impairments that can affect memory, performance, learning, concentration, and mood. Far less understood and studied, however, are the marginal, oppressed, invisible populations living in the depths of poverty and working under hazardous conditions. It is important to note that most studies have been conducted on the hearty, well, that is, military personnel, athletes, or educated. These variables alone constitute only a limited elite and privileged population. The discussion of water as a human right must include parameters of water adequacy and promote research to better and more thoroughly discover what marginalized populations experience and need. In this regard, social work is a kindred spirit, having its roots deep into social reform and social justice.[39]

From a biopsychosocial perspective that considers people in context, there are two connecting issues of critical importance. Both issues are connected to the physical, emotional, and mental well-being. The first is the inextricable link between water and religion—including spiritual practices. The second issue is the hazards that people encounter in trying to obtain water daily. One might argue that religion and spiritual practices preserve the well-being of people and their cultures. We will examine this connection first.

Most often disregarded in the discussion of adequate and potable water is the role of water in religion and spiritual practices. This dimension is of such essential and central importance that no discussion of human needs can exclude it without unraveling the very fabric of most cultures. Water plays a central role in many religions and beliefs around the world: it is 1) a source of life; and 2) it cleans the body, which by extension purifies it.[40] These two main qualities confer a highly symbolic, sacred status to water. *Navajo Nation v. United States Forest Service* further illustrated this point.[41] Under the Religious Freedom Restoration Act (RFRA), the Ninth Circuit Court of Appeals stopped the expansion of an Arizona ski resort that would have used artificial snow made from reclaimed water on a mountain

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39. Code of Ethics of National Association of Social Workers of 2008, Rule 6.04(a) (requiring social workers to engage in social and political action that seeks to ensure that all people have equal access to resources needed to meet basic human needs. In so doing, water adequacy is of critical importance in defining "basic human need.").

40. *Water in Religion*, THEWATERPAGE.COM, http://www.thewaterpage.com/religion.htm (last visited Oct. 3, 2012) [hereinafter *Water In Religion*].

41. *See* Navajo Nation v. U.S. Forest Serv., 479 F.3d 1024 (9th Cir. 2007). ("The Arizona Snowbowl is a privately-owned ski area situated in the Cuconino National Forest, on the Peaks, and is operated under a 777-acre Forest Service Special Use Permit . . . . In 1979, the Forest Service approved a series of upgrades, including new lifts, trails, and facilities.").

that is sacred to a number of Indian tribes.[42] The "Peaks," as they are commonly referred, are most sacred to the Hopi and Navajo. These tribes' religions have existed for centuries and "require pure natural resources from the Peaks, including, in particular spring water."[43] At issue was that pure mountain water was needed for particular ceremonies and such water could not be contaminated. Further, it was believed that the absence of the spring water "would prevent them from maintaining daily and annual religious practices comprising an entire way of life because the practice requires a connection to the mountain and a belief in the mountain's purity . . . ."[44] The decision upheld the tribes' right to religious freedom, which was likely to be further challenged by the defendant ski resort.

Religions and spiritual practices throughout the world mirror the sacredness of water to physical, emotional, and spiritual well-being. For example, water is used in Buddhist funerals.[45] In Christianity, water is intrinsically linked to baptism, symbolizing purification and the rejection of the original sin.[46] In Hinduism, all temples are located near a water source and followers must bathe before entering the temple. There are a number of functions of water in Islam, such as washing the whole body—it is obligatory after sex and recommended before the Friday prayers—before touching the Koran and before each of the daily prayers. Based on the veneration of the Kami, Shinto beliefs require one to begin worship of the Kami by ritual purification with water. In Judaism, water is used for ritual cleansing to restore or maintain a state of purity.[47] While there is not an exact translation or word for 'religion' in Africa, there are a number of terms that describe practices and systems of thought that correspond "closely to what most Westerners mean by religion."[48]

For many, particularly in the vast areas of East, West, Central, and Southern Africa, farmers are dependent on rain for their very survival; thus, "rain is an important focus of religious practice."[49] For the White Mountain

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42. *See* Advisories & Insights, BULLIVANT HOUSER BAILY PC, http://www.bullivant.com/latex/5260_0mj0ot55n4kfjre1l2nbnx2i.pdf (last visited Sept. 8, 2011) (stating this snow made with reclaimed water interferes with tribes' religious practices).

43. *Id*.

44. *Id*.

45. *Water In Religion*, *supra* note 40.

46. *Id*.

47. *Id*.

48. Indigenous African Religions: Explore, EXPLORING AFRICA, http://exploringafrica.matrix.msu.edu/students/curriculum/m14/activity2.php (lasted visited Sept. 9 2012) [hereinafter Indigenous African Religions: Explore].

49. *Id*.

Apache religion, there are Water People in human form.[50] For most of the populations of the world, religious and spiritual practices are essential and critical to well-being. It is not uncommon for persons deprived of water to believe that such a calamity is caused by the failure to carry out proper religious practices that frequently include the use of purified clean water.[51]

The second issue is directly related to the lack of adequate and adequately clean water and the degree that people–most often women and children–are compelled to put themselves in harm's way to obtain such water. In this regard, the external environment poses direct danger to them. In the developing world, the struggle to gain access to clean water is accompanied with many other risks that people must face on a daily basis for survival. From the threat of water or vector-born illness to the threat of rape, the dangers confronted by the people facing water scarcity are vast and numerous.

An important aspect of the risks and dangers that are presented by water scarcity is the increased threat to women and children.[52] UN Water reports, "[w]hen water is scarce, women and girls may have to travel longer distances to obtain water, and conditions are more dangerous."[53] UNICEF Executive Director Ann M. Veneman, who has also been to the Eastern part of the Democratic Republic of the Congo, observed that "when you have spoken to these women and girls, and listened to their stories, you clearly understand just how devastating their circumstances are. Simple, everyday tasks, like gathering wood or fetching water, expose them to grave danger.

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50. Grenville Goodwon, *White Mountain Apache Religion*, 40 AM. ANTHROPOLOGIST 1 (2009), *available at* http://onlinelibrary.wiley.com/doi/10.1525/aa.1938.40.1.02a00040/pdf (last visited Oct. 3, 2012).

51. *See* Indigenous African Religions: Explore, *supra* note 48.

> African religious traditions, as with Islam, Christianity, Judaism, and other major world religions, hold that just as there is good in the world, there is also evil. Goodness is the result of the blessings of God and the spiritual world in response to good behavior on the part of individuals and communities . . . .

52. Hilary Wighton, *Clean Water in Developing Countries* (Dec. 2009) (unpublished senior paper, California Polytechnic State University, San Luis Obisbo) *available at* http://digitalcommons.calpoly.edu/cgi/viewcontent.cgi?article=1009&context=socssp (last visited Oct. 3, 2012).

53. *Id*. (citing Water, Sanitation and Hygiene, UNICEF, http://www.unicef.org/wash/index_3951.html (last visited Sept. 9, 2012)) and Water, Sanitation and Hygiene – Women and Wash, UNICEF, http://www.unicef.org/wash/index_womenandgirls.html (last visited Oct. 3, 2012).

They must be allowed to live in a secure environment."[54] Clearly women and children are most expendable and vulnerable in this related issue of water.

IV. WATER ADEQUACY: AN ESSENTIAL ELEMENT IN EMPOWERING PEOPLE WHO ARE OPPRESSED AND WITHOUT PRIVILEGE

Turning to the effects of dehydration on mental functioning and mental health, it is clear from review of the literature that there is a dearth of scientific studies concerning these two dimensions. The majority of studies that do exist use hearty, well populations that include the military, athletes, and the educated as a source of information. We learned that water serves critical functions in digestion, absorption, transportation of nutrients, and preventing the body system from overheating. Further, we know that water hydration must be maintained continually, and is a non-negotiable item in securing and maintaining human well-being. Continued hydration or water replenishment is needed for optimal biological and psychological functioning. This is referred to as water adequacy**.**

Limited studies have demonstrated that even mild to moderate hydration can impair performance on tasks involving short-term memory, psychomotor skills, mood, fatigue, confusion, and even delirium. Studies have focused on the privileged and have excluded the marginalized, oppressed populations of the nation and the world. Unfortunately, these are the very populations whose need for water and water adequacy have remained unstudied. Such populations include those in countries where water is extremely limited in supply. These countries have limited water supply by virtue of being controlled and oppressed. As such, they cannot access water nor achieve water adequacy. This author contends that there is a vested interest by those in power to maintain control of water and limit water adequacy over marginalized populations in order to preserve that power.

Rooted deeply in a history of social reform and justice, social work practice is fueled through the belief "that many personal difficulties are the result of social and economic structures that make it impossible for people to utilize the strengths and competencies they do possess."[55] Further

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54. Press Release, UNICEF, V-DAY, UNICEF call for end to rape, sexual torture against girls in eastern DRC (Aug. 7, 2007) *available at* http://www.unicef.org/media/media_40512.html (last date visited Oct. 3, 2012).

55. BRADFORD W. SHEAFOR & CHARLES J. HOREJSI, TECHNIQUES AND GUIDELINES FOR SOCIAL WORK PRACTICE 280 (9th ed. 2012) ("Fundamental to empowerment is the conviction that each individual must be able to be an active participant in social and political action which can include the distribution of vital resources such as water").

examination reveals that for the powerful and wealthy, there is a distinct utilitarian use for large, impoverished populations. The powerful and wealthy who use the "poor people [who] can do the dirty work for rich people, are more willing to take service jobs or jobs that require hard labor or posing a danger . . . ."[56]

Water and water adequacy are useful weapons of coercive control for those in power. A brief examination reveals that the methods used to control people, whether hostages, political prisoners, victims of human trafficking, or domestic violence are universal.[57]

> The perpetrator supervises what the victim eats, when she sleeps, when she goes to the toilet, what she wears. When the victim is deprived of food, sleep, or exercise this control results in physical debilitation.[58]

Therefore, when water and water adequacy is controlled, it is argued that those in power can create a population that is compromised physically and mentally due to dehydration. A compromised population is more easily dominated and subject to the will of those in power. Further, people in continual weakened and compromised conditions may be less of a threat or rival force against oppression. In addition to personal, physiological, and mental processes, water also serves a multitude of other functions such as sanitation, agriculture, and quality of life related uses.

V. CONCLUSION

For purposes of showing the critical nature of water to human survival and well-being, the essential issues come down to the primacy of human survival. Water becomes a political weapon of coercive control. It serves those in power by maintaining control over resources that, if abundant and adequate, can enhance the overall well-being of marginalized and disenfranchised populations. Furthermore, it is most often these marginalized and oppressed populations that perform the most arduous labor, leading to possible permanent injury, impairment, or even death. It is for these reasons that water adequacy is an essential element in the battle for human empowerment and equality.

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56. KAREN KIRST-ASHMAN, SOCIAL WORK AND SOCIAL WELFARE CRITICAL THINKING PERSPECTIVES 210 (3d ed. 2010).

57. JUDITH HERMAN, TRAUMA AND RECOVERY: THE AFTERMATH OF VIOLENCE—FROM DOMESTIC ABUSE TO POLITICAL TERROR, 77 (BASIC BOOKS 1997) (discussing methods of establishing control are organized techniques of disempowerment and disconnection).

58. *Id*.

WATER, WORSHIP, AND WISDOM: INDIGENOUS TRADITIONAL ECOLOGICAL KNOWLEDGE AND THE HUMAN RIGHT TO WATER

Rhett B. Larson[*]

The relationship between religion and water, whether as a spiritual symbol or ceremonial source, is virtually universal. This relationship is often very strong in the religious practices and beliefs of indigenous peoples, who typically have a strong spiritual connection to their traditional lands and waters. This connection is often manifested in "traditional ecological knowledge" (TEK), socially-beneficial environmental management practices, and information transmitted by cultural and often religious tradition.

As indigenous communities and the ecological integrity of indigenous traditional waters are threatened, indigenous people may turn to claims under international human rights as a means of protecting water resources and securing water rights. The current approach to the international human right to water is likely to prove inadequate for indigenous people to achieve protection of water quality and an equitable apportionment of water resources. A new approach to the human right to water, grounded in religious rights and religiously-based TEK, could provide a stronger protection for indigenous water rights and the water quality of traditional indigenous waters. This Essay proposes such an approach, as well as a framework for international courts to adjudicate indigenous religious rights-based claims to water resources.

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* Professor Rhett B. Larson is Visiting Assistant Professor of Law at Arizona State University's Sandra Day O'Connor College of Law. I would like to thank the Inter-American Center for Human Rights at Nova Southeastern University's Shepard Broad Law Center for the opportunity to participate in their symposium—"Water: A Human Right"—on September 16–17, 2011. I would also like to thank Victor Palacios, Melanie Malave, and Gabriel Eckstein for their assistance. All errors are my own.

I. INTRODUCTION

Water is used in ceremonies or as a symbol in nearly every religious community. Despite this near universal connection between religion and water, the religious use or protection of water is largely ignored in legal scholarship. The spiritual character of water makes for an inconvenient co-religionist with water demand economics and environmental protection science, posing a miasma of legal complications. The legal challenges associated with the relationship between water and worship are particularly complex for indigenous communities. Unlike many mainstream religions, indigenous communities often center religious worship on particular

geographic features, including rivers.[1] This unique relationship between faith and geography blends complex questions on the scope and meaning of the right to life, with similar questions relating to property rights, religious rights, and sovereignty rights.

This essay evaluates how indigenous communities' religious rights, in connection with indigenous traditional ecological knowledge, may support indigenous community claims to water rights and protection of water quality under international law. Section I places the religious rights-based approach to the international human right to water for indigenous communities within the broader discussion on the human right to water. Section I also notes the advantages of a religious rights-based approach for indigenous communities seeking access to, or protection of, water resources. Section II addresses the implications of indigenous religious rights-based claims to water in the context of religiously-based traditional ecological knowledge related to water. Section III proposes how indigenous communities can best pursue a religious rights-based approach to water resource claims, and a potential framework for adjudicating indigenous religious rights claims to water under international law.[2]

II. THE INTERNATIONAL HUMAN RIGHT TO WATER AND RELIGION

Indigenous communities suffer disproportionately from environmental degradation and appropriation of their traditional lands and resources.[3] For example, the Huaroni are a small tribe living along the Napo and Curaray Rivers in the rain forests of Ecuador who have suffered from pollution of their traditional water sources from oil development.[4] As part of an effort to respond to this growing global crisis, of which the Huaroni are only one example, the United Nations (U.N.) issued its Declaration on the Rights of Indigenous Peoples (IP Declaration) in 2007.[5] Article 25 of the IP Declaration provides that indigenous peoples "have the right to maintain

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1. *See generally* GREGORY CAJETE, LOOK TO THE MOUNTAINS: AN ECOLOGY OF INDIGENOUS EDUCATION (Kivaki Press 1994).

2. This essay summarizes the broader analysis originally published in the Arizona Journal of Environmental Law and Policy, Volume 2, Issue 1 (2011); *see generally* Rhett Larson, *Holy Water and Human Rights: Indigenous Peoples' Religious-Rights Claims to Water Resources*, 2 ARIZ. J. OF ENV. L. & POL'Y 81 (2011).

3. *See* JULIAN BURGER, REPORT FROM THE FRONTIER: THE STATE OF THE WORLD'S INDIGENOUS PEOPLES (1987); *see also* Robert K. Hitchcock, *International Human Rights, the Environment, and Indigenous Peoples*, 5 COLO. J. INT'L ENVTL. L. & POL'Y 1 (1994).

4. William A. Shutkin, *International Human Rights Law and the Earth: The Protection of Indigenous Peoples and the Environment*, 31 VA. J. INT'L L. 479, 496–97 (1991).

5. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, ¶10, U.N. Doc. A/RES/47/1 (Sept. 7, 2007) [hereinafter IP Declaration].

and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, [and] *waters*"[6] [emphasis added]. The U.N. thus draws a connection between spiritual practice and rights to the use of water by indigenous peoples. This connection suggests a potential novel approach to indigenous water rights claims under international law.

Indigenous communities may face challenges in asserting a religiously-based right to water through domestic law. With respect to water, indigenous communities are often constrained by their relationship with national governments.[7] This section evaluates the potential to pursue a religiously-based right to water under international human rights law, and how such an approach may prove more successful in securing or improving water resources for indigenous communities than alternative theories under international law.

A. The Right to Water Under United Nations Declarations

Ultimately, the potential for a religious rights-based argument to water resources by indigenous peoples under international law may depend upon the existence of an enforceable international human right to water. The human right to water has been addressed expressly in several U.N. documents, but those documents, like the IP Declaration, are not typically legally binding.

The most recent non-binding iteration of the formulation of the international human right to water was set forth by the U.N. General Assembly on July 28, 2010.[8] That resolution declared that the "right to safe and clean drinking water . . . [is] a human right that is essential for the full enjoyment of life and all human rights."[9] Despite the political and diplomatic role this resolution plays in encouraging expanding access to safe drinking water, this resolution does not establish a legally binding and enforceable human right to water.[10] Nor does this resolution answer the questions at the heart of the human right to water debate: Must water be provided for free or heavily subsidized, and if so, by whom and who covers the cost? If free or heavily subsidized, what are the implications for conservation? How much water, and what quality of water, is required?

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6. *Id*. at art. 25.

7. William Blatt, *Holy River and Magic Mountain: Public Lands Management and the Rediscovery of the Sacred in Nature*, 39 LAW & SOC. REV. 681, 682 (2005).

8. The Human Right to Water and Sanitation, U.N. GAOR, 64th Sess., 108th plen. mtg. at 4, U.N. Doc. A/64/PV.108 (July 28, 2010).

9. *Id*. at 17–18.

10. *Id*.

Against whom is the right enforceable? Does such a right create rights in nations *vis á vis* other nations, or in non-state actors *vis á vis* other nations or their own nations?

U.N. human rights instruments generally do not mention water expressly, and thus an international water right must be inferred.[11] For example, Article 25 of the U.N.'s Universal Declaration of Human Rights (HR Declaration) provides the following: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family."[12] This right infers a right to access water, without which there is no standard of living at all.[13] However, the HR Declaration is binding only to the extent it has become part of "customary international law" and guides interpretation of other U.N. documents.[14]

To the extent the HR Declaration is binding, it is likely binding only for "liberty rights" (e.g., those natural rights with which governments will not legally interfere without due process) and is not binding for "welfare rights" (e.g., rights to goods or services which governments must secure or extend).[15] Any water right inferred from the HR Declaration would likely be considered a non-guaranteed "welfare right."[16]

The ultimate power of the HR Declaration, the IP Declaration, and the recent General Assembly Resolution on the human right to water lie in their political and diplomatic role and interpretive influence, not in their legal effect. This power, though not negligible, still compels indigenous communities to look elsewhere to ground claims to water quality or water resources on guaranteed rights enforceable in international tribunals by non-state actors.

B. The Right to Water Under United Nations Covenants

Unlike the U.N. declarations and resolutions described above, the U.N.'s 1967 Covenant on Civil and Political Rights (CP Covenant) imposes

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11. Stephen McCaffrey, *A Human Right to Water: Domestic and International Implications*, 5 GEO. INT'L ENVTL. L. REV. 1, 7 (1992).

12. Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/Res/217/64 (1948) [hereinafter HR Declaration].

13. McCaffrey, *supra* note 11, at 7–8.

14. *Id.*; *see also* Eric Posner and Alan Sykes, *Efficient Breach of International Law: Optimal Remedies, "Legalized Noncompliance," and Related Issues*, 110 MICH. L. REV. 243, 290–91 (2011).

15. Posner & Sykes, *supra* note 14. For an overview of human rights under U.N. treaties and the distinction between negative and positive rights, *see* LOUIS HENKIN ET AL., HUMAN RIGHTS, 214–23 (2d ed. 2009).

16. HENKIN ET AL., *supra* note 15, at 214–23.

an immediate obligation to ensure the rights it contains.[17] Article 6 provides that every person "has the inherent right to life."[18] Life cannot be sustained without adequate water; thus, the CP Covenant arguably requires states to ensure access to adequate water to all people.[19] However, many commentators view this right to life as a "liberty right," which does not impose an affirmative obligation on governments to provide adequate water.[20]

The U.N. adopted the Covenant on Economic, Social, and Cultural Rights (ESC Covenant) in 1967.[21] Article 11 recognizes a right to an "adequate standard of living," which implies a right to water (at least a "liberty right").[22] The ESC Covenant, however, requires only that states "take steps . . . to the maximum of [their] available resources, with a view to achieving progressively the full realization of the rights recognized in the [ESC Covenant]," and thus is practically non-binding on states.[23]

A right to water was recognized in 2002 under General Comment 15 to the ESC Covenant.[24] General Comment 15 infers the right to water from other rights under the ESC Covenant, finding the right to water "indispensable" to the realization of other human rights and recognizing the right to water in other international legal instruments, including human rights treaties and environmental declarations.[25]

Nevertheless, General Comment 15 alone likely does not support an international legal claim to water. General Comment 15 does not constitute a legally binding interpretation of the ESC Covenant.[26] Even if Comment

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17. International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, Supp. No. 52, U.N. Doc. A/6316 (1967) [hereinafter CP Covenant]; *see also* McCaffrey, *supra* note 11, at 9.

18. CP Covenant, *supra* note 17, at art. 6.

19. *Id*.

20. McCaffrey, *supra* note 11, at 9.

21. International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200 (XXI), U.N. GAOR, Supp. No. 49, U.N. Doc. A/6316 (1967) [hereinafter ESC Covenant].

22. *Id*. at art. 11.

23. *Id*. at art. 2(1).

24. Committee on Economic, Social, and Cultural Rights, General Comment 15, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Comment 15].

25. *Id*.

26. Erik B. Bluemel, *The Implications of Formulating a Human Right to Water*, 31 ECOLOGY L.Q. 957, 972 (2004).

15 enshrined a human right to water in the ESC Covenant, "it would be largely of symbolic value."[27]

Additionally, the ESC Covenant is a weak foundation upon which to base the human right to water, as compared to the CP Covenant. The CP Covenant contains a stronger statement with respect to state obligations and includes an adjudicative process.[28] The CP Covenant also includes a binding Optional Protocol, which provides a legal mechanism whereby non-state actors, including indigenous communities, can bring claims against their own nations for violations of human rights.[29] The ESC Covenant is ambiguous as to state obligations and lacks adjudicative processes. Furthermore, unlike the CP Covenant, the ESC Covenant's Optional Protocol remains non-binding, and thus there is no mechanism whereby non-state actors can bring claims under the ESC Covenant.[30] The absence of a binding Optional Protocol, the relatively weak obligation only to "progressively realize" guaranteed rights, and its ambiguity and lack of adjudicative processes and precedent combine to make the ESC Covenant "normatively and jurisprudentially underdeveloped compared to the [CP Covenant]."[31]

C. An Independent Human Right to Water

The human right to water could arise as an independent right if it constitutes binding "customary international law."[32] There is an increasing support for the existence of that independent right. For example, the Dublin Statement (a non-binding U.N. document) declared that it is "vital to recognize the basic right of all human beings to have access to clean water and sanitation at an affordable price."[33] However, few countries recognize

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27. STEPHEN MCCAFFREY, *The Human Right to Water*, *in* FRESH WATER AND INTERNATIONAL ECONOMIC LAW 93–115, 108 (Edith Brown Weiss et al. eds., Oxford Univ. Press 2005).

28. *See* CP Covenant, *supra* note 17, at art. 2, ¶ 1.

29. Optional Protocol to the International Covenant on Civil and Political Rights, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (Dec. 16, 1966).

30. Optional Protocol to the International Covenant on Economic, Social and Cultural Rights, G.A. Res. 63/117, U.N. Doc. A/RES/63/117 (Dec. 10, 2008).

31. SARAH JOSEPH, JENNY SCHULTZ & MELISSA CASTAN, THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS: CASES, MATERIALS, AND COMMENTARY 163 (Oxford Univ. Press 2d ed. 2004).

32. DAVID J. BEDERMAN, INTERNATIONAL LAW FRAMEWORKS (Foundation Press 2001).

33. International Conference on Water & the Environment, Jan. 26–31, 1992, *The Dublin Statement on Water and Sustainable Development*, princ. 4, U.N. Doc. A/CONF.151/PC/112 (Mar. 12, 1992) [hereinafter Dublin Statement].

an independent right to water, and the right to water has likely not achieved the status of "customary international law."[34]

Furthermore, the Dublin Statement, and even Comment 15, each discuss water as a "good."[35] Comment 15 refers to water as a "public good."[36] The Dublin Statement provides that water has "economic value in all its competing uses and should be recognized as an economic good."[37] As such, international law likely does not view privatization as a *per se* violation of the human right to water.[38] These documents arguably undercut claims to a human right to water on any basis other than "liberty rights" by characterizing water as an economic commodity and private property.[39] Indigenous communities are thus unlikely to ground a successful claim to water resources on a "customary international law" basis for a human right to water.

D. A Negative Rights Approach Over a Positive Rights Approach

Two recent domestic cases illustrate how a negative rights approach to the human right to water, such as an approach made under the CP Covenant, could prove more successful for indigenous peoples than a positive rights approach.

A recent case, *Mazibuko v. City of Johannesburg* from South Africa's Constitutional Court, illustrates the potential pitfalls of a positive rights approach to the human right to water.[40]

South Africa was the first country to explicitly provide a constitutional right to "sufficient" water.[41] South Africa's government interpreted this to mean a guarantee of at least twenty-five liters of water per person each day.[42] Initially, the City of Johannesburg complied with this requirement by supplying water based on a payment of a single, flat fee.[43] However, this soon proved economically unsustainable, particularly in Phiri, a poor

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34. Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates*, 4 NW. J. INT'L. HUM. RTS. 331, 338 (2005).

35. General Comment 15, *supra* note 24.

36. *Id*.

37. Dublin Statement, *supra* note 33.

38. McCaffrey, *supra* note 27, at 106.

39. Hardberger, *supra* note 34, at 334.

40. *Mazibuko & Others v. The City of Johannesburg & Others* 2009 ZACC 28, CCT 39/09 (CC) at ¶ 16 (S. Afr.).

41. S. AFR. CONST., 1996 at art. 27.

42. *Mazibuko*, *supra* note 40, at ¶ 11.

43. *Id*. at ¶ 15; *see also* South African Water Services Act of 1997, § 9 (S. Afr.).

and predominantly black neighborhood in the Soweto area of the City.[44] Phiri residents paid only one percent of the cost it took to provide the neighborhood with water.[45] In response to this problem, the City changed its policy.[46] It provided twenty-five liters per person each day for free, and then installed prepaid meters.[47] If residents did not prepay for water, their water services were cut off, even though regulations required notice and a hearing prior to cessation of water services.[48] While other parts of the City continued to pay for water on credit, Phiri was one of the few areas where the new "free basic water policy" was implemented.[49] Residents of Phiri claimed the City's "free basic water policy" violated their constitutionally guaranteed right to water.[50]

At the trial court level, the court held in favor of the Phiri residents, claiming that twenty-five liters per person each day was insufficient and the free amount should have been fifty liters per person each day.[51] On appeal, the appellate court held again for the Phiri residents, but reduced the amount of free water to forty-two liters per person each day.[52] On appeal, the South African Constitutional Court, however, deferred to the City's "free basic water policy" approach and reversed the lower court rulings.[53]

Ultimately, the South African Constitutional Court concluded that the positive right to water guaranteed by the South African Constitution could not be imposed without consideration of available resources and cost recovery of services provided.[54] The practical considerations of funding a sustainable water supply and distribution effectively precluded a successful human rights claim to a certain quantity or quality of water.

On the other hand, a negative rights approach, based on the types of rights guaranteed under the CP Covenant, could prove more straightforward and thus more successful. An example of the success of such a "traditional civil rights" approach to the human right to water (though at the national, rather than international level) can be found in the *Mosetlhanyane* case in

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44. *Mazibuko*, *supra* note 40, at ¶ 10.

45. *Id*. at ¶ 146.

46. *Id*.

47. *Id*. at ¶ 26.

48. *Id*. at ¶ 28; *see also* South African Promotion of Administrative Justice Act of 2000 (S. Afr.).

49. *Mazibuko*, *supra* note 40, at ¶ 31.

50. *Id*. at ¶ 105.

51. *Id*. at ¶ 26.

52. *Id*. at ¶ 28.

53. *Id*. at ¶ 171.

54. *Mazibuko*, *supra* note 40, at ¶ 169.

Botswana.[55] Here, Kalahari Bushmen secured the right to access traditionally-used wells for drinking water based on their constitutionally-protected right to be free from degrading or inhumane treatment.[56] Even though the national constitution of Botswana did not provide for an express "welfare right" to water, the right to water was secured in connection with express traditional civil rights embodied in the constitution and mirrored in Article 7 of the CP Covenant, which guarantees freedom from "cruel, inhuman, or degrading treatment."[57]

Reliance on a "liberty right," such as the right to be free from cruel or degrading treatment grounds claims on well-adjudicated, clearly binding rights that do not implicate issues of limited resources or cost recovery.[58] By avoiding such issues through a negative rights approach, the Kalahari Bushmen secured the access to water they desired.[59] By confronting such issues, the residents of Phiri failed to secure the access to water they desired, despite an express guarantee of a positive right to water in the South African Constitution.[60] Such an approach is even less likely to secure water in the international context, where no express guarantee of water exists. Importantly, in the only two instances in which water is expressly mentioned in binding international human rights instruments, it is mentioned in connection with a negative right—the right to be free from discrimination as a child or as a woman.[61]

E. The Human Right to Water and Religious Rights

Based on the above, to formulate the strongest argument under international law supporting a human right to water, the claimant should base its argument on rights contained in the CP Covenant. The argument for a human right to water should not be framed as a "welfare right" under the ESC Covenant, as these rights must only be implemented progressively and in accordance with available resources and lack a mechanism for non-state actors to bring a claim against their own nations. Instead, the human

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55. *See generally Matsipane Mosetlhanyane et al. v. Attorney General*, *Court of Appeals of the Republic of Botswana*, Civil Appeal No. CACLB-074-10 [hereinafter *Mosetlhanyane*]; High Court Civil Case No. MAHLB-000393-09.

56. *Id*.

57. CP Covenant, *supra* note 17, at art. 7.

58. *See generally Mosetlhanyane*, *supra* note 55.

59. *Id*. at 37.

60. *Id*. at 36.

61. *Convention for the Elimination of All Forms of Discrimination Against Women*, 1 March 1980, 1249 UNTS 13, Can TS 1982 No 31 [hereinafter CEDAW]; *see also Convention on the Rights of the Child*, 20 November 1989, 1577 UNTS 3, Can TS 1992 No 3 [hereinafter CRC].

right to water should be framed as a "liberty right." Such rights under the CP Covenant are immediately binding upon states and have clear adjudicative processes available to non-state actors.

With a well-established adjudicative process available to non-state actors, the right to freely exercise one's religion is a "liberty right" within the CP Covenant and is immediately binding on states.[62] Article 18 of the CP Covenant provides that everyone "shall have the right to freedom of thought, conscience and religion."[63] This right shall include "freedom to . . . either individually or in community with others . . . manifest his religion or belief in worship, observance, practice and teaching."[64] The CP Covenant provides that religious freedom may be limited only as "prescribed by law and [as] necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[65]

Any governmental action relating to water which burdens an individual or community's religious practice could constitute a violation of Article 18 of the CP Covenant, which is binding on states and includes an adjudicative process.[66] Such governmental actions could include, among other actions, discharge or abstraction permits decreasing stream flows, or degrading water quality, dam construction, international water treaties with unreasonable or inequitable apportionments, and the establishment of water quality regulations insufficiently protective of water quality.[67]

When interpreted under the IP Declaration, religious rights under the CP Covenant may provide a strong legal basis for indigenous communities to assert a religious rights-based claim to water resources. The IP Declaration implicitly connects the religious rights of the CP Covenant to indigenous communities' rights to maintain and strengthen their "distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories and water."[68]

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62. Puja Kapai and Anne S.Y. Cheung, *Hanging in the Balance: Freedom of Expression and Religion*, 15 BUFF. HUM. RTS. L. REV. 41, 48 (2009).

63. CP Covenant, *supra* note 17, at art. 18.

64. *Id*.

65. *Id*.

66. *Id*.

67. *Id*.

68. IP Declaration, *supra* note 5, at art. 25.

III. THE IMPLICATIONS OF INDIGENOUS RELIGIOUS RIGHTS-BASED CLAIMS TO WATER RESOURCES

Beyond the potential legal strategic advantages noted above, indigenous claims to water based on religion may carry positive and negative implications for cultural and ecological conservation, sovereignty and self-determination of indigenous communities, interpretation of existing water law, and resolution of water conflicts.[69]

For example, the Pueblo of Isleta (Pueblo), a tribal nation located in the Southwestern United States (U.S.), sought approval from the U.S. Environmental Protection Agency (EPA) for water quality standards established by the tribe.[70] The standards proposed by the Pueblo were more stringent than typical EPA-approved water quality standards established by the states, as the Pueblo sought protection for ceremonial uses of the water.[71] The EPA approved these standards in an acknowledgement of the tribe's right to self-determination and sovereignty over natural resources, and the tribe's policy towards improvement of water quality and environmental protection.[72] Despite these benefits, upstream water users complained that these stringent standards placed an undue burden on their water uses.[73] The upstream users, including municipalities, challenged the EPA's approval of the Pueblo's standards because they assumed costs associated with changes to their water uses and treatment of discharges into the river to conform to standards.[74] Upstream users claimed these standards were unreasonable, in part because they were based on religious beliefs they did not share; further, they considered these standards contrary to the best available science on appropriate standards established through a cost-benefit analysis.[75]

Religiously-based policies and practices toward natural resources can thus be a double-edged sword for indigenous communities. On the one hand, they may serve to preserve otherwise threatened traditional uses and cultural practices, promote and protect self-determination and sovereignty, and maintain and improve environmental quality and human health. On the

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69. Rebecca Tsosie, *Tribal Environmental Policy in an Era of Self-Determination: The Role of Ethics, Economics, and Traditional Ecological Knowledge*, 21 VT. L. REV. 225, 226 (1996).

70. *Id*. at 235; *see also* City of Albuquerque v. Browner, 865 F.Supp. 733, 733 (D.N.M. 1993).

71. Tsosie, *supra* note 69, at 236; *City of Albuquerque*, 865 F.Supp. at 736, 740.

72. Tsosie, *supra* note 69, at 235.

73. *Id*. at 236.

74. *Id*.

75. *Id*.; *City of Albuquerque*, 865 F.Supp. at 740.

other hand, such policies and practices may be viewed as unreasonable and unfair by those who share the resources with the indigenous community or compete for claims to a right over the resources.

A. Religious Rights to Water and Traditional Ecological Knowledge

The religiously-based approach toward resource protection and environmental policy demonstrated in the case of the Pueblo of Isleta codified traditional religious beliefs and practices related to the protection of water resources.[76] Religious rights-based claims to water provide a legal bulwark to potentially beneficial indigenous resource management methods. Indigenous communities may develop valuable TEK embodied in religious ceremonies and teachings that promote sustainable water management.[77] TEK is a "body of knowledge, practice and belief, evolving by adaptive processes and handed down through generations by cultural transmission, about the relationship of living beings (including humans) with one another and with their environment."[78]

Failure to legally protect indigenous religious-based TEK could have adverse ecological as well as cultural impacts, as there is an "inextricable link" between cultural and biological diversity that gives rise to a "converging extinction crises [sic]."[79] A religious-based claim to indigenous water rights operates on both fronts of these crises. By protecting and promoting environmentally-beneficial TEK through legal means, law may mitigate threats posed to both survival of indigenous cultures and to the environmental quality of traditional indigenous lands and waters.[80]

Additionally, religious-based claims to water rights reinforce the legitimacy of indigenous, religious-based TEK. For example, in the Katun River Basin in Siberia, the Altaians' religious beliefs prohibit the subjugation of the natural world and thus the Altaians opposed construction of a dam on the Katun River; the Katun River holds a particular religious significance for the Altaians.[81] Part of their strategy in successfully

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76. Tsosie, *supra* note 69, at 236.

77. FIKRET BERKES, SACRED ECOLOGY: TRADITIONAL ECOLOGICAL KNOWLEDGE AND RESOURCE MANAGEMENT 8 (Taylor and Francis: Philadelphia 1999).

78. *Id*.

79. Luisa Maffi, *Linguistic, Cultural, and Biological Diversity*, 29 ANNUAL REV. ANTHROPOL. 599, 602–11 (2005).

80. *Id*. at 611.

81. Kheryn Klubnikin, Cynthia Annett, Maria Cherkasova, Michail Shishin & Irina Fotieva, *The Sacred and the Scientific: Traditional Ecological Knowledge in Siberian River Conservation*, 10 ECOLOGICAL APPLICATIONS 1296, 1297–1300 (2000).

opposing the dam was informing scientists of their religious-based TEK, which included distinguishing fish species by physical characteristics and their knowledge of the medicinal properties of plants that would have been harmed by dam construction.[82] A religious rights-based claim to water would provide legally cognizable claims to protect the type of TEK employed by the Altaians—TEK which successfully influenced water policy and informed scientific knowledge.

Claims to water resources grounded in TEK with a demonstrated economic or environmental value are more likely to succeed as those claims are less likely to be challenged as unreasonable. Such claims can expand existing knowledge on tools for sustainable development by legitimizing the knowledge and practice of communities most familiar with the historical function of ecosystems on traditional indigenous lands.[83]

Nevertheless, in citing case studies like those of the Katun River, there is a danger of adhering to the myth of the "ecologically noble savage."[84] Indigenous religious beliefs and practices may have detrimental ecological effects. For example, the religious motivation behind the construction of the iconic stone statues of Easter Island arguably contributed to the ecological catastrophe that deforested and largely depopulated the island.[85] Where claims for water resources are grounded on practices or beliefs with no demonstrable economic or environmental benefit, these claims are less likely to succeed as those claims will likely be challenged as unreasonable. Those claims with no economic or environmental benefit undermine efforts to legitimize TEK as an important source of best practices for sustainable development.[86]

Further, resource management decisions based on indigenous religions can be as much of a double-edged sword as any other approach to resource management. For example, the Navajo Nation (Navajo) sued the U.S. Forest Service for desecrating a sacred site by authorizing use of treated sewage effluent to supplement snow during low precipitation years in a ski resort on mountains owned by the federal government, leased to a ski resort developer, and considered sacred by the Navajo.[87] Arguably, the Navajo's

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82. *Id*. at 1300–02.

83. *Id*.

84. Kent H. Redford & Allyn Maclean Stearmn, *Forest-Dwelling Native Amazonians and the Conservation of Biodiversity: Interests in Common or in Collision?*, 7 CONSERVATION BIOLOGY 248, 254 (1993).

85. *See* JARED DIAMOND, COLLAPSE: HOW SOCIETIES CHOOSE TO FAIL OR SUCCEED, Chap. 2 (Viking Books 2005).

86. Klubnikin et al, *supra* note 81, at 1300–02.

87. *See* Navajo Nation v. U.S. Forest Service, 535 F.3d 1058 (9th Cir. 2008).

opposition would prevent pollution from sewage effluent with elevated nutrient and bacteria levels.[88] However, the opposition of the Navajo also could create obstacles to water recycling, regarded by many as an essential component to water resource conservation in arid regions.[89]

Thus, even where TEK may have demonstrable environmental benefits, concerns over the cost-benefit analysis of implementing such TEK on a cross-cultural scale are problematic, particularly as religiously-based TEK may defy cost-benefit analysis in the minds of indigenous peoples basing claims on such TEK.[90] Despite the potential drawbacks, a strategy of basing claims to water resources predicated on TEK preserves and transmits potentially-valuable TEK in the face of a hegemonic threat to the culture of indigenous peoples.[91]

B. Indigenous Religious Claims to Water and Interpretation of Law

In addition to preserving valuable TEK, indigenous religious rights-based claims to water resources may legitimize interpretations of existing water law in support of ecological preservation and sustainable water management.[92] For example, the Doctrine of Beneficial Use governs water appropriations in most of the Western United States.[93] The Doctrine of Beneficial Use provides that a water right is legally recognized only if the water is put to a "beneficial use"—with non-use resulting in forfeiture of the water right, and wasteful use prohibited.[94] Often, state water law establishes a narrow definition of "beneficial use" that does not recognize cultural uses of water or even in-stream uses of water such as stream flow preservation.[95]

To preserve such water uses and water management options, the Wind River Reservation, encompassing the Shoshone and Arapahoe people,

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88. *Id*. at 1082.

89. *Id*. at 1065.

90. *See generally* Klubnikin et al, *supra* note 81, at 1300–02; Redford and Stearmn, *supra* note 84 at 252.

91. *See generally* Klubnikin et al, *supra* note 81, at 1300–02; Redford and Stearmn, *supra* note 84 at 252.

92. Klubnikin et al, *supra* note 81, at 1300–02.

93. Cathleen Flanagan and Melinda Laituri, *Local Cultural Knowledge and Water Resource Management: The Wind River Indian Reservation*, 33 ENVIRONMENTAL MANAGEMENT 262, 270 (2004).

94. *See, e.g*., Lawrence v. Clark County, 254 P.3d 606, 611 (Nev. 2011); *see also* Stephen F. Williams, *The Requirement of Beneficial Use as a Cause of Waste in Water Resource Development*, 23 NAT. RESOURCE J. 7 (1983).

95. Flanagan and Laituri, *supra* note 93, at 266.

developed the Wind River Water Code, which provides that religious and in-stream uses of water fall within the definition of "beneficial use," thereby legally protecting water rights based on ceremonial and ecological conservation as "beneficial uses."[96] Legal arguments tying the human right to water with religious rights lend legitimacy to the Wind River approach and would support in-stream and religious uses of water as valid under the Doctrine of Beneficial Use.[97] A right to water based on religious rights could foreclose legal challenges that require users to withdraw and sometimes waste water or face losing water rights under the common "use-it-or-lose-it" principle.[98]

However, interpretation of water law arising from religious rights-based claims to water carries several risks. First, the religious rights argument to water resources could be made as a pretext to secure an inequitable or unsustainable allocation of water or unreasonable protection of water quality.[99] For example, indigenous communities in the Southwestern United States have made both formal and informal efforts to prevent uranium mining on tribal land, or land held sacred by tribes.[100] These efforts have been challenged by both mining companies and tribal members claiming that religiously-based bans preclude economic development for tribal communities in need of jobs and industry from development of tribal natural resources.[101] Furthermore, development of uranium could form part of the efforts to develop nuclear power to mitigate climate change, which has arguably disproportionate impacts on indigenous peoples.[102] Nevertheless, these tribal communities opposing uranium mine

96. *Id*.

97. *Id*. at 264, 266.

98. *See e.g*., *id*. at 265; Geringer v. Runyan, 235 P.3d 867, 870 (2010); *see also* R. Lambeth Townsend, *Cancellation of Water Rights in Texas: Use It or Lose It*, 17 ST. MARY'S L. J. 1217 (1986).

99. Havasupai Tribe v. U.S., 752 F.Supp. 1471, 1476 (D. Ariz. 1990), *aff'd*, 943 F.2d 32 (9th Cir. 1991).

100. *See, e.g*., *Havasupai Tribe,* 752 F.Supp. at 1480; *see also* Winona LaDuke, "*Navajos Ban Uranium Mining*," EARTH ISLAND JOURNAL, Autumn 2005, Vol. 20 Issue 3, 37–38.

101. Judy Pastemak, *Mining Firms Again Eyeing Navajo Land*, LA TIMES.COM, Nov. 22, 2006, http://www.latimes.com/news/la-na-navajo22nov,0,2730465.story?page=1 (last visited Oct. 16, 2012); *see also Navajo's Ban Uranium Mining on Reservation*, ASSOCIATED PRESS, April 22, 2005, http://www.msnbc.msn.com/id/7602821/ns/us_news-environment/t/navajos-ban-uranium-mining-reservation/#.UHwxGIaxPCD (last visited Oct. 16, 2012).

102. Albert C. Lin, *Evangelizing Climate Change*, 17 N.Y.U. ENVTL. L.J. 1135, 1170–71 (2009); *see also* Christopher Furgal & Jacinthe Seguin, *Climate Change, Health and Vulnerability in Canadian Northern Aboriginal Communities*, 114 ENVTL. HEALTH PERSP. 1964, 1968 (2006); Robert W. Adler, *Climate Change and the Hegemony of State Water Law*, 29 STAN. ENVTL. L.J. 1, 59 (2010).

development have suffered severe health impacts from uranium mining in the past.[103] The challenge of basing claims to protect or access water resources on religious grounds is well-delineated when those claims are reasonable, or if the benefits can be weighed against the costs.

Second, religious arguments can be asserted in a manner that could uniquely (and perhaps unfairly or unwisely) privilege religious belief. For example, in *Employment Division v. Smith*, the United States Supreme Court addressed a claim by a small group of indigenous people who were denied unemployment benefits by the state because they were fired from their employment for testing positive for peyote, an illegal narcotic used by indigenous people for ceremonial purposes.[104]

In holding against these claimants, the Court cited precedent that government can burden religious practice because holding otherwise would be "in effect to permit every citizen to become a law unto himself."[105] A similar concern arises in the context of religious claims to water, whereby each individual could become "a law unto himself" if religious arguments were interpreted broadly, and impinge on legitimate and necessary water allocations or appropriately-established water quality standards.[106]

Again, opponents of tribal efforts to ban uranium mining could claim that tribal religious beliefs make tribes a "law unto themselves." This imposes costs on others; in the case of the uranium mining ban, the costs are the loss of economic opportunities and opportunities to mitigate greenhouse gas emissions contributing to global climate change.

C. Indigenous Religious Claims to Water and Water Conflict

As a religious movement with desert roots, Islam is a rich source of spiritually-derived water conservation ethics. Islamic law provides for prioritization of water uses:

1) for human health;
2) for domestic animals; and
3) for irrigation.[107]

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103. NAVAJO NATION CODE tit. 18, § 1301(A)–(F) (2005).

104. Employment Division v. Smith, 494 U.S. 872 (1990).

105. *Id*. at 879.

106. *Id*.

107. Naser I. Faruqui, *Islam and Water Management: Overview and Principles*, *in* WATER MANAGEMENT IN ISLAM, 2-3 (Faruqui, Naser I., Asit K. Biswas, and Murad J. Bino eds., United Nations University Press: New York 2001); *see also* Shaukat Farooq & Zafar Ansari,

Islamic law also includes protection of water resources for ecological purposes.[108]

Islamic law relating to water management has been a powerful influence for peace in water disputes between indigenous peoples. For example, Islamic law prioritizes water uses (as described above) between Berber tribes in the Atlas Mountains and Bedouin tribes in the Negev Desert.[109] Islamic law not only guides water management as between these communities but also guides dispute resolution mechanisms, including ritual forgiveness ceremonies for breaches of water agreements.[110]

Nevertheless, religious interests could make already complicated and contentious water disputes virtually intractable. For example, water cannot be bought or sold under a common interpretation of Islamic law, and the use of water must be available to all equally.[111] This interpretation could be a source of opposition both to the privatization of water resources or existing water rights, which could aggravate conflict within the watershed.

Ultimately, a religious rights-based claim by indigenous people to water resources protects and promotes TEK. Furthermore, religious-based TEK itself is evidence of water use and water protection efforts to which indigenous communities may point to establish legitimate claims to sovereignty over their traditional water or at least an equitable apportionment of shared water resources.[112]

IV. FRAMEWORKS FOR ADJUDICATING INDIGENOUS RELIGIOUS CLAIMS TO WATER

While religious rights-based claims by indigenous peoples to water resources may promote and protect socially-valuable TEK, such claims may have adverse impacts. These impacts include aggravating water conflict or supporting overreaching claims to water resources by indigenous communities shared with others who have legitimate claims. The question remains how an international court facing such claims should balance concerns for indigenous rights and socially-valuable TEK against such

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Wastewater Reuse in Muslim Countries: An Islamic Perspective, 7 ENVIRONMENTAL MANAGEMENT 119, 123 (1983).

108. Faruqui, *supra* note 107, at 3; Farooq and Ansari, *supra* note 107, at 119-23.

109. Aaron T. Wolf, *Indigenous Approaches to Water Conflict Negotiations and Implications for International Waters*, 5 INTERNATIONAL NEGOTIATION: A JOURNAL OF THEORY AND PRACTICE 2 (Dec. 2000).

110. *Id*.

111. *Id*.

112. *See generally* Wolf, *supra* note 109, at 365.

potential countervailing adverse impacts associated with religious-based claims to water rights.

Given the positive and negative implications associated with religious-based arguments for indigenous rights to water discussed above, courts must be extremely careful in evaluating such claims. Several possible frameworks could be employed to evaluate these claims, but this section will propose and evaluate two such frameworks: first, the "substantial burden" framework; and second, a modified "customary law" framework. Ultimately, the modified "customary law" framework proposed in this paper provides a better approach for international courts, as it can be more effectively considered evidence of valuable water uses such as religiously-based TEK.

A. The "Substantial Burden" Framework

Federal courts in the United States rely on a four-part inquiry to evaluate claims of government action burdening religious expression:

> 1) Does the claim involve a sincere religious belief?;
> 2) Does the government action impose a substantial burden on the free exercise of religion?;
> 3) If there is a substantial burden, does the government have a compelling interest justifying the substantial burden?; and
> 4) If there is both a substantial burden and a compelling interest, then has the government applied the means least restrictive of religion in achieving its compelling interest?[113]

The Supreme Court in *Employment Division v. Smith* abandoned this test; however, the U.S. Congress responded to that decision by enacting the Religious Freedom Restoration Act, restoring the "substantial burden" test, which has been upheld and applied to federal law.[114]

1. The Advantages of the "Substantial Burden" Framework

Given the inherent complexity and subjectivity of religious rights claims, the "substantial burden" framework is a straightforward and reasonable approach to evaluating claims of unlawful governmental intrusion into religious expression. International tribunals could apply this

113. *Smith*, 494 U.S. at 895 (quoting Sherbert v. Verner, 374 U.S. 398 (1963)).

114. *Smith*, 494 U.S. at 883–84; *see also* City of Boerne v. Flores, 521 U.S. 507 (1997); Religious Freedom Restoration Act, 42 U.S.C. § 2000bb.

same four-part test to indigenous religious claims to water resources under the CP Covenant.

Religious rights-based claims to water would be stronger in the context of international law than in the context of U.S. law for three reasons. First, the CP Covenant is worded more broadly than the U.S. Constitution's First Amendment (First Amendment). Whereas the First Amendment limits governmental authority to laws "prohibiting" the free exercise of religion, Article 18 of the CP Covenant provides that "[e]veryone shall have the right to freedom of . . . religion. This right shall include freedom to . . . manifest his religion or belief in worship, observance, practice and teaching."[115] It was the narrow wording of the First Amendment that led to the holding in *Smith*, a problem more easily avoided under the CP Covenant, making the "substantial burden" test a natural fit.

Second, unlike the First Amendment, the CP Covenant expressly provides that religious rights may be limited only as "prescribed by law and [as] necessary to protect public safety, order, health, or morals or the fundamental rights and freedoms of others."[116] The CP Covenant thus provides for a balancing of secular interests against religious freedoms and the "substantial burden" framework is a well-developed method for the courts' balancing of those interests.

Third, the IP Declaration, which would guide the interpretation of the CP Covenant, draws an express legal connection between the guarantee of religious rights and indigenous peoples' traditional use of water. This is referred to in Article 25 of the IP Declaration as a "distinctive spiritual relationship" with traditional water uses.[117] Thus, unlike U.S. religious rights jurisprudence, international law contemplates a nexus between religious rights and indigenous water uses, facilitating translation of the "substantial burden" test to questions of water rights.

2. Potential Disadvantages of the "Substantial Burden" Framework

The "substantial burden" framework raises potential challenges. The test requires a court to determine if a burden is "substantial."[118] Drawing lines between "substantial" and "insubstantial" burdens in religion is especially difficult in cases of minority religions like those of many indigenous communities. As U.S. Supreme Court Justice Sandra Day O'Connor noted in *Smith*, guarantees of religious freedom are most

115. CP Covenant, *supra* note 17, at art. 18(1).

116. *Id*. art. 18(3).

117. IP Declaration, *supra* note 5, at art. 25.

118. *Sherbert*, 374 U.S. at 403–04.

precious to minority religions, as those religions face a greater risk of being affected by laws of general applicability than members of mainstream religions whose interests are more easily asserted through political processes.[119]

Courts may view faith through the lens of mainstream religions, and thus fail to grasp the importance given by many indigenous faiths to water. Such was arguably the case in the *Navajo Nation* case, where the court upheld the government's approval of discharges of treated sewage effluent onto sacred Navajo land, the court held that the discharge was not a "substantial burden" to the Navajo religious observers.[120] The court in *Navajo Nation* arguably failed to grasp the magnitude of the tribe's burden, arguing that there cannot be a substantial burden unless the state either denies benefits or criminalizes behavior based on religious beliefs.[121] Indeed, the dissent in *Navajo Nation* notes: "I do not think that the majority would accept that the burden on a Christian's exercise of religion would be 'insubstantial' if the government permitted only treated sewage effluent for use as baptismal water."[122]

Finally, the "substantial burden" framework, which inadequately addresses issues arising under indigenous religious law under First Amendment jurisprudence, may not effectively translate into international law.

B. A Modified "Customary Law" Framework

Despite its advantages, the "substantial burden" framework arguably provides too little protection for the rights of indigenous peoples and is too integrated with First Amendment jurisprudence to be effectively applied in the international law context. Another potential framework for courts to consider would be to examine religious claims by indigenous peoples to water resources as a "customary law" interest in water, giving rise to a quasi-property right.[123] In this way, indigenous communities avail themselves of the benefits of grounding their claims to water resources on negative rights protected under the CP Covenant and also retain the benefits of preserving and legitimizing religiously-based and beneficial TEK.

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119. *Smith*, 494 U.S. at 902.

120. *Navajo Nation,* 535 F.3d. at 1090.

121. *Id*. at 1097.

122. *Id*.

123. Yvette Trahan, *The Richtersveld Community and Others v. Alexkor Ltd*.: *Declaration of a 'Right in Land' Through a 'Customary Law Interest' Sets Stage for Introduction of Aboriginal Title into South African Legal System*, 12 TUL. J. INT'L & COMP. L. 565, 567–68 (2004).

However, they avoid the complications associated with claims based solely on religious freedom rights.[124]

An example of this approach can be found in South African law. The indigenous people of the Richtersveld region of South Africa possessed their land for centuries, long before European colonization, until their land was largely turned over to international corporations for diamond mining.[125] The Richtersveld community's claims to a right to their traditional land was upheld on appeal to the South African Supreme Court, based on the community's argument that it had a right to the land under its own indigenous law, amounting to a "customary law interest" leading to a right to the land.[126]

"Customary law" forms a part of the law of many countries, as it is inherited from Roman and British law.[127] To constitute valid law, "custom" must have four elements:

1) ancient;
2) reasonable;
3) certain; and
4) uniformly observable.[128]

Canada has relied on "customary law" to support aboriginal claims to title and rights to land use.[129] Canadian law views indigenous claims to land under "customary law" as a spectrum of interests, ranging from no real interest in the land on one end to the middle of the spectrum, where custom may not support title to the land but can support a "site-specific right" to engage in ceremonial or cultural activities. At the far end of the spectrum, "customary law" would support the indigenous community's claim to title to the land itself.[130]

This same common law concept could be applied to indigenous claims to water resources based on religious custom, but modified to incorporate rights based on beneficial TEK. Where indigenous religious practice related to water is ancient, uninterrupted, certain, and reasonable as

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124. CP Covenant, *supra* note 17, at art. 1(2) and art. 17(1) (guaranteeing protection from arbitrary interference with means of subsistence and home, and guarantees peoples rights to dispose of their own resources).

125. Trahan, *supra* note 123, at 566.

126. *Id*. at 567.

127. *Id*. at 568.

128. *Id*. at 569.

129. *Id*. at 571.

130. Trahan, *supra* note 123, at 571–72.

evidenced by TEK, such indigenous communities could assert a right to water based on "customary law" in international courts.

1. Advantages of a Modified "Customary Law" Framework

The "customary law" framework has many benefits. It is a widely-accepted and adjudicated principle in many parts of the world, and thus well-suited for application on an international level.[131] Indeed, the Inter-American Court for Human Rights has already relied on "customary law" principles in holding that the American Convention on Human Rights includes the right of indigenous peoples to the protection of their traditional natural resources.[132]

Furthermore, the "customary law" framework includes considerations of "reasonableness," which would allow courts necessary discretion to avoid unsustainable or inequitable religious claims to water by indigenous communities.[133] Additionally, by allowing for a spectrum of interests in property, the approach is sufficiently nuanced to allow multiple water uses and property rights within the same watershed. Indeed, by taking a "property rights" approach based on religious uses rather than a "religious rights" approach, indigenous communities retain the benefits of a claim grounded in the binding CP Covenant, enabling a mechanism for claims by non-state actors predicated on immediately binding and mature rights.

The CP Covenant guarantees rights of people to self-determination; to freely dispose of their natural resources, to be free of arbitrary deprivation of means of subsistence, and to be free from arbitrary invasions of the home.[134] A "customary law" property right to water is arguably protected under these provisions to the same degree as religious rights under the CP Covenant.[135] As such, under a "customary law" approach, indigenous communities retain the legal strategic benefits of grounding water resource claims on rights guaranteed under the CP Covenant, but avoid the types of subjective and potentially culturally-biased balancing tests (like the "substantial burden" test) employed by courts in religious rights cases.

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131. *Id*. at 569.

132. *Mayagna (Sumo) Awas Tingni Cmty. v. Nicaragua*, Inter-Am. Ct. H.R. (ser. C) No. 79 (Aug. 31, 2001) (The Inter-American Court for Human Rights found that Nicaragua had violated the rights of the Awas Tingni people by granting a timber concession to a logging company within the tribe's traditional area without the tribe's consent.); *see also* Claudio Grossman & S. James Anaya, *The Case of the Awas Tingi v. Nicaragua: A New Step in the International Law of Indigenous Peoples*, 19 AZ. J. INT'L & COMP. L. 1 (2002).

133. Trahan, *supra* note 123, at 582.

134. CP Covenant, *supra* note 17, at art. 1 and art. 17.

135. *See generally id*.; Trahan, *supra* note 123, at 569.

Additionally, this approach furthers interests in the simultaneous protection of the environment and indigenous culture embodied in TEK, while avoiding the challenge courts face in evaluating religious beliefs and the degree to which government action burdens those beliefs.

2. Potential Disadvantages of the "Modified Customary" Law Framework

This "customary law" framework raises several problems. First, the elements of "customary law" can be very difficult to establish: where colonial rule has interrupted certain customary practices, where certainty is lacking as to the customary nature of the practice, and where a practice is a relatively recent development.[136] However, a modified approach, where beneficial TEK is considered an essential element in demonstrating rights to water resources, may avoid this problem by grounding claims in demonstrable, culturally-transmitted, and beneficial uses.

Second, and perhaps most problematic, this framework conceptualizes indigenous customs within the context of Western ideas of rights and ownership—concepts which may be incompatible. Indigenous communities may attempt to frame their customs within the context of Western rights in an attempt to secure resources or preserve culture, but in doing so, could further exacerbate hegemonic convergence.

V. CONCLUSION

Regardless of the framework used, a "liberty rights" approach to water resource claims (such as a religious rights-based claim) has several advantages. First, the international human right to water lacks consensus in part because it has been framed as a "welfare right," raising concerns about state liability for water service and impacts on private property rights. A "liberty rights" approach does not raise those same concerns while being legally binding, unlike "welfare rights." Second, "liberty rights" claims to water legitimize and protect effective TEK, as well as ecological and cultural uses of water.

Most importantly, "liberty rights" claims appropriately introduce questions of religious culture into the debate on water rights. As population grows and climate changes, allocation and protection of water resources will become increasingly contentious. The most hotly contested watersheds, including the Jordan River, Ganges River, Indus River, and Colorado River, have several things in common. In particular, each of these international river basins has religious significance and the river basins support indigenous communities. To avoid or mitigate water

136. Trahan, *supra* note 123, at 584–85.

conflict, policy-makers and judges must look beyond politics, economics, and ecology, and incorporate considerations of religion and culture in the formulation and interpretation of water law.

THE TRILLION-DOLLAR QUESTION: CAN GREECE BE SAVED?

Dominique Venetsanopoulos[*]

I. INTRODUCTION

What was once called the cradle of Western civilization is now known as the cradle of crisis. Decades of economic mismanagement, reckless spending, and corruption have led Greece to its current financial disaster.[1] Rescue packages have been adopted to help stabilize the crumbling Greek economy.[2] Meanwhile, a country, a currency, and an entire continent have been brought to its knees. This paper discusses Greece's astonishing rise and fall from the Euro and the worldwide consequences of its financial

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* Dominique Venetsanopoulos is a second year law student at Nova Southeastern University. She is an *ILSA Journal* Member candidate and has received a Book Award for earning the highest grade in her Lawyering Skills & Values class. She holds a Bachelor of Arts degree in Psychology from the University of Western Ontario.

1. *See* Takis S. Pappas, *The Causes of the Greek Crisis are in Greek Politics*, OPEN ECON. (Nov. 29, 2010), http://www.opendemocracy.net/openeconomy/takis-s-pappas/causes-of-greek-crisis-are-in-greek-politics (last visited Oct. 9, 2012).

2. Patricia Blazey & Robert Wetton, *The Greek Affair: A Cause or a Symptom of the European Union Instability?,* 7 MACQUARIE J. BUS. L. 147, 147 (2010).

crash. First, this paper will draw out the origins of Greek membership in the European Union (EU), along with the significance of such association for the country. Second, this paper will discuss how the Greek financial crisis escalated and how government incompetence aggravated the problem. Third, the global repercussions of a Greek exit from the Euro will be explored. Finally, the financial problems in Greece will be compared to those in the United States, reminding us of the world's interconnectedness.

II. BACKGROUND

From the very beginning, the Euro, as a single currency, has imposed high risks on some European governments like Greece.[3] When European leaders got together in 1992, opting for unification of their monetary policies, they were hoping that European economies would act in similar ways.[4] However, the plan did not transpire as they had hoped.[5] Now, with Greece in crisis and the Euro feeling the blow, the implications of this risk have become clear.

A. A Brief Overview of the EU and Greek Membership

What started out as a "regional trade association" over fifty years ago has become a regional union composed of twenty-seven member-nations.[6] Throughout the years, these member-nations have created free-trade areas, removed most of their inner borders, and vastly extended their outer ones to create new associations with other European countries.[7] They also created a system to synchronize their individual policies in areas concerning the environment, human rights, social development, and more.[8] Various forms of government were also developed to democratize the EU.[9]

In 2001, Greece became the twelfth country to join the European Monetary Union (EMU) with the hopes of gaining more stability and

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3. John Miller & Katherine Sciacchitano, *Why the United States is Not Greece*, DOLLARS & SENSE, http://www.dollarsandsense.org/archives/2012/0112millersciacchitano.html (last visited Oct. 9, 2012).

4. Martin Feldstein, *The Failure of the Euro: The Little Currency That Couldn't*, 91 FOREIGN AFF. 105, 105 (2012).

5. Vivien A. Schmidt, *The European Union's Eurozone Crisis and What (Not) to Do About It*, 17 BROWN J. WORLD AFF. 199, 200 (2010).

6. *Id*.

7. *Id*.

8. *Id*.

9. *Id*.

greater opportunities.[10] For a country with a traditionally weaker currency, joining the EMU meant a way to restructure Greece's weak economy and remove border-crossing formalities.[11] Membership would go a long way to unify and simplify the movement of people and goods between Greece and the rest of Europe. Investors, however, believed that the decision to admit Greece into the EMU would "send out the wrong signal" to financial markets because of their substantial budgetary and inflationary problems.[12] Investors worried that other, weaker economies would also be allowed to join the EMU without meeting the EU's economic criteria.[13] At the time, Greece was not in any position to join the EU.[14] In fact, there were clear indications that the Greeks were 'fudging the numbers' by making their financial situation look better than it really was.[15] Deception and lies helped smuggle Greece into the EU.[16] The acceptance of Greece into the EU was a case of decision-makers' tolerance for countries seeking EU membership.[17] It was also a demonstration of decision-makers' negligent review of the accuracy of Greek financial data.

B. Significance of the Euro for European Unity

One of the main objectives behind the EMU and the Euro was to create a more harmonious Europe.[18] Political leaders in Europe reasoned that citizens would feel a "greater sense of belonging to a European community" through their use of a common currency.[19] They also reasoned that European integration would guarantee financial growth, allowing several EU countries to compete on an international level with other major economies.[20] Thus, in 1992, upon the signing of the Maastricht Treaty, the EMU was born, giving its member-nations the world's leading trading

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10. *Greece Joins Eurozone*, BBC NEWS (Jan. 1, 2001) http://news.bbc.co.uk/2/hi/business/1095783.stm (last visited Oct. 6, 2012).

11. *See id*.

12. *Id*.

13. *Id*.

14. *Id*.

15. MATTHEW LYNN, BUST: GREECE, THE EURO, AND THE SOVEREIGN DEBT CRISIS 117 (2011).

16. *Id*.

17. *Greece Joins Eurozone*, *supra* note 10.

18. Feldstein, *supra* note 4, at 105.

19. *Id*.

20. *Europe in 12 Lessons*, EUROPA, http://europa.eu/abc/12lessons/lesson_1/index_en.htm (last visited July 19, 2012).

power, a unified currency, and a cohesive market economy for goods and services.[21] The formation of a united European market provided people and businesses with an essential platform in order to help EU countries successfully participate in world markets.[22] It also provided people with the ability to travel freely throughout Eurozone borders.[23] More importantly, there is a profound psychological effect that emerges simply by sharing a common currency.[24] As one can imagine, European citizens should feel more connected by carrying common bills and coins in their wallets each day.[25]

III. THE GREEK DEBT CRISIS

Throughout the last decade, Greece went on a debt binge that came crashing to a halt in late 2009.[26] The country's debts were impossible to finance, resulting in the Greek call for outside help.[27] This financial crisis has destroyed the country's economy, brought down a government, and unleashed violent protests, triggering a significant shock to the global economy and the future of the Euro.[28]

A. The Causes of Greek Financial Woes

To most observers, the current Greek crisis is largely based on its struggling economy.[29] Greece has violated the terms of its membership agreement in the EMU by disguising the size of the country's current deficit, which is projected to be around 300 billion Euros.[30] With numerous reports exposing the deficits and public debt accumulated by successive Greek governments and the conditions of the bailout package offered by the EU, "it is no secret that Greece has been in financial trouble for many

21. Feldstein, *supra* note 4, at 106.

22. *Europe in 12 Lessons*, *supra* note 20.

23. *See id*.

24. Matthew C. Turk, *Implications of European Disintegration for International Law*, 17 COLUM. J. EUR. L. 395, 404 (2011).

25. *Id*.

26. *The European Debt Crisis*, NYTIMES.COM, http://topics.nytimes.com/top/reference/timestopics/subjects/e/european_sovereign_debt_crisis/index.html (last updated Oct. 9, 2012).

27. LYNN, *supra* note 15, at 2.

28. *The European Debt Crisis*, *supra* note 26.

29. Blazey & Wetton, *supra* note 2, at 147.

30. *Id*. at 148.

years."[31] The Greek economy is faced with an enormous problem. Not only is the country a major threat to the economic stability of other Eurozone countries, but also to the entire world.[32] Years of unrestrained public spending, tax evasion, and early retirement for citizens with generous pension plans, combined with the failure to implement financial reforms, have left the Greek economy in worse shape than the country's ancient ruins.[33] The reasons for Greek financial troubles may be diverse. However, disastrous economic management coupled with decades of corruption in Greek politics has put Greece in crisis mode.[34]

1. A Country Living Beyond Its Means

The situation of Greece in the EU is simple. Throughout the years, Greece has received enormous injections of aid from European funds and European institutions that resulted in the nation's growth, resulting in a country living beyond its means.[35] Tens of billions of Euros were given by the EU to help "modernize and develop" Greece's subway system, as well as to construct a new Athens International Airport to accommodate the crowds that would flock to the Olympic Games of 2004.[36]

It was logical that Greece would want to host the Olympics at some point. After all, this was the country that gave birth to the Olympics and it was considered part of its legacy. However, there had always been uncertainty as to whether Greece could really afford to host the world's most extravagant sporting event. The skepticism, as it turned out, was correct. The Greek government initially estimated a total cost of $5.9 billion to host the Olympic Games.[37] But once the work was finished and the stadiums built, the real cost grew close to $15 billion.[38] Hosting the Olympics was a prime example of Greece living beyond its means. For years, however, the entire Greek economy had been living off of State aid that was readily available.[39] Eventually Greece was fiscally derailed and accumulated a tremendous debt. Since then, fellow Eurozone countries have continued to grant monetary aid to keep Greece afloat, but at a high

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31. *Id*.
32. *Id*. at 147.
33. *Id*. at 148.
34. *See* Blazey & Wetton, *supra* note 2, at 148.
35. *Id*. at 150.
36. *Id*.
37. LYNN, *supra* note 15, at 117.
38. *Id*.
39. *See* Blazey & Wetton, *supra* note 2, at 150.

cost—that of harsh austerity measures ordered by France and Germany in exchange for two massive bailout packages that attempted to stabilize the Greek economy.[40]

Together, the EU, the International Monetary Fund (IMF) and the European Central Bank (ECB), are the so-called *troika*, which devised the first bailout package in May, 2010.[41] The bailout package involved a loan of $152.6 billion with the hopes of stabilizing the country's battered banking sector.[42] In return, Greece was required to decrease public spending.[43] After the deal was announced, Greek Prime Minister George Papandreou warned his nation that Greece had a very big trial ahead and would have to accept such tough conditions in order to avoid bankruptcy. In a public broadcast, Papandreou stressed that ordinary Greeks would have to accept "great sacrifices" in order to avoid imminent "catastrophe."[44]

The Greek community met the austerity measures with great opposition, leading to violent riots, protests, and social unrest throughout the country.[45] The Greek community disfavored the austerity measures because they required deep salary cuts and tax increases, prompting a significant decline in the standard of living for the average citizen.[46] Further, taxes were added on cigarettes, gas, alcohol, and the retirement age was raised from sixty years to sixty-five years with a reformed pension scheme.[47]

The first bailout package was granted with the impression that Greece would "push through $30 billion Euros of spending cuts."[48] However, the situation did not improve. It was originally anticipated that Greece's first adjustment plan, together with the $152.6 billion bailout package, would reconstruct Greek access to private capital markets by the end of 2012.[49] However, this process would take much longer; the first bailout was not enough to avert Greece's deepening crisis.[50] As a result, a second, more drastic bailout package for Greece was formally adopted in March, 2012,

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40. *Id*. at 3.

41. *Id*. at 150.

42. Angelos Tzortzinis, *Greece*, NYTIMES.COM, http://topics.nytimes.com/top/news/international/countriesandterritories/greece/index.html (last updated Oct. 9, 2012).

43. *The European Debt Crisis*, *supra* note 26.

44. LYNN, *supra* note 15, at 4.

45. *Id*. at 5.

46. Blazey & Wetton, *supra* note 2, at 150; *see also* Tzortzinis, *supra* note 42.

47. Blazey & Wetton, *supra* note 2, at 150.

48. LYNN, *supra* note 15, at 4.

49. Tzortzinis, *supra* note 42, at 7.

50. LYNN, *supra* note 15, at 4.

involving a loan of $172 billion.[51] Under this second deal, private holders of Greek debt were required to undertake a fifty percent write-down in the value of their government bonds.[52] Furthermore, Eurozone experts would subject Greece's economic management to permanent supervision on the ground in Athens to ensure that fiscal goals were met.[53] For the Greeks, the idea of being supervised by *troika* was a degrading and unmatched intrusion into their country's sovereignty.[54] For a country that had suffered terribly under the Nazi-occupying regime during World War II, the last thing they needed was a German Chancellor imposing painful bailout conditions on their country.[55]

It is often argued that after living so far beyond their means, the Greeks are finally getting what they deserve.[56] Accusations of Greeks' living beyond their means have prompted the mistaken perception that Greece is a country full of lazy playboys and party animals. The myth is not dispelled by Greece's bad habit of unrestrained spending, corruption, and tax evasion. This predilection for economic excess has contributed to the failings of the Greek economy.[57] For instance, the case of doctors in Greece represented corruption and tax evasion.

Evidence shows that there were numerous situations where doctors never cut any receipts or documented patient medical visits.[58] Many of these doctors were proclaiming a yearly salary as low as 3000 Euros on their tax receipts.[59] How could a doctor maintain practice rooms, pay for medical supplies, and earn a proper living on such a low income? The answer, of course, was that doctors were not declaring their true income. They were simply practicing deception to avoid paying their taxes—a usual, common aspect of Greek life.

However, most of these narratives only tell one side of the story. To dispel the popular stereotype that Greeks are lazy, new research shows that Greeks work longer hours than residents of any other European nation,

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51. Tzortzinis*, supra* note 42.

52. Feldstein, *supra* note 4, at 109.

53. *The European Debt Crisis*, *supra* note 26.

54. LYNN, *supra* note 15, at 5.

55. *Id*.

56. David Ignatius, *Greece's Downward Economic Spiral*, THE STAR (June 27, 2012), http://www.thestar.com/opinion/editorialopinion/article/1218313--greece-s-downward-economic-spiral (last visited Oct. 9, 2012).

57. Paul Krugman, *Greece as Victim*, NYTIMES.COM (June 17, 2012), http://www.nytimes.com/2012/06/18/opinion/krugman-greece-as-victim.html (last visited Oct. 9, 2012).

58. LYNN, *supra* note 15, at 121.

59. *Id*.

including the Germans.[60] According to the data published, Greeks work an average of 42.2 hours per week compared to just 35.6 hours per week by Germans.[61] Also, the notion that Greek social welfare programs are responsible for unrestrained government spending is inaccurate. Greece's social expenditures as a percentage of GDP take up a significantly lower amount of government budget than countries such as Germany or Sweden, who have impressively persisted through the European crisis.[62]

Aside from its successful shipping industry, presumed to be the largest in the world, Greece's major industries are demonstrative of an economy with a weak industrial base.[63] The excessive amount of imports compared to exports, has always been a cause of concern for Greece's economy. In fact, data from the Bank of Greece has valued the amount of imports as 2.6 times greater than the amount of exports.[64] Specifically, manufactured products that are exported by Greece comprise only ten percent of the country's GDP; this is compared with an average of thirty percent for other member-nations in the Eurozone.[65] Furthermore, Greece's membership in the EU accelerated the movement away from production of agricultural goods.[66] Currently, "Greece imports almost [forty] percent of its food, most of its medicine and almost all of its oil and natural gas."[67] Industries have been eroding and wealth-generating businesses have faded, leaving the people of Athens to endure some of the highest prices in Europe, along with lower average wages than those enjoyed by other EU nations.[68] Based on the above, the root of the Greek debt crisis runs deeper than simply a country living beyond its means.

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60. Michelle Caruso-Cabrera, *Greeks Work Hard, So Why Is There a Debt Crisis*, CNBC.COM (Oct. 18, 2011, 11:42 AM), http://www.cnbc.com/id/44944435/Greeks_Work_Hard_So_Why_Is_There_a_Debt_Crisis (last visited Oct. 9, 2012).

61. *Who Works The Longest Hours in Europe?,* GUARDIAN UK, http://www.guardian.co.uk/news/datablog/2011/dec/08/europe-working-hours (last visited Oct. 7, 2012).

62. Krugman, *supra* note 57.

63. Tzortzinis, *supra* note 42.

64. Protesilaos Stavrou, *Exit of Greece from the Euro is Collective Suicide*, PROTESILAOS BLOG (Jan. 8, 2012), http://www.protesilaos.com/2012/01/analysis-exit-of-greece-from-euro-is.html (last visited Oct. 9, 2012).

65. Tzortzinis, *supra* note 42.

66. *Id*.

67. *Id*.

68. *Id*.

2. Dysfunctional Politics

Most would agree that the causes of the Greek crisis lie heavily in Greek politics. This is no surprise considering prominent political figures have been charged with corruption, bribery, and fraud. Most of this corruption involves the administration of State funds.[69] Knowledge of these scandals led to endless accusations that the Greek government and its political parties were responsible for today's current economic crisis. According to Professor of Comparative Politics Takis Pappas, "[i]f the crisis were simply due to economic mismanagement, then an economic prescription, no matter how bitter the pill, should be enough for putting the house in order."[70] In his article, he suggests that, "recovery will require much more than wise economic management."[71] Instead, it will entail the "remaking of Greece's entire political . . . system."[72]

The Greek crisis has its origins in a dysfunctional political system, which has failed to react for over thirty years.[73] The political system also failed to react during the past June 2012 elections, where the system was unsuccessful at forming a coalition government. How did Greece—once called the 'cradle of Western civilization'—come to this? The causes lie in three largely overlooked factors about Greek political life. The first is Venizelos' Law.

Greek Parliament implements Venizelos' Law, which absolves members of the Parliament for mismanagement or irresponsibility after new elections are conducted.[74] This naturally results in elections that happen frequently, especially after major scandals are revealed. The perpetrators, however, are never prosecuted. As parliamentarians, if they have been recently reelected, anything illegal they did during their previous term in Parliament has been cleared.[75] Thus, fraudulent politicians can escape their crimes simply by conducting a new election.

The second major weakness is that political parties' private interests largely control the Greek press.[76] Thus, press is essentially a government

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69. *See* Pappas, *supra* note 1.

70. *Id*.

71. *Id*.

72. *Id*.

73. *Id*.

74. *See generally* Liability of Ministers Draft Law (Law 3126/2003) (Greece).

75. *Id*.

76. Pavlos Eleftheriadis, *Only a New Political Order Can Rescue Greece*, FT.COM (May 27, 2012), http://www.ft.com/intl/cms/s/0/a02f585a-a5bd-11e1-b77a-00144feabdc0.html (last visited Oct. 9, 2012).

monopoly "with no respect for rules of objectivity or moderation."[77] The heated speechmaking of politicians is repeatedly shown and exaggerated by television reporters.[78] Thus, there is no objectivity in the press.

Finally, the judiciary system is very slow, constantly bogged down, and often corrupt. This is no surprise considering the government appoints the principal figures of the judiciary on prejudicial grounds.[79] An independent and unbiased judicial system does not exist, as it does in other major Western Nations and in the United States. The consequence is a defective governmental system.[80]

a. Greece's Government: Divided They Stand

Greece's government has been held responsible for all the major problems the country struggles with today. The political system established during modern times has been governed by the rivalry of two main political parties, the Panhellenic Socialist Movement (PASOK) and New Democracy (ND), representing the left wing and right wings respectively.[81] PASOK is a socialist movement that encouraged irrational spending to create a welfare state without providing a steady tax collection base to be able to fund their policies.[82] Citizens became frustrated with the government's endless list of ill-fated reforms.[83] Their frustration grew to resentment once economic scandals involving some leading PASOK members were exposed. As a result, the ND government promised to rearrange the State and inject a "new morality" into the political system of the country.[84] However, once in office, the measures taken by the ND were a flop.[85] No major changes were introduced; the public sector continued to expand, and public spending increased, contributing to an extraordinary deficit.[86]

It is obvious that these two main political parties lost track of their ideological origins a long time ago. Flip-flopping in and out of government since 1975, the parties focused only on how they could shower their

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77. *Id*.

78. *Id*.

79. *Id*.

80. *Id*.

81. Christos Lyrintzis, *Greek Politics in the Era of Economic Crisis: Reassessing Causing and Effects*, 45 HELLENIC OBSERVATORY PUB. 1, 3 (2011).

82. *See* Pappas, *supra* note 1.

83. Lyrintzis, *supra* note 81, at 9.

84. *Id*.

85. *Id*.

86. *Id*.

respective constituents with benefits such as jobs, higher and earlier pensions, free education, and hospitals. This was done without any consideration for the needs and ability of the country to pay.[87] In the end, the two parties followed a trail of irresponsible populism with free-spending ways, patronage politics, and ethnocentrism, leading the country to further diverge from the rest of Europe.[88] During the last thirty-five years, tax collection has been suffering, corruption has been tolerated, and many of the taxes have been ignored or forgotten and returned to collectors and politicians as kickbacks.[89] In fact, tax evasion has been so regular that Greek citizens often considered tax evasion a normal practice. Many Greeks have admitted to bribing tax inspectors, who would then turn a blind eye to fabricated tax returns.[90] In fact, the average Greek household was paying close to 1500 Euros in tax bribes per year.[91] None of this money was actually being paid to the government; therefore, none of the money was used to pay off Greece's massive debt. The judicial system has been likewise unresponsive, and in many cases corrupt. The judicial system often delays or defers decisions on taxes that were to be paid by the powerful few, and subsequently were never paid or collected.

The current Greek crisis is the product of political ignorance more than anything else. Over the past three decades, both parties refrained from any policy innovation, did not undertake to fix public finances, concealed the true state of the Greek economy from the public, and misrepresented Greece's financial situation to the EU.[92] The parties used their control of the public sector to stay in power for as long as they could. They also caved in to the demands of workers' unions that lobbied for raising workers' salaries and benefits. Further, the workers' unions pushed for retirement at an increasingly early age.[93] The unions did this by obtaining additional loans from their creditors until it exploded in the form of the fiscal crisis that recently hit Greece.

The country needs a political leader who will reveal the truth about the crisis so that Greeks can realize the essence of the problem and apply the actions necessary to solve it. It is impossible to have good therapy without a good diagnosis. Thus, in order to restore the battered state of the country, Greek politicians must realize that exchanging favors for votes only makes

87. *See generally id*.

88. Pappas, *supra* note 1.

89. *See generally id*.

90. LYNN, *supra* note 15, at 121.

91. *Id*.

92. *Id*. at 118.

93. *Id*. at 122.

the country more ineffective. Political leaders need to stop bickering about who is doing more to save the country, and put their words into action. Of course, the financial condition of the world economy does play a role in making things worse for Greece.

B. A 'Grexit' From the EU

What once seemed unthinkable is now a real possibility. All over the world, media headlines, political leaders, and economists are predicting a Greek exit from the Euro in the near future. The prospect of Greece leaving the Eurozone is increasingly conceivable, not just because of its own political dysfunction and unsustainable debt, but also because the option to leave the EMU is very enticing.

1. The Lisbon Treaty and the Exit Clause

Initially, the treaty that created the EU did not include a specific legal provision that allowed a dissatisfied member-nation to leave the EU community.[94] This resulted in a country that could secure membership based on requirements for entry, yet be sentenced to confinement for life.[95] In other words, once a country was in, it was in for good. The Lisbon Treaty and its so-called "exit clause" was created to fill this gap by prescribing a procedure for a member-nation to withdraw from the EU if it so desired. According to the treaty, a member-nation wishing to leave the EU must officially inform all its Union partners of its decision and should then try to negotiate the terms of its withdrawal in the most civilized manner possible.[96] If, however, the country cannot negotiate its exit gracefully, it will be considered to have left the EU two years after it first notified its Union partners of its decision to leave the club.[97]

Although the Lisbon Treaty prescribes a procedure for withdrawal, it "does not set out any specific grounds to invoke the exit clause."[98] What is certain, however, is that no other member-nation can force the expulsion of Greece from the Eurozone.[99] The only thing that comes close to resembling

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94. Sideek Mohamed Seyad, *The Lisbon Treaty and the EMU*, 4 SWEDISH INST. FOR EUR. POL'Y ANALYSIS 1, 5 (2008).

95. *Id*.

96. Blazey & Wetton, *supra* note 2, at 156.

97. *Id*. at 157.

98. Seyad, *supra* note 94, at 5.

99. Carlos X. Alexandre, *Only Greece Can Ask to Exit the Euro*, SEEKING ALPHA (Feb. 13, 2012), http://seekingalpha.com/article/363091-only-greece-can-ask-to-exit-the-euro.html (last visited Oct. 9, 2012).

a 'right of expulsion' in EU law is Article 7(2) and (3) of the EU Treaty, which permits a member-nation's rights to be suspended for a brief period of time if a "serious and persistent breach" of the provisions stated in the EU treaty have occurred.[100] This may be viewed as an initial step in ejecting a member-nation, but it is certainly not the same as absolute expulsion.[101] Thus, Greece cannot be kicked out unless the EU treaty is reformed, and since Greece holds a veto on any such changes, this is not an option.[102] However, if Greeks themselves voluntarily choose to leave the EU by negotiating a withdrawal with their EU partners, it would be a totally different story. While talks of returning to the drachma could be heard all across the country following the May, 2012 elections, an estimated eighty percent of Greeks wished to remain with the Euro.[103] Besides, even if Greece did decide to withdraw and repudiate on its bailout terms, complete departure from the Euro would probably take a while.[104] A surprise announcement of Greek departure would have to be made in order to prevent Greek depositors from removing their Euros from banks and holding them in cash.[105] While finance ministers in Greece are considering the possibility, orchestrating a 'Grexit'[106] would be legally complicated and quite lengthy.

2. Consequences of a Greek Departure

A Greek departure from the EU could trigger a deep and long recession in Greece, the Eurozone, and throughout the world. Although Eurozone membership has benefitted Greece economically, this membership has paid a very steep price in terms of unemployment, economic turmoil, and civil unrest.[107]

Greece has been a "traditional exporter" of products such as olive oil, honey, cheese, minerals, agricultural goods, and textiles.[108] On the other hand, Greece has increased importing since its adoption of the Euro shifted

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100. *Id*.

101. *Id*.

102. *Id*.

103. Tzortzinis, *supra* note 42.

104. *Id*.

105. Feldstein, *supra* note 4, at 115.

106. *See* Feldstein, *supra* note 4.

107. *Id*. at 114.

108. *Greece Trade, Exports and Imports*, ECON. WATCH (Mar. 29, 2010), http://www.economywatch.com/world_economy/greece/export-import.html (last visited Oct. 9, 2012).

Greek production away from agriculture and manufactured goods.[109] Principal imported products include machinery for its factories, transport equipment, fuels, chemicals, and medicine.[110] The problem is that the value of all the goods Greece imports cost a lot more that the value of the goods exported.[111] This is called "a negative trade balance."[112] Greece has managed to fill the gap with massive credits from the EU, payments from foreign residents, tourism, and its successful shipping industry.[113] In fact, millions of tourists that visit Greece each year (thanks to the majestic beaches) help the nation gather foreign capital that largely "contribute[s] to the GDP on an increasing trend."[114] As long as Greece remains in the Eurozone and receives loans from the other European countries, Greece can use some of this money to pay for the extra products it imports; as such, there will be no shortage of the imported products in the Greek market.[115] However, if Greece were to drop out of the Eurozone, this financial transfer would stop. Without the help of transfers from other Eurozone countries, Greece will have trouble meeting its debt obligations and managing its negative trade balance.[116]

The only possible solution for Greece will be to repudiate its debt and leave the EU. Greece will have to stop using the Euro and print its own currency, the drachma, to use for payments. However, the drachmas printed by Greece "will immediately be worth drastically less than the euro."[117] Economists believe "the drachma would be devalued by an estimated 50/70 percent compared to the euro."[118] All Greek businesses with foreign debts designated in Euros would be unable to pay them off, which would eventually lead to insolvency.[119] This would steer Greece into an even worse recession.[120] At the same time, since the Euros earned from its exports will not be enough to pay for continuing imports, there will be

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109. Tzortzinis, *supra* note 42.

110. *Greece Trade, Exports and Imports*, *supra* note 108.

111. *Id*.

112. *Id*.

113. *Id*.

114. *Id*.

115. *See Greece Trade, Exports and Imports*, *supra* note 108.

116. *See id*.

117. Constantine Von Hoffman, *What Will Happen if Greece Leaves the Euro?*, CBSNEWS.COM (May 15, 2012, 9:16 AM), http://www.cbsnews.com/8301-505123_162-57434206/what-will-happen-if-greece-leaves-the-euro/ (last visited Oct. 9, 2012).

118. Tzortzinis, *supra* note 42.

119. Von Hoffman, *supra* note 117.

120. *Id*.

shortages of imported goods for the country.[121] This is due to the fact that devalued currency makes imported commodities more costly and would lead Greeks with no other option but to buy local products.[122] This means that there could be blackouts because of a lack of adequate hard currency to buy energy, a shortage of medications for hospitals, a scarcity of spare parts for cars, and the list goes on.[123] This, in a nutshell, is the problem of not having adequate exchange funds for imports and needing to continue to borrow in order to finance its current trade imbalance.

On the other hand, a Greek departure from the Euro may not be so bad in the long haul. In fact, many economists, including the IMF, which has played an active role in lending Greece billions of dollars, believe a Greek exit from the EU "is in the nation's best interest."[124] Leaving the EU now and going back to the drachma would hurt a lot less financially than the current bailout course.[125] Indeed, for a couple of years, Greece would go through turbulent times where its economy would plunge faster and deeper than its current state.[126] But when this is all over, a new dawn would break, and the economy would grow even faster than it would without devaluation.[127] Not only will Greeks be forced to buy more local products due to costly imports, but also foreign buyers will find the country's cheaper exports to be more appealing.[128] The mounting cost of imported goods would cause a reduction in the job wages in Greece, which would then lead shoppers to decrease their spending habits, ultimately making Greek products and services more available for exportation.[129] This would enhance Greece's GDP growth and economy in general, and increase their competitiveness in the market.[130] If Greece leaves the Euro, the weak value of the drachma would attract vacationers all over the world because it would make Greece a cheaper travel destination than other vacation spots.[131] Overall, the Greek economy would be healthier and its exchange

121. *See id*.

122. *Id*.

123. *See id*.

124. Von Hoffman, *supra* note 117.

125. Feldstein, *supra* note 4, at 114.

126. Von Hoffman, *supra* note 117.

127. *Id*.

128. *Id*.

129. Feldstein, *supra* note 4, at 113.

130. *Id*. at 115.

131. *See* Von Hoffman, *supra* note 117.

rate would "adjust over time" to avoid the current trade deficit from taking over.[132]

Although leaving the Euro seems like a great solution for Greece to reduce its unsupportable debt, it is a lot more difficult and messy than one might think. It is naïve to believe that a Greek exit from the EU can be achieved and that business will go on as usual afterwards. If Greece leaves the EU, it could facilitate a very dangerous chain of events, instigating other countries such as Italy, Spain, Portugal, and Ireland to pull out of the EU as well.[133] Because of the risky precedent a 'Grexit' may set, Germany is willing to pay in order to prevent Greece from leaving the Eurozone.[134] It fears that a Greek departure could lead to the destruction of the Eurozone and the entire EMU.[135] If Greece were forced to leave the EU, financial investors around the world will be asking themselves, "Who is next?" If one country can so easily leave the EU, especially when the EMU was intended to be irreversible, capital markets will assume that other EU countries can do so as well.[136] This kind of uncertainty will drive the financial markets crazy, causing the EMU to eventually collapse.[137]

IV. CRUMBLING ECONOMY: WHO HAS IT WORSE, UNITED STATES OR GREECE?

Many economists contend that the United States has the same problems as Greece and that the financial situation of Greece is just the beginning of a much larger problem the United States will soon face.[138]

A. Similarities and Differences

Although the United States economy is not in the same dire straits as the Greek economy, there are some similarities between the United States and Greek fiscal woes. In Greece, unemployment and underemployment is widespread with 25.4 percent of the population actively looking for jobs, as

132. Feldstein, *supra* note 4, at 113.

133. Blazey & Wetton, *supra* note 2, at 147.

134. Feldstein, *supra* note 4, at 115.

135. *Id*.

136. *Id*.

137. *Id*.

138. Peter Morici, *The United States is Becoming Too Much Like Greece*, THE EPOCH TIMES (June 28, 2012), http://www.theepochtimes.com/n2/opinion/the-united-states-is-becoming-too-much-like-greece-258271.html (last visited Oct. 9, 2012).

reported in August, 2012.[139] Greece's economy is still getting worse.[140] According to the latest data published, unemployment in Greece is almost twice the average jobless rate in the seventeen countries that are part of the EU.[141] Similar to Greece, the United States has had issues with unemployment with a rate above eight percent.[142] Far too many students are graduating from college and finding themselves "waiting on tables or at counters at Starbucks" because they are unable to find work despite hopes that a degree would pay off.[143] To solve the unemployment issue in Greece, the government allowed workers to retire at an increasingly young age and spent too much on generous pension plans.[144] Before changes were made to the pension system in 2010, some pensioners were making much more than when they were actually employed.[145] If the country had not reformed their pension spending and continued to allow generous benefits for retirees, there would be nothing left for those who were actually working.[146] Given its aging population, Greek pension spending would amount to twenty-four percent of its GDP by 2060, and this figure alone would be enough to bankrupt the entire Greek economy.[147]

Additionally, the Greek government has spent abundantly on educational systems, health care benefits, and other services to generate more employment opportunities for the people.[148] The plan to create more jobs obviously failed and put Greece in a position of having to pay more than it could possibly set aside. Similarly, in the United States, governments at the state and local level are generously spending on social security and employee retirement plans.[149] According to financial analysts, "78 million baby boomers [will] begin drawing on Social Security and Medicare programs to support them in retirement."[150] Unless the

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139. *Greece Unemployment Rate*, TRADE ECON., HTTP://WWW.TRADINGECONOMICS.COM/GREECE/UNEMPLOYMENT-RATE (last visited Nov. 19, 2012).

140. *See id*.

141. *Id*.

142. Morici, *supra* note 138.

143. *Id*.

144. LYNN, *supra* note 15, at 122.

145. *Id*.

146. *Id*. at 123.

147. *Id*.

148. Morici, *supra* note 138.

149. *Id*.

150. Landon Thomas, Jr., *Patchwork Pension Plan Adds to Greek Debt Woes*, NYTIMES.COM (Mar. 11, 2010), http://www.nytimes.com/2010/03/12/business/global/12pension.html (last visited Oct. 9, 2012).

government raises taxes, reduces the benefits, or increases retirement age, the programs will not be able to keep up with their promised pension payments in the coming years.[151] The United States yearly federal deficit has escalated from $161 billion in 2007 to about $1.3 trillion in 2011,[152] while the Greek yearly government deficit was $26 billion in 2011.[153] For both countries, this is an annual budget deficit of about one-tenth of their national output.[154] As in Greece, where high interest rates on government debt will drive the country into bankruptcy, the United States federal and state debt will continue to rise and creditworthiness will continue to fall if the debt is not curtailed.[155]

While large government debts have led to economic distress in both the United States and Greece, the relationship between the two countries is much more complex. Generally, high interest rates on a country's debt will cause a major reduction in the value of their currency.[156] Since Greece is a member of the EMU, it does not control the value of its own currency.[157] Instead, Germany and France—the two biggest economies of the seventeen countries that are member-nations of the EU—largely control the value of the Euro.[158] By contrast, the United States has its own currency and is guided by its own monetary policies.[159] Therefore, the United States can print more money and increase or decrease the value of their currency to balance their trade deficit, if they so desire.[160]

Being firmly associated with a unified and established political regime has offered more protection to the United States than Greece, which is "loosely connected to the rest of Europe."[161] When financial conditions get difficult in the United States, the federal government is very receptive to those in need, providing support through various programs such as unemployment compensation, housing assistance, the Earned-Income Tax

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151. *Id*.

152. Morici, *supra* note 138.

153. *Economy of Greece*, WIKIPEDIA.COM, *available at* http://en.wikipedia.org/wiki/Economy_of_Greece (last visited Oct. 9, 2012).

154. Miller & Sciacchitano, *supra* note 3.

155. *See* Stephen J. Rose & William T. Dickens, *The United States Is Not Greece*, FORBES (May 30, 2012, 5:36 PM), http://www.forbes.com/sites/realspin/2012/05/30/the-united-states-is-not-greece/ (last visited Oct. 9, 2012).

156. *Id*.

157. *Id*.

158. *Id*.

159. *Id*.

160. Miller & Sciacchitano, *supra* note 3.

161. Rose & Dickens, *supra* note 155.

Credit, Medicaid, and more.[162] In Greece, financial assistance is more sparse and given reluctantly.[163] The current economic crisis has prompted many Greek residents to flee the country in the hopes of a better future.[164] However, it is much more difficult to start over in a completely different country, with language and cultural barriers, than it is to move within the United States.[165] Greeks have fewer resources and the Greek economy has far less influence over the world.[166] Greece's central bank is unable to finance its deficit—the sole reason why help is coming from the outside, primarily with Germany lending money to bail Greece out.[167] On the other hand, the United States remains the largest and most dominant economy in the world and its central bank can support its public spending during an economic crisis.[168] Based on the comparisons mentioned above, it is clear that the United States economy is not in the same dire straits as the Greek economy.[169] Although there are some similarities between the two countries, they are nowhere near as great as exaggerated comparisons contend. Instead, their fiscal positions as well as their tools to subsidize government spending and respond to economic emergencies are different.

B. How A Probable Greek Default May Affect the United States

If Greece left the Eurozone, an economic domino effect would unquestionably take place in Europe.[170] However, one cannot help but wonder but what the financial effect a Greek default would have on the United States economy. Although United States businesses and banks are not entangled in the Greek economy, investors fear that if Greece repudiates its debt and leaves Greek bond holders with nothing, other European countries like Spain and Portugal would suffer a financial strain on their already weakened economies.[171] If the EU economy were to crumble

162. *Id*.

163. *Id*.

164. *Id*.

165. *Id*.

166. Miller & Sciacchitano, *supra* note 3.

167. *Id*.

168. *Id*.

169. *See id*.

170. Scott Bombeck, *What Happens Here if Greece Exits the Euro?*, EXAMINER.COM (June 26, 2012), http://www.examiner.com/article/what-happens-here-if-greece-exits-the-euro?cid=rss (last visited Oct. 9, 2012).

171. Michael Murray, *What a Greek Debt Default Could Mean for You*, ABCNEWS.COM (June 16, 2011), http://abcnews.go.com/Business/greek-debt-default-affect-american-economy/story?id=13858070#.UBlBlO1pvq0 (last visited Oct. 9, 2012).

because of a chain of defaults and related bank failures, it could drag the United States economy down with it, since the United States and Europe engage in a lot of trade with one another.[172] The EU is in fact the biggest trading partner for the United States, and the loss of this market could hurt United States companies who rely on sending exports to Europe.[173] In other words, if an EU recession occurs, there will be less demand in Europe for American exports because they will be more costly for Europeans.[174] Rather, money that is available will be spent on cheaper, local products, greatly hurting United States businesses. However, it is important to note that the United States' exports to Greece are minor.[175] The problem, however, exists the moment that one country leaves the EU, since the market focus would shift to the other deeply troubled economies of Spain, Portugal, Italy, and Ireland.[176] Thus, even though United States exports to Greece are small, the United States could be considerably affected by a Greek default if a shockwave spreads throughout Europe, endangering the Eurozone as a whole.

V. CONCLUSION

The only thing anyone seems to be talking about in the markets these days is the prospect of Greece leaving the EU. However, do not expect a Greek exit from the EU to happen just yet. Although the media frequently discusses the possibility, Eurozone members have fought way too hard to manage the short-term symptoms of the crisis to just let Greece go. They have already bought some time by executing an enormously expensive rescue package and will continue to fight until the very end. Of course, the austerity measures implemented by the EU and the IMF have been tough for a fragile country like Greece. The bailout terms have significantly impacted all aspects of Greek life including the psychology of the people, employment, income, pensions, and more. Still, Greece has a duty to itself and to the rest of Europe to emerge from its current debt crisis. Difficult as the adjustment process may be, Greece will eventually gain from the present restructuring imposed by *troika*. The institutional and economic reforms will contribute to the creation of a balanced budget and the removal

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172. *Id*.

173. Bombeck, *supra* note 170.

174. *Id*.

175. Stella Dawson, *What Would Greek Exit Mean for the U.S. Economy?*, REUTERS.COM (May 24, 2012, 7:04PM), http://www.reuters.com/article/2012/05/24/us-usa-economy-europe-idUSBRE84N1PZ20120524 (last visited Oct. 9, 2012).

176. Blazey & Wetton, *supra* note 2, at 147.

of bureaucratic procedures and corruption—all of which make Greece uncompetitive.

Greeks should be willing to accept the painful bailout conditions if it means they can stay with the Euro.[177] In fact, for the Greeks, sticking with the common currency may be the policy goal of greatest significance.[178] In late May, 2012, a poll found that eighty-one percent of Greeks believed that Greece "should stick with the [Euro] 'at all costs.'"[179] Additionally, the European Central Bank's Vice President, Vitor Constancio, recently told reporters that he does [not] anticipate that Greece will depart from the EU and has faith that Athens will work cooperatively with Europe to come out of its crisis.[180] If all this is not enough assurance that Greece is capable of sticking with the Euro, we can look to the country's lasting history for more answers.

Whether it involved keeping their culture alive under Ottoman rule or defending their homeland from Persian invasion, the Greeks had a fighting spirit and refused to give up. Drawing from its resilient past, the truth suddenly becomes clear; there is still hope for Greece to be saved.

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177. Louis Klarevas, *Greeks Don't Want a Exit*, FOREIGN POLICY (June 14, 2012), http://www.foreignpolicy.com/articles/2012/06/14/greeks_don_t_want_a_grexit (last visited Oct. 9, 2012).

178 *Id*.

179. *Id*.

180. *ECB's Constancio Doesn't Expect Greece to Exit the Euro*, NBCNEWS.COM (May 22, 2012, 10:47 AM), http://www.msnbc.msn.com/id/47518489/ns/world_news-europe/t/ecbs-constancio-doesnt-expect-greece-exit-euro/#.UCLLUO1pvq (last visited Oct. 9, 2012).

SOME CRITICAL THINKING ABOUT A HUMAN RIGHT TO WATER

Doug Donoho[*]

I. THE CRITICAL IMPORTANCE OF WATER

Last year student members of the Inter-American Center for Human Rights organized a symposium focused on the incipient "international right to water." When asked if I thought this would be a good topic I replied, and not without some enthusiasm, "not really." I wasn't being hard-hearted or disinterested; the importance of water and its role in basic human dignity is manifest. Rather, I was expressing a sense of cynical skepticism about the prospects of meaningfully addressing the problem of clean water and sanitation by creating another empty international promise dressed up as an individual right. This skepticism was grounded in misgivings about the legal and practical implications of creating an individual right to water on the international level,[1] and on doubts about its potential for affecting meaningful change. Thankfully, the students ignored me. The symposium was a timely and terrific two-day event full of insight and information. My skepticism about creating a meaningful international individual human right

* Professor of Law, Nova Southeastern University, Shepard Broad Law Center; LL.M., Harvard Law School; J.D., Rutgers University-Camden; B.A., Kalamazoo College.

1. The right to water could be variously defined but reasonably would include, at minimum, reasonable physical access to water of sufficient quantity and quality for basic human functions. A somewhat distinct but related claim would involve adequate sanitation without which access to water would obviously be compromised. Throughout this essay the right to water is meant to cover all of these related interests.

to water, although tempered, remains. The reasons for this skepticism and some critical thinking about the prospects for a right to water are set out in this essay.

No one doubts that water is essential to human life. Historically, access to water has been a source of enduring conflict governed by force of arms, power, and economic imperatives.[2] Even in political debate, one encounters virtually no disagreement about these simultaneously trite and profound facts. In the modern West, technology and the relative abundance of water has generally dulled public appreciation of the essential connection between clean water and human life.[3] Water in the industrialized world is primarily treated as a commodity; essential to industry and agriculture both, controlled primarily through market forces.[4] Water and sanitation adequate for personal needs is widely and almost universally available in developed countries. Indeed, it is probably safe to say, despite increasing awareness of pollution, depletion, and looming shortages, most people in industrialized societies largely take access to clean water and sanitation for granted.

In most parts of the world and for vast numbers of people, however, clean water is far from a given. The United Nations (U.N.) estimates that "700 million people in 43 countries suffer today from water scarcity" and that "by 2025, 1.8 billion people will be living in countries or regions with absolute water scarcity."[5] The U.N. further asserts, "[a]nother 1.6 billion people, or almost one quarter of the world's population, face economic water shortage (where countries lack the necessary infrastructure to take water from rivers and aquifers)."[6]

In addition to scarcity, the World Health Organization (WHO) has reported that 780 million people lacked safe drinking water in 2010.[7] More than 2.5 billion people lack adequate sanitation, and 1.5 billion of them are

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2. *See, e.g.*, Pacific Institute, Water Conflict Chronology, *available at* http://www.worldwater.org/conflict.html (last visited Sept. 9, 2012); *see also,* Rachel Nuwer, *The Power Politics of Water Struggles, Science Blog*, N.Y. TIMES MAG., Nov. 28, 2011, *available at* http://green.blogs.nytimes.com/2011/11/28/the-power-politics-of-water-struggles/ (last visited Sept. 9, 2012).

3. *See* University of Kentucky, *Water Usage*, *available at* http://www.ca.uky.edu/enri/pubs/usage.pdf.

4. *Id*.

5. UN International Decade for Action 'WATER FOR LIFE' 2005-2015, *Water Scarcity*, *available at* http://www.un.org/waterforlifedecade/scarcity.shtml (last visited Sept. 9, 2012).

6. *Id*.

7. World Health Organization, *Global analysis and assessment of sanitation and drinking-water*, *available at* http://www.who.int/water_sanitation_health/en/ (last visited Sept. 9, 2012).

forced to practice open defecation.[8] As many as thirty thousand people die each day from diseases that are preventable with clean water and basic sanitation facilities.[9] Among these needless deaths are 3000 children under age five who die every day from diarrhea (more than 1 million per year).[10]

Surprisingly, these statistical indicators have actually improved substantially over the last two decades through the concerted effort of the U.N. and others.[11] Nevertheless, without significant international effort and reforms, these problems will inevitably continue and are likely to become more acute over time. The demands for fresh water, a finite and indispensable resource, have grown tremendously with world population growth and the corresponding need to grow more food. Increasing industrial development will put further burdens on the water supply. As recently stated in a special report in *The Economist*, "For Want of a Drink:"

> The number of people on Earth rose to 6 billion in 2000, nearly 7 billion today, and is heading for 9 billion in 2050. The area under irrigation has doubled and the amount of water drawn for farming has tripled. The proportion of people living in countries chronically short of water, which stood at 8% (500m) at the turn of the 21st century, is set to rise to 45% (4 billion) by 2050. And already 1 billion people go to bed hungry each night, partly for lack of water to grow food. [12]

These harsh realities, and events like the ongoing cholera epidemic in Haiti,[13] make it vital to realize that clean water and sanitation are critical in the fight against poverty and disease prevention. For the billion people who

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8. *See* World Health Organization, *Fast facts*, *available at* http://www.who.int/water_sanitation_health/monitoring/jmp2012/fast_facts/en/index.html (last visited Sept. 9, 2012).

9. *Id*.

10. *See* World Health Organization Report, *Why Are Children Still Dying And What Can Be Done*, *available at* http://whqlibdoc.who.int/publications/2009/9789241598415_eng.pdf; *see also* U.N. Development Program, *Water Supply and Sanitation, available at* http://www.undp.org/content/undp/en/home/ourwork/environmentandenergy/focus_areas/water_and_ocean_governance/water-supply-and-sanitation/ (last visited Sept. 9, 2012).

11. *See* World Health Organization Report, *Progress on Drinking Water and Sanitation 2012 Update (UNICEF/WHO)*, *available at* http://www.wssinfo.org/fileadmin/user_upload/resources/JMP-report-2012-en.pdf.

12. The Economist, *For Want of a Drink*, THE ECONOMIST MAG., May 20, 2010, *available at* http://www.economist.com/node/16136302 (last visited Sept. 9, 2012) [hereinafter *Drink*].

13. Editorial, *Haiti's Cholera Crisis*, N.Y. TIMES MAG., May 12, 2012, *available at* http://www.nytimes.com/2012/05/13/opinion/sunday/haitis-cholera-crisis.html (last visited Sept. 9, 2012).

lack it, clean water is essential to their very survival.[14] Seen in these terms, access to adequate clean water and sanitation is unquestionably one of the most pressing social and economic issues of our time. Indeed, there appears to be almost universal agreement among governments that universal access to clean water and sanitation should be a priority of the international community.[15] What to do about it is an entirely different question. Is there an international human right to water? Should there be? Can a rights-based approach to water issues be effective and meaningful?

II. CURRENT STATUS OF THE RIGHT TO WATER

Given its essential character, it is not at all surprising that there is an international movement directed toward recognition of a right to water and sanitation. As described below, this includes numerous declarations by significant international organizations that "recognize" the right to water. The latest of these declarations, found in the agenda of the just completed Rio+20 U.N. Conference on Sustainable Development, is typical.[16] Article 67 of the "Zero Draft" document on "The Future We Want," declares: "We underline the importance of the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all other human rights."[17] Such declarations make it easy to confuse the laudatory and timely effort to promote universal access to adequate water with more technical but critical legal questions about whether binding international obligations have in fact been created, should be created, and what they might mean.

There is an endemic feature of the international human rights system that should be kept in mind when considering claims about international obligations, particularly regarding affirmative obligations such as an

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14. *See, e.g.*, Kate Kelland, *Better Sanitation Could Save 2 Million Lives a Year*, (Reuters) Nov. 15, 2010, *available at* http://www.reuters.com/article/2010/11/15/us-sanitation-idUSTRE6AE4EY20101115 (last visited Sept. 9, 2012).

15. *See* Zero Draft Rio+20, *infra* note 16; *see also infra* notes 16–17 and accompanying text.

16. The Rio+20 Conference was held June 20–22, 2012. More than 130 world leaders, including U.S. Secretary of State Hilary Clinton, attended talks at the conference which is focused on developing a cooperative global agenda for achieving sustainable development. *See* Rio+20 U.N. Conference on Sustainable Development, *available at* http://www.uncsd2012.org/ (last visited Sept. 9, 2012); *See also* Rory Carroll, *Clinton to attend Rio+20 conference*, (Reuters), June 13, 2012, *available at* http://www.reuters.com/article/2012/06/13/us-rio-us-idUSBRE85C0CO20120613 (last visited Sept. 9, 2012); *See also* Rio+20 U.N. Conference on Sustainable Development, *7 Critical Issues at Rio+20*, *available at* http://www.uncsd2012.org/7issues.html (last visited Sept. 9, 2012).

17. Rio+20 UN Conference on Sustainable Development, *The Future We Want, Outcome Documen*t, *Zero Draft*, *available at* http://www.uncsd2012.org/rio20/mgzerodraft.html (last visited Sept. 9, 2012).

international right to water. This is the pronounced tendency of human rights' advocates and institutions to gloss over the very real, legal requirements and implications of establishing binding and effective international rights. On one level, this is entirely understandable. There is a natural tendency to confuse political or moral acknowledgement of human needs with the existence of legal obligations that conflate our aspirations with meaningful, binding legal standards. It feels good and, I agree, it is how the world ought to be. Similarly, a declaration by international organizations that some human need or interest is a "right" is often best understood as primarily a claim about its importance rather than a concrete legal claim. Consider this rather elegant but equally inaccurate statement of Kofi Annan about the right to water: "[a]ccess to safe water is a fundamental human need and therefore a basic human right."[18] The sentiment is golden but the cold reality is that recognition of a human need, no matter how essential, does not in itself establish a legally enforceable right to it.

Speaking in very general terms, there are at least two key qualifiers in establishing a binding international human right (a question distinct, as described below, from enforcement and effectiveness). The first prerequisite, acknowledgement of a universal interest or need which is essential to human dignity, is uncontestable and obvious with regard to water. Water is essential to life itself, and, arguably indispensable to all other human rights. Like food and shelter, clean water is one of the first things we think of when identifying universal human needs. It should, like food, shelter, and health, be a priority for both domestic governments and the international community

But what about the prospects of meeting the second qualification, recognition by states of the right as a binding and meaningful international legal obligation? The hard and inconvenient fact is that no state is bound absent its consent.[19] Moreover, even when such consent is established on a general level, serious questions inevitably arise about precisely what kind of obligation the state has consented to and what it means. As described later, this is particularly true of affirmative human rights obligations, which are typically adopted in very general and often ambiguous terms, lacking elements essential to enforceability. A "rights obligation" is created, but it hardly means anything in practice.

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18. The Right to Water and Sanitation, *available at* http://www.righttowater.info/ (last visited Oct. 5, 2012).

19. *See Preamble*, THE UNIVERSAL DECLARATION OF HUMAN RIGHTS, *available at* http://www.un.org/en/documents/udhr/index.shtml (last visited Oct. 5, 2012).

Whether international obligations ever really mean anything is, in turn, a function of the choices each state makes about whether to incorporate those obligations into binding domestic law. Ultimately, declarations of rights have little legal or practical consequences absent the political will to implement them, something that depends on genuine state consent and commitment. These legal realities have important practical implications for the prospects of ensuring adequate water through individual rights.

A. The Right to Water Under Existing Conventional Law

Thus far, the recent movement towards recognition of a right to water has fallen somewhat short of the mark in garnering actual state consent to binding, unambiguous international obligations applicable to all. In terms of existing conventional law, there are currently three global human rights treaties[20] that create explicit state obligations regarding water. Each is directed at protecting particularly vulnerable populations in specific ways rather than demanding a universal, general right to water applicable to all.

The most significant of these references to water rights appears in the Convention on the Rights of the Child (Child's Convention). Article 24(2) of the Child's Convention demands, as part of the "right to health," that its 193 state parties[21] " . . . take appropriate measures: . . . (c) [t]o combat disease and malnutrition, including within the framework of primary health care, through, inter alia . . . the provision of adequate nutritious foods and clean drinking water . . . ."[22] As discussed below, these rights are subject to significant limiting language regarding actual state party obligations.[23] Nevertheless, even though subsumed within the more general right to health and cast in terms of disease prevention, this expression of a child's right to "clean drinking water" would seem an important first step toward progressive recognition of a more universal right to water. Thus, the Child's Convention presents perhaps the clearest recognition of a right to water with wide potential application created to date.

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20. The Geneva Conventions on Armed Conflict also make a number of references to water and forbid its denial of water to civilian populations and prisoners during armed conflicts. *See generally* Ameur Zemmali, *The Protection of Water in Times of Armed Conflict, International Review of the Red Cross, No. 308, 31-10-1995*, *available at* http://www.icrc.org/eng/resources/documents/misc/57jmra.htm (last visited Sept. 9, 2012).

21. *See* Convention on the Rights of the Child, Feb. 16, 1995, *available at* http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en (last visited Sept. 9, 2012) (The United States is not a party to the Child's Convention).

22. *See infra* notes 26–28, 50, and accompanying text.

23. *See infra* notes 24–26, 40, and accompanying text.

The Convention on the Elimination of All Forms of Discrimination Against Woman (CEDAW) contains a more obscure and limited reference to a right to water. In Article 14, styled as a prohibition against discrimination aimed at "rural women," CEDAW demands that its 187 state parties:[24]

> Take all appropriate measures to eliminate discrimination against women in rural areas in order to ensure, on a basis of equality of men and women, that they participate in and benefit from rural development and, in particular, shall ensure to such women the right . . . (h) To enjoy adequate living conditions, particularly in relation to housing, sanitation, electricity and water supply, transport and communications.[25]

By its terms, this provision is even more limited than Article 24 of the Child's Convention, explicitly applicable to only a defined and limited population and focusing on discrimination. On the positive side, this provision is directed at a population disproportionately affected by a shortage of clean, accessible water.[26]

Finally, the 2006 Convention on the Protection of Persons with Disabilities creates an obligation to ensure "equal access" to "clean water services" as a part of a more general obligation to protect a disabled person's right to "an adequate standard of living and social protection."[27]

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24. United Nations Convention on the Elimination of All Forms of Discrimination Against Women, art. 27(7), Dec. 18, 1979, 1248 U.N.T.S. 13 (*entered into force* on Sept. 3, 1981).

25. *Id*.

26. According to the WHO, 7 out of 10 people lacking adequate sanitation are rural dwellers with approximately 653 million rural dwellers lacking access to improved sources of drinking water. *See also Progress on Drinking Water and Sanitation 2012 Update*, UNICEF WORLD HEALTH ORGANIZATION, *available at* http://www.wssinfo.org/fileadmin/user_upload/resources/JMP-report-2012-en.pdf*; See also* United Nations Department of Economic and Social Affairs, T*he Human Right to Water and Sanitation*, http://www.un.org/waterforlifedecade/human_right_to_water.shtml (last visited Sept. 12, 2012). (As to the specific issues affecting women, including physical access).

27. Article 28 of the Convention on the Rights of Persons with Disabilities provides:
> 1. States Parties recognize the right of persons with disabilities to an adequate standard of living for themselves and their families, including adequate food, clothing and housing, and to the continuous improvement of living conditions, and shall take appropriate steps to safeguard and promote the realization of this right without discrimination on the basis of disability. 2. States Parties recognize the right of persons with disabilities to social protection and to the enjoyment of that right without discrimination on the basis of disability, and shall take appropriate steps to safeguard and promote the realization of this right, including measures: a) To ensure equal access by persons with disabilities to clean water

Each of the above treaties give some recognition to the idea that water access is a human right, at least for those covered by these conventions in the nations that are parties. It is also clear, however, that they provide only limited support for the claim that water is a universal individual right. Each treaty is focused on a specific vulnerable population and created as a general corollary to more general and amorphous rights, such as a "right to health," non-discriminatory access to "rural development," "social protection," and an "adequate standard of living." At best, it can be said that for some important vulnerable groups, there is some form of undefined international obligation relating to water.

Perhaps more importantly, like other well-intended social and economic rights, the water right recognized in these treaties is expressly qualified, so much so that it is easy to doubt the significance of the obligation. Like virtually all social and economic rights, for example, the child's right to clean water is qualified by Article 4's general proviso that a state's obligation is to implement such economic and social rights "to the maximum extent of their available resources."[28] Article 14 of CEDAW is similarly qualified by waffle words such as "appropriate measures to ensure" that rural women "participate in and benefit" from "rural development" in order to enjoy "adequate living conditions."[29] Needless to say, such qualifying language casts doubt on precisely what obligation the state has agreed to and whether it could ever be enforceable.

Nor is it at all clear whether these expressions of a right to water were intended to create an enforceable individual right in the first place, or what such a right might mean in practice. Given the paucity of authoritative international enforcement and interpretive processes, these questions are essentially left to each state party to decide for itself, subject to weak

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> services, and to ensure access to appropriate and affordable services, devices and other assistance for disability-related needs.

Article 28—Adequate Standard of Living and Social Programs, UNITED NATIONS ENABLE, *available at* http://www.un.org/disabilities/default.asp?id=288 (last visited Sept. 10, 2012); *See also Convention and Optional Protocol Signatures and Ratifications*, UNITED NATIONS ENABLE, *available at* http://www.un.org/disabilities/countries.asp?navid=17&pid=166 (last visited Sept. 10, 2012).

28. Article 4 States:

> Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

Office of the United Nations High Commissioner for Human Rights, Convention on the Rights of the Child, art. 4, Nov. 20, 1989 (*entered into force* on Sept. 2, 1990) *available at* http://www2.ohchr.org/english/law/crc.htm#art4.

29. *See supra* note 25, and accompanying text.

international monitoring. Enforceability and other practical implications are discussed further below in Section C.

In general, the only plausible argument that existing conventional law creates such a right is grounded on the idea that water is a "derivative right" necessary to other expressly declared rights.[30] While emotionally appealing, this argument once again ignores the essential factor of actual state intent in ratifying such agreements. The reality is that states will not acknowledge and cannot be meaningfully bound to international obligations in such an indirect "bootstrap" fashion.

B. Soft Law on the Right to Water

In the absence of concrete, explicit treaty obligations, a number of international human rights institutions have nevertheless proclaimed an international human right to water. Such claims are ubiquitous at the U.N.[31] However cast, such proclamations are, in essence, non-binding efforts to promote the creation of water rights by intergovernmental human rights institutions. Such efforts may well be beneficial to the political aspect of securing water for all. They may perhaps even lead, as "soft law,"[32] to the eventual establishment of legally binding norms. They do not, however, create a binding international right to water.

The first and most concrete endorsement of a right to water was issued by the Committee on the Economic, Social and Cultural Rights Convention (ESCRC). The ESCRC is a treaty-based institution of eighteen "independent experts" charged with monitoring the implementation of the Convention.[33] In 2002, the ESCRC adopted General Comment 15, a form of guidance to state parties concerning their treaty obligations, declaring that water is implicitly guaranteed as part of rights to an "adequate standard

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30. *See, e.g.*, United Nations Department of Economic and Social Affairs, *The Human Right to Water and Sanitation*, http://www.un.org/waterforlifedecade/human_right_to_water.shtml.

31. *Id*.

32. The term "soft law" is often used to describe the status of non-binding international instruments of ambiguous legal authority that may influence state behavior and form "quasi-binding" state obligations. The term might also be applied to the non-binding output of international organizations purporting to interpret state obligations. For a recent critique of the concept, see Anthony D'Amato, *International Soft Law, Hard Law, and Coherence*, Northwestern Public Law Research Paper No. 08-01 (Mar. 1, 2008), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1103915&rec=1&srcabs=1113537.

33. *See* Office of the United Nations High Commissioner for Human Rights, *Committee on Economic, Social and Cultural Rights—Members*, *available at* http://www2.ohchr.org/english/bodies/cescr/members.htm (last visited Oct. 5, 2012).

of living" (Art. 11) and to "health" (Art. 12).[34] In addition to relying upon the fundamental human need for adequate water, the Committee reasoned that water was a prerequisite for attainment of other rights explicitly recognized in the Convention, which utilizes a "catalogue of rights . . . not intended to be exhaustive."[35] General Comment 15 directly suggests that the right to water is legally binding for the 160 state parties to the Convention.[36] It also describes the Committee's view of what such a right requires in detail that would undoubtedly cause consternation among national governments and those who prefer democratically driven policy making.[37]

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34. *See* Committee on Economic Social and Cultural Rights, General Comment 15, U.N. Doc. E/C.12/2002/11 (Jan. 20, 2003) [hereinafter General Comment 15] General Comment 15 states:

> The human right to water entitles everyone to sufficient, safe, acceptable, physically accessible and affordable water for personal and domestic uses. An adequate amount of safe water is necessary to prevent death from dehydration, to reduce the risk of water-related disease and to provide for consumption, cooking, personal and domestic hygienic requirements.

35. *Id*.

36. *Id*. at 17–34.

37. *See* General Comment 15*, supra* note 34, at. 4. The General Comment includes, for example, the following assertions of state obligations:

> [D]isadvantaged and marginalized farmers, including women farmers, have equitable access to water and water management systems, including sustainable rain harvesting and irrigation technology . . . [w]ater should be treated as a social and cultural good, and not primarily as an economic good . . . water should be of an acceptable colour, odour and taste for each personal or domestic use . . . [a]ll water facilities and services must be of sufficient quality, culturally appropriate and sensitive to gender, life-cycle and privacy requirements . . . even in times of severe resource constraints, the vulnerable members of society must be protected by the adoption of relatively low-cost targeted programmes . . . investments should not disproportionately favour expensive water supply services and facilities that are often accessible only to a small, privileged fraction of the population, rather than investing in services and facilities that benefit a far larger part of the population . . . States parties should give special attention to those individuals and groups who have traditionally faced difficulties in exercising this right, including women, children, minority groups, indigenous peoples, refugees, asylum seekers, internally displaced persons, migrant workers, prisoners and detainees . . . [t]o ensure that water is affordable, States parties must adopt the necessary measures that may include, *inter alia*: (a) use of a range of appropriate low-cost techniques and technologies; (b) appropriate pricing policies such as free or low-cost water; and (c) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.

General Comment 15 was followed by a series of non-binding resolutions of the UN Human Rights Council endorsing the concept of an international right to water. The latest of these resolutions, in 2011:

> Reaffirms that States have the primary responsibility to ensure the full realization of all human rights, and must take steps, nationally and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realization of the right to safe drinking water and sanitation by all appropriate means, including particularly the adoption of legislative measures in the implementation of their human rights obligations.[38]

The U.N. General Assembly has also periodically added its non-binding support for an incipient right to water. In 2000, for example, the Assembly endorsed "promotion" of a "fundamental right" to "clean water" as a "moral imperative" in achieving the "full realization of the right to development."[39] In 2010, the General Assembly explicitly recognized ". . . the right to safe and clean drinking water and sanitation as a human right that is essential for the full enjoyment of life and all human rights . . . ."[40] There were no negative votes, but forty-one nations abstained, primary among them industrialized nations and water rich countries[41] including the United States, Canada, and most of the European Union.[42] As noted above,

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While many may agree that these are excellent ideas, it is equally true that each reflects basic policy judgments about priorities more properly assigned to domestic, democratic processes.

38. Resolution of Human Rights Council, Oct. 12, 2011, A/HRC/RES18/1, available at: http://www.un.org/ga/search/view_doc.asp?symbol=A/HRC/RES/18/1 (last visited Oct. 5, 2012).

39. The Right to Development, G.A. Res. 54/175, U.N. Doc. A/RES/54/175 (Feb. 15, 2000).

40. The Human Right to Water and Sanitation, G.A. Res. 64/292, U.N. Doc. A/RES/64/292 (Aug. 3, 2010).

41. *See Drink*, *supra* note 12. According to The Economist special report: Water is not evenly distributed—just nine countries account for 60% of all available fresh supplies—and among them only Brazil, Canada, Colombia, Congo, Indonesia, and Russia have an abundance. America is relatively well off, but China and India, with over a third of the world's population between them, have less than 10% of its water.

42. Abstaining states complained that the declaration of a right to water was premature, uncertain in meaning and disruptive of international efforts to improve water access. *See* Press Release, General Assembly, General Assembly adopts resolution recognizing access to clean water, sanitation as human right, by recorded vote of 122 in favor, none against, 41 absentations, U.N. Doc. GA/10967 (Jul. 28, 2010).

a right to water also appears on the agenda documents for the Rio+20 Conference on Sustainable Development, which took place in June, 2012.[43]

All of these various sources are, in essence, non-binding interpretations of pre-existing treaties or statements of aspiration. It seems clear that they lend support for the argument in favor of creating state obligations regarding water. They are not, however, law. They should also be viewed with skepticism regarding their practical significance. Governments and international bodies, especially at the U.N., are famous for high rhetoric while endorsing non-binding, empty promises. The General Assembly in particular tends to classify all human needs and interests under the rubric of rights, typically in meaningless resolutions designed primarily as feel good statements.

The reality is that virtually no state treats such interpretations and declarations as legally binding. Thus, suggestions at the U.N. and other international fora that a generally applicable right to adequate water and sanitation has been established are unconvincing at best. Although there is clearly some promising movement towards recognition of the concept of a right to water, the ultimate limitation remains securing state consent to meaningful and clear obligations.

Ultimately, the important question is whether there is something real to be gained from a rights-based approach to water on the international level. A corresponding question is whether there are potential downsides to a rights-based approach. In other words, is the creation of an international human right to water consistent with, and does it effectively address, the real threats to the availability of clean water: pollution, depletion, inequitable distribution, lack of international cooperation, and mismanagement? The answers are not terribly clear. Arguably, treating water as an enforceable individual right has at best a very indirect, and perhaps even a disruptive effect on these very real impediments to securing safe water for all.

III. PROSPECTS FOR A *MEANINGFUL* INTERNATIONAL HUMAN RIGHT TO WATER

Although it is fairly clear that a generally applicable international human right to water has yet to reach the status of binding international law, the concept has been enthusiastically embraced by the U.N. and assorted human rights institutions. These efforts raise a number of basic and interrelated questions:

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43. *See generally* notes 16–17, *supra* and accompanying text.

1) Will the international community eventually recognize water as a legally enforceable individual human right?
2) Should it?
3) What are the practical implications of recognizing such rights?
4) Is there something real to be gained by addressing the essential human need for adequate water through the mechanisms of international human rights law?

A. Prospects for State Consent

As to the first predictive question, whether an enforceable legal right to water will be recognized as a binding international obligation, the prospects appear somewhat mixed. On the one hand, it seems inevitable that a right to water in some form will become part of the normative fabric of international human rights law. Indeed, taking a casual approach, some may argue that it has already attained that status, at least as soft law. International organizations, particularly at the U.N., have enthusiastically adopted the mantle of water rights, in typical fashion viewing declarations of rights more in aspirational terms than legal.[44] Even so, doubts remain about what the international community really means when it endorses a right to water. Would such a declared right be meaningful? History is not inspiring in this regard.

A great many governments will readily endorse such a right, as they have many other rights, simply because they do not take human rights obligations seriously in the first place. Most governments have a long history of treating international human rights as window dressing; the right to water will be the latest fashionable addition to the list of unenforceable and ignored rights. Many of these same governments with pressing needs for material assistance of every kind will also view the right to water as part of their general argument for assistance from the developed world.[45] Indeed, the right to water already has taken on the flavor of North-South political wrangling over the obligations of wealthier nations.[46] Thus, even

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44. *See generally* Mary Ann Glendon, *The Rule of Law in the Universal Declaration of Human Rights*, *available at* http://www.law.northwestern.edu/journals/jihr/v2/5/5.pdf.

45. *See generally* United Nations Human Rights Office of the High Commissioner, *California: New Law on the Human Right to Water and Sanitation Sets "Inspiring Example for Others"—UN Expert*, *available at* http://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=12605&LangID=E (last visited Oct. 5, 2012); *see also* Glendon, *supra* note 44.

46. *See generally* Felicia Fonseca, *Arizona high court settles water rights query*, Sept. 20, 2012, *available at* http://www.capitalpress.com/print/AP-AZ-Water-rights-091212 (last visited Oct. 5, 2012).

formal recognition of a right within the international system would not suggest that such interests will be enforceable, meaningful, or clear as to content. As described below, using the ESCRC as an illustration, this is particularly true historically with regard to affirmative social or economic rights such as the proposed right to water.

It seems equally clear, that many industrialized and water rich states will resist recognition of an international, individual human right to water and eventually refuse consent to such obligations, at least in the form of justiciable individual rights. It seems highly unlikely, for example, that countries like the United States, Canada, or the United Kingdom will consent to a binding international human right to water.[47] To explain why this is true, one need only consider the Western perspective on what rights mean and the practical implications of an individual right to water.

First, at least from the Western legal perspective, there is a fundamental difference between acknowledging the importance of a particular individual interest and establishing that interest as a legal entitlement. This distinction is typically ignored at the U.N. and in international parlance where the term "right" is instead a synonym for important needs. For the lawyer and for practical purposes, however, the distinctions between "ought" and "is," "need" and "legal entitlement" are critical. For the legal system, a right is an enforceable entitlement; a mechanism by which a particular individual interest may be enforced against the government.[48] It is not simply an expression of high aspiration.[49]

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47. Even with regard to the non-binding agenda document for the Rio+20 Conference these states initially resisted inclusion of language describing an international right to water. *See* WASH NEWS INTERNATIONAL, *Rio+20: Canada Finally Recongises Human Right to Water and Sanitation*, June 3, 2012, *available at* http://washinternational.wordpress.com/2012/06/03/rio20-canada-finally-recognises-human-right-to-water-and-sanitation/ (last visited Oct. 6, 2012).

48. *See generally* thefreedictionary.com, *available at* http://legal-dictionary.thefreedictionary.com/p/right (last visited Oct. 5, 2012).

49. The ESCRC clearly does not view the right to water as merely aspirational. General Comment 15 sets out a great number of specific policy directives—an astonishing display of hubris for an unelected, unaccountable advisory body with no binding power and questionable degree of authoritativeness. It also provides in Articles 55 & 56 that specific justiciable remedies must be provided in the form of "adequate reparations, including restitution, compensation, satisfaction or guarantees of non-repetition . . ." as well as "legal assistance for obtaining remedies." The Committee apparently views itself as the ultimate safeguard for its own policy directives regarding the right to water, directing states to set "benchmarks" for the adequacy of water quantities, qualities, and access based on international standards which the Committee will then supervise. General Comment 15, *supra* note 34, at Art. 53.

1. Philosophical Resistance

On some level, such distinctions reflect well-known and enduring philosophical differences among various societies and governments over the appropriate relationship and obligations of governments to individuals. From a Western liberal perspective, rights are generally viewed primarily as limitations on negative government action against individuals.[50] Rights are a legal mechanism that respond to government interference with personal liberty and protect against governmental abuse.[51] Classic illustrations would include freedom of speech and the prohibition against torture. This view contrasts with the idea, often attributed to non-Western or socialist societies, that rights also involve affirmative obligations on governments to provide for essential human needs.[52] Rights may be used to demand that governments organize and allocate public resources to ensure that everyone has adequate food, shelter, education, and absolutely yes, clean water and sanitation. Western societies similarly aspire to satisfy these basic needs, but often dispute whether justiciable individual rights are the appropriate means to those ends.[53]

Distinctions between rights as negative limitations on government versus affirmative obligations to promote human dignity, while often exaggerated, are not simply a theoretical, pointy-headed professor concern. First, they likely reflect philosophically-based political resistance to water rights among some Western nations. Second, such distinctions also reflect some important practical implications that are likely to create real obstacles to the establishment of a meaningful, enforceable, individual international right to water. As discussed below, the emphasis here is on the language "meaningful, enforceable individual right".

Western resistance to a right to water is likely to be first grounded on the argument that the problem of water should not be addressed via justiciable individual rights**,** that is, as a claim that can be adjudicated and enforced by individuals against their government and society. Many governments that take rights seriously have persistently resisted creating enforceable rights that involve affirmative obligations to individuals because they necessitate reallocation of resources through the wrong

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50. *See generally Liberalism*, ENCYCLOPEDIA.COM, *available at* http://www.encylopedia.com/topic/liberalism .aspx (last visited Oct. 6, 2012).

51. *See id*.

52. *See generally* Amy Hardberger, *Life, Liberty, and the Pursuit of Water: Evaluating Water as a Human Right and the Duties and Obligations it Creates* 4 NW. U. J. INT'L HUM. RTS. 331 (2005).

53. *See* Martin Scheinin, *Economic, Social and Cultural Rights: Models of Enforcement*, *available at* http://web.abo.fi/instut/imr/research/martin/ESCMartinScheinin.doc (last visited Oct. 5, 2012).

means.[54] Rights to food, shelter, health care, clean environment, and water all suggest that governments must utilize both public funds and power to achieve certain distributions of resources at the behest of individual claimants. Even governments that support fulfilling such essential needs with extensive social services and comprehensive "safety nets," such as the United States, tend to reject the idea that such needs should be addressed through justiciable rights.[55] Rather, these vital needs must be negotiated through accountable political institutions weighing competing claims and priorities. Whether for right or wrong, such philosophical resistance to meaningful affirmative rights obligations—like clean water—remains real.

Of course, this philosophical resistance is neither universal nor insurmountable. Indeed, one might ask why the widespread adoption of the U.N. Economic and Social Rights Covenant, which recognizes many rights similar in nature to water access, is not evidence to the contrary. At minimum, widespread adoption of the Covenant should indicate a commitment by a great number of states to address such essential human needs through rights. While there is a grain of truth to this claim, it is an uncritical and overly optimistic perspective on the actual and practical meaning of the Covenant's obligations. It is a view that fails to accurately account for what rights in the context of the Convention actually mean. For a variety of reasons, the interests recognized under the Covenant as rights are unlikely to ever take the form of justiciable entitlements that are enforceable by individual claimants.

The first reason for this is tied to an endemic characteristic of the current human rights system, which is particularly true of economic and social rights; rights are typically cast in general and malleable terms with plenty of wiggle room, allowing states the pretense of compliance. This textual flexibility is particularly problematic within the institutionally weak international system, since history tells us that most governments also do not mean or practice what they say.

The ESCRC is a good example. The treaty text itself generally only creates hortatory goals for state parties to achieve progressively its laudatory ends to the extent national resources allow.[56] There is no serious

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54. *See* Gary D. Libecap, *"Chinatown" Owens Valley and Western Water Reallocation: Getting the Record Straight and What It Means for Water Markets*, *available at* http://www.u.arizona.edu/~libecapg/downloads/published/LibecapUTAustinE3.pdf.

55. *See generally* Michael J. Dennis and David P. Stewart, *Justiciability of Economic, Social, and Cultural Rights: Should There be an International Complaints Mechanism to Adjudicate the Rights to Food, Water, Housing, and Health?*, July 01, 2004, *available at* http://www.escr-net.org/docs/i/431329 (last visited Oct. 5, 2012).

56. *See CESCR General Comment: The nature of State parties obligations (Art. 2, Par.1)*, UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, Dec. 14, 1990, *available*

enforcement mechanism associated with the treaty and the state parties have not directly incorporated the ESCRC's list of rights into national law in the form of binding legal obligations enforceable by domestic institutions. A cynic might describe the ESCRC as the wouldn't-it-be-nice or if-we-only-could treaty. It is painless to agree to a vague, unenforceable obligation to do your best to someday achieve general social ends with which no one disagrees. This is not to say that the rights based approach of the ESCRC is useless. The rhetorical power of rights discourse certainly serves to promote and educate. The ESCRC does not, however, create effective justiciable rights for either groups or individuals.

Likely resistance to water rights is not merely philosophical. An international human right to water also raises important practical issues that have developed, which water-rich nations are likely to view as deeply problematic. The most important of these problematic practical implications circle back to the fact that international human rights are, at least in the Western view, a legal institution with legal prerequisites and implications. There can be, of course, legitimate disagreement over the legal attributes of human rights. At least in the West, most legal systems would agree over three basic characteristics that define a right from a legal perspective. First, human rights are a legal construct, an entitlement allowing individuals to demand certain treatment by their government as a matter of enforceable law. Second, to be meaningful, rights must be related to subjects that can be acted upon by courts or other bodies, interests that can be enforced by threat of sanction, a justiciable claim, instead of an empty promise of future behavior. Third, international human rights are not

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at http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument (last visited Sept. 9, 2012). Article 2 of the Covenant casts the state parties' obligation in terms of progressively achieving rights to the maximum extent of available resources. The Human Rights Council reiterated this formulation when articulating its view of the proposed international right to water:

> Reaffirms that States have the primary responsibility to ensure the full realization of all human rights, and must take steps, nationally and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realization of the right to safe drinking water and sanitation by all appropriate means, including particularly the adoption of legislative measures in the implementation of their human rights obligations. Reaffirms that States have the primary responsibility to ensure the full realization of all human rights, and must take steps, nationally and through international assistance and cooperation, especially economic and technical, to the maximum of its available resources, to achieve progressively the full realization of the right to safe drinking water and sanitation by all appropriate means, including particularly the adoption of legislative measures in the implementation of their human rights obligations . . . .

only claims against one's own government, but also potentially against the entire world community; it is an obligation from all, to all.

2. Practical Implications: Domestic Redistribution

What do these characteristics mean regarding the practical implications of the prospective international right to clean water and sanitation? Water is not only an essential need, it is also both a commodity and a scarce resource. A legally recognized right to water, if taken seriously, would necessarily suggest a transfer of resources and redistribution, both domestically and internationally. Take, for instance, the real cost of clean water and sanitation under developing international standards.[57] Currently, most people do not pay anywhere near the actual cost of water if one includes externalities, pollution control, and

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57. General Assembly Resolution, A/RES/58/217, December 2003, proclaimed the period 2005-2015 "International Decade for Action 'Water for Life'." The U.N. Department of Economic and Social Affairs, maintains a website promoting the program which relies on standards set by the WHO. Among other things, these standards would require that water must be:

Sufficient. The water supply for each person must be sufficient and continuous for personal and domestic uses. These uses ordinarily include drinking, personal sanitation, washing of clothes, food preparation, personal, and household hygiene. According to the WHO, between 50 and 100 litres of water per person per day are needed to ensure that most basic needs are met and few health concerns arise.

Safe. The water required for each personal or domestic use must be safe, therefore free from micro-organisms, chemical substances and radiological hazards that constitute a threat to a person's health. Measures of drinking-water safety are usually defined by national and/or local standards for drinking-water quality. The WHO Guidelines for drinking-water quality provide a basis for the development of national standards that, if properly implemented, will ensure the safety of drinking-water.

Acceptable. Water should be of an acceptable colour, odour and taste for each personal or domestic use [. . .] [a]ll water facilities and services must be culturally appropriate and sensitive to gender, lifecycle, and privacy requirements.

Physically accessible. Everyone has the right to a water and sanitation service that is physically accessible within, or in the immediate vicinity of the household, educational institution, workplace, or health institution. According to WHO, the water source has to be within 1000 metres of the home and collection time should not exceed 30 minutes.

Affordable. Water, and water facilities and services, must be affordable for all. The United Nations Development Programme (UNDP) suggests that water costs should not exceed 3 percent of household income.

International Decade for Action 'Water For Life' 2005-2015, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *available at* http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument (last visited Sept. 9, 2012).

infrastructure.[58] More critically, it seems clear that vast numbers of people will never be able to pay even the nominal cost of adequate clean water as measured by developing international standards. According to *The Economist*, at a cost of $10 per month for basic water needs: "in the continent's poorer countries, such as Honduras, Nicaragua and Bolivia, 30-50% of urban households could not stretch that far. And in India and sub-Saharan Africa, more than half of households would struggle to pay."[59] According to the U.N. Water for Life Decade program:

> People living in the slums of Jakarta, Manila and Nairobi pay 5 to 10 times more for water than those living in high-income areas in those same cities and more than consumers in London or New York. In Manila, the cost of connecting to the utility represents about three months' income for the poorest 20% of households, rising to six months' in urban Kenya.[60]

The daunting reality is that water and sanitation that would meet international standards is currently not affordable for much of the world's population, and its true costs will dramatically rise over time. This reality is reflected in pronouncements about water rights by international organizations that stress distributive goals. General Comment 15, for example, describes state obligations regarding water in this way:

> To ensure that water is affordable, States parties must adopt the necessary measures that may include, *inter alia*: (*a*) use of a

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58. *Special Report on Water*, *Trade and Conserve*: *How to make tight supplies go further*, THE ECONOMIST, May 20, 2010, *available at* http://www.economist.com/node/16136292 (last visited Sept. 9, 2012). The Economist special report on water describes actual cost of water this way:

> Dr Perry, the irrigation economist, says water is typically priced at 10-50% of the costs of operating and maintaining the system, and that in turn is only 10-50% of what water is worth in terms of agricultural productivity. So to bring supply and demand into equilibrium the price would have to rise by 4-100 times.

Clean water is a right: But it also needs to have a price, THE ECONOMIST, Nov. 9, 2006, *available at* http://www.economist.com/node/8142904 (last visited Sept. 9, 2012). In another article in the series titled, "Clean Water is a Right," the author also cites the UN Development Fund for his observation that:

> If the poor cannot pay, someone else must. Taxpayers already bear some of the costs of water, shoveling money into loss-making public utilities. Ms. Foster and Mr. Yepes reckon that almost 90% of water utilities in low-income countries do not charge their retail customers enough to cover the costs of operating and maintaining their pipes, let alone investing in them.

59. *Id*.

60. *International Decade for Action 'Water For Life' 2005-2015*, UNITED NATIONS DEPARTMENT OF ECONOMIC AND SOCIAL AFFAIRS, *available at* http://www.unhchr.ch/tbs/doc.nsf/0/94bdbaf59b43a424c12563ed0052b664?Opendocument (last visited Sept. 9, 2012).

> range of appropriate low-cost techniques and technologies; (*b*) appropriate pricing policies such as free or low-cost water; and (*c*) income supplements. Any payment for water services has to be based on the principle of equity, ensuring that these services, whether privately or publicly provided, are affordable for all, including socially disadvantaged groups. Equity demands that poorer households should not be disproportionately burdened with water expenses as compared to richer households.[61]

There are, of course, far more flexible and reasonable governments than the United States regarding affirmative rights.[62] Nevertheless, imagining the reaction of Congress to a proposed individual right to water illustrates that reluctance is not simply a matter of ideological intransigence. "Obamacare" might become "Obamawater" along with moronic, ill-informed cries of socialism, but the underlying issues would involve legitimate concerns over taxes and resource allocation. An enforceable individual right to water would imply that taxes must be used to provide free or subsidized water to those who cannot afford its true cost. While this may be an entirely reasonable and laudable result, it will spur significant resistance by governments, particularly those which are market oriented, and especially if it is driven by international obligations.

3. International Supervision of Domestic Priorities

Part of this resistance will rest on the implication that such redistributions must be accompanied by international supervision over domestic decisions on uses and priorities. If taken seriously, an international, individual right to water clearly suggests national reallocations and controls over water usage. Limitations on lawn watering and swimming pools might be easy, but what about the wide variety of agricultural and industrial uses that are directly tied to both jobs and capital investments? Most critically, such reallocations could conceivably be driven by the claims of individuals enforcing their rights subject to international supervision rather than via negotiated domestic social policy. In the United States, it would also probably require federalization of water allocation to achieve international obligations. Each of these results is clearly contemplated by the ESCRC's General Comment 15, which

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61. General Comment 15, *supra* note 34, at ¶ 27.

62. *See generally* Andrew Moravcsik, *Why Is U.S. Human Rights Policy So Unilateralist?*, *available at* http://www.princeton.edu/~amoravcs/library/unilateralism.pdf.

specifically addresses allocation of water resources, water usage priorities, nationalization, and detailed international supervision.[63]

An international obligation on governments, to paraphrase language from the ESCRC, to "progressively achieve" adequate clean water for all, to the "extent of available resources, without discrimination," raises other troublesome questions.[64] For example, water is traditionally a locally accessed resource (concentrated in basins and aquifers) because it is very heavy and both expensive and difficult to move. In a significant number of places water is supplied by localized private industry.[65] Is nationalization of water resources required to ameliorate the vagaries and harsh realities of the market? At minimum, an enforceable right to water implies either governmental control or intervention beyond what many societies would deem proper standards to apply to the conduct of private actors. Once again, the ESCRC's General Comment 15 suggests these results:

> The obligation to protect requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water. Third parties include individuals, groups, corporations and other entities as well as agents acting under their authority. The obligation includes, *inter alia*, adopting the necessary and effective legislative and other measures to restrain, for example, third parties from denying equal access to adequate water; and polluting and inequitably extracting from water resources, including natural sources, wells and other water distribution systems.[66]
>
> Where water services (such as piped water networks, water tankers, access to rivers and wells) are operated or controlled by third parties, state parties must prevent them from compromising equal, affordable, and physical access to sufficient, safe and acceptable water. To prevent such abuses, an effective regulatory system must be established in conformity with the Covenant and

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63. *See id*. at ¶ 14, 16, 21–28, 44 (further illustrations regarding resource priorities). The General Comment insists of the creation of "national" plans for water allocation. General Comment 15, *supra* note 34, at ¶ 47. It lists pollution, "inequitable extraction," "unaffordable price increases," "insufficient expenditure or misallocation of public resources," and failure to "reduce the inequitable distribution of water facilities and services "as potential violations of the right to the implied right to water, it also provides for detailed international supervision. *Id*. at ¶ 53–56.

64. General Comment 15, *supra* note 34 at ¶ 11–12.

65. Wikipedia, citing studies by the World Bank and others, provides an adequate summary of the "privatization" of water globally at: http://en.wikipedia.org/wiki/Water_privatization. The estimates vary between 270–900 million people whose water needs are met by private companies.

66. General Comment 15, *supra* note 34 at ¶ 23.

> this General Comment, which includes independent monitoring, genuine public participation, and the imposition of penalties for non-compliance.[67]

May industrial and agricultural usages, which arguably produce society-wide economic benefits, be favored over individual domestic usage? Do international individual rights here trump property interests and pre-existing water allocation law (only 10% of water currently goes to domestic uses)?[68] If polluting uses are prohibited or limited in favor of individual domestic needs, would such priorities be imposed on the underdeveloped world economies? Could thirsty Texans force Michigan to distribute its water to Texas, vindicating individual international rights?

An individual right to water is problematic in this sense: water is a vital resource not simply for individuals but also for entire societies, nations, and the global economy. Individual needs will sometimes conflict with, and yet must inevitably coexist with, these competing concerns, not the least of which involve water's role in the environment, economic development, and international affairs. Given the content and tenor of General Comment 15, it is not surprising that some governments believe that the existence of an international human right to water suggests international supervision and international assessments regarding the legitimacy of domestic spending and use priorities set by domestic law.

4. Internationalization of Water Distribution and Access

Apart from the potential domestic legal complications of treating water access as an individual right, many governments will also resist the internationalization of water allocation that it implies. That is, apart from creating international supervision over domestic allocation and use, an international right to water suggests that water is a shared global resource. All governments owe an obligation to all people to achieve the basic human right to adequate water wherever they may reside. Does creation of an international human right to water raise the prospect of overarching international supervision over the international allocation of water? A legitimate concern of some governments, particularly those which are developed and water-rich, is that an international human right to water suggests further internationalization of water resources.[69] If we

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67. *Id*. at 24.

68. *See Use of water in food and agriculture*, LENNTECH, *available at* http://www.lenntech.com/water-food-agriculture.htm (last visited Oct. 5, 2012).

69. *See Special Report: Water*; *to the Last Drop, How to Avoid Water Wars*, THE ECONOMIST, May 20, 2010, *available at* http://www.economist.com/node/16136292 (last visited Sept. 9, 2012).

internationalize water access as an individual human right, who is to set the appropriate priorities over access and distribution? Consider the following statement in General Comment 15:

> Depending on the availability of resources, States should facilitate realization of the right to water in other countries, for example through provision of water resources, financial and technical assistance, and provide the necessary aid when required. In disaster relief and emergency assistance, including assistance to refugees and displaced persons, priority should be given to Covenant rights, including the provision of adequate water. International assistance should be provided in a manner that is consistent with the Covenant and other human rights standards, and sustainable and culturally appropriate. The economically developed States parties have a special responsibility and interest to assist the poorer developing States in this regard.[70]
>
> For the avoidance of any doubt, the Committee wishes to emphasize that it is particularly incumbent on states' parties and other actors in a position to assist, to provide international assistance, and cooperation, especially economic and technical, which enables developing countries to fulfill their core obligations indicated above in paragraph 37.[71]

Taking these concerns to the extreme, some opponents to water rights may suggest that such rights will eventually necessitate international redistribution of water resources. If water access is an international human rights obligation, *erga omnes*, shouldn't Michigan supply water not only to Texas but also to Mexico? Are wealthy or water-rich nations required to supply water to poor ones? Note this language in the General Assembly Resolution endorsing a right to water:

Although access to water tends to be local, many major water sources are shared by multiple nations. According to The Economist:

> International river basins extend across the borders of 145 countries, and some rivers flow through several countries. The Congo, Niger, Nile, Rhine and Zambezi are each shared among 9-11 countries, and 19 share the Danube basin. Adding to the complications is the fact that some countries, especially in Africa, rely on several rivers; 22, for instance, rise in Guinea. And about 280 aquifers also cross borders. Yet a multiplicity of countries, though it makes river management complicated, does not necessarily add to the intractability of a dispute.

70. General Comment 15, *supra* note 34, at ¶ 34.

71. *Id*. at ¶ 38.

> Calls upon States and international organizations to provide financial resources, capacity building and technology transfer, through international assistance and cooperation, in particular to developing countries, in order to scale up efforts to provide safe, clean, accessible and affordable drinking water and sanitation for all.[72]

5. Priorities, Effectiveness & Legitimacy

All of these concerns, real and fanciful, raise crucial questions of legitimacy and efficacy. As world population and industrialization increases, critical conflicts over water access and use will also inevitably increase. The question is whether those issues, involving difficult decisions about priorities, are best resolved within the democratic legal structure of the nation along with international negotiation, or under the mantle of international human rights adjudicated at the behest of individuals.

Reallocation of resources designed to ensure that all people have access to clean water and sanitation is undoubtedly an appealing idea for many (including this author). Some might reasonably argue that, even if driven by litigation and individual claims, the ultimate result would surely be preferable to the alternative world, in which some lack something essential to life itself. Yet, reallocation and subsidization for the poor may be problematic for other reasons as well. Free and subsidized water will almost inevitably mean less conservation and far more waste. How do we address environmental necessities and the pressing need for conservation under the rubric of individual rights? What are the appropriate standards and mechanisms for addressing individual access and usage in an era of increasing shortage and environmental pressures? Can a justiciable right to water accommodate the complicated economics of water?

However resolved, such issues will inevitably involve a weighing of competing priorities and societal objectives. This fact underlies one of the chief objections of many governments to the creation of an international human right to water. Many governments, especially in the industrialized West, will reject the idea that such priorities and allocations should be made in the context of individual rights as opposed to other processes, including legislative action and international negotiation. In fact, most Western governments already strongly support using extensive resources to ensure water access and sanitation throughout the world.[73] What they resist is

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72. *Land, Energy, and Water*, STWR, *available at* http://www.stwr.org/land-energy-water/un-declares-access-to-clean-water-a-basic-human-right.html (last visited Oct. 4, 2012).

73. *See* UN International Decade for Action 'WATER FOR LIFE' 2005-2015, *Water quality*, *available at* http://www.un.org/waterforlifedecade/quality.shtml (last visited Oct. 4, 2012).

further complicating an already complicated issue by creating an enforceable individual right.

IV. THE BRIGHT SIDE

My observations in this essay are meant to bring a critical and hopefully realistic viewpoint on recognizing an international human right to water. This seems cynical and depressing even to me. There is, however, also a strong positive side to casting water as a human right that should be acknowledged. Despite obstacles, definitional problems, and likely state resistance to acceptance of a meaningful and enforceable right to water, it is important to remember that international rights also serve important political and aspirational purposes. The claim that there should be a recognized right to water might best be viewed not strictly by legal principles, but rather by its potential role in advocating for human dignity. The power of international rights is not always about their efficacy in courtrooms but rather about their rhetorical power and influence on how we, and our governments, think. Perhaps most importantly, even if not technically binding or adopted in an enforceable form, the push for international recognition of the right to water may lead to the eventual acknowledgement of the need for better water policy within national legal systems and corresponding international cooperation. The rhetorical power of rights may help promote safe water for all through other means, confirming our collective moral obligations.

Although adoption of a meaningful and enforceable right to water is unlikely in my view, there might also be some real benefits if the right were to become a reality. An enforceable individual right to water might conceivably serve as a legal counterweight to the more politically and economically powerful segments of a society that will inevitably demand a dominant share of this scarce and vital resource. Water rights might be seen then as a form of an equalizer, insisting that governments set priorities in distribution that fulfill the minimum requirements for a dignified life.

INTERNATIONAL COURT OF JUSTICE

COMPROMIS

THE 2012 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

BETWEEN THE REPUBLIC OF APROPHE
(APPLICANT)

v.

AND THE FEDERAL REPUBLIC OF RANTANIA
(RESPONDENT)

TO SUBMIT TO THE INTERNATIONAL COURT OF JUSTICE
THE DIFFERENCES BETWEEN THE STATES CONCERNING THE MAI-TOCAO TEMPLE

JOINTLY NOTIFIED TO THE COURT ON 12 SEPTEMBER 2011

COUR INTERNATIONALE DE JUSTICE

COMPROMIS

THE 2012 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

ENTRE LA REPUBLIQUE D'APROPHE
(DEMANDEUR)

v.

ET LA REPUBLIQUE FÉDÉRALE DE RANTANIA
(DÉFENDEUR)

VISANT À SOUMETTRE À
LA COUR INTERNATIONALE DE JUSTICE
LES DIFFÉRENDS QUI OPPOSENT LES DEUX ÉTATS
EN CE QUI CONCERNE LE TEMPLE DE MAI-TOCAO

NOTIFIE CONJOINTEMENT A LA COUR LE 12 SEPTEMBRE 2011

TABLE OF CONTENTS

I. JOINT NOTIFICATION ADDRESSED TO THE REGISTRAR OF THE COURT:

The Hague, 12 September 2011

On behalf of the Republic of Aprophe ("the Applicant") and the Federal Republic of Rantania ("the Respondent"), in accordance with Article 40(1) of the Statute of the International Court of Justice, we have the honor to transmit to you an original of the Compromis for submission to the International Court of Justice of the Differences between the Applicant and the Respondent concerning the Mai-Tocao Temple, signed in The Hague, The Netherlands, on the twelfth day of September in the year two thousand eleven.

General Page Andler
Interim President of
The Republic of Aprophe

Olivier Phillippe
Ambassador of the Federal Republic of Rantania
to the Kingdom of The Netherlands

II. COMPROMIS SUBMITTED TO THE INTERNATIONAL COURT OF JUSTICE BY THE REPUBLIC OF APROPHE AND THE FEDERAL REPUBLIC OF RANTANIA ON THE DIFFERENCES BETWEEN THEM CONCERNING THE MAI-TOCAO TEMPLE

The Republic of Aprophe and the Federal Republic of Rantania,

Considering that differences have arisen between them concerning the Mai-Tocao Temple and other matters;

Recognizing that the Parties concerned have been unable to settle these differences by negotiation;

Desiring further to define the issues to be submitted to the International Court of Justice (hereinafter referred to as "the Court") for settling this dispute;

In furtherance thereof the Parties have concluded the following Compromis:

A. Article 1

The Parties submit the questions contained in the Compromis (together with Corrections and Clarifications to follow) to the Court pursuant to Article 40(1) of the Statute of the Court.

B. Article 2

(a) It is agreed by the Parties that the Republic of Aprophe shall act as Applicant and the Federal Republic of Rantania as Respondent, but such agreement is without prejudice to any question of the burden of proof.

(b) The Parties stipulate that any reference to "Aprophe" in this Compromis is without prejudice to Respondent's contention that the interim and/or de facto government is not the lawful government of Aprophe.

C. Article 3

(a) The Court is requested to decide the Case on the basis of the rules and principles of international law, including any applicable treaties.

(b) The Court is also requested to determine the legal consequences, including the rights and obligations of the Parties, arising from its Judgment on the questions presented in the Case.

D. Article 4

(a) Procedures shall be regulated in accordance with the applicable provisions of the Official Rules of the 2012 Philip C. Jessup International Law Moot Court Competition.

(b) The Parties request the Court to order that the written proceedings should consist of Memorials presented by each of the Parties not later than the date set forth in the Official Schedule of the 2012 Philip C. Jessup International Law Moot Court Competition.

E. Article 5

(a) The Parties shall accept any Judgment of the Court as final and binding upon them and shall execute it in its entirety and in good faith.

(b) Immediately after the transmission of any Judgment, the Parties shall enter into negotiations on the modalities for its execution.

In witness whereof, the undersigned, being duly authorized, have signed the present Compromis and have affixed thereto their respective seals of office.

Done in The Hague, The Netherlands, this twelfth day of September in the year two thousand eleven, in triplicate in the English language.

General Page Andler Interim President of The Republic of Aprophe	Olivier Phillippe Ambassador of the Federal Republic of Rantania to the Kingdom of The Netherlands

III. COMPROMIS THE 2012 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION THE CASE CONCERNING THE TEMPLE OF MAI-TOCAO

THE REPUBLIC OF APROPHE

v.

THE FEDERAL REPUBLIC OF RANTANIA

1. Aprophe, a developing state with a population of about 50 million people, was founded in 1698 at the Council of Marcelux (its present-day capital).

2. Rantania, a federal state with a developing industrial economy and a population of almost 90 million people, is located to the immediate east of Aprophe. Rantania's economy has blossomed in recent years, in large part due to its close diplomatic and trade relations with three neighboring countries: Lamarthia, Verland, and Pellegrinia.

3. The Mai-Tocao temple complex, one of the most famous religious and archaeological sites in the world, is located near the modern Rantanian-Aprophian border. Archaeologists have found evidence of permanent human habitation on the site as early as 2500 BCE and massive stone structures, apparently religious in nature, dating to at least 2000 BCE. Both Herodotus and Sima Qian mentioned Mai-Tocao in their writings, and although neither historian appears to have visited the site, each remarked upon its tremendous significance to a variety of cultures. Tradition holds that Mai-Tocao was the birthplace of Isah Lereh, the principal deity of the

ancient religion in the region. Today, Mai-Tocao consists of a complex of six small stone buildings and one central temple. Over 500,000 tourists visit the site each year, including tens of thousands of Aprophian and Rantanian nationals, who regard the site as central to their cultural heritage.

4. The indigenous peoples who initially settled the territory surrounding Mai-Tocao were nomadic, and there was no settled boundary between Aprophe and Rantania at the time of Aprophe's founding. As a result, sovereignty over Mai-Tocao and the surrounding territory was a significant point of contention between Aprophe and Rantania for over 300 years. Disputes ranged from small-scale fighting among ethnic and tribal groups to full-scale wars between the two states.

5. The most recent hostilities ("the Mai-Tocao War") began in August 1962, at which time the location of the border near the Mai-Tocao site was still disputed. After local villagers of unknown nationality attacked several Aprophian soldiers in Aprophian territory, an elite unit of the Aprophian army pursued the villagers into Rantanian territory near the Mai-Tocao site. The incident escalated, and skirmishes occurred throughout the region sporadically for two years, resulting in hundreds of civilian casualties and the destruction of several towns and villages. The United Nations Security Council declared itself seized of the matter, but took no steps to enforce a ceasefire because of the opposition of a permanent member.

6. From 1962 to 1964, the Aprophian army secured and pacified the Mai-Tocao site and occupied undisputed Rantanian territory, disarming and rounding up Rantanian villagers who lived nearby. More than 500 Rantanian peasants were forced to labor to provide goods and services to the army in shifts of 12 hours a day. The so-called "military internees" were not paid, although the Aprophian army provided them with three meals a day and lodged them in barracks near the labor sites.

7. By July 1965, the conflict reached a stalemate. In an effort to quell further violence, the two states resorted to the good offices of the UN Secretary-General and engaged in peace negotiations. By the end of the year, they concluded a Peace Agreement ("the 1965 Treaty," attached at Annex I) intended to "create the basis for a stable and lasting peace."

8. The 1965 Treaty committed the boundary delimitation question to an arbitral tribunal. The parties agreed that once the boundary arbitration was concluded, any affected villagers could elect to resettle in the state of their choice.

9. The arbitral tribunal reached a decision in 1968, awarding the entirety of the disputed territory and a small portion of previously undisputed Rantanian territory to Aprophe, and establishing a border placing the Mai-Tocao site 10 kilometers within Aprophe. Over the next

six months, hundreds of villagers—including the "military internees"—relocated to the Rantanian side of the border set by the tribunal. The border has remained peaceful and undisputed to the present day.

10. In 1980, Rantania, Lamarthia, Verland and Pellegrinia negotiated and ratified the Eastern Nations Charter of Human Rights ("the Eastern Nations Charter", attached at Annex II). The Eastern Nations Charter established a human rights court ("the Eastern Nations Court"). In its early years, the Eastern Nations Court received only two or three petitions per year, although since 2000 it has heard more than 40 cases annually. States Parties have in all cases complied with the final judgments of the Eastern Nations Court.

11. Aprophe and Rantania are both parties to the 1972 UNESCO Convention Concerning the Protection of the World Cultural and Natural Heritage ("the World Heritage Convention"). In 1986, Rantania was elected to the World Heritage Committee for a three-year term. Also in 1986, Aprophe proposed that the Mai-Tocao site be inscribed on the World Heritage List, "to recognize its outstanding historical and archeological value." During the deliberations of the World Heritage Committee, Rantania's representative vigorously supported the application, stating, "Although Mai-Tocao is located within Aprophe, the site is of tremendous importance to Rantania and Rantanians. We will accordingly regard its inscription as a cause for national pride for Rantanians as well as Aprophians."

12. Mai-Tocao was inscribed in the World Heritage List in 1988. At a joint press conference of Aprophian and Rantanian government leaders, the Rantanian President declared, "More unites our nations than separates us, and the newly-inscribed Mai-Tocao World Heritage Site is one example of our region's proudly shared history and culture."

13. In 1990, Rantania, Lamarthia, Verland, and Pellegrinia created the Eastern Nations International Organization ("the ENI"), a regional organization devoted to strengthening economic cooperation and political ties among its members. The Treaty Establishing the ENI (attached at Annex III) guarantees free movement across borders for citizens of ENI Member States, and also contains a mutual defense pact among them. The Treaty incorporates the Eastern Nations Charter by reference.

14. In November 2000, Aprophian Senator Mig Green was elected President by the largest margin of the popular vote in Aprophe's history. His campaign platform proposed applying for membership in the ENI. In January 2001, representatives of Green's government met with the ENI Council which, after several months of study, prepared a list of preconditions for Aprophe's application for membership.

15. Over the next five years, Green's government instituted a series of measures designed to meet these requirements. The measures included restrictions on the rights of Aprophe's historically strong labor unions and financial and tax incentives for businesses from ENI Member States investing in Aprophe. To meet another precondition, Aprophe acceded to the Eastern Nations Charter in 2005, having negotiated an exemption according to which it would be subject to the compulsory jurisdiction of the Eastern Nations Court only once it achieved full membership in the ENI. In addition, although not required by the ENI Council, Green also instituted an "open borders policy" whereby citizens of ENI Member States would be free to enter and reside and work in Aprophe. Several thousand citizens of ENI Member States, chiefly from Rantania, moved to major cities in Aprophe after the policy was implemented. By 2002, labor unions, opposition political parties, and nationalist groups within Aprophe were routinely organizing strikes and demonstrations to protest these measures.

16. In August 2001, "Our Forgotten Workers", an award-winning documentary by the filmmaker Fro Ginyo, brought to public attention the story of the Rantanian military internees. The documentary presented interviews with some of the surviving internees who recounted their labor during the war. It was extensively discussed in the media, attracting the attention of the International League for Solidarity and Access (ILSA), a Rantanian advocacy group whose mission includes initiating litigation on behalf of victims of alleged human rights abuses.

17. In November 2001, ILSA instituted proceedings against Aprophe in a local Aprophian court on behalf of 60 former Rantanian military internees, including one Mr. Richard Turbando. The complaint alleged that the plaintiffs had been forced to engage in uncompensated labor for the Aprophian military, and sought damages reflecting the monetary value of their labor with interest to the present day as well as moral damages commensurate with the magnitude of their alleged suffering. The trial court granted a motion to dismiss in light of the six-year Aprophian statute of limitations, and the plaintiffs appealed. On June 13, 2002, the Aprophian Supreme Court, Aprophe's highest court, affirmed the decision of the local court.

18. After the dismissal of the Aprophian case, ILSA instituted similar proceedings in Rantania against Aprophe on behalf of the internees. Rantania has no statute of limitations for civil and criminal proceedings alleging certain enumerated violations of human rights, including forced labor. Aprophe moved to dismiss the case, *Turbando, et al., v. The Republic of Aprophe*, on two grounds: Article XV of the 1965 Treaty, and the doctrine of foreign sovereign immunity. The trial court granted the motion, concluding that:

> The application of foreign sovereign immunity to these facts presents a very difficult question, placing our own tradition of broad immunity in direct conflict with the growing international trend to hold all states responsible for gross violations of human rights. However, in this case, we need not resolve this question. Article XV of the 1965 Treaty constitutes a complete waiver of claims like the ones currently before the court, regardless of whether the defendant is entitled to assert the defense of sovereign immunity.

The Rantanian Supreme Court, Rantania's highest court, affirmed the decision of the trial court in all of its particulars.

19. ILSA then filed a petition against Rantania on behalf of the Rantanian plaintiffs before the Eastern Nations Court. The petition contended that the judgment of the Rantanian courts deprived the plaintiffs of rights protected by the Eastern Nations Charter. The Eastern Nations Court delivered a judgment in January 2009, which in relevant part read:

> To the extent that the 1965 Treaty purports to deny the petitioners' right to reparations, this Court cannot permit Respondent to rely on it. To accept Aprophe's argument would allow Rantania to use a treaty relationship with a third party to deprive its own citizens of inalienable rights protected by the Eastern Nations Charter and customary international law. Accordingly, the invocation by the Rantanian courts of Article XV of the 1965 Treaty to bar plaintiffs' suit amounted to a denial of justice and was inconsistent with fundamental human rights law as incorporated in the Charter. The Supreme Court of Rantania is directed to proceed in a manner consistent with this opinion.

20. Following the Eastern Nations Court's decision, the Supreme Court of Rantania remanded the cases for trial, consistent with Rantanian appellate procedure. Aprophe declined to participate, but submitted a letter to the Rantanian Ministry of Foreign Affairs, asserting that the Rantanian court was obliged to dismiss the claim on sovereign immunity grounds. On December 12, 2009, the trial court considered the foreign sovereign immunity question and issued an opinion that read, in relevant part:

> In its earlier decision this court was not required to resolve the close question of whether Aprophe is entitled to sovereign immunity in this case; today we must. Modern developments in this area have indicated that immunity does not extend to violations of peremptory norms of international law, particularly where a state stands accused of having breached a fundamental

> duty to respect human rights. The forced labor alleged in the complaint before this Court would, if proved, constitute an egregious violation of the law of nations. This Court therefore must, consistent with its obligations under the Eastern Nations Charter, proceed to exercise its jurisdiction in this matter.

The court found that forced labor had occurred, took evidence on the measure of damages, and awarded the individual plaintiffs damages ranging from the equivalent of US$75,000 to US$225,000 apiece, depending upon the facts established in each plaintiff's case. Aprophe did not participate in these proceedings and did not appeal the decision or the awards.

21. The Minister of Foreign Affairs of Aprophe, Ken A. Barrow, denounced the decision of the Rantanian court as "an unacceptable violation of Aprophe's immunity from the jurisdiction of foreign courts," and also as "a flagrant violation of the 1965 Treaty, whereby all claims in this regard had been waived." He also stressed that Aprophe was "not subject to any judgment the Eastern Nations Court might deliver." Rantania's Attorney General, Odelle Gateau, responded, "Once the Eastern Nations Court clarified our obligations under the Eastern Nations Charter, to which both Rantania and Aprophe are parties, the courts of Rantania were bound to give expression to them."

22. After the successful plaintiffs applied for leave to enforce their judgments against Aprophian property located in Rantania, the Rantanian Foreign Ministry sought a stay of enforcement "in light of the potentially serious implications of the matter upon Rantanian foreign policy." The trial court granted an indefinite stay, to be reviewed upon the petition of either party in the future.

23. The outcome of the lawsuit strengthened nationalist and anti-Rantanian sentiments within Aprophe, and opposition to President Green's pro-ENI program. Dissident factions in Aprophe staged several nationwide strikes throughout 2010, calling for Green's resignation. Despite the social unrest, a poll conducted by the Aprophian Office for National Statistics in November 2010 indicated that 55% of Aprophians considered the policies of Mig Green's government to be "very good" or "good" and that 60% approved of the government's efforts to join the ENI.

24. President Green declared his candidacy to stand for a third term in the elections to be held in March 2011. In the wake of the strikes, however, on January 10, 2011, Green invoked the emergency powers granted to the President under the Aprophian Constitution, announcing that he was postponing the election for one year "in the expectation that order can be restored during that time." Relying on the same constitutional provision, on January 13, President Green ordered the Aprophian military

to begin armed patrols in major urban areas "to prevent and quell civil unrest."

25. On January 15, 2011, all of the major newspapers in Aprophe published an "Open Letter" to President Green, from General Paige Andler, chief of staff of the Aprophian armed forces. Gen. Andler described the suspension of the March elections as "a clear attempt to subvert the will of the people," and called upon President Green to restore the elections. Her letter concluded:

> Mr. President, when you took your oath of office, you swore to uphold the democratic principles of this great nation. I took that same oath over 40 years ago, when I enlisted to serve my country in ending the Mai-Tocao War. All Aprophian soldiers are trained to understand that, in a democracy, we who proudly wear our uniforms are required to implement the decisions of elected political officials without question. But, President Green, although we respect you as our Commander-in-Chief, we will not carry out your order of January 13. We will not take up arms against our fellow Aprophians.

26. President Green immediately fired Gen. Andler, withdrew her military commission, and ordered her arrest on charges of insubordination and sedition. On the morning of January 16, 2011, senior officers of the national police arrived at Andler's apartment in Marcelux, and were turned away by armed soldiers loyal to her.

27. That evening, army units loyal to Andler forcibly entered the Presidential Palace and other government installations. President Green and his ministers fled during the night to Rantania. The following morning, Andler proclaimed herself "interim president" of Aprophe, and declared that she would stay in power

> For as long as necessary to reestablish democratic institutions and the rule of law in the country. Restoring order to our streets and cities requires that we stop the headlong rush toward irreversible change until we are sure that this reflects the will of the people. It is not clear that the Aprophian people are committed to ENI membership, at least until some basic questions are answered. So long as I am interim president, Aprophian concerns come first.

She immediately suspended the open borders policy, the tax and other incentives extended by President Green to nationals of ENI Member States, and other pro-ENI measures instituted by Green.

28. In the face of widespread and growing opposition to the interim government, Andler declared a state of emergency and, pursuant to emergency powers granted by law, dissolved parliament. In a press conference held on January 18, 2011, Andler stated that the dissolution had been necessary to "ensure stability and maintain public order." She also assured the citizens of Aprophe that "new elections [would] be called soon" and that, in any event, "all civil rights and liberties [would] be respected."

29. Several parliamentarians belonging to Green's party also fled to Rantania. Forty Aprophian Ambassadors, including the Permanent Representatives to the United Nations and to the Kingdom of the Netherlands, renounced Andler and declared their allegiance to Green. Andler's government successfully established order in over 90% of Aprophian territory (comprising approximately 80% of the population), and the armed forces in and around Marcelux were loyal to Andler. However, approximately 800 members of the army's National Homeland Brigade, based in outlying regions, remained loyal to Green and established bases in two villages in the north of Aprophe. The Brigade is a lightly-armed force ordinarily tasked with patrolling Aprophe's borders. Several hundred civilian supporters of Green migrated to those villages, under the protection of the pro-Green forces.

30. Andler ordered more than 2,000 members of the army elite Quick Reactionary Forces (QRF) to the two villages to confront the National Homeland Brigade. The heavily-armed QRF troops demanded that the pro-Green forces surrender and threatened to arrest any soldier who refused to lay down his or her arms. No troops loyal to Green surrendered and no arrests were carried out. Small-scale fighting between the QRF and pro-Green forces began early in the morning on January 20, 2011, and continued for the next three weeks.

31. Andler's assault upon the pro-Green units were condemned by several nations. On January 20, 2011, Green announced that he and his ministers had formed what he called a "government in exile" in Rantania. Over the next two days, Green held talks with the Rantanian government, in which he urged Rantania to intervene to end the fighting and to restore his government in Aprophe. On January 22, Rantania introduced a resolution before the ENI Council—then chaired by a representative of Lamarthia—which began, "Given that the tragedy in Aprophe derives in some measure from that nation's desire to join the ENI, it is appropriate that any response be undertaken by the ENI rather than by any individual Member State." The Council unanimously passed the resolution, which recognized Green as the "lawful President of Aprophe," condemned "the military *coup d'état*," and urged "a prompt cessation of military activities and restoration of democracy." In the following days, each ENI Member State and 27 other

nations formally announced that they would conduct diplomatic relations only with the Green regime. As of the date of submission of this Compromis, 14 nations recognize Andler's government.

32. On January 23, 2011, Andler delivered a public statement denouncing the ENI Council resolution. She declared, "This resolution is an unjustified interference in the internal affairs of Aprophe. Despite former President Green's continuing efforts to subordinate our nation and its future to the ENI, in my government, Aprophian concerns come first." On the same day, the Minister of Foreign Affairs of the interim government informed the Secretary-General of the United Nations that Aprophe was denouncing the Eastern Nations Charter.

33. Upon the request of Rantania and with the support of the other ENI Members, on January 29, 2011, the United Nations General Assembly adopted Resolution A/RES/65/598, by a vote of 109 votes in favor and 16 against, with the remaining Member States abstaining. The resolution condemned "the *coup d'état* against the democratically elected government of Aprophe" and called upon "the Security Council to consider immediate action under Chapter VII of the Charter of the United Nations to preserve peace and restore the constitutional order of Aprophe."

34. Neither the pro-Green nor pro-Andler forces had made any progress in the conflict in the north. On February 10, 2011, the QRF launched artillery strikes against the two villages still loyal to Green. Sixty soldiers and 80 civilians were killed and hundreds more were wounded during shelling in the region over the next three days, and QRF ground-force commanders indicated their immediate intention to enter the villages. Green and his representatives urged the ENI Council to take immediate steps to "prevent an imminent humanitarian crisis."

35. On February 15, 2011, Rantania proposed and the ENI Council unanimously approved "Activation Orders" for air strikes against "military and strategic assets in Aprophe that at once threaten civilian lives and perpetuate the illegal exercise of power by the current regime." At Rantania's suggestion, the Council appointed Major-General Otaz Brewscha, a Rantanian national, to head the campaign as Force Commander.

36. On the same day, Rantanian President Sue Perego informed ILSA that the Rantanian government had no objection to ending the stay of enforcement proceedings in *Turbando, et al., v. The Republic of Aprophe*. ILSA moved to lift the stay, and the court granted its motion. Bailiffs promptly identified and seized the equivalent of US$10,000,000 in non-diplomatic property of the government of Aprophe located in Rantania. The court's order and the bailiffs' seizure were fully consistent with Rantanian law on the subject.

37. According to the terms of the Activation Orders, the Eastern Nations Organization launched "Operation Uniting for Democracy" before dawn on February 18, 2011. The operation consisted of around-the-clock air strikes against verified military installations in and around Marcelux. Operation Uniting for Democracy was conducted almost entirely by the Rantanian Air Force, as Rantania is the only ENI Member State with airborne military capability of any significant size. Pursuant to the Activation Orders, all operational decisions were to be taken by Major-General Brewscha, under the direction of the ENI Defense Committee.

38. Within days, Operation Uniting for Democracy resulted in the destruction of 12 of the 15 military installations near Marcelux and the deaths of 50 Aprophian soldiers. There were no civilian casualties and only incidental damage to non-military buildings. The Sterfel Institute, an independent military think-tank with long experience in the region and experts on the ground in Marcelux, reported on February 25, 2011, "The Aprophian military has effectively been destroyed. It cannot fight back and it cannot defend itself." On the same day, the United Nations Security Council met in emergency session to discuss what it called "the escalating cycle of violence in Aprophe."

39. On February 27, 2011, Andler and her staff fled from the capital to the grounds of the Mai-Tocao National Park. During one of his daily media briefings on February 28, 2011, Major-General Brewscha announced that, rather than risk damage to the Mai-Tocao site by striking Andler's headquarters there, ENI ground forces would be mobilized "within days, if not hours" to enter Aprophe and capture Andler.

40. On February 28, 2011, Andler made the following announcement from the Great Antechamber of the Mai-Tocao Temple, which was distributed to the media by satellite uplink:

> This is a sad day for Aprophe. Those we have come to regard as friends and neighbors now threaten our independence, and the very lives of our people. They have rained death from the sky every day and every night and I regret to announce that our brothers and sisters in uniform no longer have the means to stop them. I will not order a last-ditch military defense that would inevitably cost the lives of more of our dear soldiers, and that would do no more than postpone the inevitable.
>
> As we speak, foreign soldiers are massing at the border, coming here to hunt down and kill what remains of our fragile democracy. Let us be clear. This massacre of our people is being committed with no legal or moral authority. No policy differences can justify this attack.

> These are unprecedented circumstances, and they call for an unprecedented response. If even a single foreign soldier sets foot on the territory of our homeland—and if the bombing campaign does not cease immediately—we must be prepared to sacrifice our beloved Mai-Tocao Temple. We will destroy one building every other day as long as the unlawful military operation continues. This grieves me deeply, but I can see no other way to end the killing, to restore law and order and sanity, and to safeguard the future for our children.

41. On March 1, 2011, the United Nations Security Council unanimously adopted a resolution condemning Operation Uniting for Democracy. Although an early draft of the resolution would have supported stronger Council action and invoked Chapter VII of the UN Charter, the resolution simply noted that neither ENI nor any of its Member States had provided advance notice to the Council as required by the United Nations Charter, called upon the ENI Member States to end the Operation, and indicated that the Security Council would remain seized of the matter.

42. The aerial bombardment of the military installations near Marcelux continued unabated for the next two days. Shortly before midnight on March 3, 2011, Andler ordered the controlled detonation of explosives in one of the smaller buildings in the Mai-Tocao complex, usually described as the residence of Isah Lereh's mortal lover, Lair-Ner. Almost half of the structure was destroyed, although no one was injured.

43. On the morning of March 5, 2011, Rantanian President Perego issued a declaration condemning the detonation at the Mai-Tocao Temple as a violation of international law, in particular the 1965 Treaty and the World Heritage Convention. She nonetheless ordered an immediate grounding of the Rantanian air force. That evening, the ENI Council formally suspended Operation Uniting for Democracy.

44. In the following weeks, Andler and her government returned to Marcelux. On May 12, 2011, Aprophe filed an application with the Registry of the International Court of Justice, instituting proceedings against Rantania. Andler signed the Application herself, in the capacity of "Interim President of Aprophe." The Application asserted that the ENI attacks were contrary to international law, and that Rantania was internationally responsible for those attacks. It cited as the basis of this Court's jurisdiction the compromissory clause of the 1965 Treaty.

45. Upon receiving the Application, Rantanian Attorney General Gateau issued a statement declaring that Rantania would not consent to the jurisdiction of the Court. She explained:

> In accordance with our treaty obligations, Rantania would willingly accede to a request to have the International Court of Justice resolve a dispute between ourselves and Aprophe were it presented by the proper authorities. But this request does not come from the government of Aprophe: it comes from a gang of military officers, elected by no one and coming to power by force, masquerading as the government. Only the legitimate government, now in exile, may claim to represent Aprophe before the Court or any other international body. Moreover, it is evident that the Court cannot give a ruling on a dispute concerning the action taken by ENI, an international organization possessing a legal personality distinct from that of its members. Only States may be parties to disputes before the Court, according to the terms of its Statute.

46. Facing increasing public pressure, Ms. Gateau announced on July 1, 2011, that Rantania would engage Aprophe before the International Court of Justice, on the condition that Aprophe withdraw its Application and instead agree jointly to submit to the Court all claims that the parties might have against one another. She specified that any such joint submission would be "without prejudice to our position regarding whether Andler may act on Aprophe's behalf, which we intend to litigate fully in the case." Aprophe withdrew its application on July 20, 2011, and over the course of the next several months, the parties met, negotiated and ultimately agreed to this Compromis.

47. Aprophe and Rantania have been parties to the Vienna Conventions on Diplomatic and Consular Relations since 1966; to the Vienna Convention on the Law of Treaties since 1970; and to the World Heritage Convention since 1983. In addition, Aprophe and Rantania have been parties to the Geneva Conventions of 1949 since 1968 and 1976, respectively, to both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights since 1971 and 1976, respectively. Both states were admitted to the United Nations in 1966. Aprophe has signed but not ratified the 2004 United Nations Convention on Jurisdictional Immunities of States and Their Property, not yet in force; Rantania has neither signed nor ratified that Convention. Aprophe and Rantania are not parties to any other relevant bilateral or multilateral treaty.

48. Aprophe requests the Court to adjudge and declare that:

> (a) The Court may exercise jurisdiction over all claims in this case, since the Andler government is the rightful government the Republic of Aprophe;

(b) Rantania is responsible for the illegal use of force against Aprophe in the context of Operation Uniting for Democracy;
(c) Since the exercise of jurisdiction by Rantanian courts in the case of *Turbando, et al., v. The Republic of Aprophe* violated international law, Rantania may not permit its officials to execute the judgment in that case; and
(d) Aprophe's destruction of a building of the Mai-Tocao Temple did not violate international law.

49. Rantania requests the Court to adjudge and declare that:

(a) The Court is without jurisdiction over the Applicant's claims, since the Andler regime and its representatives cannot appear before this court in the name of the Republic of Aprophe;
(b) The use of force against Aprophe in the context of Operation Uniting for Democracy is not attributable to Rantania, and in any event, that use of force was not illegal;
(c) Since the exercise of jurisdiction by Rantanian courts in the case of *Turbando, et al., v. The Republic of Aprophe* was consistent with international law, Rantanian officials may execute the judgment in that case; and
(d) Aprophe violated international law by destroying a building of the Temple of Mai-Tocao.

IV. ANNEX I: THE PEACE AGREEMENT OF 1965

Aprophe and Rantania, in the interest of ending decades of conflict between them and between their respective citizens, and in order to create the basis for a stable and lasting peace between them and their populations, hereby agree as follows:

A. Article I

The cessation of any and all hostilities between the parties starts on the day of signature of this Treaty.

…

B. Article X

(1) The question of territorial boundaries shall be determined by an arbitral tribunal established by the parties, and presided over by an individual to be designated by the Secretary-General of the Permanent

Court of Arbitration. The parties agree to abide to the decision of the tribunal, which shall be final.

(2) For a period of six (6) months after the decision of the tribunal, both parties shall permit any individual who may find himself or herself in the territory of a state other than the one to which he or she professes loyalty or affiliation to relocate and, for this purpose, to cross the territorial boundary.

…

C. Article XV

Each party hereby waives on its own behalf and on behalf of its citizens all claims against the other or the other's citizens arising out of the conflict which began in August 1962. This waiver shall be deemed to include all debts and claims, financial or otherwise, for loss or damage occurring during the conflict. In order to ensure that this commitment will be enforceable, each State represents to the other that it has the authority under its own constitution and laws to waive such claims on behalf of its citizens.

…

D. Article XXV

The Parties shall submit to the judgment of the International Court of Justice any dispute which may arise between them concerning the interpretation or application of this Treaty.

…

Done in Geneva, Switzerland, on July 25th, 1965.

V. ANNEX II: EASTERN NATIONS CHARTER OF HUMAN RIGHTS (1980)

A. Preamble

Lamarthia, Pellegrinia, Rantania and Verland, *reaffirming* their intention to consolidate in the region, within the framework of democratic institutions, a system of personal liberty and social justice based on respect for the essential rights of all people; have agreed upon the following:

VI. PART I RIGHTS PROTECTED

A. Article 1: Obligation to Respect Rights

The States Parties to this Charter undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.

B. Article 2: Domestic Legal Effects

Where the exercise of any of the rights and freedoms referred to in Article 1 is not already assured by legislative or other provisions, the States Parties undertake to adopt, in accordance with their constitutional processes and the provisions of this Convention, such legislative or other measures as may be necessary to give effect to those rights and freedoms.

…

C. Article 10: Freedom from Slavery

1. No one shall be subject to slavery or involuntary servitude, which are prohibited in all their forms.

2. No one shall be required to perform forced or compulsory labor. This provision shall not be interpreted to mean that, in those countries in which the penalty established for certain crimes is deprivation of liberty at forced labor, the carrying out of such a sentence imposed by a competent court is prohibited. Such exceptionally permissible forced labor shall not adversely affect the dignity or the physical or intellectual capacity of the prisoner.

D. Article 11: Right to a Fair Trial

Every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labor, fiscal, or any other kind.

…

E. Article 13: Right to Remedy

1. Everyone whose rights and freedoms as set forth in this Convention are violated shall have a right to an effective remedy before a national authority.

2. Everyone has the right to simple and prompt recourse to a competent court or tribunal for protection against acts that violate his fundamental rights recognized by the constitution or laws of the state concerned, by this Convention or by customary international law, even though such violation may have been committed by persons acting in the course of their official duties.

…

F. Article 31: The Eastern Nations Court of Human Rights

1. To ensure the observance of the engagements undertaken in the Charter, there shall be established an Eastern Nations Court of Human Rights, hereinafter referred to as "the Court." It shall function on a permanent basis.

2. The Court shall have jurisdiction to hear all cases brought before it by individuals concerning the application of the provisions of this Charter. The jurisdiction is compulsory as to all States Parties to this Charter, for any violation alleged to have happened after the entry into force of this instrument for the State Party.

3. The States Parties to the Convention undertake to comply with the judgment of the Court in any case to which they are parties.

…

G. Article 44: Ratification and Adherence

Ratification of or adherence to this Convention shall be made by the deposit of an instrument of ratification or adherence with the Secretary-General of the United Nations.

H. Article 45: Denunciation

1. Any State Party may denounce this Convention by means of notice given three months in advance. Notice of the denunciation shall be addressed to the Secretary-General of the United Nations, who shall inform the other States Parties.

2. Such a denunciation shall not have the effect of releasing the State Party concerned from the obligations contained in this Convention with respect to any act that may constitute a violation of those obligations taken by that state prior to the effective date of denunciation.

…

VII. ANNEX III: THE TREATY ESTABLISHING THE EASTERN NATIONS INTERNATIONAL ORGANIZATION (1990)

Lamarthia, Pellegrinia, Rantania and Verland, *united* by their close historical and cultural ties, *inspired* by the pursuit of the democratic rule of law and respect for human rights, d*evoted* to the principles and objectives of the United Nations, in particular regional peace and mutual security, have agreed to the following:

A. Section I: Objectives and Principles

1. Article 1: Establishment of the ENI

The Eastern Nations International Organization (ENI) is hereby established. It shall work for the accomplishment of the objectives outlined below.

2. Article 2: Objectives

The Member States commit themselves to take all practical measures:

1. To foster democratic governance and the protection of human rights across the region;
2. To accelerate political and socio-economic integration;
3. To defend the sovereignty, territorial integrity and independence of each Member State; and
4. To maintain and develop their individual and collective capacity to resist armed attack.

3. Article 3: Principles

The ENI shall function based on the following principles:

1. Sovereign equality and independence;
2. Respect for the rule of law and democracy;
3. Respect for human rights and fundamental freedoms;
4. Peaceful dispute settlement;
5. Non-interference in the internal affairs of a Member State; and
6. Establishment of a common defense policy.

B. Section II: Organizational Structure

1. Article 4: Principal Organs

1. There are established, as the principal organs of the Eastern Nations International Organization: a Council, a Secretariat, and a Committee on Economic Policy.

2. Such subsidiary organs as may be found necessary shall be established in accordance with procedures set out in the present Treaty.

2. Article 5: The ENI Council

1. The ENI Council is the principal decision-making body for the pursuance of the objectives outlined in this Treaty. The ENI Council is composed of the Ministers of Foreign Relations of the Member States, or their accredited representatives. The Council shall make decisions in all matters by simple majority vote of the Member States, each Member State having one vote.

2. The Chair of the Council shall be held by Member States on the basis of rotation for terms of two (2) years each.

…

C. Section IV: Human Rights and Democratic Governance

1. Article 10: Eastern Nations Charter of Human Rights

1. The Eastern Nations Charter of Human Rights is hereby incorporated into this Treaty and the Member States reaffirm their commitments to that Charter. Any State seeking membership in the ENI must ratify the Eastern Nations Charter of Human Rights prior to applying for membership.

2. The Eastern Nations Court of Human Rights, established under the Eastern Nations Charter, shall be considered for all purposes a principal organ of the Eastern Nations International Organization.

…

D. Section VI: Mutual Defense and Security

1. Article 50: Peaceful Settlement of Disputes

The Member States undertake to attempt to settle all international disputes by peaceful means, as listed in Article 33 of the United Nations Charter.

2. Article 61: Mutual Defense

1. An armed attack against one Member State shall be considered an attack against all of them. Consequently, the Member States agree that, if such an armed attack occurs, each will, in exercise of the right of collective self-defense recognized by Article 51 of the Charter of the United Nations, assist the Member State so attacked by forthwith taking, individually and collectively, such action as is necessary, including the use of armed force, to restore and maintain the security of the region.

2. Any Member State facing a situation of internal disruption may request the ENI Council to take collective action, including the use of armed force, to restore and maintain public order, democracy, and the rule of law on its territory.

3. Article 62: Defense Committee

A Defense Committee, composed of the Ministers of Defense of each of the Member States, is hereby established. The Committee shall implement any action involving armed force that the ENI Council may authorize.

…

E. Section X: Miscellaneous Provisions

1. Article 83: Relationship to the United Nations Charter

In the event of a conflict between the obligations of ENI Member States and those contained in the United Nations Charter, the latter shall prevail.

2. Article 84: Privileges and Immunities

The Organization, as well as its representatives, shall enjoy the following privileges and immunities in the territories of the Member States:

1. The Organization and its property and assets shall be immune from every form of legal process except insofar as in any particular case it has expressly waived its immunity.
2. The headquarters and any missions of the Organization shall be inviolable.
3. The Organization's archives, and in general all documents belonging to or held by it, shall be inviolable.
4. Organization officials, as identified in this Treaty or as may subsequently be designated by the ENI Council, shall:

a. Be immune from legal process in respect of words spoken or written and acts performed by them in their official capacity;
b. Be exempt from taxation on the salaries and emoluments paid to them by the Organization; and
c. Be accorded the same privileges as are accorded to the officials of comparable ranks forming part of diplomatic missions to the Government concerned.

…

THE 2012 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

CASE CONCERNING THE MAI-TOCAO TEMPLE

REPUBLIC OF APROPHE
(APPLICANT)

v.

FEDERAL REPUBLIC OF RANTANIA
(RESPONDENT)

2012

The International Court Of Justice at the Peace Palace,
The Hague, The Netherlands

MEMORIAL OF THE APPLICANT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

TREATIES AND CONVENTIONS

UNITED NATIONS RESOLUTIONS AND OTHER DOCUMENTS

INTERNATIONAL CASES AND ARBITRAL DECISIONS

MUNICIPAL CASES AND STATUTES

TREATISES AND OTHER BOOKS

ARTICLES AND ESSAYS

MISCELLANEOUS

STATEMENT OF JURISDICTION

The Republic of Aprophe and the Federal Republic of Rantania have agreed to submit the present dispute to the Court for final resolution, by Special Agreement in accordance with Articles 36(1) and 40(1) of the Statute of the Court. As per Article 36, the jurisdiction of the Court comprises all cases that the parties refer to it. Applicant submits to the jurisdiction of the Court.

QUESTIONS PRESENTED

1. Can the Andler government represent the Republic of Aprophe before this Court?
2. Is Rantania responsible for the illegal use of force against Aprophe in the context of Operation Uniting for Democracy?
3. Did the exercise of jurisdiction by the Rantanian Courts in the case of *Turbando, et al., v. The Republic of Aprophe* violate international law?
4. Is Aprophe's destruction of a building of the Mai-Tocao Temple consistent with international law?

STATEMENT OF FACTS

The present dispute concerns the Mai-Tacao Temple ["the Temple"] complex, located on the border of the parties to these proceedings, the Republic of Aprophe ["Aprophe"], the Applicant in these proceedings, and the Federal Republic of Rantania ["Rantania"], the Respondent.

The Temple is of immense cultural significance to both parties. Consequently, several wars were fought over the sovereignty of the Temple. The most recent of these was the Mai-Tocao War of 1962, in which the Aprophian military secured the site around the Temple. In the course of this, about 500 Rantanian peasants were made to provide goods and services to the Aprophian army, in return for three meals a day and lodging in barracks near the labour sites. By 1965, the conflict had reached a stalemate. A Peace Agreement ["1965 Treaty"] was signed between the States, which submitted the boundary dispute to an arbitral tribunal. This awarded the Temple to Aprophe, along with ten kilometres of previously undisputed Rantanian territory. The Temple was inscribed in the World Heritage List in 1988.

The Eastern Nations International Organisation ["ENI"] was formed in 1990 by Rantania, Lamarthia, Verland and Pellegrinia. This was a regional organisation devoted to strengthening cooperation between members, and included a mutual defence pact. This incorporated the Eastern Nations Charter of Human Rights ["EN Charter"] which had been entered into by the same States in 1980.

In 2000, Senator Mig Green ["Green"] was elected President of Aprophe. After the election, the Green government proceeded to carry out measures designed to secure membership of ENI, including acceding to the EN Charter, the weakening of Aprophe's traditionally strong labour unions and the implementation of an open border policy. By 2006, there were a series of protests organised against the Green government.

In 2001, prompted by the documentary "Our Forgotten Workers," the International League for Solidarity and Access ["ILSA"] instituted proceedings against Aprophe in the Aprophian Courts on behalf of 60 former military internees. This case, *Turbando et al* v. *The Republic of Aprophe*, sought compensation from the Aprophian government for the uncompensated labour of the Rantanian peasants. Finding that the claim was barred by limitation in the Aprophian Courts, ILSA instituted similar proceedings before Rantanian Courts on behalf of the internees, alleging forced labour. The Rantanian Courts initially dismissed the claim against Aprophe as being barred by a waiver in the 1965 Treaty. Consequently, in January 2009, ILSA filed a petition against the Eastern Nations Court ["EN Court"], which found that the waiver in the 1965 Treaty would leave the plaintiffs without a remedy. In December 2009, in accordance with the EN

Court's decision, the Rantanian trial Court exercised jurisdiction and further held that foreign sovereign immunity did not extend to violations of peremptory norms of international law, and proceeded to award compensation to the plaintiffs. This was denounced by the Aprophian Minister for Foreign Affairs as "*an unacceptable violation of Aprophe's immunity…"*

Further, as a result of the decision in *Turbando*, there were widespread protests against the Green government. In response to the social unrest that followed, Green declared emergency on January 20, 2011, and postponing elections scheduled for March 2011 by one year. Green also ordered the Aprophian military to begin armed patrols in major urban areas to "prevent and quell civilian unrest." In response to this, Aprophian Chief of Staff General Paige Andler ["Andler"] wrote an open letter to Green, refusing to take up arms against the people of Aprophe. Subsequently, Green ordered her dismissal and arrest on charges of insubordination and sedition. On January 16, 2011, Andler and some soldiers entered the Presidential Palace and other governmental installations in Marcelux, the capital of Aprophe. As Green and his ministers fled to Rantania, Andler declared herself "interim president" of Aprophe.

Within two days of the coup, the Andler government had established order over the bulk of the Aprophian population and territory. Even as Andler dissolved Parliament, she continually reiterated that "*elections [would] be called soon*" and that civil liberties would be protected. Only two villages in the outlying regions of Aprophe remained outside Andler's control. These were controlled by the National Homeland Brigade ["NHB"], which was loyal to Green. The Andler government ordered the Quick Reactionary Force ['QRF"] to confront the NHB. Only small-scale fighting took place from January 20, 2011.

Meanwhile, Green and his ministers formed a "government in exile" in Rantania, and held talks to intervene to restore that government in Aprophe. At Rantania's initiation, the ENI recognised the Green government. The Green government then proceeded to request intervention in Aprophe from the ENI, in response to artillery strikes carried out by the QRF against the villages with NHB bases. On February 15, 2011, the ENI approved Rantania's proposal for the approval of Activation Orders for Operation Uniting for Democracy ["OUD"]. These permitted air strikes against Aprophe. Major-General Otaz Brewscha ["Brewscha"], a reserve officer in the Rantanian air force, was appointed Force Commander. The air strikes were carried out almost exclusively by the Rantanian air force, as it was the only ENI member State with significant airborne capability.

Within only days from its commencement on February 18, 2011, the air strikes had destroyed twelve of the fifteen military installations in

Aprophe, and had killed fifty Aprophian soldiers. The Sterfel Institute, an independent military think-tank, reported that the Aprophian military could no longer defend itself. Despite this, the attacks air strikes continued. By February 27, 2011, the Andler government fled to the Mai-Tocao National Park. The next day, she announced that since Aprophe could no longer defend itself, she would be forced to destroy part of the Temple in response to the attacks. As the air strikes did not cease even after a Security Council resolution "call[ing] *upon*" ENI member States to end OUD, Andler's staff destroyed a part of one of the buildings in the Mai-Tocao complex. The ENI Council suspended OUD shortly thereafter.

Andler then filed an application before the Registry of the International Court of Justice instituting proceedings against Rantania. Since Rantania did not consent to jurisdiction based on the compromissory clause in the 1965 Treaty, the parties drafted this *Compromis* which is now before this Court.

SUMMARY OF PLEADINGS

Only a government that exercises 'effective control' over the state's territory can fulfil international obligations on behalf of the State. Thus, under customary international law, only the Andler government may represent Aprophe before this Court as it exercises effective control over Aprophe's territory and population. Governments lacking effective control cannot represent States solely because they have legitimate origins. Furthermore, since the Andler government has not displayed an unwillingness to comply with international human rights obligations, it cannot be denied the right to represent Aprophe internationally.

This Court may exercise jurisdiction over the present claim as ENI is not an indispensible third party to the dispute. The principle of indispensible third parties does not apply to international organisations. In any event, ENI is not a subject of international law. Moreover, the determination of ENI's responsibility is not a *pre-requisite* to the adjudication of the claim against Rantania.

Rantania exercised control over the operational decisions with respect to the conduct of the Rantanian air force in OUD. This satisfies the test of effective control necessary to attribute actions of the air force to Rantania. The test of ultimate authority and control is inapposite in the present claim, and cannot be relied on to avoid attribution to Rantania. Finally, Rantania used ENI in order to circumvent its obligations in international law. As a result, Rantania is responsible for the air strikes in OUD.

Article 2(4) of the UN Charter is a complete prohibition on the use of force irrespective of the motivation behind it. As a result, the air strikes in OUD constitute a violation of Article 2(4), even if they were carried out for humanitarian purposes. Further, intervention in order to restore the Green government is unlawful, as international law does not recognise intervention for the restoration of democracy. Moreover, the Green government could not invite intervention for its restoration. The use of force pursuant to such intervention is unlawful. Finally, customary international law does not States permit a right of unilateral humanitarian intervention. Consequently, Rantania is responsible for the unlawful use of force in OUD.

Rantania's exercise of jurisdiction in *Turbando et al. v. The Republic of Aprophe* allowing individuals' claims for forced labour violates international law. In the exercise of their sovereign powers, both Aprophe and Rantania had validly waived individuals' claims under Article XV of the 1965 Treaty. Aprophe can invoke Article XV as the decision of the EN Court invalidating Article XV does not bind Aprophe. Further, the EN Charter's non-retroactive application implies that it cannot regulate the application of Article XV.

Further, Rantania's denial of immunity from jurisdiction to Aprophe is not justified under the tort exception as the conduct of the Aprophian military does not fall within the scope of this exception. Nor does the violation of *jus cogens* norms justify denial of immunity as there is no conflict between the substantive *jus cogens* violation and the procedural norm of immunity. Customary international law also does not recognise such an exception.

The destruction of a building of the Temple does not violate international law. Breach of Article 1 of the 1965 Treaty requires an attack *against* an adversary causing harm to its military operations. Thus, destruction within Aprophe's own territory does not violate Article 1. In any case, the non-performance exception negatives Aprophe's wrongfulness.

Rantania cannot invoke the World Heritage Convention as the Convention does not create an *erga omnes* obligation. In any case, such an obligation does not confer standing to institute proceedings before the Court. In any event, the destruction does not violate the Convention as the Convention is inapplicable during armed conflict.

The non-exhaustion of local remedies precludes Rantania from exercising diplomatic protection for enforcing the rights guaranteed under the ICESCR. In any event, the ICESCR does not apply either during armed conflict or extra-territorially.

Even in the event that the World Heritage Convention and the ICESCR are applicable, international humanitarian law recognises the 'imperative military necessity' to destruction of cultural property during armed conflict. Since this exception justifies the destruction in the present case, Aprophe's act does not violate the World Heritage Convention, ICESCR or customary international law.

PLEADINGS

I. THE ANDLER GOVERNMENT CAN REPRESENT APROPHE BEFORE THIS COURT AS THE RIGHTFUL GOVERNMENT OF APROPHE.

The Andler government has come to power in Aprophe through a military *coup d'etat*. Aprophe requests the Court to find that governments with effective control may represent States internationally [A]. Further, the Andler government exercises effective control [B]. Finally, the Andler government does not fall within the exceptions to the effective control principle [C]. Consequently, it may represent Aprophe internationally.

A. Customary international law confers a right of representation on governments exercising effective control.

Aprophe submits that a government exercising effective control can represent States internationally [a]. Further, customary international law does not permit governments lacking effective control to represent States solely based on the legitimacy of their origins [b].

1. A government exercising effective control can represent the State internationally.

The authority of a government to represent a State internationally stems from its effective control.[1] As demonstrated in *Tinoco*,[2] this is premised on government's control of state machinery, crucial to fulfilling the international obligations of the State. Indeed, a change of government inconsistent with the municipal law of the State cannot, *ipso facto*, negate such authority.[3] As a result, customary international law only empowers governments with effective control to represent States.

Extensive State practice supports this view.[4] For instance, the GA permitted representation by military governments including Pakistan's Musharraf government[5] and Thailand's Chulanont government.[6] Additionally, the requirement of *opinio juris* is satisfied. In Resolution 2758, the GA referred to the People's Republic of China, which exercised

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1. LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 639 (1947); AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW 82 (1997) ["AKEHURST"].

2. Arbitration between Great Britain and Costa Rica, 18(1) AJIL 147, 157 (1924)["Tinoco"].

3. Cyprus v. Turkey, Preliminary Objections, App.No.6780 & 6950/75, ¶4.

4. Genocide Case, Preliminary Objections, 1996 ICJ General List No. 91, Memorial, Bosnia and Herzegovina, 41; Luther v. Sagor [1920] A. 1861; Ratliff, *UN Representation Disputes*, 87 CAL. L. REV. 1207,1226 (1999).

5. U.N.Doc.A/56/PV.45.

6. U.N.Doc.A/62/PV.9, 19.

effective control, China's "*legitimate representatives*".[7] Furthermore, the reference to the determination of representation based on "*principles and purposes*" of the Charter in UNGA Resolution 396(V),[8] Aprophe submits that this is not inconsistent with the test of effective control. As Secretary-General Lie observed, the functioning of the UN requires that governments be in control of the machinery of the State, in order to fulfil international obligations.[9] In any event, the existence of widespread and consistent State practice in favour of effective control leads to a *presumption* of *opinio juris*.[10] Aprophe therefore submits that governments with effective control may represent States internationally.

2. Customary international law does not permit representation by governments solely by reason of their constitutional origin.

State practice permitting representation by governments lacking effective control is sparse,[11] and does not meet the "*uniform and widespread*" requirement for the formation of customary international law.[12] Indeed, the non-representation of the undemocratic regime in Haiti[13] is regarded as an exception to the general rule of representation.[14] Moreover, *opinio juris* does not support representation by governments lacking effective control. The African Union Act[15] and the Charter of the Organisation of American States[16] embody distinct norms, and do not reflect *opinio juris* sufficient to lead to a conclusion of the existence of custom. Thus, customary international law does not confer a right of representation by reason of legitimate origin alone. At best, any such rule is *lex ferenda*.[17]

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7. U.N.Doc.A/RES/2758.

8. U.N.Doc.A/RES/396(V).

9. U.N.Doc.S/1466.

10. Case No: STL- II -0ll1, ¶199 (Interlocutory decision of 16th February).

11. Crawford, *Democracy and the Body of International Law*, *in* DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW 115 (Fox & Roth eds., 2000)["Crawford-Democracy"]; Murphy, *Democratic Legitimacy and the Recognition of States and Governments*, 48(3) ICLQ 545, 572 (1999) ["Murphy"].

12. North Sea Continental Shelf, 1969 ICJ 3, ¶74.

13. Crawford-Democracy, 115.

14. ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 260(2000).

15. Article 30, CONSTITUTIVE ACT OF THE AFRICAN UNION, 2158 U.N.T.S. 3 (2000).

16. Article 9, CHARTER OF THE ORGANISATION OF AMERICAN STATES, 119 U.N.T.S. 1609 (1952).

17. Franck, *The Emerging Right to Democratic Governance*, 86(1) AJIL 46, 91(1992) ["Franck"].

3. Non-recognition by other States does not affect the capacity of the Andler Government to represent Aprophe.

Rantania may contend that several States have recognised only the Green government, and consequently, only the Green government may represent Aprophe internationally. However, recognition refers to the willingness of a State to carry on relations with the government of another State.[18] The question in this case refers to the right of a government to represent a State internationally, and not in relations between States.[19] As a result, non-recognition does not affect representation by the Andler government.

B. The Andler Government exercises effective control.

The existence of effective control is determined by several factors, including control over the capital and State apparatus.[20] Here, the Andler government controls the Presidential Palace and the government installations in Marcelux, the Aprophian capital. Subsequent to the dissolution of the Aprophian Parliament, it has remained the *only* entity in control of these. Moreover, the ability to maintain public order,[21] and the ability to command obedience of the majority of a population[22] also leads to the inference of an effective control. In less than a week following the coup, Andler's government had established order over eighty per cent of the population of Aprophe, and about ninety per cent of its territory. The fact that the National Homeland Brigade controlled some parts of Aprophe's territory is not fatal to a finding of effective control.[23] It is therefore submitted that the Andler government exercises effective control over Aprophe.

C. The Andler government has not committed acts sufficient to deny it a right of representation.

A government may be denied representation if it has been installed by foreign military intervention, if it denies a people the right to self-determination, or if it remains unwilling to fulfil international human rights

18. TALMON, RECOGNITION OF GOVERNMENTS IN INTERNATIONAL LAW 25 (2001).
19. U.N.Doc.S/1466.
20. Blix, *Contemporary Aspects of Recognition*,130 RDC 586, 642 (1970) ["Blix"].
21. Tinoco,154.
22. Blix, 642.
23. Blix, 641-642.

obligations.[24] Here, the Andler government has not committed human rights violations [a], nor has it displayed an unwillingness to fulfil its international obligations [b] sufficient to warrant denial of the right of representation.

1. The Andler government has not committed human rights violations sufficient to warrant denial of a right of representation.

Governments may be denied the right to represent States if they commit violations of peremptory norms.[25] However, not all violations of human rights warrant the denial of the right of representation. Thus, the apartheid government in South Africa was denied the right of representation.[26] However, the military governments of Pakistan,[27] Thailand[28] and Guinea-Bissau[29] were represented in the UN, despite having declared emergency and suspending civil liberties.[30] Here, even as the Andler government declared emergency, it promised that fresh elections would be conducted, and that civil liberties would be protected. Rantania may seek to establish that the deployment of the QRF constituted a violation of human rights sufficient to deny a right of representation. However, Aprophe submits that this was only a lawful exercise of the right of governments to suppress rebellion.[31] Consequently, the Andler government may represent Aprophe internationally.

2. The Andler government has not displayed an unwillingness to fulfil international obligations.

An unwillingness to comply with international obligations may serve as a ground to deny a government the right of representation.[32] This is evidenced in consistent and flagrant violations of international law. For instance, the GA denied representation to the government of South Africa as apartheid constituted a *flagrant* violation of the obligations under the UN

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24. Talmon, *Who is a Legitimate Government in Exile?*, *in* REALITY OF INTERNATIONAL LAW (1999) ["Talmon"].

25. Taki, *Effectiveness*, MPEPIL ¶10 (2008).

26. U.N.Doc.A/RES/506; D'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 NYU L. J. 877, 905 (2007).

27. U.N.Doc.A/56/PV.45.

28. U.N.Doc.A/62/PV.9, 19.

29. U.N.Doc.S/PV.4834.

30. Pongsudhirak, *Thailand Since The Coup*, 19(4) J.DEMOCRACY 140, 146(2008); Roth, *Despots Masquerading as Democrats*, 1(1) J.H.RTS.PRAC 140, 155 (2009).

31. Congo, 2005 ICJ 168, ¶¶45-6.

32. Talmon; Magiera, *Governments*, MPEPIL ¶18 (2011).

Charter.[33] Similarly, the Taliban was denied representation, as it used the territory of Afghanistan for terrorism, despite several binding SC resolutions.[34] In the present case, the Andler government has assured the conduct of elections, and has promised that civil liberties would be protected. This indicates a commitment to democracy and to international human rights obligations.[35] Further, the Andler government has signed the present Compromis, indicating its willingness to comply with the international obligation of peaceful dispute resolution.[36] Thus, Aprophe submits that the Andler government has not displayed an unwillingness to comply with international obligations. As a result, Aprophe requests the Court to find that the Andler government may represent it internationally.

II. RANTANIA IS RESPONSIBLE FOR THE UNLAWFUL USE OF FORCE IN OPERATION UNITING FOR DEMOCRACY.

Pursuant to ENI's Activation Orders, a force comprising primarily the Rantanian air-force carried out air strikes in Aprophe. Aprophe requests the Court to find that it may exercise jurisdiction over the present claim as the ENI is not an indispensible third party to the proceedings. [A]. Further, the use of force in OUD was unlawful [B]. Finally, the use of force in OUD is attributable to Rantania [C].

A. This Court can exercise jurisdiction over the question of responsibility for the use of force.

According to the Court in *Monetary Gold*,[37] this Court cannot exercise jurisdiction where a third party's interests form the subject-matter of the dispute. Aprophe submits that this principle in *Monetary Gold* does not apply to international organisations [a]. In any event, ENI is not a subject of international law as it does not possess separate legal personality [b]. Even if ENI possesses separate legal personality, the adjudication of ENI's responsibility is not a pre-requisite to the adjudication of the present claim [c].

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33. U.N.Doc.A/RES/506.

34. Wolfrum & Phillip, *The Status of the Taliban*, MAX PLANCK YBUNL 561, 581-2(2002).

35. U.N.Doc.S/PV.4834.

36. SIMMA, UN CHARTER: A COMMENTARY 183 (2002) ["SIMMA"]; U.N.Doc.A/Res/506(VI).

37. *Monetary Gold, 1954 ICJ 19, 32.*

1. The principle of indispensible parties does not apply to international organisations.

Since only States may be parties before the Court, applying the *Monetary Gold* principle will have the effect of depriving the Court of jurisdiction in every case involving an international organisation. This could not have been the intention of Article 34,[38] as it would permit States to abuse the process of the Court by acting through international organisations. While Rantania may contend that *Macedonia*[39] implicitly applied the *Monetary Gold* principle to international organisations, Aprophe submits that the Court did not consider this question in that case. As a result, the *Monetary Gold* principle is inapplicable in this case.

2. In any event, ENI is not a subject of international law

The intention of the founding member-States determines whether an international organisation possesses legal personality.[40] This may be discerned by an examination of whether the functions of the IO necessitate an inference of legal personality.[41] ENI was established to promote economic cooperation in the region, and to take collective action. These do not necessitate an inference of the organisation's separate legal personality.[42] Moreover, the provisions of the ENI Treaty also do not establish ENI's legal personality. Such an inference must be implied from the provisions of the treaty as a whole.[43] Despite providing for privileges and immunities, as well as for separate organs, the ENI treaty does not contain a provision obligating members to carry out decisions of the ENI. This suggests a lack of personality.[44]

3. In any event, ENI is not an indispensible third party to the proceedings.

The *Monetary Gold* principle only applies where the determination of the third party's rights is a pre-requisite to the adjudication of the claim before the Court.[45] It cannot deprive the Court of jurisdiction where the

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38. ZIMMERMAN ET AL, THE STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, A COMMENTARY 604(2005).

39. FYRM v. Greece, 2009 ICJ 19, 32.

40. BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 476 (2009).

41. Reparation, 1949 ICJ 174, 178-9.

42. BOTHE, OSCE IN THE MAINTENANCE OF PEACE AND SECURITY 198 (1997).

43. AMERASINGHE, PRINCIPLES OF THE INSTITUTIONAL LAW OF INTERNATIONAL ORGANISATIONS 78(2005).

44. Reparations, 178-9; Reuterswiird, *The Legal Nature of International Organizations*, 49 NORDISK TIDSSKRIFT INT'L REV.14, 15-22 (1980).

45. East Timor, 1995 ICJ 90, ¶ 30.

responsibility of the parties may be determined *independent* of the third party.[46] The present claim concerns the responsibility of Rantania for its own conduct, and not that of ENI. The attribution of the acts of the Rantanian air force to the ENI is only a question of *fact*, and not of the legal rights of ENI.[47] As a result, Rantania's responsibility for the acts of its air force, and the degree of control exercised by Rantania may be ascertained without affecting the legal rights of ENI.[48]

Further, the *Monetary Gold* principle was intended to apply only where the third party's interests formed the subject-matter of the claim, such that any decision would, in effect, bind the third party despite the protection provided under Article 59.[49] Such decision would defeat the protection provided under Article 59 of the Court's Statute. A determination of Rantania's responsibility for the circumvention of its obligations through ENI would not have this effect. Even if the Court were to arrive at a conclusion of ENI's responsibility, the enforcement of the award would not bind the ENI. Consequently, the *Monetary Gold* principle does not preclude the exercise of jurisdiction in the present case.

B. The use of force in OUD is unlawful.

Aprophe requests the Court to find that the air strikes constitute a violation of Article 2(4) of the UN Charter [a]. Further, intervention directed at the restoration of the Green government is unlawful [b]. Moreover, the air strikes were not carried out as a lawful exercise of the right of humanitarian intervention [c].

1. The air strikes carried out in the course of OUD violate Article 2(4).

Article 2(4) of the UN Charter proscribes all use of force, irrespective of the motivation behind it.[50] This is supported by the *travaux*, as the text of Article 2(4) at the Dumbarton Oakes Conference read as a complete prohibition on the use of force[51] and the expression "*territorial integrity and political independence*" was inserted to provide a safeguard to small

46. Nauru, 1992 ICJ 240, ¶55; Oil Platforms, 2003 ICJ 161 (Judge Simma Sep.Op.), ¶¶ 82-3.

47. Larsen/Hawaiian Kingdom Arbitration, 119 ILR (2001) 566, ¶11.24.

48. Nuhanović v. The Netherlands, ILDC 1742 (NL 2011), ¶ 5.8.

49. East Timor, (Judge Weeramantry Diss.Op.), 156-7.

50. Corfu Channel, 1949 ICJ 4, 109; Arechaga, *International Law in the Past Third of a Century*, 159 RDC 1, 9(1978) ["Arechaga"].

51. BROWNLIE, INTERNATIONAL LAW AND THE USE OF FORCE BY STATES 266 (1963) ["BROWNLIE II"].

States.[52] Indeed, even as the Drafting Committee accepted an Australian amendment proposing the insertion of this phrase, it clarified that "*the unilateral use of force …is not authorized or admitted*."[53] The rejection of the New Zealand amendment proposing a narrower view of Article 2(4) bolsters this position.[54] In any event, custom that has developed alongside the Charter supports a wide interpretation of Article 2(4).[55]

Further, the view that humanitarian intervention is not "*inconsistent with the purposes of the UN*" is untenable as the maintenance of peace overrides all other obligations in international law.[56] Although Articles 55 and 56 obligate member-States to promote human rights, they do not authorise the use of force for this end. Indeed, the use of the term *promotion*, and not *protection* of human rights was intended to avoid raising "*hopes going beyond what the United Nations could successfully accomplish*."[57] Moreover, the right of unilateral humanitarian intervention is at odds with the SC's monopoly over the use of force under the Charter.[58] Thus any use of force, even in humanitarian intervention, is inconsistent with the purposes of the UN.[59] Therefore, Aprophe submits that OUD was a violation of Article 2(4).

2. Intervention directed at the restoration of the Green government is unlawful.

Rantania may seek to establish a right to intervene in order to restore governance by a democratically elected government in Aprophe. However, the right to democratic governance has not crystallised into customary international law.[60] Further, international law does not does not permit the use of force for the restoration of democracy.[61] Frequently cited instances of pro-democratic intervention, including Grenada (1983), Panama (1989)

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52. Brownlie, *General Course on Public International* Law, 255 RDC 9,199 (1995); Arechaga, 91.

53. Lachs, *The Development and General Trends of International Law in Our Time*, 169 RDC 9, 324(1980).

54. BROWNLIE II 266.

55. GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS 68–9 (1st edn., 1946); GOODRICH & HAMBRO, CHARTER OF THE UNITED NATIONS 51-2 (2nd edn.,1969).

56. Cassese, *Ex Injuria Ius Oritur*,10(1) EJIL 23, 24(1999).

57. Simon, *Contemporary Legality of Unilateral Humanitarian Intervention*, 24 CAL. W.INT'L L.J. 117, 134(1993).

58. Villani, *The Security Council's Authorisation of Enforcement Action by Regional Organisations*, MAX PLANCK YBUNL 535, 552(2002).

59. Arechaga, 91.

60. Franck, 91.

61. Nanda, *U.S. Forces in Panama*, 84 AJIL 494, 500(1990) ["Nanda"].

and Sierra Leone (1997) have been widely condemned as unlawful.[62] As a result, Rantania cannot claim a right of pro-democratic intervention.

Aprophe further submits that the use of force on Green's invitation remained unlawful. States have an inalienable right against intervention directed at imposing a political system.[63] It is well-settled that States cannot intervene at the invitation of the constitutional government in a civil war, as it is uncertain whether this government retains in effective control, and hence, the right to represent a State.[64] Indeed, where a government retains effective control, it cannot invite intervention even against civil strife.[65] Aprophe submits that, *a fortiori*, that intervention at the invitation of a deposed government is unlawful. In particular, such intervention is unlawful where it is directed at the restoration of that government.

3. Humanitarian intervention is unlawful under customary international law

Customary international law does not authorize intervention for the protection of human rights.[66] Practice suggesting the existence of such a right must refer to humanitarian considerations as humanitarian intervention must *solely* be for humanitarian motives.[67] Contrary to this, the interventions in Dominican Republic (1965), Stanleyville (1965) and Cambodia (1978) were for the protection of the nationals of the intervening States.[68] The interventions in Sierra Leone (1997) and Bangladesh (1971) have been regarded as being politically motivated.[69] State practice, therefore, does not support the right of humanitarian intervention.

Opinio juris with respect to humanitarian intervention is also insufficient.[70] Although some NATO States referred to the intervention in

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62. U.N.Doc.S/1997/958; U.N.Doc.A/RES/44/240; U.N.Doc.A/RES/38/7.

63. U.N.Doc.A/RES/2625; Nicaragua, 1986 ICJ 14, ¶¶191-2.

64. SIMMA, 121.

65. Nolte, *Intervention by Invitation*, MPEPIL ¶6; Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 BYIL189, 214-221(1985); *Resolution on the Principle of Non-Intervention in Civil Wars,* 56 INS. INT'L L. 544(1975); U.N.Doc.A/Res/38/7; U.N.Doc.S/16077/REV.1.

66. Rodley, *Human Rights and Humanitarian Intervention*,38(2) ICLQ 321, 327(1980); CASSESE, INTERNATIONAL LAW 374 (2005).

67. Joyner, *Responsibility to Protect*, 47 VA. J. INT'L L. 693, 713(2007); Brownlie & Apperly, *Kosovo Crisis Inquiry*,49(4) ICLQ 878, 904(2000) ["Brownlie-III"].

68. Terry, *Rethinking Humanitarian Intervention After Kosovo*, ARMY L. 36, 42(2004) ["Terry"].

69. GRAY, INTERNATIONAL LAW AND THE USE OF FORCE 33 (2008); Schachter, *In Defense of International Rules on the Use of Force*, 53 U.CHI.L.REV. 144(1986).

70. Corten, *Human Rights and Collective Security*, *in* HUMAN RIGHTS, INTERVENTION AND THE USE OF FORCE 88, 102(2008).

Kosovo as a lawful exercise of the right of humanitarian intervention,[71] several others doubted the legality of the operation.[72] Moreover, the US did not rely on the right of humanitarian intervention, but on SC Resolution 1199 to justify the operation.[73] Additionally, Germany and Belgium cautioned that Kosovo was *sui generis*, and not to be regarded as forming precedent.[74] Indeed, even the World Summit Outcome on the Responsibility to Protect only permits intervention on authorisation of the SC.[75]

Furthermore, given that implicit authorisation under Article 53 must be unequivocal,[76] Rantania cannot rely on the SC Resolution of 1 March 2011 condemning OUD as implicitly authorising OUD. Indeed, the airstrikes in OUD were carried out without the authorisation of the SC, as required by Article 53 and as such, violate international law.[77]

C. The use of force in OUD is attributable to Rantania.

Aprophe submits that Rantania is responsible for the use of force in OUD as it exercised effective control over the conduct of the Rantanian air force [a]. The test of ultimate authority and control is inapposite in this case [b]. In any event, Rantania used ENI as a means of circumventing its obligations in international law [c].

1. Rantania exercised effective control over the conduct of the Rantanian air force.

Under customary international law, the conduct of a State organ placed at the disposal of an international organisation is attributable to the entity exercising effective control.[78] Aprophe submits that Rantania exercised effective control over the conduct of the air strikes. Here, the Rantanian air force had been placed at the disposal of ENI. However, as it had not been *fully seconded* to ENI, the powers retained by Rantania are determinative of

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71. Brownlie-III.

72. Cassese, *A Follow-up: Forcible Humanitarian Countermeasures and Opinio Necessitatis*, 10 EJIL 791, 792(1999). ["Cassese Follow-Up"].

73. Terry, 42.

74. Cassese Follow-Up, 793.

75. U.N.Doc.A/60/L.1, 31.

76. Gray, *From Unity to Polarisation*, 13(1) EJIL 1, 7(2002).

77. Akehurst, *Enforcement Action by Regional Agencies with Special Reference to the OAS*, 42 BYIL 175, 220(1969).

78. Article 7, ILC Draft Articles on Responsibility of International Organisations (2011) ["DARIO"]; U.N.Doc.A/51/389, ¶18; Gaja, Second Report, U.N.Doc.A/CN.4/541["Second Report"],¶40; U.N.Doc.A/C.6/59/SR.21,¶21,32,39; Al-Jedda v. UK, App.No.27021/08,¶84.

effective control.[79] In particular, since the air strikes were carried out "*almost exclusively*" by the Rantanian air force, the withdrawal of the forces would have a crippling effect on the operation.[80] As a result, the retention of the power of withdrawal strongly suggests Rantania's effective control.[81] In fact, the withdrawal of the Rantanian air force possibly resulted in the suspension of OUD. This is bolstered by Brewscha's position as Force Commander, as well as reserve officer in the Rantanian air force, which suggests that some directions may have been issued by Rantania.[82] In any event, Article 48, DARIO provides for multiple attribution where command and control over an organ is shared by several entities. The ability of Rantania to influence the conduct of OUD suggests shared command and control, leading to multiple attribution.[83] While Rantania may contend that effective control requires the issuance of specific directions in relation to individual acts,[84] Aprophe submits that this is inapplicable in the present case. The test in *Nicaragua* is inapposite in relation to organs which comprise an organised, hierarchical structure,[85] and the acts of the organ are directed at achieving a purpose identical to that of the controlling entity.[86]

2. The test of ultimate authority and control does not apply.

The ultimate authority and control test, which seeks to attribute acts to international organisations on the ground that they were delegated by the organisation,[87] is inapposite. *First*, the Court in *Behrami* relied on the test of delegation applied in the context of State responsibility in order to attribute actions to the UN. However, international organisations are not analogous to States, and delegation of responsibility by an international organisation does not of itself serve as a ground for attribution.[88] *Secondly*,

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79. Commentary on Draft Articles on Responsibility of International Organisations, 28 ¶7; Larsen, *Attribution of Conduct in Peace Operations*, 19 EJIL 509(2008).

80. Seyersted, *United Nations Forces*, 37 BYIL 351, 384(1961).

81. Dannenbaum, *Translating the Standard of Effective Control into a system of Effective Accountability*, 51(1) HARV. J.INT'L L. 133, 150(2010).

82. Mustafiü v. Netherlands, LJN:BR5386, ¶5.18.

83. HIRSCH, RESPONSIBILITY OF INTERNATIONAL ORGANISATIONS TOWARDS THIRD PARTIES 66 (1995).

84. Nicaragua, ¶115.

85. Prosecutor v. Tadic, IT-94-1-A, (Judge Shahabuddeen, Sep. Op.), ¶16.

86. Genocide Case, 2007 ICJ 43 (Judge Ad HocMahiou, Diss. Op.), ¶¶114-5; (Vice-President Al-Khasawneh, Diss. Op.),¶¶ 38-9.

87. Behrami v. France, App.No.71412/01 ["Behrami"].

88. Milanovic & Papic, *As Bad as it Gets*, 58(2) ICLQ 284, 289(2009).

the decision in *Behrami* turned on the exercise of effective control by the UN over the territory of Kosovo[89] and on the UN retaining the primary responsibility for the maintenance of international peace and security.[90] *Finally*, the decision in *Behrami* is not reflective of custom. Customary international law recognises only the *derivative* responsibility of international organisations for the authorisation of unlawful acts, and does not rule out the responsibility of the State carrying out the mandate of the organisation.[91] In any case Rantania's obligations under the UN Charter would override any obligation under the ENI Treaty.[92] Thus, since the air strikes constituted a violation of Article 2(4) of the Charter, Rantania's participation in the air strikes amounts to a breach of the obligation to refrain from the use of force. The ENI's authorisation of the air strikes does not absolve Rantania of responsibility of this obligation. [93]

3. In any event, Rantania used ENI as a means of circumvention of its obligations.

States incur primary responsibility for acts committed by an international organisation, if the organisation is used as a means to circumvent its obligations in international law.[94] An inference of circumvention follows if a State exercises control over an organisation, so as to undermine the autonomy of the international organisation,[95] and hence causes a certain decision to be taken.[96] This test is particularly apposite in small organisations, which exercise limited autonomy from their members.[97] In the present case, Green invited intervention from Rantania. However, Rantania introduced a resolution before the ENI Council for intervention by ENI, despite being the only ENI member-State with the airborne military capacity necessary for such an operation. Moreover, Force Commander Brewscha was appointed at Rantania's suggestion.

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89. Sari, *Autonomy, Attribution and Accountability*, *in* INTERNATIONAL ORGANISATIONS AND THE IDEA OF AUTONOMY 259 (2011).

90. Behrami, ¶132; Bell, *Reassessing Multiple Attribution*, 42 N.Y.U. J. INT'L. L.&POL.501, 511(2010).

91. Article 17, DARIO.

92. Articles 103, CHARTER OF THE UNITED NATIONS, 1 U.N.T.S. XVI (1945).

93. Second Report, ¶7; FINAL REPORT ON THE ACCOUNTABILITY OF INTERNATIONAL ORGANISATIONS, INTERNATIONAL LAW ASSOCIATION, BERLIN CONFERENCE (2004), 28.

94. Article 61, DARIO; Waite & Kennedy, App.No.26083/94, ¶67; Bosphorus v. Ireland, App.No.45036/98, ¶154.

95. Aspremont, *Abuse of the Legal Personality of International Organisations*, 4 INT'L ORG. L.R. 91, 101(2007).

96. DARIO Commentary, 122 ¶7.

97. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 684 (2008).

Although Rantania may contend that it lacked specific intent to circumvent obligations through ENI, Aprophe submits that specific intent need not be established in order to arrive at an inference of circumvention of obligations.[98] Therefore, Aprophe submits that Rantania used ENI as a means to circumvent its obligations in international law. Consequently, Rantania is responsible for the use of force in OUD.

III. RANTANIA MAY NOT EXECUTE THE JUDGMENT IN TURBANDO, ET AL., V. THE REPUBLIC OF APROPHE.

Aprophe requests the Court to hold that the Rantanian courts' exercise of jurisdiction in *Turbando, et al., v. The Republic of Aprophe* violated international law since Article XV of the 1965 Treaty bars all claims by individuals [**A**]. Additionally, Rantania's exercise of jurisdiction violates Aprophe's sovereign immunity [**B**].

A. Article XV of the 1965 Treaty bars all claims by individuals.

Since the EN Court's decision invalidating Article XV does not bind Aprophe [a] and the EN Charter does not affect Aprophe's rights under that provision [b], Aprophe can invoke Article XV. Alternatively, Article XV is valid as States can waive claims on behalf of individuals [c].

1. The non-binding nature of the EN Court's decision entitles Aprophe to invoke Article XV

a. Aprophe's reservation to the EN Court's jurisdiction is valid

Aprophe submits that since all State parties to the EN Charter consented to Aprophe's reservation, it is valid. According to the Court,[99] the validity of a reservation is governed by objections from other State parties. In fact, Switzerland's impermissible reservation to the League of Nations was validated by unanimous consent of State parties.[100] The ILC also authorises state-parties to accept even an impermissible reservation.[101] Although the final draft of the ILC Guidelines omits this provision, this deletion was based on other grounds, such as inadequate time-period for filing objections.[102]

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98. Gaja, Fourth Report, U.N.Doc.A/CN.4/564/Add.2, ¶73.

99. Reservations, 1951 ICJ 15, 21.

100. Mendelson, *Reservations to the Constitutions of International Organizations*, 45 BYIL 137, 140-141(1972).

101. ILC Guide to Practice on Reservations with commentaries, 513(2010).

102. U.N.Doc.A/CN.4/639, 16-19.

In any case, in consonance with the Court's jurisprudence,[103] Aprophe's reservation does not affect its substantive obligations under the EN Charter. Thus, the reservation is compatible with the object and purpose of the Charter.

b. In the event that the reservation is invalid, Aprophe is not bound by the EN Charter.

Reservation to a treaty-provision is instrumental to the State's consent to be bound by the treaty.[104] Thus, the UN Secretary-General's Practice[105] and state practice[106] consistently endorse the Court's opinion[107] that the author of an invalid reservation is not considered a party to the convention. Recent state practice[108] to the contrary is too sparse and inconsistent to develop a rule of custom. Hence, the non-severability of Aprophe's reservation implies its non-membership of the EN Charter.

c. In any event, the EN Court's decision does not bind Aprophe.

Article 31(3) of the EN Charter obligates States to comply with only those EN Court judgments that are made directly against them.[109] Thus, Aprophe has the *discretion*,[110] and not an *obligation*, to follow the EN Court's judgment declaring Article XV as invalid. Thus, Aprophe's rights under Article XV do not conflict with its EN Charter obligations.[111] Consequently, in the absence of a conflict, Aprophe can invoke Article XV.

2. The EN Charter does not affect Aprophe's rights under Article XV

The temporal law governing substantive rights and obligations is that in force at the time of commission of an act.[112] Indeed, the EN Charter itself prescribes against retroactivity.[113] Since the EN Charter came into force after the 1965 Treaty, Article 13 of the Charter does not regulate the application of Article XV.

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103. Armed Activities, 2006 ICJ 6, ¶67.

104. Interhandel, 1959 ICJ 6 (Judge Lauterpacht Diss.Op.), 117.

105. U.N.Doc.ST/LEG/7/Rev.1 57, ¶¶191–3.

106. 15th Report on Reservations to Treaties, U.N.Doc.A/CN.4/624/Add.1, ¶¶450–1.

107. Reservations, 29.

108. Klabbers, *A New Nordic Approach to Reservation*, 69 NORDIC J.INT'L L. 179, 183-185, (2000).

109. HARRIS ET AL, LAW OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS 700(1995).

110. Ress, *The Effect of Decisions and Judgements of the European Court of Human Rights in the Domestic Legal Order*, 40 TEX.INT'L L.J. 359, 374(2005).

111. FYRM v. Greece, ¶¶109-110.

112. Nauru, 250-253.

113. Article 31(2), EN Charter.

Rantania may contend that Article XV is not an instantaneous act but constitutes a 'continuing situation', recurring during the period Article 13 is applicable. However, the extinguishment of a right does not create a 'continuing situation'.[114] In any event, the right to remedy, a secondary right, cannot independently constitute a continuing breach.[115] Thus, in the absence of any incompatibility, Article XV continues to apply.

3. Article XV is valid as States can waive claims on behalf of individuals.

While international law recognises individuals' right to reparation for IHL violations, it entitles States, and not individuals themselves, to claim such reparation [i] and States have the authority to waive this right [ii].

a. International law entitles only States to claim reparations on behalf of individuals

Customary international law does not entitle individuals to claim reparations for IHL violations.[116] The *travaux* of the 1907 Hague Convention and decisions of national courts[117] suggest that Article 3, which provides for war reparations and reflects custom, concerns inter-State responsibility alone.[118] Indeed, only inter-State claims can address the magnitude of war-claims.[119] Although Greek and Italian Courts have allowed reparation claims by individuals, the conferral of such a right on individuals under customary international law requires consistent practice to that effect.[120] Accordingly, the Van Bouven/Bassiouni Principles, providing for individuals' right to claim reparation before national courts, stipulate that these guidelines are *lex ferenda*.[121]

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114. Malhous v. Czech Republic, App.No.33071/96; Pauwelyn, *The Concept of 'Continuing Violation' of an International Obligation*, 66 BYIL 415, 423(1995).

115. U.N.Doc.A/56/10, 60.

116. Tomuschat, *Reparation for Victims of Grave Human Rights Violations*, 10 TUL. J.INT'L &COMP.L. 157, 173(2002).

117. Princz v. Germany, 26 F.3d 1166 ["Princz"]; Bong, *Compensation for Victims of Wartime Atrocities*, 3(1) J.INT'L CRIM. JUST. 187, 188(2005).

118. Zwanenburg, *Van Bouven/Bassiouni Principles*, 24 NETH.Q.HUM.RTS. 641, 658(2006).

119. Gattini, *The Dispute on Jurisdictional Immunities of the State Before the ICJ*, 24(1) LJIL 173, 193(2011) ["Gattini"].

120. Tel-Oren v. Libya, 726 F.2d 774 (Judge Bork Conc.Op.).

121. U.N.Doc.E/CN.4/2003/63, ¶8.

b. States can waive claims on behalf of individuals.

Post World War peace treaties unequivocally suggest that States' authority to waive the claims of individuals is "*universally accepted*."[122] Further, practice of states, entitled to claim reparations, has expressly affirmed the lawful exercise of sovereign authority to waive claims, including claims for *jus cogens* violations.[123] Indeed, such waiver clauses are valid as they do not *directly* conflict with *jus cogens* norms.[124] Further, the lack of alternate remedy does not restrict such authority of States[125] where the legitimate aim of establishing peaceful relations and quelling further injury is proportionate to the waiver.[126] Since the Mai-Tocao War had resulted in loss of life and property and had reached a stalemate, the waiver of claims by both States to achieve such legitimate aim is justified.

Although China criticized the Japanese Court decision dismissing Chinese nationals' claims for war reparations, its reaction is inapposite as it did not question the Court's ruling on the validity of the waiver clause.[127] Moreover, in response to the recent support of the US government for individuals' claims against Germany, the Senate Judiciary Committee clarified that the 1951 Peace Treaty barred the claims.[128]

Thus, Aprophe submits that the unambiguous waiver of individuals' claims under Article XV of the 1965 Treaty bars the jurisdiction of Rantanian Court.

B. Rantania violated international law by denying sovereign immunity to Aprophe

It is well settled that, subject to recognised exceptions, States enjoy immunity from jurisdiction of foreign courts in consonance with sovereign equality of States. Aprophe contends that the Rantanian courts' denial of jurisdictional immunity violates international law as the 'tort exception' is inapplicable in this case [a]. Further, the violation of *jus cogens* norms does not justify denial of immunity [b].

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122. MCNAIR, LEGAL EFFECTS OF WAR 391,395 (1948); Draper, *The Implementation and Enforcement of the Geneva Conventions of 1949 and of the Two Additional Protocols*, 164 RDC 1, 43(1979).

123. Polish Institute for International Affairs, 172 German Affairs, in 9 Series of Documents (1953); Murphy, *Contemporary Practice of the United States Relating to International Law*, 95 AJIL 132, 141(2001); Nishimatsu Construction v. Song Jixiao, (Sup.Ct.Apr.27), 2007 ["Nishimatsu"].

124. Fitzmaurice, Third Report, U.N.Doc.A/CN.4/SER.A/1958/Add.l, 44,45.

125. Taiheiyo v. The Superior Court, 117 Cal. App. 4th 380, 395.

126. Prince v. Germany, App.No.42527/98, ¶¶56-59.

127. Asada & Ryan, *Post-war Reparations between Japan and China and Individual Claims*, 27 J.JAPAN.L. 257, 282(2009).

128. Hearing before the Senate Committee on the Judiciary, 106th Cong. 14 (2000).

1. The tort exception is inapplicable as it does not include acts of armed forces

The tort exception justifies denial of immunity from jurisdiction of foreign courts to States for injury caused by its organs in the forum State. However, Aprophe submits that the exception does not include within its scope the activities of armed forces.[129]

Since the conduct of armed forces, inextricably linked to states' foreign and defence policy,[130] is regulated through inter-State agreements, the 'tort exception' does not extend to such conduct.[131] Indeed, the exception concerns "*accidents occurring routinely within the territory*" of the forum State.[132] Thus, the European Convention,[133] legislations of UK[134] and Australia[135] expressly exclude armed forces' conduct. Additionally, even in the absence of an express exclusion, the UN Convention[136] and States' declarations[137] endorse this interpretation. Further, the Italian Military Court in *Lozano* observed that the exception does not include such acts.[138] Although the Greek SC considered the conduct of armed forces within the 'tort exception', the Greek Special Supreme Court rejected this view.[139] Thus, Aprophe submits that the tort exception is inapplicable in this case.

2. Violation of jus cogens norms does not justify denial of jurisdictional immunity

The alleged violation of a peremptory norm does not "*automatically*" deprive states of their sovereignty.[140] Hence, a State performing such a violation cannot be considered to have impliedly waived its immunity. Indeed, the 'waiver exception' to immunity is narrowly construed.[141] Further, Aprophe submits that independent of the recognised exceptions to

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129. McElhinney v. Ireland, App.No.31253/96, ¶38.

130. Lechouritou v. Dimosio, C-292/05 (ECJ), ¶37.

131. U.N.Doc.A/CN.4/SER.A/1988/Add.l, 111.

132. Hall, *UN Convention on State Immunity*, 55(2) ICLQ 411, 412 (2006).

133. Article 31, EUROPEAN CONVENTION ON STATE IMMUNITY, ETS.NO.074 (1972).

134. §16(2), UK State Immunity Act, 1978, 17 ILM 1123.

135. §6, Australia Foreign States Immunities Act, 1985, 17 ILM 1123.

136. U.N.Doc.A/C.6/59/SR.13, ¶36.

137. Declarations of Sweden and Norway to the UN Convention.

138. Lozano v. Italy, ILDC1085 (IT2008), ¶7.

139. Germany v. Margellos, ILDC87(GR2002), ¶14.

140. Gattini, *War Crimes and State Immunity in the* Ferrini *Decision*, 3(1) J.INT'L CRIM. JUST. 224, 236(2005).

141. Sampson v. Germany, 250 F.3d 1145, ¶19.

sovereign immunity, denial of immunity for *jus cogens* violations is not justified.

a. International law does not recognise a jus cogens exception to sovereign immunity

Aprophe contends that sovereign immunity does not conflict with *jus cogens* norms. Since immunity is a limitation on the *jurisdictional* powers of national courts, it does not purport to justify the State's conduct or recognise its lawfulness.[142] Consequently, it can conflict with a peremptory norm only if that norm also implies a duty to establish jurisdiction that is peremptory in nature.[143] However, as the Court has clarified, States' obligation to punish and prosecute various crimes is without prejudice to the immunities under customary international law.[144] Accordingly, subsequently the Court[145] and also the ILC observed that *jus cogens* does not provide "*automatic access to justice irrespective of procedural obstacles*".[146] Therefore, international law does not justify denial of immunity based on the hierarchical supremacy of *jus cogens* norms.[147]

Indeed, state practice is insufficient to prove the existence of a *jus cogens* exception to jurisdictional immunity of States.[148] The European Convention, the UN Convention, national legislations, dealing with State immunity do not recognise this exception.[149] Further, during the drafting of the UN Convention, the exception was not considered to be *lex lata*.[150] Indeed, the absence of a *jus cogens* exception in the Convention is "*wholly inimical*" to Rantania's case.[151]

The decisions of international and national courts[152] also militate against the existence of a *jus cogens* exception. The ECHR has found no

142. Yang, *State Immunity in the European Court of Human Rights*, 74(1) BYIL 333, 340(2003).

143. Wet, *The Prohibition of Torture as an International Norm of* Jus Cogens *and its Implications for National and Customary Law*, 15(1) EJIL 97, 107(2004).

144. Arrest Warrant, 2002 ICJ 3, ¶60.

145. Armed Activities, ¶64.

146. Report of the Study Group of the ILC, Fragmentation of International Law, U.N.Doc.A/CN.4/L.682, ¶372.

147. FOX, THE LAW OF STATE IMMUNITY 156 (2008).

148. THE FUNDAMENTAL RULES OF THE INTERNATIONAL LEGAL ORDER 216 (Tomuschat ed.,2006) ["TOMUSCHAT"].

149. Gattini, 174.

150. U.N.Doc.A/C.6/54/L.12, 7.

151. Jones v. Saudi Arabia, 2006 UKHL 26, ¶26 ["Jones"].

152. Nishimatsu; Bouzari v. Iran, [2004] OJ No.2800, ¶88,90; Jones, ¶27.

firm basis for it in custom.[153] The ICTY's decision in *Furundjiza*[154] is inapposite as it did not address the issue of damages in the context of State immunity.[155]

The apparently contrary practice of US and Italy is not sufficient to establish the customary law nature of the *jus cogens* exception. The *sui generis* 'anti-terrorism' exception added to the US FSIA denies immunity only for *certain jus cogens* violations and only to *specific* states.[156] Indeed, even after the amendment, following pre-amendment rulings, US courts grant immunity for *jus cogens* violations not expressly stated therein.[157]

Rantania may rely upon Italian practice, in particular *Ferrini* and *Milde*,[158] to support the existence of the exception. However, the Court in *Ferrini* itself acknowledged the absence of "*definite and explicit international custom*" to support such a conclusion.[159] Further, the Court in *Tissino* held: "*international practice, even after* Ferrini*, had invariably reiterated as 'fundamental' the rule on jurisdictional immunity… even when the defendant state was accused of an international crime*".[160] Significantly, the Italian government did not consider *Ferrini* and *Milde* in consonance with international law.[161] Hence, Italian practice, which is inconsistent, cannot unilaterally alter custom.[162]

Thus, Aprophe submits that international law does not recognise a *jus cogens* exception to jurisdictional immunity.

IV. APROPHE'S DESTRUCTION OF A BUILDING OF THE MAI-TOCAO TEMPLE DOES NOT VIOLATE INTERNATIONAL LAW.

Aprophe submits that the destruction of a building of the Mai-Tocao Temple does not violate the 1965 Treaty [A], the WHC [B], the ICESCR [C] or customary international law [D].

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153. Al-Adsani v. United Kingdom, App.No.35763/97, ¶63; Kalogeropoulou v. Greece, App.No.50021/00, 9.

154. Prosecutor v. Furundzija, IT-95-17/1-T, ¶155.

155. Per Lord Hoffman, Jones, ¶54.

156. TOMUSCHAT, 216.

157. Belhas v. Ya'alon, 515 F.3d 1279, 1282.

158. Criminal proceedings against Milde, ILDC 1224(IT2009), ¶6.

159. Ferrini v. Germany, ILDC19 (IT2004), ¶11 ["Ferrini"].

160. US v. Tissino, ILDC 1262 (IT2009), ¶20.

161. Jurisdictional Immunities, 2008 ICJ General List No. 143, Memorial of the Federal Republic of Germany, 18.

162. Lauterpacht, *Problem of Jurisdictional Immunities of States*, 28 BYIL 220, 248(1951).

A. Aprophe's act does not violate the 1965 Treaty.

Aprophe's act does not violate Article 1 of the Treaty [a]. In any case, the non-performance exception precludes its wrongfulness [b].

1. Aprophe did not violate Article 1 of the Treaty

Article 1, which ceases hostilities between the States, marks the termination of armed conflict.[163] Therefore, a violation of this obligation requires "*unleashing a new war*"[164] i.e. hostile acts directed *against* an adversary causing harm to its military operations.[165] Since Aprophe's destruction in its own territory would not constitute an act *against* Rantania,[166] it does not violate Article 1.

2. In any event, the non-performance exception precludes the act's wrongfulness.

According to the non-performance exception, a general principle of law, an injured State can withhold the execution of reciprocal obligations under a treaty.[167] Although the VCLT and the ASR do not expressly provide for this exception, it is a principle of treaty interpretation.[168] It is implied through reciprocity that is inherent in certain treaty obligations such as cease-fire agreements.[169] Since Rantania's attacks *prevented*[170] Aprophe from performing its obligations under the Treaty, the non-performance exception precludes the wrongfulness of the act.

B. Aprophe's destruction of a building of the Temple did not violate the WHC.

Aprophe contends that Rantania lacks standing to invoke the WHC [a]. In any case, the WHC is inapplicable during armed conflict [b].

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163. THE HANDBOOK OF INTERNATIONAL HUMANITARIAN LAW 62 (Dieter Fleck ed., 2008).

164. DINSTEIN, WAR, AGGRESSION AND SELF-DEFENCE 46 (2005).

165. MELZER, TARGETED KILLING IN INTERNATIONAL LAW 276 (2009) ["MELZER"].

166. SANDOZ ET AL, ICRC COMMENTARY ON THE ADDITIONAL PROTOCOLS ¶1890(1987) ["SANDOZ"].

167. Diversion of Water from the Meuse, 1937 PCIJ., SeriesA/BNo.70 (Judge Anzilotti Diss.Op.), 50; Klöckner v. Cameroon, 114 ILR 211(1989).

168. Crawford, *Exception of Non-performance*, 21 AUST. YBIL 55, 59(2000).

169. Report of the Secretary-General to the SC on the Palestine Question, U.N.Doc.S/3596, 7.

170. Fitzmaurice, *The General Principles of International Law Considered from the Standpoint of the Rule of Law*, 92 RDC 1, 119 (1957).

1. Rantania lacks standing to invoke the WHC.

The preservation of World Heritage Sites within a State's territory is the prerogative of the State.[171] Therefore, outside agencies can interfere only with the State's consent.[172] Further, Chapter II accords primacy to State sovereignty over cultural heritage.[173] This respect for state sovereignty indicates that the WHC does not intend to create *erga omnes* obligations.[174]

Moreover, 'collective interest' is a prerequisite to proving *erga omnes* obligations.[175] The phrase 'outstanding universal value' only suggests collective *assistance*,[176] as indicated by the Preamble.[177] Additionally, the substantive obligations do not prescribe the collective aspect.[178] In any event, the collective interest in protection of property is recognised only in the *diplomatic* sense.[179] In any case, *erga omnes* obligations do not confer standing before the Court.[180]

2. In any event, Aprophe's act does not violate the WHC.

a. The WHC is inapplicable during armed conflict.

The Preamble to the WHC suggest that it applies only in peace time as its purpose was to secure the peace time protection of cultural heritage and prevent it from "*social and economic threats*".[181] Indeed, the *travaux* expressly rejects the applicability of Article 6(3) during armed conflict, as it was decided that Hague Convention "*should continue to govern States' obligations in these circumstances.*"[182] The Director of UNESCO's Cultural Heritage Division categorically endorsed this view.[183] Further, the

171. Meyer, Travaux Preparatoires *for the UNESCO World Heritage Convention*, 2 EARTH LAW JOURNAL 45, 61(1976).

172. World Heritage Committee Report of the 18th Session, U.N.Doc.WHC-94/CONF.003/16, 14 ¶ IX.6.

173. Simmonds, *UNESCO World Heritage Convention*, 2 ART ANTIQUITY AND LAW 251, 270 (1997) ["Simmonds"].

174. Per Brennan J., Commonwealth of Australia v. State of Tasmania, [1983] HCA 21, 529.

175. Congo (Judge Simma, Sep.Op.), ¶ 35.

176. THE 1972 WORLD HERITAGE CONVENTION 136 (Francioni ed., 2008) ["Francioni"].

177. 7th Preamble, CONVENTION CONCERNING THE PROTECTION OF THE WORLD CULTURAL AND NATURAL HERITAGE, 1037 U.N.T.S. 151 (1972) ["WHC"].

178. Francioni, 134.

179. Francioni, 134.

180. Barcelona Traction,1970 ICJ 3, ¶ 91; Nuclear Weapons, 1996 ICJ 226 (Judge Castro, Diss. Op.), 387.

181. 1st Preamble, WHC; FORREST, INTERNATIONAL LAW AND THE PROTECTION OF CULTURAL HERITAGE 226-227 (2010).

182. Simmonds, 275.

183. U.N.Doc.WHC-2001/CONF.205/10 ¶I.9.

2003 Declaration reinforces the distinct applicability of the WHC in peace time and the Hague Convention in armed conflict.[184] Admittedly, ICTY suggested that the protections of a World Heritage Site remain applicable in armed conflict.[185] However, it relied on the List merely to determine the 'outstanding value' of the cultural property within the scope of Article 3(d) of its statute.[186]

In any event, the IHL governing protection of cultural property being *lex specialis*[187] excludes the applicability of WHC in armed conflict.[188] The Court's ruling in *Nuclear Weapons* that applied environmental treaties *only* to determine breaches of IHL endorses this view.[189]

C. Aprophe's act does not violate the ICESCR.

Aprophe contends that non-exhaustion of local remedies by Rantania precludes its claim of diplomatic protection [a]. Alternatively, Aprophe's act does not violate the ICESCR as the Convention does not apply either during armed conflict [b] or extra-territorially [c]. Alternatively, the acts do not violate Article 15(1)(a) [d].

1. Non-exhaustion of local remedies precludes Rantania's claim of diplomatic protection.

Exhaustion of local remedies, as an essential requirement of diplomatic protection, is a well-established rule of customary international law.[190] Indeed, the optional protocol to the ICESCR also mandates this requirement.[191] Contrary to the Court's prior jurisprudence, the ILC expressly requires States to exhaust local remedies even while seeking declaratory reliefs[192] to ensure that States "*do not circumvent the . . . rule*" by seeking reliefs in multiple proceedings.[193] Since Rantania has not exhausted local remedies, its claim is inadmissible.

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184. Articles IV, V, 2003 UNESCO Declaration concerning the Intentional Destruction of Cultural Heritage, 32C/Res.38 (2004-2005).

185. Prosecutor v. Strugar, IT-01-42-T, ¶279.

186. Vrdoljak, *Intentional Destruction of Cultural Heritage and International Law*, MULTICULTURALISM AND INTERNATIONAL LAW, 377, 388(2007).

187. O'KEEFE, THE PROTECTION OF CULTURAL PROPERTY IN ARMED CONFLICT 312(2006) ["O'KEEFE"].

188. Lindroos, *Addressing Norm Conflicts in a Fragmented Legal System*, 74 NORDIC J. INT'L L. 27, 32 (2005).

189. Nuclear Weapons, ¶¶28-31.

190. Diallo, 2007 ICJ General List 103, ¶43.

191. Article 10.1(c), ICESCR Optional Protocol, U.N.Doc.A/RES/63/117.

192. Article 14(3), ILC Draft Articles on Diplomatic Protection, U.N.Doc.A/61/10.

193. Aréchaga, 293.

2. In any event, the ICESCR is inapplicable during armed conflict.

Rantania submits that in an armed conflict, IHL as *lex specialis*[194] prevails over *general* human rights norms. Hence, an act in compliance with IHL would never violate HR standards.[195] Particularly, the ICESCR contemplates progressive realization of rights,[196] through legislations, which presumes the existence of peace. State Parties have opposed the CESCR's deduction of non-derogable obligations under the ICESCR.[197] Hence, the ICESCR is inapplicable during armed conflict.

3. In any event, the ICESCR does not apply extra-territorially.

The Court held that the obligations under the ICESCR are "*essentially territorial*."[198] Further, States[199] have opposed CESCR's observations to the contrary that the rights have extraterritorial application. In any event, extra-territorial operation of human rights obligations arises only in *exceptional situations*, for instance, where the state exercises territorial control outside its borders.[200] Hence, Aprophe has no obligations towards Rantanian nationals.

4. In any event, the destruction does not violate Art. 15(1)(a).

In the event of an armed conflict, IHL, as *lex specialis*, determines the scope of the HR obligation, the *lex generalis*.[201] Since IHL allows for destruction of cultural property in cases of 'imperative military necessity', the destruction is justified.[202]

D. Aprophe's destruction of the building does not violate customary international law.

Aprophe submits that Rantania cannot invoke custom as the obligation to respect cultural property is not *erga omnes* [a]. In any case, such an obligation does not confer standing. Alternatively, the destruction of the Temple in this case is justified under the exception of military necessity [b].

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194. Nuclear Weapons, ¶25.

195. Regina v. Secretary of State for Defence, [2005] EXHC 1809, ¶¶128-140.

196. Article 2(1), INTERNATIONAL COVENANT ON ECONOMIC, SOCIAL AND CULTURAL RIGHTS, 993 U.N.T.S. 3.

197. Dennis & Stewart, *Justiciability of Economic, Social and Cultural Rights*, 98 AJIL 462, 495 (2004).

198. Wall, 2004 ICJ 36, ¶112.

199. U.N.Doc.E/CN.4/2004/SR.51, ¶84; U.N.Doc.E/CN.4/2005/52, ¶76.

200. Cyprus v. Turkey, App.No.25781/94, ¶¶76-81.

201. Nuclear Weapons, ¶ 25.

202. §IV(D), Memorial.

1. The obligation to protect cultural property is not erga omnes in nature

International instruments governing cultural property do not contain provisions suggesting the existence of an *erga omnes* obligation.[203] Although States unanimously condemned the destruction of the Bamiyan Buddhas, only Ukraine classified it as a violation of international law.[204] Indeed, the condemnation by States was diplomatic and not legal.[205] This indicates the absence of *opinio juris* required for the formation of an *erga omnes* obligation.

2. Alternatively, the military necessity exception justifies Aprophe's acts

While prohibiting destruction of cultural property, customary IHL recognises the military necessity exception.[206] Aprophe submits that the destruction of the building does not violate IHL as: the military necessity exception permits *destruction* of cultural property even when it is not used for military purposes and is located within Aprophe's territory [i]; and the present case satisfies the requirements of military necessity [ii].

a. The military necessity exception permits destruction of cultural property not used for military purposes within the State's own territory.

Admittedly, custom recognizes the principle of distinction[207] and cultural property may only be *attacked* if it qualifies as a military objective. However, "*[D]estructive acts undertaken by a belligerent in his own territory would not comply with the definition of attack*" under Art 49 of AP1.[208] Hence, Aprophe submits that its act constituted '*destruction*' and not an '*attack*'. In fact, Netherland's military manual makes the same distinction in the context of cultural property.[209] Prior to the Second Protocol, even UNESCO adopted the traditional interpretation of the exception.[210] Hence, although, Article 6(a) of the Second Protocol does not expressly adopt this distinction, to the extent that it discards this distinction, it departs from custom.[211]

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203. Brenner, *Cultural Property Law*, 29 SUFFOLK TRANSNAT'L L. REV. 237, 263 (2005-2006).

204. U.N.Doc.A/55/PV.94, 12.

205. O'Keefe, *World Cultural Heritage*, 53(1) ICLQ 189, 207(2004).

206. CUSTOMARY INTERNATIONAL HUMANITARIAN LAW I 127-129 (Henckaerts & Doswald-Beck ed. 2005).

207. Nuclear Weapons, ¶78.

208. SANDOZ, ¶1890.

209. Netherlands, Military Manual (1993); Netherlands, Military Handbook 7-36 (1995).

210. Hladik, *The 1954 Hague Convention and the Notion of Military Necessity*, 835 INT'L REV. OF RED CROSS (1999) ["Hladik"].

211. O'KEEFE, 251.

b. Aprophe's act was justified by 'imperative military necessity'.

States have adopted[212] the IMT's definition of military necessity as allowing a belligerent to "*to apply any amount and kind of force to compel the complete submission of the enemy...*"[213] This exception requires the existence of a military purpose; nexus of the measure with the purpose and; proportionality.[214] Additionally, the word 'imperative' requires an advanced warning and that the alleged act is the *only* available method.[215] Here, General Andler issued a statement giving an ultimatum. Further, the report of the independent agency clearly indicated that the military capacity of Aprophe had been exhausted.

First, the measure must have a legitimate military purpose.[216] This may even be purely defensive in nature.[217] In fact, AP1 recognises defending "*national territory against invasion*" as a legitimate military objective.[218] Hence, Aprophe submits that the act, aimed at ceasing the air strikes and preventing an invasion, had a military purpose.

Secondly, the measure must have a reasonable nexus with the military purpose.[219] Since the Temple represents the shared culture of Aprophe and Rantania, any damage to the Temple was against Rantania's interests. Notably, States have taken such considerations into account.[220] Although attacks for psychological advantage alone may violate IHL,[221] such advantage may be relied on to achieve a military purpose.

Thirdly, military necessity requires that the harm resulting from the measure be proportionate to the military value of the purpose.[222] The drafting history of the Hague Convention suggests that destruction of cultural property to save human lives satisfies this requirement.[223] Further, destruction of even *essential civilian objects*, in response to a threat of invasion, is permitted under Article 54(5) of AP1. Thus, the destruction of one of the smaller buildings, which was aborted as soon as the purpose was

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212. MELZER, 283-286.

213. US v. Wilhelm List, et al. ("The Hostage Case") (1948), XI TWC 1253– 54.

214. Downey, *The Law of War and Military Necessity*, 47 AJIL 251, 254 (1953).

215. Hladik.

216. The Manual of the Law of Armed Conflict (UK Ministry of Defence, 2004) ¶ 2.2.

217. Hardman v. US, 6 RIAA 25, 26(1913); SHWARZENBERGER, INTERNATIONAL LAW AS APPLIED BY INTERNATIONAL COURTS II 1332 (1976).

218. Article 54(5), ADDITIONAL PROTOCOL I TO THE GENEVA CONVENTIONS, 1125 U.N.T.S. 3 (1977).

219. Wall, ¶137.

220. Meyer, *Tearing Down the Facade*, 51 AIR FORCE L. REV. 143, 169-171(2001).

221. DINSTEIN, THE CONDUCT OF HOSTILITIES 86 (2004).

222. Beit Sourik Village v. Israel, HCJ 2056/04.

223. REPORT OF THE CONFERENCE CONVENED BY UNESCO, ¶277 (1954).

achieved, was proportionate and satisfied the requirements of the exception of imperative military necessity.

CONCLUSION AND PRAYER FOR RELIEF

The Republic of Aprophe respectfully requests the Court to adjudge and declare that:

1. Since the Andler government is the rightful government the Republic of Aprophe, the Court may exercise jurisdiction over all claims in this case;
2. Rantania is responsible for the illegal use of force against Aprophe in the context of Operation Uniting for Democracy;
3. Since the Rantanian courts' exercise of jurisdiction in *Turbando, et al., v. The Republic of Aprophe* violated international law, Rantania may not execute the judgment in that case; and
4. Aprophe's destruction of a building of the Mai-Tocao Temple did not violate international law.

TEAM 560R

THE 2012 PHILIP C. JESSUP INTERNATIONAL LAW MOOT COURT COMPETITION

CASE CONCERNING THE TEMPLE OF MAI-TOCAO

THE REPUBLIC OF APROPHE
(APPLICANT)

v.

THE FEDERAL REPUBLIC OF RANTANIA
(RESPONDENT)

SPRING TERM 2012

On Submission to the International Court of Justice
The Peace Palace, The Hague, The Netherlands

MEMORIAL OF THE RESPONDENT

TABLE OF CONTENTS

INDEX OF AUTHORITIES

I.C.J. & P.C.I.J. CASES

OTHER INTERNATIONAL CASES

NATIONAL CASES

INTERNATIONAL AGREEMENTS

UNITED NATIONS AND OTHER DOCUMENTS

NATIONAL LAW

BOOKS AND TREATISES

ARTICLES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The Republic of Aprophe ("Aprophe") and the Federal Republic of Rantania ("Rantania") hereby submit the present dispute to the International Court of Justice ("I.C.J.") pursuant to Article 40(1) of the Court's Statute, in accordance with the Compromis for submission to the I.C.J. of the differences concerning the Mai-Tocao Temple, signed in The Hague, The Netherlands, on the twelfth day of September in the year two thousand and eleven. Both States have accepted the jurisdiction of this Court pursuant to Article 36(1) of its Statute and Article XXV of the Peace Agreement of 1965.

QUESTIONS PRESENTED

1. Whether the Andler regime and its representatives can appear before this Court in the name of Aprophe.
2. Whether the use of force against Aprophe in the context of Operation Uniting for Democracy is attributable to Rantania, and whether that use of force was illegal.
3. Whether the exercise of jurisdiction by Rantanian courts in the case of *Turbando, et al., v. The Republic of Aprophe* was consistent with International Law.
4. Whether Aprophe violated international law by destroying a building of the Temple of Mai-Tocao.

STATEMENT OF FACTS

Background

Rantania maintains close diplomatic and trade relations with neighboring countries Lamarthia, Verland, and Pellegrinia. Aprophe is a state on Rantania's immediate west. The Mai-Tocao temple complex, located in Aprophe near the Rantanian-Aprophian border, is a world-renowned cultural site, with a history dating to 2500 BCE. Ancient historians wrote about its significance to multiple cultures. Mai-Tocao attracts over 500,000 tourists annually, and is central to Aprophian and Rantanian cultural heritage. In 1986, Aprophe proposed, with Rantania's strong support, that Mai-Tocao be inscribed on the World Heritage List. This happened in 1988.

In 1962, Aprophe and Rantania engaged in a war over Mai-Tocao and its surrounding territory. During this Mai-Tocao War, the Aprophian army occupied undisputed Rantanian territory, subjecting more than 500 Rantanian peasants—so-called "military internees"—to forced labor without compensation in daily 12-hour shifts.

In 1965, the two states engaged negotiated and concluded a Peace Agreement, which submitted the boundary dispute to arbitration. The arbitral tribunal awarded all disputed territory, including Mai-Tocao, to Aprophe.

In 1980, Rantania, Lamarthia, Verland, and Pellegrinia concluded the Eastern Nations Charter of Human Rights ("Charter"), which established the Eastern Nations Court ("ENC"). In 1990, they created the Eastern Nations International Organization ("ENI") to strengthen their economic and political ties. The constituent treaty contains a mutual defense pact and incorporates the Charter by reference.

In 2000, Aprophian Senator Mig Green was elected President by the largest margin of votes in Aprophe's history. His campaign platform proposed joining the ENI. From 2001 to 2006, Green's government implemented pro-ENI policies to meet preconditions for ENI membership. Aprophe acceded to the Charter in 2005, with an exemption from the ENC's compulsory jurisdiction.

The Turbando Case

In 2001, the International League for Solidarity and Access ("ILSA") instituted proceedings against Aprophe in an Aprophian court on behalf of 60 former military internees, raising claims of forced, uncompensated labor during the Mai-Tocao War. The Supreme Court affirmed the trial court's dismissal of the case due to Aprophe's statute of limitations.

ILSA subsequently instituted similar proceedings in Rantania. The case was initially dismissed based on Article XV in the 1965 Peace Agreement, but the ENC held that Rantania could not rely upon this clause to bar the suit. On remand in 2009, the trial court denied immunity to Aprophe and awarded damages to the plaintiffs. Aprophe did not participate in or appeal these proceedings, but maintained that the Rantanian decision violated Aprophe's sovereign immunity and the Peace Agreement. The trial court granted an indefinite stay of enforcement, reviewable upon either party's petition.

In 2011, ILSA successfully moved to lift the stay, and bailiffs seized US$10,000,000 worth of Aprophe's non-diplomatic property located in Rantania, consistent with Rantanian law. Rantanian judicial authorities currently hold the property.

The Coup

The Rantanian court's decision in *Turbando* strengthened opposition to Green's pro-ENI policies. However, a poll conducted by Aprophe's Office for National Statistics indicated that a majority of Aprophians approved of Green's policies and pro-ENI efforts.

Green declared his candidacy for a third term. However, on January 10, 2011, following some civil unrest, he invoked constitutional powers to postpone the elections for one year, and ordered the Aprophian military to begin armed patrols.

On January 15, General Paige Andler, the Aprophian military Chief-of-Staff, wrote an open letter refusing to obey Green's orders. On January 16, armed soldiers loyal to Andler forcibly entered the Presidential Palace and other government installations. President Green and members of his government fled to Rantania. Andler proclaimed herself "interim president" of Aprophe, establishing control over most of the population and the territory.

Two days later, facing widespread and growing opposition to her government, Andler declared a state of emergency and dissolved parliament. She assured Aprophians that their civil rights would be respected and that elections would be called soon. To date, elections have not been called.

Forty Aprophian Ambassadors, including those to the United Nations ("UN") and the Netherlands, renounced Andler and declared allegiance to Green. Approximately 800 members of the National Homeland Brigade remained loyal to Green and established bases in two villages, to which hundreds of Green supporters migrated. Andler ordered over 2,000 heavily-armed members of the Quick Reactionary Forces ("QRF") to

confront the Brigade. Small-scale fighting commenced on January 20, continuing over the next three weeks.

Many countries condemned Andler's assault upon the pro-Green units. On January 22, the ENI Council unanimously passed a resolution introduced by Rantania, recognizing Green as the lawful president and condemning Andler's coup. The UN General Assembly adopted a resolution by an overwhelming majority, condemning the coup and urging the Security Council to intervene. All ENI members and 27 other nations formally announced that they would conduct relations only with Green's government. To date, only 14 nations recognize Andler's regime.

Andler denounced the ENI Council resolution as an unjustifiably interference in Aprophe's internal affairs, and the interim foreign affairs minister informed the UN Secretary-General that Aprophe was denouncing the Eastern Nations Charter.

Operation Uniting for Democracy

On February 10, the QRF launched artillery strikes against the two villages loyal to Green. One hundred forty people were killed and hundreds were wounded in three days. QRF commanders indicated their immediate intention to enter the villages. Green urged the ENI Council to take steps to "prevent an imminent humanitarian crisis."

The ENI Council unanimously approved "Activation Orders" for air strikes against military assets used to threaten civilians and perpetuate Andler's illegal regime. Rantanian Major-General Brewscha was appointed as Force Commander to make all operational decisions under the direction of the ENI Defense Committee. The ENI launched the operation on February 18, with the Rantanian air force playing a major role, conducting air strikes against verified military installations in Marcelux, Aprophe's capital.

The operation destroyed 12 of 15 military installations near Marcelux and killed 50 Aprophian soldiers, with no civilian casualties and only incidental damage to non-military buildings. A military think-tank reported that the operation effectively destroyed Aprophe's military.

On March 1, the UN Security Council adopted a resolution condemning Operation Uniting for Democracy for failing to provide advance notice pursuant to the UN Charter. The campaign continued until the ENI council formally the operation on March 5.

The Destruction of a Mai-Tocao Building

On February 27, Andler fled to Mai-Tocao. Brewscha announced that, rather than risking damage to Mai-Tocao by striking Andler's headquarters there, ENI ground forces would enter Aprophe and capture Andler. Andler publicly threatened to destroy a Mai-Tocao building every other day as long as the ENI operation continued.

When the air strikes continued, Andler blew up a building in Mai-Tocao on March 3, destroying almost half of it. The World Heritage Committee issued a press release calling the destruction "tragic." Rantanian President Perego condemned it a breach of international law and ordered an immediate grounding of Rantania's air force.

Submission Before the International Court of Justice ("I.C.J.")

Without prejudice to Rantania's contention that the Andler regime is illegitimate and cannot represent Aprophe before the Court, both parties jointly submitted the dispute to the I.C.J.—Aprophe as Applicant, Rantania as Respondent.

SUMMARY OF PLEADINGS

Andler's Governmental Illegitimacy

The Andler government cannot represent Aprophe before this Court because Andler is not the legitimate head of state. Only legitimate governments can bind states in contentious international disputes. Andler has not received the international recognition that this Court in *Genocide* held is necessary to gain legitimacy.

Alternatively, Andler violated the Aprophian people's right to participatory governance. If democratic governance has not crystallized as customary international law, then Andler's government is still illegitimate because it does not reflect popular sovereignty. Finally, Andler never established sufficient effective control to garner legitimacy. Even if Andler has effective control, this presumption of legitimacy is rebutted by democratic expression.

Alternatively, the Green government is a legitimate government-in-exile with the exclusive ability to bind the Aprophian state in these proceedings.

Attributability to Rantania and Legality of Operation Uniting for Democracy

As the Eastern Nations International Organization ("ENI") is an international organization with a separate and independent legal personality, Operation Uniting for Democracy can only be attributable to the ENI and not to Rantania. This is the case whether this Court applies either a test of "ultimate authority and control" or of "effective control."

ENI had "ultimate authority and control" because the operation was commanded by an ENI designated force commander and was directed by the ENI Defense Committee. Furthermore, as Applicant can provide no evidence that Rantania directed, controlled or interfered with any specific conduct of the forces placed at the ENI's disposal, the ENI also had "effective control" of any acts in which the alleged violations occurred.

Even if Rantania is found to be secondarily or concurrently responsible, the subject matter of this dispute involves the rights and obligations of the ENI, Lamarthia, Verland and Pellegrinia. Therefore, in accordance with the long-held Monetary Gold principle, the Court must decline to exercise its jurisdiction.

In any event, the use of force against Aprophe was not internationally wrongful because Aprophe both requested and consented to the use of force. As Mig Green's government was the legitimate government of

Aprophe, it was empowered under international law to request foreign military assistance, even absent Security Council authorization.

Sovereign Immunity

Rantania's court lawfully exercised jurisdiction in the case of *Turbando v. Aprophe*, because state practice on immunity does not establish a customary international law prohibition on the lifting of immunity for *jus cogens* violations. The *Lotus* principle permits Rantania to recognize a *jus cogens* exception to immunity in the absence of such a prohibition.

Aprophe violated the *jus cogens* prohibition on forced labor and slavery by subjecting more than 500 Rantanians to forced labor during the Mai-Tocao war. Aprophe has failed to take any step to provide the victims of its illegal acts with any remedy, even fifty years later. The Rantanian court may consider the peremptory nature of the norms violated, as well as Aprophe's failure to provide redress, when denying immunity, particularly in light of the victims' right of access to justice. Because *jus cogens* norms are hierarchically superior to rules on state immunity, they override immunity rules in cases of conflict. Aprophe also waived its sovereign immunity defense by violating a *jus cogens* norm.

Destruction of Cultural Property

Since Andler exercised elements of governmental authority after forcing the rightful Green government into exile, her unlawful actions are attributable to Aprophe. Andler's destruction of a building in Mai-Tocao, an important cultural site, constituted an illegal act of hostility directed against cultural property. Far from discharging its responsibility to protect cultural property in its territory, Aprophe willfully destroyed a building in Mai-Tocao as a political measure to coerce the ENI into ceasing its operation. There is no evidence of imperative military necessity to justify destroying the Mai-Tocao building, particularly because Mai-Tocao is wholly unconnected to the events giving rise to ENI's operation. Furthermore, Andler unlawfully made Mai-Tocao a military objective by entering it and using it as a shield from ENI forces. Thus, even if there was imperative military necessity, Andler contributed to the situation of necessity and cannot be permitted to invoke the defense.

Lastly, the destruction of cultural property was an illegal act of reprisal, prohibited by customary international law without any exception of military necessity.

PLEADINGS

I. THE COURT IS WITHOUT JURISDICTION OVER THE APPLICANT'S CLAIMS, SINCE THE ANDLER REGIME AND ITS REPRESENTATIVES CANNOT APPEAR BEFORE THIS COURT IN THE NAME OF APROPHE

A. This Court should defer to the international community's determination that Andler's government is illegitimate

Only a legitimate government may bind a state in international law.[1] Therefore, this Court may only exercise jurisdiction over claims submitted by the legitimate government of a state.[2] The General Assembly's power to pursue dispute resolution[3] and recommend the codification and progressive development of international law[4] renders that body the most competent international institution to make legitimacy determinations.[5]

In the *Genocide* case, this Court deferred to the General Assembly and the international community in determining that Bosnian president Alija Izetbegovìc was the legitimate representative of the Bosnian government, noting that the Izetbegovìc government had been seated by the General Assembly and had been signatories to international treaties.[6] Likewise, in the *Anastasiou* case, the European Court of Justice deferred to the European Union and its members' position that the Clerides government was the sole legitimate government of the Republic of Cyprus in finding that only the Clerides government was empowered to issue agricultural certificates.[7] Similarly, courts regularly defer to their executive branches for legitimacy determinations in the domestic context.[8]

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1. Jean D'Aspremont, *Legitimacy of Governments in the Age of Democracy*, 38 N.Y.U J. INT'L L. & POL. 877, 878 (2006) [hereinafter "D'Aspremont, *Democracy*"].

2. *See Application of the Convention on the Prevention and Punishment of Crime of Genocide (Bosn. & Herz. v. Yugo.)*, Preliminary Objections, 1996 I.C.J. 1, ¶44 [hereinafter "*Genocide,* Preliminary Objections"]; Statute of the International Court of Justice, 59 STAT. 1055 (1945), art.34(1).

3. Charter of the United Nations, 1 U.N.T.S. XVI (1945), art.14 [hereinafter "U.N. Charter"].

4. *Id.*, art.13(a)(1).

5. BRAD ROTH, GOVERNMENTAL ILLEGITIMACY IN INTERNATIONAL LAW 258-9 (2000) [hereinafter "ROTH, ILLEGITIMACY"] . *See also* Louise Doswald-Beck, *The Legal Validity of Military Intervention by Invitation of the Government*, 56 B.Y.I.L. 189, 199 (1986) [hereinafter "Doswald-Beck"].

6. *Genocide,* Preliminary Objections.

7. Stefan Talmon, *The Cyprus Question before the European Court of Justice*, 12 E.J.I.L. 727, 736 (2001).

8. LORI DAMROSCH ET AL., INTERNATIONAL LAW CASES AND MATERIALS 373 (5th ed. 2009) [hereinafter "DAMROSCH"].

Only fourteen countries have recognized Andler's regime.[9] Further, Aprophe's U.N. ambassador has remained loyal to President Green,[10] and there is no indication that the General Assembly's Credentials Committee has considered seating a rival Andler delegation. Moreover, the General Assembly has condemned the Andler regime by an overwhelming majority vote.[11] Through these actions, the international community has affirmatively denied the legitimacy of Andler's regime.

This Court should follow the established practice of courts and defer to the international community's rejection of the legitimacy of Andler's government, which would deprive this Court of jurisdiction to hear Aprophe's claims.

B. Andler's government is illegitimate because it came to power in violation of the principle of political participation

Even if this Court declines to defer to the international community, it should independently determine that Andler's government is illegitimate because it came to power through non-participatory means and is non-democratic.

In the early 1990's, state practice signaled the emergence of a "right to political participation" or a "right to democratic governance" in international law.[12] Under this norm, governments derive their legitimacy from the extent to which they come to power through participatory political mechanisms.[13] Recent state practice in response to non-democratic coups in Madagascar[14] and Honduras[15] demonstrates that this norm has crystallized in customary international law.[16]

The norm of political participation is rooted in a number of multilateral instruments. Article 25 of the International Covenant on Civil and Political Rights ("ICCPR") provides every citizen with the right to take

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9. Compromis ¶31.

10. Compromis ¶29.

11. Compromis ¶33.

12. Gregory Fox, *The Right to Political Participation in International Law*, 17 YALE J. INT'L L. 539 (1992); Thomas Franck, *The Emerging Right to Democratic Governance*, 86 A.J.I.L. 46 (1992) [hereinafter "Franck"].

13. Franck, 46.

14. Brad Roth, *Secessions, Coups and the International Rule of Law: Assessing the Decline of the Effective Control Doctrine*, 11 MELBOURNE J. INT'L L. 37, 46 (2010) [hereinafter "Roth, *Coups*"].

15. G.A. Res. 63/301, U.N. Doc. A/RES/63/301 (2009).

16. Jean D'Aspremont, *The Rise and Fall of Democracy Governance in International Law: A Reply to Susan Marks*, 22 E.J.I.L. 549, 569 (2011) [hereinafter "D'Aspremont, *Reply*"]; IAN CLARK, LEGITIMACY IN INTERNATIONAL SOCIETY 176 (2007); Ben Chiagara, *The Right to Democratic Entitlement: Time for Change?,* 8 MEDITERRANEAN J. H.R. 53 (2004).

part in the public affairs of the state,[17] which has been interpreted to provide the right to challenge the government.[18] For example, the European Commission of Human Rights interpreted similar language in the European Convention on Human Rights to condemn the Greek junta's elimination of political parties.[19] Likewise, the Inter-American Commission on Human Rights interpreted similar language in the American Convention on Human Rights to affirm the citizenry's right to be free from coercion when making electoral decisions.[20]

More specifically, article 1 of the ICCPR grants all people the right to freely determine their political status.[21] This right has been interpreted by many states to require democratic government.[22] Accordingly, states have organized around participatory principles.[23] As of 2000, 106 states had pledged to resist the overthrow of democratic systems.[24] Moreover, non-democratic states now claim legitimacy not by challenging the democratic order but by attempting to credibly claim democratization.[25]

Andler's regime violated the norm of political participation and democratic governance by overthrowing President Green's democratically-elected government in a coup.[26] Although Andler has pledged to hold new elections,[27] she has made no effort to do so. Thus, because Andler's regime came to power in violation of the principles of political participation and democratic governance, it is illegitimate under international law and is not entitled to represent Aprophe before this Court.

C. Andler's government is illegitimate because it has not received the consent of the Aprophian people

If this Court finds that the norms of democratic governance and political participation have not yet crystallized in customary international

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17. International Covenant on Civil and Political Rights, 999 U.N.T.S. 171 (1966), art.25 [hereinafter "ICCPR"]; H.R.C., General Comment 25, U.N. Doc. CCPR/C/21/Rev.1/Add.7 (1996); Roland Rich, *Bringing Democracy into International Law*, 12 J. DEMOCRACY 20, 23 (2001) [hereinafter "Rich"].

18. ROTH, ILLEGITIMACY, 336.

19. *The Greek Case*, Y.B. EUR. CONV. H.R. 179, 180 (1969).

20. *Mexico Elections Decisions, Cases 9768, 9780, 9828*, Inter-Am. Comm'n H.R., OEA/Ser.L/V/11.77/doc.7/rev.1 (1990), 97, 108.

21. ICCPR, art.1.

22. Steven Wheatley, *Democracy in International Law: A European Perspective*, 51 I.C.L.Q. 225, 231 (2002)

23. Franck, 47.

24. Rich, 30.

25. D'Aspermont, *Reply,* 556.

26. Compromis ¶15.

27. Compromis ¶28.

law, the applicable rule for the determination of a government's legitimacy is popular sovereignty, which has been the governing standard in international law for at least the past century[28] and is supported by multiple General Assembly resolutions and international conventions.[29] Unlike the principles of political participation and democratic governance, popular sovereignty does not require a democratic form of government.[30] However, popular sovereignty requires that every legitimate government enjoy the consent of the governed.[31] While a government's effective control establishes a presumption of legitimacy, that presumption may be rebutted by election results that demonstrate the true political will of the people.[32]

1. Andler's government is not entitled to a presumption of legitimacy because it does not exercise effective control over Aprophe

a. President Green's government exercises effective control over Aprophe

Established governments enjoy a strong presumption of legitimacy in international law.[33] The international community has frequently recognized the legitimacy of established governments even when insurgents control most of a state's territory.[34] Because President Green's government was indisputably the established government of Aprophe before Andler's coup, Andler's regime will not enjoy a presumption of effective control until President Green's government no longer has any "fighting chance" of reclaiming control of the country.[35]

The situation in Aprophe has not reached this point, as Green's forces have not succumbed to persistent attacks by the Andler regime's military.[36] As a result, President Green's government enjoys the presumption of

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28. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 220-21 (Anders Wedburg trans. 1961); Universal Declaration of Human Rights, G.A. Res. 217, U.N. Doc. A/810 (1948), art.21 [hereinafter "UDHR"].

29. UDHR; U.N. Charter, preamble; United Nations Declaration on the Granting of Independence to Colonial Peoples, G.A. Res. 1514, U.N. Doc. A/4684 (1960); ICCPR, arts. 1, 3; International Covenant on Economic, Social, and Cultural Rights, 993 U.N.T.S. 3 (1966), arts. 1, 3.

30. Roth, ILLEGITIMACY, 150.

31. *Id*. 142.

32. Niels Petersen, *The Principle of Democratic Teleology in International Law*, 16 MAX PLANCK INSTITUTE FOR RESEARCH ON COLLECTIVE GOODS 40 (2008) [hereinafter "Petersen"]; D'Aspremont, *Democracy*, 903.

33. Roth, ILLEGITIMACY, 151.

34. *Id.* 132 (describing continued international recognition of governments in Angola 1975-95, Cambodia 1970-75, Biafra 1967-70, Eritrea 1970s-90s).

35. HERSCH LAUTERPACHT, RECOGNITION IN INTERNATIONAL LAW 348 (1947) [hereinafter "LAUTERPACHT, RECOGNITION"]; ROTH, ILLEGITIMACY, 151.

36. Compromis ¶30.

effective control over Aprophe. Therefore, Andler's government is not entitled to any presumption of legitimacy.

b. In the alternative, neither Andler nor President Green's government exercises effective control over Aprophe

Effective control is not binary, as the Credentials Committee has recognized on multiple occasions. In 1997, when rival governments split control over Cambodia, the Committee declined to seat any delegation until elections resolved the dispute.[37] Similarly, in 2010, the Committee declined to seat any delegation from Madagascar.[38] In 1994, the Security Council noted that because a power vacuum existed in Somalia, no regime could bind that state in international law.[39]

Andler's ability to control the country decreased dramatically since the coup. Her military was effectively destroyed by February 2011.[40] Meanwhile, President Green's supporters hold territory in northern Aprophe, and it appears as though the Andler regime has lost its ability to dislodge them from their strongholds,[41] indicating that neither government exercises effective control over the country. As a result, Andler's government is not entitled to any presumption of legitimacy based on effective control.

2. In the alternative, popular support for President Green's government rebuts any presumption of legitimacy Andler's government derives from its effective control of Aprophe

Even if Andler's government does maintain effective control over Aprophe, that control merely establishes a rebuttable presumption of legitimacy.[42] Where an election demonstrates the true political will of the people, the election's results rebut that presumption because the consent of the governed determines a government's legitimacy.[43] Exceptions to the effective control doctrine's presumption, including for foreign military intervention and racist minority governments, demonstrate that the underlying test for governmental legitimacy is popular sovereignty.[44]

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37. ROTH, ILLEGITIMACY, 393.

38. Roth, *Coups*, 46.

39. *Report of the Commission of Inquiry established pursuant to Security Council resolution 885*, U.N. Doc. S/1994/653 (1994), ¶31.

40. Compromis ¶¶39-40.

41. Compromis ¶¶ 34, 38.

42. ROTH, ILLEGITIMACY, 2, 30; *Mokotso v. King Moshoeshoe II* (1988), 90 I.L.R. 427, 494 (1990) (Lesotho High Ct.).

43. Petersen, 40; D'Aspremont, *Democracy*, 903.

44. LAUTERPACHT, RECOGNITION 348; *Legal Consequences for States of the Continued*

States in Europe,[45] the African Union,[46] the Americas,[47] and the Commonwealth[48] have explicitly endorsed popular sovereignty as the standard for governmental legitimacy. Democratically-elected governments ousted in *coups d'etat*, such as in Haiti, [49] Liberia,[50] Sierra Leone,[51] Honduras,[52] and Madagascar,[53] have been recognized as the sole legitimate governments of their respective states, despite their lack of effective control. Additionally, where the democratic process has been disregarded, such as in Angola,[54] Cambodia,[55] and Myanmar,[56] states have refused to recognize the resultant government.

In 2000, Mig Green was elected President with the largest majority in Aprophian electoral history.[57] The most recent polls indicate that 55% of Aprophians approve of his government and 60% support his efforts to join the ENI.[58] The only groups opposing President Green—labor unions and nationalists—represent special interests whose opinions are not reflective of Aprophian society.[59] By contrast, Andler faced immediate "widespread and growing opposition" when she seized power.[60]

President Green's government enjoys a clear mandate from the Aprophian people, and is thus reflective of popular sovereignty. This

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Presence of South Africa in Namibia (S.W. Africa), Advisory Opinion, 1971 I.C.J. 16; *East Timor (Port. v. Austl.)*, 1995 I.C.J. 90.

45. O.S.C.E., *Document for the Moscow Meeting on the Human Dimension, Emphasizing Respect for Human Rights, Pluralistic Democracy, the Rule of Law, and Procedures for Fact Finding*, 30 I.L.M. 1670 (1991); O.S.C.E., *Document of the Copenhagen Meeting of the Conference on the Human Dimension*, 29 I.L.M. 1305 (1990), art.1(3).

46. Constitutive Act of the African Union, 2158 U.N.T.S. 3 (2000), arts.3-4.

47. *Declaration of Santiago on Democracy and Public Trust: A New Commitment to Good Governance for the Americas,* AG/DEC.31 (XXXIII-O/03), OEA/Ser.P/XXXIII-O.2, vol. 1 (2003).

48. The Commonwealth, *Millbrook Commonwealth Action Programme on the Harare Declaration* (1995).

49. *Ad Hoc Meeting of Ministers of Foreign Affairs: Support to the Democratic Movement of Haiti*, MRE/RES.2/91, OEA/Ser.F/V.1 (1991); ROTH, ILLEGITIMACY, 372; G.A. Res. 46/7, U.N. Doc. A/RES/46/7 (1991).

50. S.C. Res. 788, U.N. Doc. S/RES/788 (1992); ROTH, ILLEGITIMACY, 397.

51. ROTH, ILLEGITIMACY, 406; S.C. Res. 1132, U.N. Doc. S/RES/1132 (1997).

52. G.A. Res. 63/301, U.N. Doc. A/RES/63/301 (2009).

53. Roth, *Coups,* 46.

54. S.C. Res. 811, U.N. Doc. S/RES/811 (1993); S.C. Res. 864, U.N. Doc. S/RES/864 (1993); S.C. Res. 851, U.N. Doc. S/RES/851 (1993).

55. *Report of the Credentials Committee*, U.N. Doc. A/52/719 (1997), ¶5.

56. G.A. Res. 49/197, U.N. Doc. A/RES/49/197 (1994).

57. Compromis ¶14.

58. Compromis ¶23.

59. Compromis ¶15.

60. Compromis ¶28.

rebuts any presumption of legitimacy that Andler's government might have derived from effective control.

3. President Green's government is a legitimate government-in-exile

When a democratic regime is forced into exile, the deposed government retains its legitimacy so long as it fulfills the criteria of a legitimate government-in-exile.[61] State practice in response to anti-democratic coups in Haiti,[62] Sierra Leone,[63] and Honduras[64] demonstrates that this rule has attained customary status.

President Green's government fulfills all four criteria of a legitimate government-in-exile, exclusively entitled to bind the state in international law.[65] It purports to represent a recognized state, Aprophe;[66] it purports to represent a people, the Aprophian people;[67] it is independent of its host, Rantania;[68] and the government in *de facto* control of the state, Andler's government, is illegitimate because it does not represent the will of the people.[69]

Green's government also satisfies the fourth criterion on alternative grounds.[70] This Court held in *Nicaragua* that it was possible for a government to legally bind itself by treaty to democratic governance.[71] In 2005, Aprophe did so by acceding to the Eastern Nations Charter of Human Rights ("EN Charter"),[72] reaffirming Aprophe's commitment to democracy and undertaking to adopt "legislative or other measures necessary" to ensure personal liberty and social justice within a democratic framework.[73] By seizing power in violation of Aprophe's treaty commitment to maintain

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61. Edward Collins, Jr. *et al., Regime Legitimation in Instances of Coup-Caused Governments-in-Exile: The Cases of Presidents Makarios and Aristide*, 5 J. INT'L L. & PRAC. 199, 229 (1996).

62. *Id.*

63. Karsten Nowrot & Emily Schabacker, *The Use of Force to Restore Democracy: International Legal Implications of the ECOWAS intervention in Sierra Leone*, 14 AM. U. INT'L L. REV. 321 (1998) [hereinafter "Nowrot"].

64. G.A. Res. 63/301, U.N. Doc. A/RES/63/301 (2009).

65. Stefan Talmon, *Who is a Legitimate Government in Exile? Towards Normative Criteria for Governmental Legitimacy in International Law*, *in* THE REALITY OF INTERNATIONAL LAW: ESSAYS IN HONOUR OF IAN BROWNLIE 499-537 (1999) [hereinafter "Talmon, *Exile*"].

66. Compromis ¶31.

67. Compromis ¶23.

68. Compromis ¶31.

69. *See* Part I(C)(2) *supra.*

70. Talmon, *Exile.*

71. *Military and Paramilitary Activities in and against Nicaragua (Nic. v. U.S.)*, Merits Judgment, 1986 I.C.J. 14. ¶392 [hereinafter "*Nicaragua*"].

72. Compromis ¶15.

73. Compromis, Annex II preamble, art.2.

a democratic system of government, Andler's government became an illegitimate in government *in situ*.

As a result, President Green's government fulfills the criteria for a legitimate government-in-exile, and is thus the sole entity entitled to represent Aprophe before this Court.

II. THE USE OF FORCE AGAINST APROPHE IN OPERATION UNITING FOR DEMOCRACY IS NOT ATTRIBUTABLE TO RANTANIA, AND IN ANY EVENT, THAT USE OF FORCE WAS NOT ILLEGAL

A. The use of force is attributable to the Eastern Nations International Organization ("the ENI")

1. The ENI possesses independent international legal personality

International organizations possess legal personality separate from their members, and are responsible for their own acts.[74] In *Reparations*, this Court provided two criteria to determine if an organization has objective international legal personality.[75]

First, the organization's founding states must have intended to imbue the organization with independent legal personality.[76] This is established as the ENI Treaty provides for privileges and immunities for the organization in member states,[77] creates independent ENI organs,[78] and requires only a simple majority for ENI Council decisions.[79]

Second, the organization must "in fact [be] exercising" independence from its members.[80] This has been demonstrated by the ENI's actions, including its collective decision to take military action[81] and the Eastern Nations Court's ("ENC") reversal of the judgment in the case of *Turbando,*

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74. *Reparations for Injuries Suffered in the Service of the United Nations*, Advisory Opinion, 1949 I.C.J. 174, 179 [hereinafter "*Reparations*"]; ANTONIO CASSESE, INTERNATIONAL LAW 135 (2005) [hereinafter "CASSESE, LAW"]; PHILIPPE SANDS & PIERRE KLEIN, BOWETT'S LAW OF INTERNATIONAL INSTITUTIONS 475-479 (2009) [hereinafter "BOWETT"]; MALCOLM SHAW, INTERNATIONAL LAW 260, 1311 (2008) [hereinafter "SHAW"].

75. *Reparations*, 179, 185; CASSESE, LAW, 137; Draft Articles of Responsibility of International Organizations, Y.B.I.L.C., vol.II (Part Two) (2011), art.2 cmt.¶9 [hereinafter "DARIO"]; Finn Seyersted, *Objective International Personality of Intergovernmental Organizations: Do Their Capacities Really Depend Upon the Conventions Establishing Them?*, 34 NORDISK TIDSKRIFT FOR INTERNATIONAL RET 1 (1964), 99 (1964) [hereinafter "Seyersted, *Objective*"]; SHAW, 1298.

76. *Reparations*, 179.

77. *Id.*; Compromis, Annex III art.84.

78. *Reparations*, 178; Compromis, Annex III arts.4-5, 62; Seyersted, *Objective*, 99.

79. Compromis, Annex III art.5; CASSESE, LAW, 137.

80. *Reparations*, 179.

81. Compromis ¶¶35-37.

et al., v. the Republic of Aprophe ("*Turbando*"), originally delivered by a trial court in Rantania, one of its member states.[82] Additionally, organizations with structures and attributes similar to those of the ENI, such as the North Atlantic Treaty Organization, are widely considered to possess independent legal personality.[83]

Lastly, even if affirmative recognition of an organization's legal personality by a non-member state is required, Aprophe recognized the ENI's legal personality by acceding to the EN Charter and by taking steps to become an ENI member.[84]

2. Operation Uniting for Democracy was an ENI operation

Rantanian Air Force units were seconded to the ENI for the duration of Operation Uniting for Democracy. The ENI's responsibility for acts undertaken by these units depends on whether it had either "ultimate authority and control" over the operation,[85] or "effective control" over the specific conduct in question.[86] The ENI is responsible for the operation under either standard.

The ENI had ultimate authority and control over the operation because all of the acts committed by the Rantanian Air Force units fell within the ENI's mandate for the operation.[87] Further, the ENI retained operational command and control by directing the operation through its Defense Committee.[88]

The ENI also exercised effective control over the operation.[89] Since the Rantanian Air Force units were seconded to the ENI, Aprophe must show evidence of actual Rantanian orders concerning or interfering with the operation[90] to demonstrate Rantania's responsibility. Aprophe must also prove that Rantania gave "instructions . . . in respect of each operation in

82. Compromis ¶19, Annex III art.10(2).

83. *Branno v. Ministry of War*, 22 I.L.R. 756 (1954) (It.); *Mazzanti v. H.A.F.S.E. & Ministry of Def*., 22 I.L.R. 758 (1954) (It. Flor. Trib.); Jan Klabbers, *The Concept of Legal Personality*, 11 IUS GENTIUM 35, 36 (2005); IAN BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 678 (7th ed. 2008) [hereinafter "BROWNLIE"].

84. Compromis ¶¶14-15; BOWETT, 480.

85. *Behrami v. France; Saramati v. France, Germany and Norway*, 45 E.H.R.R. 10, 134 (2007) [hereinafter "*Behrami*"]; *Kasumaj v. Greece*, E.C.H.R. 6974/05 (2007); *Gajic v. Germany*, E.C.H.R., 31446/02 (2008); *R (Al-Jedda) v. Secretary of State for Defence*, (2007) U.K.H.L. 58, ¶55 (U.K.).

86. DARIO, art.7.

87. *Behrami,* 124-126; Compromis ¶35.

88. *Behrami*, 139; Compromis ¶¶35-37.

89. DARIO, art.7.

90. *Behrami*, 139.

which the alleged violations occurred, not generally in respect of the overall actions."[91]

However, the ENI-designated Force Commander made all operational decisions.[92] There is no evidence that Rantanian organs instructed, guided, or controlled any specific act in respect to any allegedly wrongful acts.[93] Neither the size of Rantania's contribution to the ENI forces nor the Force Commander's nationality permits a contrary conclusion.[94]

Further, Rantania's ability to ground its air force does not signify effective control over the air strikes.[95] International organizations maintain effective control over their operations even when states retain some degree of control over individual units.[96] In United Nations ("UN") peacekeeping operations, troop-contributing nations "always retain the power to withdraw their soldiers at any moment,"[97] but this factor does not free the UN from responsibility for acts the troops commit. Moreover, even after the grounding of the Rantanian Air Force, the suspension of the operation as a whole required action by the ENI Council.[98]

B. The use of force is not attributable to both the ENI and Rantania

1. Rantania is not secondarily or concurrently responsible for Operation Uniting for Democracy

Member states are not concurrently liable for acts attributable to international organizations with separate legal personality.[99] In the context of a military intervention performed under the aegis of an international organization, conduct is ordinarily not simultaneously attributable to troop-

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91. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosn. & Herz. v. Serb. & Montenegro)*, Judgment, 2007 I.C.J. 43, ¶400 [hereinafter "*Genocide*, Judgment"]; *Nicaragua*, ¶115.

92. Compromis ¶¶35-37.

93. FINN SEYERSTED, UNITED NATIONS FORCES IN THE LAW OF PEACE AND WAR 411 (1966).

94. *Behrami*, 91.

95. *Genocide*, Judgment, ¶400; *Nicaragua*, ¶115; Antonio Cassese, *The Nicaragua and Tadić Tests Revisited in Light of the ICJ Judgment on Genocide in Bosnia*, 18 E.J.I.L. 649, 667 (2007); Kjetil Larsen, *Attribution of Conduct in Peace Operations: The 'Ultimate Authority and Control' Test*, 19 E.J.I.L. 510, 516 (2008).

96. DARIO, art.1 cmt.¶1.

97. Venice Commission, *Opinion on human rights in Kosovo: Possible establishment of review mechanisms*, 280/2004, CDL-AD 033, ¶14 (2004).

98. Compromis ¶43.

99. Rosalyn Higgins, *The Legal Consequences for Member States of the Non-Fulfilment by International Organizations of Their Obligations Towards Third Parties*, 66 Y.B. INST. INT'L L. 249, 257 (1995).

contributing nations.[100] Since at all relevant times Rantanian units acted under the ENI's auspices, the actions of those units correspondingly "ceased to be attributable" to Rantania.[101]

2. In the alternative, the Court lacks jurisdiction as the ENI, Lamarthia, Verland, and Pellegrinia constitute indispensable third parties

Even if Rantania was secondarily or concurrently responsible for the actions of its Air Force, the *Monetary Gold* principle[102] would require that this Court decline to exercise its jurisdiction because any decision on the merits of this dispute would necessarily implicate the rights and obligations of third parties, in this case Lamarthia, Verland, Pellegrinia, and the ENI.[103] The rights, obligations and responsibilities of these parties would form the "very subject matter"[104] and be a "pre-requisite"[105] of any decision concerning wrongfulness on Rantania's part, as all relevant acts committed by Rantania's organs were performed pursuant to decisions of the ENI Council.[106]

C. The use of force was not illegal because Aprophe's legitimate government consented to Operation Uniting for Democracy

The prohibition on the use of force contained in article 2(4) of the UN Charter is not absolute.[107] As this Court held in *Nicaragua*, military intervention "at the request of the [host] government" does not violate international law,[108] even absent Security Council authorization.[109]

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100. *Behrami*, 139; DARIO, art.7 cmt.¶4 (noting that dual or multiple attribution would "not frequently occur in practice").

101. *Al-Jedda v. U.K.*, E.C.H.R., 27021/08 (2011), ¶80.

102. *Monetary Gold Removed from Rome in 1943 (It. v. Fr., U.K., U.S.)*, 1954 I.C.J. 19, ¶32 [hereinafter, "*Monetary Gold*"].

103. *See* preliminary objections of Portugal (145); France (29-35); Canada (22); Netherlands (¶7.2.17); Belgium (¶533); *and* U.K. (¶6.18) *in the Legality of Use of Force* cases before this Court; Jean D'Aspremont, *Abuse of the Legal Personality of International Organizations and the Responsibility of Member States*, 4 INT'L. ORG. L. REV. 91, 117 (2007).

104. *Monetary Gold*, ¶32.

105. *Certain Phosphate Lands in Nauru (Nauru v. Austl.),* Preliminary Objections, Judgment, 1992 I.C.J. 240, ¶55.

106. Compromis ¶35-37.

107. PHILIP JESSUP, A MODERN LAW OF NATIONS 162 (1948).

108. *Nicaragua*, ¶126; *see also* Articles on Responsibility of States for Internationally Wrongful Acts, Y.B.I.L.C., vol.II (Part Two) (2001), art.20 [hereinafter "ARSIWA"]; DARIO, art.20; SHAW, 1313; David Wippman, *Military Intervention, Regional Organizations, and Host-State Consent*, 7 DUKE J. COMP. & INT'L L. 209, 209 [hereinafter "Wippman"]; G.A. Res. 3314, U.N. Doc. A/RES/3314 (1974), art.3(e); Doswald-Beck, 191.

While only the state's legitimate representative in international law may validly request another state's intervention,[110] President Green's government was the only legitimate government of Aprophe when he requested the ENI's intervention under any of the tests for governmental legitimacy discussed *supra.*[111]

Even if Andler's government exercises effective control over Aprophe today, it had not established effective control before President Green requested Rantania's assistance, as Green's government still had a "fighting chance."[112] Even more importantly, since Green's popular support rebuts any presumption of legitimacy Andler could derive from her effective control of Aprophe, any effective control Andler held could not have prevented Green's ability to represent Aprophe, request assistance, or consent to an intervention.[113]

Further, since Green's government was a legitimate government-in-exile, it was empowered to provide valid consent.[114] Substantial state practice supports the capacity of a legitimate government-in-exile to consent to foreign military intervention.[115] For example, even though the transitional government of Somalia had little control over any state territory,[116] it still had the capacity to validly consent to Ethiopia's subsequent military intervention and assistance.[117] Additionally, the Liberian and Sierra Leonean governments-in-exile had the capacity to

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109. Jochen Frowein, *Legal Consequences or International Law Enforcement in Case of Security Council Inaction*, *in* THE FUTURE OF INTERNATIONAL LAW ENFORCEMENT: NEW SCENARIOS, NEW LAW 111, 120 (Jost Delbrück ed. 1993).

110. ARSIWA, art.20 cmts.4-6; Doswald-Beck, 251; *Eighth Report on State Responsibility*, U.N. Doc. A/CN.4/318, 2 Y.B.I.L.C. 3, 36 (1979); JAMES CRAWFORD, THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT AND COMMENTARIES 164 (2001).

111. *See* Part I *supra.*

112. *See* Part I(C)(1) *supra.*

113. Georg Nolte, *Restoring Peace by Regional Action: International Legal Aspects of the Liberian Conflict*, ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 53, 603 (1993) [hereinafter "Nolte"]; Wippman, 209.

114. Doswald-Beck, 251 (describing the validity of consent of ineffective regimes in Congo (1960) and Lebanon (1978)); *Genocide*, Preliminary Objections, ¶¶221-22; Matthew Saul*, From Haiti to Somalia: The Assistance Model and the Paradox of State Reconstruction in International Law*, 11 INT'L CMTY. L. REV. 119, 139 (2009) [hereinafter "Saul"]; *see also* ANTHONY AUST, MODERN TREATY LAW AND PRACTICE 9 (2007) (noting that oral pronouncements can be legally binding).

115. Nowrot, 386; Nolte, 603; Monica Hakimi, *To Condone or Condemn? Regional Enforcement Actions in the Absence of Security Council Authorization*, 40 VANDERBILT J. TRANSNAT'L L. 643, 666 (2007).

116. Saul, 146.

117. *Id*.; S.C. Res. 2020, U.N. Doc. S/RES/2020 (2011).

provide consent to interventions undertaken by the Economic Community of West African States—consent that has been widely recognized as valid.[118] Lastly, years after Haitian President Jean-Bertrand Aristide had lost effective control of Haiti, the Security Council resolution authorizing the use of force to restore his presidency specifically recognized the legitimacy of his government and took special note of his request for foreign military assistance.[119]

Because President Green's government was the sole legitimate government of Aprophe when Green requested the ENI's intervention, his request precluded the operation's wrongfulness.

III. RANTANIAN OFFICIALS MAY EXECUTE THE JUDGMENT IN *TURBANDO* SINCE THE EXERCISE OF JURISDICTION BY RANTANIAN COURTS IN THAT CASE WAS CONSISTENT WITH INTERNATIONAL LAW

The Rantanian trial court's exercise of jurisdiction in *Turbando* was fully consistent with international law, because the court had jurisdiction to hear the case and was entitled to deny the application of foreign sovereign immunity where Aprophe violated peremptory norms of international law and did not compensate the victims.

This Court recognized in *Arrest Warrant* that a state must first demonstrate jurisdiction before the question of immunities becomes relevant.[120] Rantanian courts have jurisdiction to adjudicate the dispute in *Turbando* based on the principle of territoriality,[121] as Aprophe committed the acts giving rise to the claims of the former military internees on Rantanian territory.[122]

A. Article XV of the 1965 Peace Agreement did not waive the claims of the Rantanian former military internees

Article XV of the 1965 Peace Agreement purports to waive civil claims by Rantanian nationals against Aprophe.[123] However, the claims of the Rantanian military internees for human rights abuses cannot be waived, because these claims stem from Aprophian violations of *jus cogens*

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118. S.C. Res. 788, U.N. Doc. S/RES/788 (1992), 2; S.C. Res. 1162, U.N. Doc. S/RES/1162 (1998), ¶2.

119. S.C. Res. 940, U.N. Doc. S/RES/940 (1994).

120. *Arrest Warrant of 11 April 2000 (Dem. Rep. Congo v. Belg.)*, 2002 I.C.J. 3, ¶46 [hereinafter "*Arrest Warrant*"].

121. SHAW, 579; RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES §402 (1987) [hereinafter "RESTATEMENT (THIRD)"].

122. Compromis ¶6.

123. Compromis, Annex I art.XV.

norms.[124] Any treaty that bars compensation claims for a *jus cogens* violation is void pursuant to articles 53 and 64 of the Vienna Convention on the Law of Treaties[125] because it frustrates the very purpose and realization of that peremptory norm.[126]

The *Turbando* claims allege violations of the peremptory prohibitions on forced labor and slavery.[127] In such cases alleging forced labor, the prohibition on barring compensation claims for *jus cogens* violations applies with even greater force, because the absence of due compensation defines the norm's violation in the first place.[128] Thus, a waiver of compensation claims for forced labor would be tantamount to a waiver of the peremptory prohibition on forced labor itself.

Furthermore, Aprophe has not provided any alternative means of redressing its violations. Enforcement of Article XV with respect to Aprophe's violations of *jus cogens* norms would therefore leave the former military internees without any compensation whatsoever. As a result, Article XV cannot and does not waive the *Turbando* plaintiffs' forced labor claims.

B. Sovereign immunity does not bar the claims of the former military internees

Although a customary international norm of sovereign immunity exists, it does not always entail exact prescriptions on how domestic courts must give effect to this norm.[129] As an area of international law that developed principally from judicial state practice,[130] state practice has been too inconsistent in their applications of immunity to establish rules more specific than a general recognition of immunity and a broad set of circumstances where it applies.[131] States may thus apply immunity within

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124. BROWNLIE, 514-16; V.D. DEGAN, SOURCES OF INTERNATIONAL LAW 217, 226 (1997); Gay McDougall, *Report of Special Rapporteur on Contemporary Forms of Slavery,* U.N. Doc. E/CN.4/Sub.2/1998/13 (1998), ¶¶58-60; Karen Parker & Jennifer Chew, *Compensation for Japan's World War II War-Rape Victims*, 17 HASTINGS INT'L & COMP. L. REV. 497, 538 (1994).

125. Vienna Convention on the Law of Treaties, 1155 U.N.T.S. 33 (1969), arts.53, 64 (nullifying treaty provisions that conflict with a peremptory norm of international law, even if the norm attains *jus cogens* status after entry into force of the treaty).

126. Dinusha Panditaratne, *Rights-Based Approaches to Examining Waiver Clauses in Peace Treaties: Lessons from the Japanese Forced Labor Litigation in Californian Courts*, 28 B.C. INT'L & COMP. L. REV. 299, 315 (2005) [hereinafter "Panditaratne"].

127. *See* Part III(B)(2)(i) *infra*.

128. Panditaratne, 316.

129. CASSESE, LAW, 104; BROWNLIE, 330.

130. *Report of the ILC on the work of its thirty-second session*, U.N. Doc. A/35/10, 143 (1980) [hereinafter "*ILC Report, 1980*"].

131. CASSESE, LAW, 104; BROWNLIE, 330.

these broad limits set by international law, in accordance with the *Lotus* principle.[132] In light of factors particular to the *Turbando* case, the Rantanian court did not violate any international standard requiring the application of sovereign immunity.

1. Rantania is entitled to apply sovereign immunity consistently with developments in international law

There is no express international prohibition on denying sovereign immunity for violations of *jus cogens* norms. Regional and domestic judicial decisions that have found that no obligation to lift immunity for *jus cogens* violations existed in international law, never held that states were prohibited from denying immunity under such circumstances.[133] In the absence of any such prohibition, Rantania may apply rules on sovereign immunity with due regard to developments in international human rights law, avoiding an "artificial, unjust, and archaic" result.[134]

The sovereign immunity doctrine is an exception to the dominant principle of territorial jurisdiction,[135] developed to encourage international comity.[136] Therefore, there is no inherent right of state immunity.[137] Practical considerations guide domestic courts in their immunity analyses, balancing sovereign equality against factors such as the rights of their own citizens.[138] This allows national courts to apply sovereign immunity in a manner that better reflects evolving inter-state relationships.[139]

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132. *Case of the S.S. Lotus (Fr. v. Turk.),* 1927 P.C.I.J. (Ser.A) No.10, ¶46.

133. *See, e.g., Al-Adsani v. U.K.*, E.C.H.R., 35763/97 (2001), ¶61 [hereinafter "*Al-Adsani*"]; *Kalogeropoulou v. Greece*, E.C.H.R., 50021/00 (2002). Since Aprophe's forced labor violations were committed in Rantania, the *Bouzari* judgment may also be distinguished as it upheld state immunity for *jus cogens* violations committed "outside the forum state." *See Bouzari v. Iran*, 220 O.A.C. 1, ¶¶93-95 (2004) (Can. Ont. Ct. App.).

134. Hersch Lauterpacht, *The Problem of Jurisdictional Immunities of Foreign States*, 28 B.Y.I.L. 220, 221 (1951) [hereinafter "Lauterpacht, *Immunities*"].

135. Ian Sinclair, *The Law of Sovereign Immunity: Recent Developments*, 167 RECUEIL DES COURS 113, 215 (1980) [hereinafter "Sinclair"]; BROWNLIE, 321; Lauterpacht, *Immunities*, 229; GAMAL MOURSI BADR, STATE IMMUNITY: AN ANALYTICAL AND PROGNOSTIC VIEW 11 (1984).

136. *ILC Report, 1980*, ¶58; *Schooner Exchange v. McFaddon*, 7 Cranch 116 (1812) (U.S. Sup.Ct.); *Austria v. Altmann*, 541 U.S. 677 (2004) (U.S.); *Buck v. Attorney-General* [1965] Ch. 745, 770-71 (U.K. Ct. App.).

137. Lee Caplan, *State Immunity, Human Rights and Jus Cogens,* 97 A.J.I.L 741, 771 (2003); Sinclair, 215 ("one does not start from an assumption that immunity is the norm, and that exceptions to the rule of immunity have to be justified").

138. *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 937 (1984) (U.S. Ct. App.).

139. *Arrest Warrant*, *Joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal*, ¶72.

For example, states were able to respond to the growing participation of governments in commercial transactions with private persons by restricting the doctrine of immunity, which had hitherto been absolute,[140] and distinguishing between sovereign acts and commercial acts.[141] As tort law developed, states have also denied sovereign immunity for tortious acts committed by foreign states in the prosecuting state's territory.[142] Recently, the U.S. created a terrorism exception to immunity in civil suits, reflecting growing concerns over the threat of terrorism.[143] These examples demonstrate that national court decisions and legislation, guided by considerations of comity, drive the progressive development of the international law governing immunities. Therefore, since no inherent right of state immunity exists for *jus cogens* violations, Rantania is entitled to consider the growing importance of human rights in international law and deny immunity to Aprophe.[144]

2. Factors support Rantania's denial of immunity in *Turbando*

It is significant that Aprophe has not provided redress for the victims of the Aprophian military's forced labor crimes. Since the purpose of immunity is not to grant impunity,[145] state immunity affords an opportunity for the defendant state to provide the remedies itself to comply with international norms.[146] It cannot be abused to bar access to justice in the context of *jus cogens* violations.[147]

The Inter-American Court of Human Rights has recognized access to justice as a peremptory norm when the substantive rights violated were also *jus cogens*.[148] The International Criminal Tribunal for the former

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140. BROWNLIE, 327-29; SHAW, 701; DAMROSCH, 859; Sinclair, 210-13.

141. *I Congreso del Partido* [1983] A.C. 244, 267 (U.K.); *Claims Against the Empire of Iran,* 45 I.L.R. 57, 80 (1963) (Ger.); *U.S. v. Public Service Alliance of Canada (Re Canada Labour Code)*, 94 I.L.R. 264, 278 (1992) (Can.); *Reid v. Republic of Nauru,* 101 I.L.R. 193, 195-96 (1993) (Austl. Vict. Sup. Ct.); *De Sanchez v. Banco Central de Nicaragua*, 770 F.2d 1385, 1393 (1985) (U.S. Ct. App.).

142. Christoph Schreuer, *Some Recent Developments on the Law of State Immunity*, 2 COMP. L. Y.B. 215 (1978); Convention on the Jurisdictional Immunities of States and their Property, U.N. Doc. A/RES/59/38 Annex (2004), art.12; European Convention on State Immunity, 11 I.L.M. 470 (1972), art.11; U.K. State Immunity Act, 17 I.L.M. 1123 (1978), §5; U.S. Foreign Sovereign Immunities Act, 28 U.S.C. §1605(a)(5) [hereinafter "FSIA"]; *Prefecture of Voiotia v. Germany*, Case 11/2000 (2000) (Gr.) (applying the tort exception to immunity to proceedings for war damage).

143. FSIA, §1605A.

144. Compromis ¶20.

145. *Arrest Warrant*, ¶60.

146. Hazel Fox, *State Immunity and the International Crime of Torture*, 2 E.H.R.L.R. 142 (2006) [hereinafter "Fox"].

147. Redress Trust, *Immunity v. Accountability* (2005), 43.

148. *Goiburú v. Paraguay*, Inter-Am. Ct. H.R., Merits Judgment, Series C-153 (2006), ¶131.

Yugoslavia ("ICTY") has also recognized the possibility that victims of *jus cogens* violations could bring civil claims before foreign states' courts.[149] Further, Rantania is obliged to provide redress for the former military internees, particularly since Aprophe has not done so, under article 13 of the EN Charter, as the ENC held in its January 2009 judgment.[150]

a. Sovereign immunity may be lifted for Aprophe's violations of the jus cogens prohibition on forced labor

During the Mai-Tocao War, "more than 500 Rantanian peasants were forced to labor" for the Aprophian army in daily 12-hour shifts.[151] This treatment constituted forced labor,[152] a modern variant of slavery and a *jus cogens* violation.[153] The definition of slavery contained in the 1926 Slavery Convention,[154] supplemented by the 1930 Forced Labour Convention and the 1956 Supplementary Convention on Slavery,[155] includes forced labor. Thus, the *Turbando* claims arise out of violations of the *jus cogens* prohibition on slave labor.[156]

The presence of *jus cogens* norms violations in *Turbando* has important consequences. Under article 41 of the Articles on State Responsibility (ASR), states are obliged to not recognize a situation created by serious breaches of peremptory norms as lawful.[157]

Moreover, the peremptory nature of Aprophe's breach takes primacy over rules on sovereign immunity in cases of conflict. There is a normative conflict between sovereign immunity and violations of peremptory norms because the invocation of immunity will impede the latter's

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149. *Prosecutor v. Furundžija*, Trial Judgment, IT-95-17/1-T (1998), ¶155.

150. Compromis ¶19, Annex II art.13.

151. Compromis ¶6.

152. Convention Concerning Forced or Compulsory Labour, 39 U.N.T.S. 55 (1970) , art.2.1 [hereinafter "Forced Labour Convention"].

153. ILO, *Forced Labour in Myanmar (Burma)* (1998), ¶538; *Ferrini v. Germany*, n.5044 (2004) (It.) [hereinafter "*Ferrini*"]; *John Doe I v. Unocal Corp*., 395 F.3d 932 (2002) (U.S. Ct. App.). *See also* UDHR; Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis, 82 U.N.T.S. 280 (1945), art.6 (making forced labor a war crime); BROWNLIE, 515; Theodor Meron, *On a Hierarchy of International Human Rights*, 80 A.J.I.L. 1 (1986); Sarah Cleveland, *Norm Internalization and U.S. Economic Sanctions*, 26 YALE J. INT'L L. 1, 26-27 (2001) (reading the prohibition against slavery to include the prohibition against forced labor).

154. Convention to Suppress the Slave Trade and Slavery, 60 L.N.T.S. 253 (1926), art.1.1.

155. Forced Labour Convention, art.2.1; Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, 266 U.N.T.S. 3 (1956), art.1.

156. *Barcelona Traction, Light & Power Co., Ltd. (Belg. v. Spain)*, 1970 I.C.J. 3, ¶¶33-34 [hereinafter "*Barcelona Traction*"]; M. Cherif Bassiouni, *International Crimes: Jus Cogens and Obligatio Erga Omnes*, 59 LAW & CONTEMP. PROBS. 63, 68 (1996); RESTATEMENT (THIRD), §702.

157. ARSIWA, art.41(2).

enforceability.[158] To dismiss the *Turbando* case on sovereign immunity grounds would deprive the former military internees of their only available means of redress for their suffering.[159] Since the rules on state immunity conflict with a hierarchically higher *jus cogens* norm, the procedural bar of immunity must be lifted.[160] This *jus cogens* exception to immunity was applied by the Italian Supreme Court in *Ferrini*,[161] and has found support among members of this Court,[162] national judges,[163] and academics.[164]

Besides, Aprophe impliedly waived its immunity defense by violating a *jus cogens* norm. Aprophe cannot claim the privilege of immunity for acts that violate *jus cogens* prohibitions, because international law does not and cannot bestow immunity for acts it has universally criminalized.[165]

Therefore, the Rantanian court correctly recognized that the acts underlying the *Turbando* claims were *jus cogens* violations that allowed the court to deny immunity and lawfully exercise jurisdiction.[166] This interpretation of immunity reflects the growing importance of international human rights law in the conduct of inter-state relations.

IV. APROPHE VIOLATED INTERNATIONAL LAW BY DESTROYING A BUILDING OF THE TEMPLE OF MAI-TOCAO

The Mai-Tocao temple complex is undisputedly a site of "outstanding universal value."[167] It is one of the most famous religious and archaeological sites in the world, attracting over 500,000 tourists

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158. Alexander Orakhelashvili, *State Immunity and the Hierarchy of Norms: Why the House of Lords Got It Wrong*, 18 E.J.I.L. 955, 957 (2007).

159. The military internees' claims have already been brought before Aprophian courts, but were dismissed in 2002. Compromis ¶17.

160. *Al-Adsani*, *Joint dissenting opinion of Judges Rozakis, Caflisch, Costa, Wildhaber, Cabral Barreto and Vajic*, ¶3.

161. *Ferrini*, ¶¶9, 9.1, *affirmed in Italy v. Milde*, n.1072 (2009) (It.).

162. *See, e.g., Arrest Warrant*, *Dissenting opinion of Judge Al-Khasawneh*, ¶7; *id.*, *Dissenting opinion of Judge* ad hoc *Van den Wyngaert*, 157-159.

163. *R. v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3)*, [2000] A.C. 147, 278 (U.K.); *Lozano v. Italy*, n.31171/2008 (2009), §6 (It.).

164. Fox, 152; Andrea Bianchi, *Denying State Immunity to Violations of Human Rights*, 46 AUST. J. PUB. & INT'L L. 195 (1994) [hereinafter "Bianchi"]; Erika de Wet, *The Prohibition of Torture as an International Norm of Jus Cogens and Its Implications for National and Customary Law*, 15 E.J.I.L. 94 (2004); Kate Parlett, *Immunity in Civil Proceedings for Torture: The Emerging Exception*, 1 E.H.R.L.R. 49, 51 (2006); Robert Taylor, *Pinochet, Confusion, and Justice: The Denial of Immunity in U.S. Courts to Alleged Torturers Who Are Former Heads of State*, 24 T. JEFFERSON L. REV. 101, 114 (2001).

165. Bianchi, 240.

166. Compromis ¶20.

167. Convention Concerning the Protection of the World Cultural and Natural Heritage, 1037 U.N.T.S. 151 (1972), art.1 [hereinafter "WHC"].

annually.[168] Mai-Tocao was recognized by ancient historians as having tremendous significance to various cultures and is central to Aprophian and Rantanian cultural heritage.[169] Mai-Tocao was added to the World Heritage List in 1988,[170] reflecting the international community's recognition of its universal value.[171] Far from complying with its duty to protect the Mai-Tocao site,[172] Aprophe breached international law by destroying one of its buildings.

Three preliminary matters relating to attribution, standing, and applicable international law must be addressed before considering Aprophe's substantive violations. First, while Andler's regime is illegitimate and cannot represent Aprophe before this Court, its internationally wrongful acts[173] can still be attributed to Aprophe under article 9 of the ASR[174] because Andler exercised elements of Aprophe's governmental authority by *inter alia* suspending Green's policies and dissolving parliament in the absence of the official authorities, as Aprophe's legitimate government was illegally deposed by Andler's coup.[175]

Additionally, Respondent has standing to invoke Aprophe's state responsibility for Andler's destruction of cultural property, because these acts violated rules that are binding *erga omnes* and owed to the international community as a whole.[176] Therefore, under article 48 of the ASR, Respondent may invoke Aprophe's responsibility for breaching the *erga omnes* prohibition on destruction of cultural property.[177]

Regarding the applicable legal norms, Respondent acknowledges that Aprophe is not a signatory to several conventions applicable to this area of law, including the 1954 Hague Convention for the Protection of Cultural Property ("Hague Convention")[178] and the Additional Protocols to the 1949

168. Compromis ¶3.

169. *Id.*

170. Compromis ¶12.

171. WHC, art.11.

172. WHC, art.4.

173. Compromis ¶¶39-42.

174. ARSIWA, art.9.

175. Compromis ¶¶27-28.

176. *Separate Opinion of Judge Cançado Trindade, Request for interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v. Thai.)*, Order on Provisional Measures, General List No.151 (2011), ¶93; WHC, preamble; Francesco Francioni, *The Human Dimension of International Cultural Heritage Law: An Introduction*, 22 E.J.I.L. 9, 13 (2011); Francesco Francioni & Federico Lenzerini, *The Destruction of the Buddhas of Bamiyan and International Law*, 14 E.J.I.L. 619, 634 (2003); Roger O'Keefe, *World Cultural Heritage: Obligations to the International Community as a Whole?*, 53 I.C.L.Q. 189, 190 (2004).

177. ARSIWA, art.48(1); *Barcelona Traction*, 33.

178. Convention for the Protection of Cultural Property in the Event of Armed Conflict, 249

Geneva Conventions ("Additional Protocol I" and "Additional Protocol II").[179] Nonetheless, all the rules forbidding the destruction of cultural property in these treaties have been widely recognized as international custom, including the fundamental principles of respect for cultural property set out in article 4 of the Hague Convention[180] and the protection of cultural objects and places of worship set out in article 53 of Additional Protocol I.[181]

A. The destruction of the building was an act of hostility directed against cultural property

Customary international law prohibits states from making cultural property the object of attack.[182] Andler's destruction of a Mai-Tocao building[183] violated international law as an act of hostility directed against cultural property, prohibited by article 4(1) of the Hague Convention. Article 53(a) of Additional Protocol I also applies to prohibit acts of hostility directed against Mai-Tocao, because Mai-Tocao constitutes the "cultural or spiritual heritage of peoples."[184] This provision applies any object "whose value transcends geographical boundaries, and which are unique in character and are intimately associated with the history and culture of a people."[185] Mai-Tocao is such an object. The Rantanian

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U.N.T.S. 240 (1954) [hereinafter "Hague Convention"].

179. Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 1125 U.N.T.S. 3 (1977) [hereinafter "AP I"]; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts, 1125 U.N.T.S. 609 (1977).

180. UNESCO, General Conference 27/C/Res.3.5 (1993), preamble; *Annotated Supplement to the US Naval Handbook* (1997), §5.4.2 (accepting the binding nature of the Hague Convention, even though the U.S. is not a party); *Prosecutor v. Tadić*, Decision on Motion for Interlocutory Appeal Jurisdiction, IT-94-1-AR72 (1995), ¶98; *Prosecutor v. Brdjanin*, Trial Judgment, IT-99-36-T (2004), ¶595 ("[i]nstitutions dedicated to religion are protected… under customary international law"); *Partial Award: Central Front, Eritrea's Claims 2, 4, 6, 7, 8 and 22*, 43 I.L.M. 1249 (2004); David Meyer, *The 1954 Hague Cultural Property Convention and Its Emergence into Customary International Law*, 11 B.U. INT'L L.J. 349 (1993).

181. Christopher Greenwood, *Customary Law Status of the 1977 Geneva Protocols*, *in* HUMANITARIAN LAW OF ARMED CONFLICT, CHALLENGES AHEAD, ESSAYS IN HONOR OF FRITS KALSHOVEN 93, 110 (Astrid Delissen & Gerard Tanja eds., 1991). A similar provision is contained in art.16 of Additional Protocol II.

182. Hague Convention, art.4(1); AP I, art.53(a); ICRC, Customary International Humanitarian Law Database, rule 38B [hereinafter "ICRC, Database"].

183. Compromis ¶42.

184. AP I, art.53(a).

185. JEAN-MARIE HENCKAERTS & LOUISE DOSWALD-BECK, CUSTOMARY INTERNATIONAL HUMANITARIAN LAW, VOL.1 (2005), ¶2064 [hereinafter "HENCKAERTS & DOSWALD-BECK"], *cited with approval in Prosecutor v. Kordić and Cerkez*, Appeal Judgment, IT-95-14/2-A (2004), ¶91.

president's statement in 1988, citing Mai-Tocao as part of the region's "proudly shared history and culture,"[186] acknowledged its importance beyond Aprophe's borders. Mai-Tocao is also intimately associated with the history and culture of Aprophians and Rantanians, possessing religious significance dating thousands of years to 2000 BCE.[187]

States have condemned attacks against cultural property as contravening international humanitarian law[188] and banned such attacks in their legislation.[189] The ICTY has also held individuals criminally responsible for destroying cultural property, declaring such attacks to be particularly serious violations of international humanitarian law.[190]

It is irrelevant that the bombing of the Mai-Tocao building did not cause more extensive damage.[191] International law prohibiting the destruction of cultural property does not require a minimum threshold of damage.[192] The Draft Code of Crimes against the Peace and Security of Mankind included wilful attacks on cultural property as "exceptionally serious war crimes," without referencing any result requirement.[193] In 2007, UNESCO condemned a mortar attack of a World Heritage site in Kosovo even though the site sustained only minor damage and no one was wounded.[194]

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186. Compromis ¶12.

187. Compromis ¶3.

188. *See* the practice of Cape Verde (*cited in* ICRC, Customary International Humanitarian Law: Practice, Vol.II, §181); China (§183); Croatia (§185); France (§192); Germany (§194); Iran (§202); Pakistan (§215); United Arab Emirates (§219) [hereinafter "ICRC, Practice"]; S.C. Res. 1265, U.N. Doc. S/RES/1265 (1999), ¶2; G.A. Res. 47/147, U.N. Doc. A/RES/47/147 (1992), preamble; G.A. Res. 49/196, U.N. Doc. A/RES/49/196 (1994), preamble; G.A. Res. 50/193, U.N. Doc. A/RES/50/193 (1995), preamble; UNESCO, General Conference 27/C/Res.4.8 (1993), ¶¶1-2; U.N. Commission on Human Rights, Res. 1998/70 (1998), ¶¶2(g), 5(h); UNESCO, Press Release No. 2001-27 (2001); UNESCO, Press Release No. 2001-38 (2001) (denouncing attacks on cultural property in the former Yugoslavia, Afghanistan, and Korea).

189. *See* the legislation of Argentina (*cited in* ICRC, Practice, §105); Australia (§109); Azerbaijan (§110); Bosnia and Herzegovina (§113); Bulgaria (§114); Canada (§117); Chile (§118); China (§119); Colombia (§120); Congo (§122); Croatia (§124); Dominican Republic (§128); Estonia (§130); Germany (§132); Italy (§135); Kyrgyzstan (§138); Mali (§142); Mexico (§143); Netherlands (§§144-45); New Zealand (§147); Nicaragua (§148); Paraguay (§152); Peru (§153); Poland (§154); Romania (§155); Russian Federation (§156); Slovenia (§158); Spain (§160); United Kingdom (§167); United States (§168); Uruguay (§169); Venezuela (§170).

190. *Prosecutor v. Jović*, Sentencing Judgment, IT-01-42/1-S (2004), ¶53 [hereinafter "*Jović*"]; *Prosecutor v. Strugar*, Trial Judgment, IT-01-42-T (2005).

191. Compromis ¶42.

192. *Jović*, ¶50; HENCKAERTS & DOSWALD-BECK, ¶2070.

193. *Report of the ILC on the work of its forty-third session*, U.N. Doc. A/46/10 (1991), art.22(2)(f).

194. "UNESCO condemns attack against World Heritage site in Kosovo," Kuwait News Agency, April 6, 2007.

1. No imperative military necessity existed to justify the building's destruction

Since the Mai-Tocao complex constitutes the cultural and spiritual heritage of peoples, the destruction of a building therein in violation of article 53(a) of Additional Protocol I cannot be excused on the basis of imperative military necessity.

Neither can Aprophe invoke the defense of imperative military necessity contained in article 4(2) of the Hague Convention,[195] because there is no evidence in the Compromis to show that such necessity existed. Andler's actions were political measures intended to coerce political decision-makers, and are not the result of a military decision to obtain a military advantage.[196] Furthermore, imperative military necessity requires the cultural property to have first been converted into a military objective, and that no feasible alternative to obtain a similar military advantage existed.[197] Applicant bears the burden of establishing these preconditions,[198] which were not met. For example, military necessity does not permit the use of cultural property as a shield from attack.[199] The Mai-Tocao temple also never became a military objective for Andler, as Major-General Brewscha had already announced that ENI forces would not attack the site.[200] Thus, no military advantage would be gained from its destruction.[201] In fact, by fleeing to Mai-Tocao to escape impending capture by ENI forces,[202] Andler turned Mai-Tocao into a military objective for ENI forces by deliberately operating from within a cultural site in violation of the customary prohibition on using cultural property for purposes likely to expose it to destruction or damage, contained in article 4(1) of the Hague Convention[203] and set forth in numerous military manuals

195. Hague Convention, art.4(2).

196. YORAM DINSTEIN, THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT 86 (2004).

197. Second Protocol to the Hague Convention, 38 I.L.M. 769 (1999), art.6(a).

198. *Temple of Preah Vihear (Cambodia v. Thai.)*, Merits Judgment, 1962 I.C.J. 6, 15-16 (stating that the burden of proof in respect of each claim lies on the party asserting it).

199. *See* the military manual of Israel (*cited in* ICRC, Practice, §308); U.S. Department of Defense, *Final Report to Congress on the Conduct of the Persian Gulf War, Appendix O: The Role of the Law of War*, 31 I.L.M. 624 (1992); U.S., *Manual for Military Commissions* (2007), §6(10) (criminalizing the use of protected property as a shield); O.S.C.E. Spillover Monitoring Mission to Skopje, Press Release, Aug. 7, 2001; Nobuo Hayashi, *Requirements of Military Necessity in International Humanitarian Law and International Criminal Law*, 28 B.U. INT'L L.J. 39, 87-88 (2010).

200. Compromis ¶39.

201. AP I, art.52(2) (defining "military objective" as an object that makes an effective contribution to military action and whose destruction offers a definite military advantage).

202. Compromis ¶39.

203. Hague Convention, art.4(1); ICRC, Database, rule 39.

of states,[204] including those not party to the Convention.[205] Therefore, since Andler made Mai-Tocao a military objective, she contributed to the situation of necessity and thus cannot rely upon the exception.[206]

B. The destruction of the Mai-Tocao building was an illegal act of reprisal

Reprisals are acts of self-help committed in response to a perceived violation of international law to compel the offending state to cease its actions.[207] Andler destroyed a building in Mai-Tocao to stop what she characterized as the ENI's "unlawful military operation."[208] Therefore, that destruction constitutes a reprisal against cultural property, prohibited in customary rules described in the Hague Convention and Additional Protocol I.[209] This prohibition is accepted throughout the international community,[210] including by states not party to the Hague Convention.[211] Therefore, Andler's act of reprisal violates the prohibition on reprisals against cultural property, which does not permit any military necessity exception.

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204. *See* the military manuals of Argentina (cited in ICRC, Practice, §301); Australia (§302); Canada (§§303-4); Croatia (§305); Germany (§§306-7); Israel (§308); Italy (§§309-10); Netherlands (§§312-13); Nigeria (§316); Russian Federation (§317); South Africa (§318); Spain (§319); Sweden (§320); Switzerland (§§321-22).

205. *See* the military manuals of Kenya (*cited in id.*, §311); New Zealand (§314); United States (§324-29).

206. ARSIWA, art.25; *Gabčíkovo-Nagymaros Project (Hung. v. Slovk.)*, 1997 I.C.J. 7, ¶52.

207. BROWNLIE, 466; PETER MALANCZUK, AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW, 351 (7th ed. 1997); SHAW, 1023.

208. Compromis ¶40.

209. Hague Convention, art.4(4); AP I, art.53(c); ICRC, Database, rule 147.

210. *See* the practice of Argentina (*cited in* ICRC, Practice, §§960, 991); Australia (§§961-62); Azerbaijan (§992); Belgium (§963); Burkina Faso (§965); Cameroon (§966); Canada (§967); Colombia (§993); Congo (§968); Croatia (§969); France (§§970-71); Germany (§§972-74); Hungary (§975); Indonesia (§976); Italy (§§977, 994); Netherlands (§§979-80); New Zealand (§981); Spain (§§982, 995); Sweden (§983); Switzerland (§§984, 996).

211. *See* the practice of Benin (*cited in id.*, §964); Kenya (§978); Togo (§985); United States (§§987-989).

PRAYER FOR RELIEF

The Federal Republic of Rantania respectfully requests this Honorable Court to adjudge and declare that:

1. The Andler regime and its representatives appear in the name of the Republic of Aprophe before this Court, and thus the Court has no jurisdiction over the Applicant's claims.
2. The use of force against Aprophe in the context of Operation Uniting for Democracy is not attributable to Rantania, and in any event, that use of force was not illegal.
3. The exercise of jurisdiction by Rantanian courts in the case of *Turbando, et al., v. The Republic of Aprophe* was consistent with International Law, and therefore Rantanian officials may execute the judgment in that case.
4. Aprophe violated International Law by destroying a building of the Temple of Mai-Tocao.

Respectfully submitted,

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Agents for Rantania