

# THE JOURNAL

## of International Policy Solutions

The Relationship  
Between Human  
Trafficking, the  
Japanese Commercial  
Sex Industry,  
and the Yakuza:

Recommendations for the  
Japanese Government

Amanda M. Jones –  
University of Michigan

Crushing the Crescent:  
The Tashkent Approach  
in Regulating  
Independent Islam

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International  
Environmental Claims  
Under the Alien Tort  
Claims Act

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University of Montana



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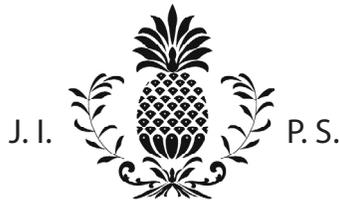
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**W**ELCOME TO the Spring 2011 edition of the Journal of International Policy Solutions! You may have noticed that it has been a year since our last issue. Our editorial board decided to adopt a once-a-year publication schedule in order to maximize the quality of our publication, and we hope you'll appreciate the difference in the depth of the articles and the professionalism of the design.

The past year has been exciting and tumultuous, both at the University of California, San Diego and throughout the world. From political upheaval in the Middle East to catastrophic natural disasters, there is an acute need for well-reasoned, well-researched, and well-presented policies and solutions. As I prepare to graduate, I am inspired by the intelligence and compassion of my peers at IR/PS. The future looks bright when there are so many talented people thinking about how to make the world a better place.

This edition contains fascinating analysis and perspectives from around the world. Amanda M. Jones of the University of Michigan writes about the relationship between human trafficking, the Japanese commercial sex industry, and the yakuza organized-crime syndicate while providing pragmatic policy recommendations to the Japanese government. Kate B. Wilkinson from the Elliott School of International Affairs at George Washington University presents a fascinating account of Uzbekistan's crackdown on religious activities and its effect on national security. Claudia V. Espinosa and Greg Lestikow of IR/PS explore Argentina's foreign policy through various presidential administrations and weigh the Latin American nation's chances for regional leadership. Finally, University of Montana law student Anna Saverud offers a legal perspective on a U.S. statute that may be effective in addressing international environmental claims.

Next year's issue will be published by the IR/PS class of 2012 under the guidance of Editor in Chief Lis Best. Here's wishing the new editorial board—and the world—a great year! Thank you for reading!

Best wishes,  
Abigail Aronofsky  
Editor in Chief

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the relationship  
between human  
trafficking,  
the japanese  
commercial sex  
industry,  
and the yakuza:

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Recommendations for the Japanese  
Government in Their Efforts to Combat  
Human Trafficking

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By Amanda M. Jones  
University of Michigan | Gerald R. Ford School of Public Policy  
Edited by Kieran Cusack

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**H**UMAN TRAFFICKING, a criminal act perpetrated for centuries, results in a loss of an individual's human rights, increases global health risks such as HIV/AIDS, and promotes the growth of organized crime. Although the United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN TIP) entered into force in 2003, reports indicate that human trafficking, especially that involving sexual exploitation, continues to be an issue in Japan. Reports indicate that the Japanese government implemented some of the policies required by UN TIP and has the resources to carry out these policies, but suggest that Japanese officials lack the will to carry out these policy initiatives to combat human trafficking. This lack of will by government officials appears to be related to three key factors: the demand for sex by Japanese citizens, the prevalence of sex within the Japanese culture, and the level to which the yakuza, an organized criminal organization, is engrained in Japanese society—economically, politically, and historically. To decrease human trafficking in Japan, government officials should implement policies aimed at decreasing demand for the commercial sex industry, dismantling the yakuza, increasing support for the identification of victims, and developing a regional partnership against human trafficking.

## INTRODUCTION

Human trafficking is a global issue that is only recently being recognized with global action. The United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN TIP), the first global initiative of its kind, entered into force in 2003. This protocol defined human trafficking in order to set an international standard for the criminalization and prosecution of trading in persons.

Both the UN and the U.S. Department of State conduct global reviews of state actions to prevent human trafficking. Both reports indicate that human trafficking, especially in relation to sexual exploitation, continues to be an issue in Japan. Their reports indicate that Japan implemented some of the policies required by UN TIP and has the resources to carry out these policies, but suggest that Japanese officials lack the will to carry out these policy initiatives to combat human trafficking. This lack of will by government officials appears to be related to three key factors:

- The demand for the Japanese sex industry
- The prevalence of sex within the Japanese culture
- The level to which the yakuza, gatekeepers to the commercial sex industry, are engrained economically, politically, and historically in Japanese society

The yakuza worked with the Japanese government during World War II to provide Imperial soldiers with "comfort women." From that time, the yakuza expanded into sex tourism, human trafficking of women to Japan, and pornographic enterprises, in addition to gambling businesses and the trafficking of drugs and weapons. The yakuza developed

relationships with other organized-crime syndicates abroad to globalize their network and promote and establish their legitimate and illegitimate businesses.

Upon visiting Japan, tourists are bombarded by bright lights and advertisements, many of which advertise for "massage parlors" or call-girl services. Often, these shops serve as fronts for large-scale prostitution rings. The shops in question are successful enough to stay in business, which indicates there is a high demand for the commercial sex industry in Japan.

To decrease human trafficking in Japan, government officials should implement policies aimed at decreasing demand for the commercial sex industry, dismantling the yakuza, increasing support for the identification of victims, and developing a regional partnership against human trafficking.

## A GLOBAL ISSUE: HUMAN TRAFFICKING

Human trafficking is a criminal act that results in the loss of an individual's human rights, increases global health risks such as HIV/AIDS, and promotes the growth of organized crime. The UN defines human trafficking as:

"the recruitment, transportation, transfer, harboring, or receipt of persons, by means of the threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of the giving or receiving of payments or benefits to achieve the consent of a person having control over another person, for the purpose of exploitation."<sup>1</sup>

<sup>1</sup> United Nations, "Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children," [http://www.uncjin.org/Documents/Conventions/dcatoc/final\\_](http://www.uncjin.org/Documents/Conventions/dcatoc/final_)

Exploitation may include forced labor, sex slavery, domestic servitude, forced marriage, organ removal, ritual killings, and the use of children for begging and warfare. The definition of human trafficking applies to the exploitation of people domestically, regionally, and/or globally.

Although human trafficking has existed for centuries, the demand for the criminalization of human trafficking did not gain widespread support until the late 1990s. In 1999, the U.S. and Argentina presented a proposal to the United Nations for a protocol against human trafficking. The UN adopted the UN Convention against Transnational Organized Crime in November 2000, and the affiliated UN Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children (UN TIP) came into force in December 2003. The UN released its first global human-trafficking report and launched a global awareness campaign in February 2009.

As of November 2008, 63 percent of the 155 countries reviewed by the UN had passed laws against human trafficking. An additional 16 percent of countries surveyed had passed anti-trafficking laws covering some aspects of UN TIP, and the number of signatory countries to UN TIP had reached 117 by 2011. Despite these protocols, though, the UN reports indicate that human trafficking increased over the last year.

The U.S. Department of State began researching global human-trafficking trends in 2000 and has since released ten comprehensive reports on the subject. The exact number of humans trafficked annually is unknown, but the Department of State estimates that 800,000 people are trafficked across borders each year (this figure does not include

domestic trafficking of persons), 80 percent of those trafficked are women and girls, and up to 50 percent of victims are minors.<sup>2</sup> Seventy-nine percent of human trafficking is conducted for the purposes of sexual exploitation.<sup>3</sup>

### THE HISTORY OF HUMAN TRAFFICKING FOR SEXUAL EXPLOITATION IN JAPAN

The issue of human trafficking for the purpose of sexual exploitation is nothing new to the people of Japan. The commercial sex industry has flourished in Japan since before World War II. During World War II the yakuza, an organized-crime syndicate, worked in conjunction with the Japanese government to provide sex slaves or “comfort women” to the members of the Imperial Army. The majority of these “comfort women” were exported from South Korea and other Asian countries after being attacked by the Japanese army.<sup>4</sup> After World War II, the yakuza operated brothels for American servicemen to utilize throughout the U.S. occupation of Japan.<sup>5</sup>

To this day, the Japanese government has refused to accept full responsibility for sponsoring human trafficking during and after World War II. Officials have claimed that women volunteered

to provide these services as a nationalistic endeavor, but neglect to mention that the majority of the women “offering” their services were Korean rather than Japanese. Despite an official statement in 1993 that acknowledged and apologized for the Imperial Forces’ involvement in the recruitment of women for prostitution, subsequent administrations provided little or no assistance to former “comfort women.” The Japanese government’s continued unwillingness to fully acknowledge these crimes against women continues to affect perceptions of prostitution and the sex industry in Japan today.

### THE GROWING INFLUENCE OF THE YAKUZA

The yakuza is one of the oldest and most complex organized-crime networks in the world. The yakuza can trace its origins to the seventeenth century and the traditions of the samurai, but their name stems from a losing hand in a game of cards. Early in their existence, the yakuza served as groups of gambling and labor bosses. These highly organized groups helped the central government procure laborers for many construction projects. The yakuza became further entrenched in Japanese political society in the late 1800s when the Meiji regime requested help in raising an army to fight against the Tokugawa regime. Throughout this period and into the twentieth century, the yakuza continued to expand their influence in the gambling sector and in other illicit activities while increasing their acceptance within Japanese society through political and business connections.

After helping the Japanese government procure “comfort women” for Japanese and then American soldiers, the yakuza continued to promote the commercial sex industry in Japan. Although geisha had existed

for centuries in Kyoto and elsewhere, the development of the commercial sex industry during the economic recovery of the 1950s was increasingly widespread, lucrative, and extensive.

### THE YAKUZA AND HUMAN TRAFFICKING

The 1970s and 1980s proved to be a prosperous time for Japan and the yakuza. Toward the end of the 1960s, the tourism industry exploded as Japanese citizens earned larger incomes and a strong yen made travel abroad relatively inexpensive. However, tourism was not utilized to strengthen cultural education. Rather, Japanese men lined up at airports to experience wild weekends abroad with an itinerary focused on sex parties. Although the yakuza did not invent sex tourism, they capitalized on this new tourism frenzy by organizing large-scale sex tours throughout East Asia.

The yakuza first exploited this new industry in Taiwan and Korea. In Korea, they organized trips to kisaeng parties. Kisaeng is a Korean word traditionally associated with female entertainers similar to Japanese geisha, but with the influx of tourists these women simply became known as prostitutes. By the end of the 1970s more than 650,000 Japanese citizens visited Korea annually, with 80 percent of visitors listing kisaeng as the primary focus of their trip.<sup>6</sup> Sex tourism became so popular that major transportation carriers such as Japan Airlines listed kisaeng parties among the recommended tourist activities in their guidebooks for Korea.<sup>7</sup>

During the 1970s, the yakuza expanded the sex tourism industry to Thailand and the Philippines, where many sex workers

documents\_2/convention\_%20traff\_eng.pdf (Accessed 14 April 2009).

2 U.S. Department of State, “Trafficking in Persons Report 2008,” Introduction, pp. 1-53, June 2008, <http://www.state.gov/documents/organization/105655.pdf> (Accessed 14 April 2009).

3 UNODC, “Global Report on Trafficking in Persons,” February 2009, [http://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/Global_Report_on_TIP.pdf) (Accessed 14 April 2009).

4 Rollie Lal, “Chapter 10: Japanese Trafficking and Smuggling,” in *Transnational Threats: Smuggling and Trafficking in Arms, Drugs, and Human Life*, edited by Kimberly Thachuk. 2007. Westport, CT: Greenwood Publishing Group, Inc.

5 Roth, Mitchell P. *Organized Crime*. 2010. Upper Saddle River, N.J.: Pearson Education, Inc.

6 Kaplan, David E. & Dubro, Alec. *Yakuza: Japan's Criminal Underworld*. 2003. Berkeley: University of California Press.

7 Ibid.

were sold into sex slavery by their poor families. The yakuza did not control the industry in these countries; instead, they worked with local gang members to bribe village leaders to convince families to sell their daughters into the sex industry. The yakuza also financed and operated many of the clubs that Japanese men frequented abroad.

In the early 1980s, sex tourism began to receive negative attention. Women's protest groups popped up throughout Japan and pressured the prime minister to put a halt to sex tourism. While sex tourism decreased as a result, overall demand for the commercial sex industry did not. The yakuza changed their tactics and began to import foreign women so Japanese men would not have to risk traveling abroad for sex. The yakuza employ the same tactics other criminal groups use to lure vulnerable foreign women into sex slavery, such as advertising for high-paying jobs and marriage contracts. Japanese men continue to travel abroad for sex with children—but the yakuza focus their efforts on importing foreign women and, more recently, forcing domestic women into the pornography and prostitution businesses.<sup>8</sup>

### RESPONSE TO HUMAN TRAFFICKING BY JAPANESE OFFICIALS

Japan has not ratified the United Nations' Protocol to Prevent, Suppress and Punish Trafficking in Persons (UNTIP).<sup>9</sup> Although several news stories highlighted the plight of foreign sex slaves in Japan throughout the 1990s, the Japanese government did little to decrease human trafficking until 2004. In 2004 the

U.S. Department of State placed Japan on its "Tier 2 Watch List," which harmed Japan's image as a safe and relatively crime-free country and motivated the Japanese government to act.<sup>10</sup>

To counteract negative media attention, Japanese officials created and implemented a National Plan of Action to combat human trafficking in 2004; in 2005, it was expanded to include the offense of buying and selling human beings. The government also defined trafficking in persons in Article 2 of the Immigration Control Act of 2006, criminalizing all forms of exploitation defined in Article 3 of the UNTIP. In order to prevent the human trafficking of sex workers, the Japanese government created a massive awareness campaign, distributing 25,000 trafficking awareness posters to police stations, foreign embassies, and consulates. The government disseminated 500,000 brochures throughout the nation detailing the traumas faced by trafficked persons, and provided information on how to receive assistance. The government also donated \$79,000 to a Thai NGO for the construction of a dormitory for vulnerable Thai citizens in Japan.

The Japanese government provides various services to victims of human trafficking in accordance with UNTIP, such as legal protection and legal services, temporary stay programs, medical and psychological support, housing and shelter, and repatriation assistance. The government created the Women's Consulting Office to aid battered women in the 1990s, but it now also serves as a refuge for trafficked women. As of 2006, the Women's Consulting Office had 47 offices throughout the country with the ability to house 720 women at any point in time.

### THE PROMULGATION OF THE SEX INDUSTRY IN JAPAN

#### Demand for the Commercial Sex Industry

Sex has played a prominent role in the Japanese culture for centuries. Shunga, which refers to erotic art and pornographic paintings and woodblock prints, dates back to the Edo period of the seventeenth to nineteenth centuries. Although pornography has changed greatly since that time, it is still a mainstay in Japanese culture. Hentai Anime is a type of pornographic comic originally created in Japan and now exported around the world; it is estimated to net \$20 million in sales in the U.S. alone. There are more than 1,000 companies in Japan producing more than 30 new legal and illegal adult videos per day, which are sold in stores and vending machines.<sup>11</sup> The production companies operate "adult video acting schools" for young women, and many of these actresses have online fan clubs. Although it is illegal to produce child pornography in Japan, it is not illegal for Japanese citizens to own or possess child pornography. Many critics relate the acceptance of child pornography to the continued demand for sexual exploitation of children by Japanese men. According to the U.S. Department of State, Japanese men still utilize sex tourism to have sex with children abroad.<sup>12</sup>

Surveys conducted throughout Japan indicate that over 50 percent of men have paid for sex, and 75 percent of junior and high school girls have been solicited

by middle aged men.<sup>13</sup> These survey results and the prevalence of sex-related shops throughout Japan indicate that the demand for sex is integrated within the Japanese culture, and has been for centuries. "Massage parlors" typically serve as fronts for the commercial sex industry. The yakuza were responsible for opening the first "massage parlors" throughout Japan, and continue to operate the majority of these shops. This industry has expanded to include "soaplands," bathhouses where men receive personal bath experiences from a beautiful young helper; "fashion-health delivery services," for home-delivery escorts; "image clubs," where men can live out their fantasies with their choice of women in themed rooms; and "pink salons," semi-public pubs where men can receive oral sex while enjoying sake or beer. These shops have been able to subvert the anti-prostitution laws by limiting their advertising to the non-intercourse services offered.

One signal that Japanese women are pushing for a change in this culture is the demand for female-only subway cars during rush hour. The groping of women on railways is a common practice for chikan, Japanese for pervert. More than 2,000 arrests were made for the molestation of women on railways in 2008 alone, but experts believe this number represents only a tiny fraction of those women accosted annually on public transit.<sup>14</sup> The punishment for sexually harassing a woman on a train or elsewhere is minimal and unlikely to alter behavior patterns.

### YAKUZA—A MAINSTAY OF JAPANESE CULTURE

The yakuza enjoy a relative ac-

8 U.S. Department of State, "Trafficking in Persons Report 2008," Introduction, pp. 1-53, June 2008, <http://www.state.gov/documents/organization/105655.pdf> (Accessed 14 April 2009).

9 Ibid.

10 Rollic Lal, "Chapter 10: Japanese Trafficking and Smuggling," in *Transnational Threats: Smuggling and Trafficking in Arms, Drugs, and Human Life*, edited by Kimberly Thachuk. 2007. Westport, CT: Greenwood Publishing Group, Inc.

11 Japan Visitor, "Sex Glossary," <http://www.japanvisitor.com/index.php?cID=365&pID=387&cName=Sex&pName=culture-sex-glossary> (Accessed 14 April 2009).

12 U.S. Department of State, "Trafficking in Persons Report 2008," Introduction, pp. 1-53, June 2008, <http://www.state.gov/documents/organization/105655.pdf> (Accessed 14 April 2009).

13 Japan Visitor, "Sex Glossary," <http://www.japanvisitor.com/index.php?cID=365&pID=387&cName=Sex&pName=culture-sex-glossary> (Accessed 14 April 2009).

14 Ibid.

ceptance by the people, national government, and local police forces of Japan. For decades the yakuza have offered services that even the national government approved, albeit not publicly. Japan places a cap on the number of lawyers allowed to practice in the country, and the government is known for its reluctance to litigate. In Japan, there is approximately one lawyer per 8,500 people; by contrast, in the United Kingdom there is one lawyer per 900 people, and in the U.S. there is one lawyer per 400 people.<sup>15</sup> Due to the scarcity of lawyers in Japan, it is very expensive to file civil suits. Some members of the yakuza have become known as *urashakai no bengosh*, or “lawyers from the dark side of society,” and are increasingly used by citizens to solve disputes. David Kaplan and Alec Dubro unearthed a poll from 1993 which found that “23 percent of men and 17 percent of women believed that hiring gangsters to collect money, obtain contracts, or settle disputes by threatening violence is ‘not bad’ or ‘can’t be helped.’”<sup>16</sup>

In addition, the yakuza and the police force lead a relatively peaceful coexistence and are often on a first-name basis with one another. Many attribute Japan’s generally low violent crime rates to the yakuza, because organized crime in Japan is less violent than unorganized crime. For instance, if an individual hoodlum commits a violent crime in a neighborhood “owned” by yakuza affiliate, the yakuza are likely to punish this individual before the police even hear about the crime. This coexistence is also sponsored by bribes and payoffs. To appear as though the police force is above corruption, law enforcement officials periodically stage large-scale crackdowns on the gangs. These “busts” are general-

ly orchestrated and serve as publicity stunts for the newspapers.

Corrupt relationships between yakuza members and high-level businessmen and politicians also exist. When the Japanese economic bubble of the late 1980s popped, the level of yakuza influence in corporate business became more apparent. The yakuza were widely blamed for inflating the economic bubble by coercing banks into giving large loans to unapproved individuals and corporations. In the early 1990s, the police and the government cracked down on the yakuza by passing more stringent laws against racketeering and tax laws in an attempt to tax the earnings of the gangster class. However, shortly after implementing these new laws the prime minister pardoned a top member of the yakuza. Kaplan and Dubro expertly describe what these actions do to the criminal culture of Japan: “Tolerance of organized crime breeds acceptance, and this in turn allows the underworld a greater opportunity to expand, to seek new venues and new businesses. The message of tolerance, moreover, is not merely received by organized crime, but by criminals and corrupt officials across the nation.”<sup>17</sup>

With new laws limiting the yakuza’s ability to inflict corporate extortion, the yakuza quickly expanded their smuggling portfolio to drugs, guns, and humans. The punishment for trafficking drugs and weapons is relatively harsh in Japan compared to the punishment for trafficking humans or for running prostitution rings. Therefore, the yakuza used a large proportion of their resources to expand their connections throughout Asia for the purposes of human trafficking throughout the 1980s, 1990s, and into the twenty-first century.

### THE YAKUZA CONNECTION ABROAD

Between 2005 and 2006, the Japanese National Police Agency (NPA) found that 40 percent of identified human trafficking victims were Filipino, 33 percent were Indonesian, 14 percent were Thai, eight percent were Chinese/Taiwanese, and three percent were Russian or East European.<sup>18</sup> The yakuza maintains strong ties with Filipino business leaders and bureaucrats, with various gangs throughout the Golden Triangle (Burma, Laos, and Thailand), the Chinese Triads, and the Russian mob; the nationalities of identified victims provide ample evidence for these connections.

Starting with the sex tours of the 1970s, the yakuza quickly expanded their operations into the Philippines. The Philippines now serves as the hub of their international operations, and the nation’s thousands of tiny islands provide myriad opportunities for stashing drugs, weapons, and people. Yakuza members infiltrated Filipino businesses and forged strong ties with leading bureaucrats through bribes that have enabled them to enjoy relatively easy passage throughout the Philippines. Many of the larger yakuza groups established business offices in Makati, the Wall Street of the Philippines, to run their legitimate and illegal businesses. Working with Filipino gangs, yakuza members set up more than 30 clubs and bars in the Ermita red light district, and began funneling people out of the Philippines and into Japan.

A 1998 study conducted by Chulalongkorn University in Thailand estimates that the illegal activities of organized crime in Thailand is worth \$8 billion to \$13 billion per year, with illegal gambling and prostitution serving as the two largest com-

ponents.<sup>19</sup> The yakuza’s ties to Thailand began with the sex trade, but quickly expanded to include gambling and drugs. By 1990, it was estimated that more than 200 yakuza resided permanently in Thailand to organize operations throughout the region. Working with various gangs throughout the region, the yakuza recruits young women from poor, rural locations into the sex industry. Many go willingly with promises of lucrative jobs, but others sold into the industry by their impoverished families.

The yakuza’s relationship with the Triads of Hong Kong formed in the late 1970s. The yakuza began setting up nightclubs and travel services throughout the busy metropolis and, rather than kicking them off the island, the Triads warily welcomed the yakuza. Together, they were able to expand their drug- and human-trafficking routes throughout East Asia. Although there is no fear that the two gangs will merge to form a concerted Asian Mafia, their ability to expand their operating networks together is concerning. Evidence now exists that their partnership has expanded outside Hong Kong into Thailand, Taiwan, Macao, and San Francisco. In these locations, the Triads are able to help provide the yakuza with women and children for the sex industry in the Japan.

After the fall of the Soviet Union, the Russian Mafia grew out of the rubble and expanded their reach across the entire globe. Although the Russian Mafia and the yakuza do not have strong, organized ties, they have collaborated extensively in the stolen-car and human-trafficking markets. With the help of the yakuza, the Russian Mafia has secured thousands of visas for Russian and East European “entertainer” women they help export to Japan. In 1995, more

15 Kaplan, David E. & Dubro, Alec. *Yakuza: Japan’s Criminal Underworld*. 2003. Berkeley: University of California Press.

16 *Ibid.*

17 *Ibid.*

18 UNODC, “Global Report on Trafficking in Persons,” February 2009, [http://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/Global_Report_on_TIP.pdf) (Accessed 14 April 2009).

19 Kaplan, David E. & Dubro, Alec. *Yakuza: Japan’s Criminal Underworld*. 2003. Berkeley: University of California Press.

than 5,000 of these visas were approved by the Japanese immigration services, representing a fifth of all approved Russian visas for Japan that year.<sup>20</sup>

Due to these increasingly transnational gang connections, breaking the chain of human trafficking would prove to be incredibly difficult. If one connection or source were to be severed, another connection in another part of the world would surely be created as the yakuza's network spans the globe. Any approach to disrupting the yakuza's illegal global activities would have to be performed in a multilateral forum to ensure that governments around the world would help clamp down on organized crime simultaneously. Unfortunately, many governments of developing countries direct more attention to rooting out government corruption and place little emphasis on addressing organized crime.

### THE STRUGGLE TO REDUCE HUMAN TRAFFICKING

#### Japanese Response to Human Trafficking: Is it Working?

After being placed on the Human Trafficking "Tier 2 Watch List" by the U.S. Department of State, Japanese officials energetically pursued several new legislative policies aimed at cracking down on human trafficking. The government also promoted an anti-trafficking campaign throughout the country and increased funding for NGOs protecting vulnerable foreign groups within Japan. These regulations and campaigns resulted in a large increase of prosecutions and identification of victims of human trafficking in 2005. In addition, the Japanese police force shut down a large number of sex shops purportedly providing prostitution services and cleaned up some of the seedier areas in Tokyo's red-light districts.

20 Ibid.

After 2005, though, the Japanese government again paid less attention to the plight of victims being trafficked into the country for the commercial sex industry. The number of victims identified decreased two years in a row. In 2005, 116 victims were identified, but this number decreased by half to 58 in 2006 and decreased yet again in 2007 to only 43 victims. The number of victims reaching out to NGOs and help hotlines indicates that the actual number of trafficked victims is larger than the statistics cited by the Japanese government. This suggests the unlikelihood that the number of humans trafficked into Japan has actually decreased in the last few years; it is more likely that the commercial sex industry has moved underground.

In addition, the number of prosecutions for human trafficking decreased in 2007 from 17 in 2006 to 11 in 2007. Of the 12 offenders convicted in the 11 prosecuted cases in 2007, seven of those convicted received sentences between two to four years, and five received suspended sentences. By comparison, those convicted of human trafficking operations in the U.S. receive a minimum of ten years in prison with the possibility of a life sentence.

Although Japan offers many services to victims of human trafficking, they are not widely advertised. The NPA lacks language experts to help translate foreign victims' testimony, and foreign victims are not often educated on their rights to legal aid, temporary stay programs, and repatriation assistance. Against protocol, Japanese officials repatriated 16 of 43 victims in 2007 without referring them to the International Organization for Migration (IOM) for risk assessment and formal repatriation. Many of these women may have become victims of reprisals in their own country because Japanese officials did not appropriately gauge the risk of sending

them back to their home countries. Additionally, because of the yakuza's continued ability to infiltrate the police forces, many victims are scared to approach the police for help because they fear being returned to their handlers.

As previously mentioned, many critics of Japan's policies believe the commercial sex industry has moved underground, making it more difficult for Japanese police agencies to identify victims and disrupt these businesses. These fears are not unfounded. In the first half of 2007, the NPA identified 773 Japanese children who had been prostituted or exploited in child pornography.<sup>21</sup> This statistic also raises concerns that domestic human trafficking is on the rise within Japan, as immigration officials have been trained more thoroughly to identify trafficked foreigners. Because human trafficking comprises the exploitation of imported foreigners and domestic workers, new legislation and training of police forces concerning human trafficking must include protocols for identifying and aiding foreign and domestic victims.

Policies Utilized to Combat the Sexual Exploitation of Trafficked Humans in Other Countries.

Trafficking in persons for the purpose of sexual exploitation continues to be a problem in almost every country. Because there is no exact method for calculating the extent of the problem, it is difficult to measure the effectiveness of programs implemented to stem human trafficking. Regardless of this measurement issue, some countries have created policies and/or media campaigns to alter perceptions concerning the sex industry and human trafficking. These programs aim to improve education

21 U.S. Department of State, "Trafficking in Persons Report 2008," Japan Country Profile, pp. 149-152, June 2008, <http://www.state.gov/documents/organization/105658.pdf> (Accessed 14 April 2009).

and decrease demand for the sexual exploitation of trafficked humans.

In its 2008 report on human trafficking, the U.S. Department of State recognized national campaigns in Madagascar, Brazil, and France for increasing awareness about human trafficking.<sup>22</sup> The government of Madagascar distributed a film highlighting the dangers of child sex tourism to schools throughout the country in the hopes of educating youth about various scams human traffickers may utilize to ensnare them. With a similar goal in mind, the government of Brazil implemented a national awareness campaign that described the crimes and punishments associated with human trafficking and provided contact information for those seeking help. Brazil's national awareness campaign was broadcast in several languages so vulnerable foreigners could access the information. France's state-controlled airline, Air France, shows in-flight videos that define the crime of human trafficking and the associated penalties. These campaigns have successfully educated large numbers of people about the dangers of human trafficking.

In 1999, Sweden criminalized the purchase and brokering of sexual services and decriminalized the selling of sexual services with the hope of decreasing human trafficking. This was the first policy of its kind, and was not warmly received in Sweden or elsewhere. Many feared that prostitution would move underground or that those women who knowingly offered these services would be subject to higher rates of sexually transmitted diseases and abuse. Initially, the policy focused solely on the penalties associated with the new crime but did little to support women in-

22 U.S. Department of State, "Trafficking in Persons Report 2008," Introduction, pp. 1-53, June 2008, <http://www.state.gov/documents/organization/105655.pdf> (Accessed 14 April 2009).

involved in prostitution. More recently, the Swedish government has begun to offer services to help prostitutes emerge from the commercial sex industry, such as drug rehabilitation treatment programs, work training programs, and other health and psychological assistance.<sup>23</sup>

More than ten years after the implementation of this policy, evidence suggests it has been extremely effective in lowering human trafficking and overall prostitution rates. In 2008, Swedish police estimated between 400 to 600 people were trafficked into the country annually, whereas approximately 10,000 to 15,000 women were trafficked into neighboring Finland. The Swedish police also calculated that the number of active prostitutes in Stockholm dropped to between 105 and 130 women following the criminalization of the purchase of sexual services. In neighboring Finland, the estimated number of active prostitutes in Oslo exceeds 5,000.<sup>24</sup>

More important, though, the perception of the crime by Swedish nationals has changed drastically over the past decade. Initially, prosecution rates for johns, or men who solicit prostitutes for sex, were relatively low as cops did not initially accept the law. This perception has changed as law enforcers began to accept that prostitution is not a normal business; the number of johns prosecuted increased from 11 in 1999 to 108 in 2006.<sup>25</sup> The overall perception of paying for sex also changed significantly in this time period. In 1996, three years before the ban was implemented, only 30 percent of the population felt it was wrong to pay for sex. A similar survey conducted

in 2008 indicated that 70 percent of respondents favored maintaining the criminalization of payment for sex.<sup>26</sup> These cases signify a shift in the “norm” with regard to attitudes toward payment for sex. Changing norms ultimately decrease the overall demand for the commercial sex industry.

In January 2009, the Norwegian government implemented a similar policy to that of Sweden to decrease human trafficking, and the UK is currently discussing the implementation of similar measures.<sup>27</sup> Jacqui Smith, former UK Home Secretary, launched a campaign to punish men who pay for sex with trafficked women. Although prostitution and “persistent soliciting” are illegal, paying for sex is not currently illegal in the UK.<sup>28</sup>

## RECOMMENDATIONS

### Sign and Ratify the UNTIP

By signing the UNTIP, Japanese officials would demonstrate to the world and to their own citizens that they recognize the gravity of human trafficking. By accepting responsibility for combating national and international human trafficking, Japanese officials would set a standard in Japan and help force a shift in beliefs concerning the commercial sex industry.

### Force a Shift in the Norm

As the Swedish case indicates, it is possible to alter national perceptions in a relatively short

time period. The demand for the commercial sex industry remains high throughout Japan and the relative acceptance of organized crime through the yakuza—the primary instigator and facilitator of human trafficking in Japan—induces an environment in which human trafficking thrives. In order to alter this environment, the Japanese government must prove it has the political will to combat human trafficking. The following actions should be taken to decrease demand for the commercial sex industry:

- Follow Sweden’s lead – Criminalize the act of paying to have sex with trafficked women and children. This policy would need to be implemented in conjunction with increased funding for victim support services, such as health and psychological services. This policy formulation is gaining traction in the Netherlands, where prostitution is currently legal, as there is little evidence to indicate that legalization of prostitution has decreased crime as originally expected.<sup>29</sup>

- Increase prosecutions – Japan currently has multiple statutes that address human trafficking (albeit not an all-inclusive, comprehensive anti-trafficking law). One of these laws allows the Japanese government to prosecute Japanese nationals for crimes committed overseas, but it has not been used since 2005. According to the U.S. Department of State, Japanese men continue to travel abroad to have sex with children and thus violate the Japanese law protecting minors from abuse. If such criminal activities were prosecuted fully, it might cause a shift in behavior.

- Criminalize possession of child porn – Although it is illegal to produce child pornography in Japan, it is not illegal to possess it. By decreasing access to child pornography, overall demand for the sexual exploitation of children will decrease.

- Increase punishments for human trafficking – The current Japanese laws against the buying and selling of persons limits prison terms to ten years. By increasing the punishment associated with human trafficking, the Japanese government can increase the stigma associated with the commercial sex industry.

- Implement large-scale anti-trafficking campaigns – Anti-trafficking campaigns should serve two purposes: 1) to educate the public about the issue of human trafficking and the associated punishments and 2) to educate victims about services available to them. Again, by creating a stigma associated with human trafficking and the commercial sex industry, the Japanese government can begin to shift perceptions surrounding the payment for sex and ultimately the demand for purchased sexual services. By increasing the identification of victims who willingly approach the police for help, police forces may increase their knowledge of current human trafficking rings.

### Dismantle the Yakuza

Although the yakuza has lost a great deal of prominence among the people of Japan over the last decade, their presence and the services they provide continue to be engrained in the Japanese culture. The Japanese government must diminish the role of the yakuza in Japanese society before they can dismantle the organization.

23 “Prostitution Ban Huge Success in Sweden,” HumanTrafficking.org, 30 January 2008, <http://www.humantrafficking.org/updates/838> (Accessed 15 April 2009).

24 Ibid.

25 Ibid.

26 Gregg Bucken-Knapp, “Swedish Attitudes Towards the Purchase of Sexual Services,”

Nordic Prostitution Policy Reform, 9 February 2009, <http://nppr.se/2009/02/09/swedish-attitudes-towards-the-purchase-of-sexual-services/> (Accessed 15 April, 2009).

27 “Europe and NZ Poles Apart on Sex Trade,” BBC, 18 March 2009, <http://news.bbc.co.uk/2/hi/europe/7933973.stm> (Accessed 15 April, 2009).

28 “Men Face Penalties Over Paying for Sex with Trafficked Victims,” 20 September 2008, <http://www.timesonline.co.uk/tol/news/uk/crime/article4791871.ece> (Accessed 15 April 2009).

29 “Europe and NZ Poles Apart on Sex Trade,” BBC, 18 March 2009, <http://news.bbc.co.uk/2/hi/europe/7933973.stm> (Accessed 15 April, 2009).

- Create a “strike force” – To combat the American Mafia, the United States established a national investigative unit, the United States Organized Crime Strike Force, to inspect organized criminal activities and collect evidence to prosecute high-ranking members of Mafia families. This body worked with other national and local law-enforcement agencies to bring members of organized crime syndicates to justice. Because the yakuza ranks as one of the top four most complex criminal organizations in the world, the Japanese government should create a specialized investigative unit within the NPA to address organized crime.<sup>30</sup>

- Implement a zero-tolerance policy for corruption – The Japanese government must alter perceptions concerning the acceptance of the yakuza. The government should crack down on police members and government officials who accept bribes from yakuza members to distort any beliefs that the government coexists peacefully with the yakuza.

- Crack down on commercial sex operations – Many commercial sex businesses advertising oral sex or call-girl services serve as fronts for full-scale prostitution rings. The Japanese police force must monitor these businesses more closely in order to detect and break up prostitution rings and collect evidence against top yakuza members. This increased surveillance may also increase the

number of victims identified.

### Increase Funding for the Identification of Victims of Human Trafficking

Japanese police forces require additional training and knowledge to unearth non-mainstream commercial sex businesses in order to identify foreign and domestic victims of human trafficking. In addition, further training should enable police forces to follow and staunch the yakuza's funding sources.

- Increase training for investigative practices concerning the commercial sex industry – With the introduction of more stringent laws aimed at decreasing human trafficking in 2005, many fear the commercial sex industry has gone underground. The decreased number of prosecutions and victims identified since 2005 may be indicative of this concealment.

- Increase the number of language experts on police forces – Once victims of human trafficking are identified, the government is expected to provide legal services for these people. Currently, the Japanese government does not employ enough language experts to care for victims. Language experts can ensure that victims receive adequate knowledge of their rights and services provided by the government and nonprofit organizations. In addition, if victims have knowledge of police capabilities through multilingual anti-trafficking campaigns, they may be more willing to seek help from local authorities.

### Work with ASEAN to Create a Regional Human-Trafficking Policy

The flow of human beings to Japan is a regional issue. More than 50 percent of persons trafficked into and within Japan are foreigners, and the large majority of those come from developing countries in Asia.<sup>31</sup> To decrease human trafficking in Japan and throughout the region, Japan should work with other members of ASEAN to create a regional, comprehensive human-trafficking policy.

- A multilateral approach – The European Union created the Council of Europe Convention on Action against Trafficking in Human Beings in December 2008 to combat the increase in human trafficking throughout the EU.<sup>32</sup> Although ASEAN member countries are not as institutionally bound as those of the EU, they can simulate the actions taken by the EU by implementing a regional policy targeting human trafficking.

- Japan must lead the way – Throughout Asia a primary concern is the need to combat poverty, which serves as a catalyst for many of the schemes the yakuza and other gangs utilize to deceptively recruit sex workers. Japan will need to provide funding to many of these countries (particularly the Philippines, Thailand, and Indonesia) for national campaigns aimed at educating the population about tactics employed to trick or coerce citizens into sex slavery.

- Regional action against organized crime – Japan should also offer funding for the training of immigration officials and police forces in ASEAN countries, enabling regional partners to identify potential victims of human trafficking. In addition to funding, Japan should provide better intelligence to other countries concerning the identities of yakuza members and international gang connections so that police forces can intercept criminals abroad. With more funding, training, and better intelligence, ASEAN can attempt to weaken links between the yakuza and other regional organized-crime syndicates.

## CONCLUSION

Human trafficking is a complex issue, and the Japanese government will need to conduct a multifaceted approach, as outlined above, to eliminate human trafficking in Japan. The Japanese government faces several barriers to enacting policies regarding human trafficking; for example, the criminal organizations that orchestrate human trafficking are highly organized and often include influential members of society. In addition, people's perceptions concerning the sex industry and the victims of human trafficking can hamper the government's ability to propose the large-scale changes necessary for eliminating human trafficking. Due to these and other obstacles, change will not happen overnight. However, the approaches discussed in this analysis will enable the Japanese government to slowly eliminate the barriers associated with human trafficking and work toward the elimination of this criminal activity.

<sup>30</sup> “Wide Angle – Business of Human Trafficking: Criminal Groups,” PBS, 23 September 2003, <http://www.pbs.org/wnet/wideangle/episodes/dying-to-leave/business-of-human-trafficking/criminal-groups/1423/> (Accessed 14 April 2009).

<sup>31</sup> UNODC, “Global Report on Trafficking in Persons,” February 2009, [http://www.unodc.org/documents/Global\\_Report\\_on\\_TIP.pdf](http://www.unodc.org/documents/Global_Report_on_TIP.pdf) (Accessed 14 April 2009).

<sup>32</sup> Council of Europe, “Action Against Trafficking in Human Persons,” [http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/FSCConv\\_en.asp#TopOfPage](http://www.coe.int/t/dghl/monitoring/trafficking/Docs/Convntn/FSCConv_en.asp#TopOfPage) (Accessed 19 April 2009).



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# crushing the crescent:

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The Tashkent Approach in Regulating  
Independent Islam

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## ABSTRACT

AS RADICAL ISLAM becomes a more permanent feature in the global system, governments are increasingly inventing new ways to regulate and moderate religious practice. The fear of losing control over vital national interests has led many newly independent states to adopt repressive policies toward Islam. The state of Uzbekistan in particular has pursued one of the most restrictive policies regarding Islam in Central Asia. In the name of domestic security, the Uzbek government maintains that its strong control over independent religious practice prevents radicalization and terrorist activity. At the same time, much has been written about the human rights abuses allegedly committed by the government in order to suppress organizations and individuals that don't fit neatly into the purview of state-sponsored Islam. This paper will examine the formation of this policy to explain how historical precedent and current events helped shape the government's approach toward religion. It will then look at the policy itself, analyzing the rhetorical, legal, and policing framework in place to regulate religion. Finally, it will address some potential effects of this policy to examine how they form a comprehensive approach toward regulating independent Islam, and shed some light on whether it is possible to say that the Uzbek campaign against religion has either increased or decreased domestic security in the form of stability.

## INTRODUCTION

As radical Islam becomes a more permanent feature in the global system, governments are increasingly inventing new ways to regulate and moderate religious practice. The fear of losing control over vital national interests has led many newly independent states to adopt repressive policies toward Islam. The state of Uzbekistan in particular has pursued one of the most restrictive policies regarding Islam in Central Asia, and out of 43 countries profiled, sociologist Matthew Fox claims that "No Muslim state engages in more regulation of Islam than does Uzbekistan."<sup>1</sup> While the conclusion may be slightly overstated, it illustrates a general trend in Uzbekistan, given the government's dualistic approach of promoting organized state religion as "truly Uzbek" and restricting what President Islam Karimov deems "foreign strands" of Islam that lead to terrorism.<sup>2</sup>

In the name of domestic security, the Uzbek government maintains that its strong control over independent religious practice prevents radicalization and terrorist activity. At the same time, much has been written about the human rights abuses allegedly committed by the government in order to suppress organizations and individuals that don't fit neatly into the purview of state-sponsored Islam. Several scholars, including Edwin Bakker and T. Jeremy Gunn, assert that such strong repression will have the eventual effect of radicalizing the Uzbek population, thereby

precipitating the heightened tensions and decreased security that the regime hopes to avoid.<sup>3,4</sup>

The dichotomy between the Karimov administration's views on how to deal with independent adherents to Islamic groups and the charges of abuse by outside observers calls for an analysis of Uzbekistan's comprehensive approach toward restricting the activity of independent Islam, especially after 1999. This paper will examine the formation of this policy to explain how historical precedent and current events helped shape the government's approach toward religion. It will then look at the policy itself, analyzing the rhetorical, legal, and policing framework in place to regulate religion.<sup>5</sup> Finally, it will address some potential effects of this policy to examine how they form a comprehensive approach toward regulating independent Islam, and shed some light on whether it is possible to say that the Uzbek campaign against religion has either increased or decreased domestic security in the form of stability.

## POLICY FORMATION

In order to examine why Uzbekistan is pursuing its current course of religious policy, a historical perspective of Islam in the country is necessary.

1 Fox, Jonathan, "Variations on a Theme: State Policy toward Radical Islam in Four Post-Soviet Sunni Muslim States," (Illinois: International Studies Association, 2007) 13

2 Human Rights Watch, "Creating Enemies of the State: Religious Persecution in Uzbekistan," (March 29, 2004) 6 [www.hrw.org/en/reports/2004/03/29/creating-enemies-state?print](http://www.hrw.org/en/reports/2004/03/29/creating-enemies-state?print) (accessed March 24, 2009)

3 Gunn, T. Jeremy, "Shaping an Islamic Identity: Religion, Islamism, and the State in Central Asia," *Sociology of Religion*, 2003, 64:3 389-410

4 Bakker, Edwin, "Repression, political violence, and terrorism: the case of Uzbekistan," *Helsinki monitor*, Apr. 2006, Vol. 17 Issue 2, 108-118

5 For the purposes of this analysis, religion refers mainly to Islam, both mainstream and independent strands of the faith that encompasses over 80 percent of Uzbeks. (HRW, 14) In this security context, Islam is the religion that presents the greatest potential for Uzbek instability; in addition, it is the most censored religion in the state, thus providing the means for correlative and casual analysis.

**Pre-Soviet Era**

Islam became the dominant religion in Central Asia in the early eighth century, first among the elites then later among the general population. The early traditions of Islam, formed in leading centers of learning and culture such as Bukhara, have “left a deep and indelible impression” on Uzbekistan’s people and culture.<sup>6</sup> Before Uzbekistan became a part of the Soviet Union, madrassas and mosques, especially in the cities of Bukhara, Samarkand, and Khiva, were the “dominant forces shaping the culture and social identity of the people.”<sup>7</sup>

**Soviet Era**

The consolidation of Soviet rule in Central Asia amplified the role of the state in religious affairs, creating clergy and regulatory bodies to oversee the implementation of a “pale state-controlled ‘official Islam’” in the country.<sup>8</sup> This was accompanied by a concentrated crackdown on individual forms of religion, especially those that did not fit in with the state-prescribed faith. According to Gunn, “During the 70 years of Soviet rule, the Islamic mosques and madrassas that had previously thrived in Central Asia were closed, destroyed, or converted into museums and factories.”<sup>9</sup> For the Soviets, organized religion was an “instrument for social control” that the government could wield for whatever purposes it saw fit, especially for consolidating and strengthening the national secular identity.<sup>10</sup> The government supported official Muslim authorities willing to submit to

imperial directions in exchange for defense against brands of Islam they deemed heretical and destabilizing. In this context, independent religion was seen not as an individual right to be bestowed upon citizens, but as “an activity to be supervised by the state.”<sup>11</sup> Although illegal, the underground, independent practice of Islam continued to flourish, and adherents practiced non-government-approved forms of religion in their homes and in small groups.<sup>12</sup> This model of advancing the state religion while controlling independent religion left a direct legacy for governments to come.<sup>13</sup>

**Post-Soviet Era**

After the breakup of the Soviet Union, post-Soviet states were left with an ideological void to be filled by the new leadership, who had to decide what course the country would take in the future. For Uzbekistan, creating a national identity was of paramount importance; it would unite the regionally segregated citizenry under a common national banner. Initially, to distance itself from the Soviet Union, Uzbekistan—along with all the other Central Asian states—adopted more relaxed stances and “progressive structures” toward religion in the early 1990s.<sup>14</sup> The 1991 Uzbek Constitution contained several provisions protecting the religious rights of individuals and ensuring that the government did not maintain an iron grip on the public sphere in matters of faith as the Soviets had done. As the beginning of the 1990s brought a renaissance of democratic ideals,

the Uzbek government flirted with openness, pursuing Western alignment, allowing civil society to operate, and even contributing funding to religion and local mosques which increased in number from approximately 80 to more than 4,000.<sup>15</sup>

**Post-1999 Era**

After enjoying more than half a decade of loosening control over religion and religious institutions, the sudden reversal in the government’s policy toward religion in 1999 was perceived as an attack on independent Muslims throughout Uzbekistan. The Tajik civil war, a manifestation of the increasing global presence of fundamental Islam and terrorism, became a “cautionary example” for Karimov, who used security concerns as an excuse to crack down on religion, consolidate power, and eliminate competition from other parties at the same time.<sup>16</sup> Exacerbated by the role of the Islamic Movement of Uzbekistan (IMU) in Afghanistan, the Uzbek government shifted gears and began to act strongly against “religious extremism,” a battle that began in 1998, intensified in 2001, and came to a head in 2004–2005.<sup>17</sup> Karimov encapsulated his concept of national identity thusly: “The Uzbek people will never be dependent upon anyone,” and the president ascribes to the government the responsibility and power to utilize any means necessary to protect the state for the good of the Uzbek people.<sup>18</sup> This includes suppressing any sections of the population likely to pose a

threat to the state, whether this threat is material, as in the case of an uprising or attack, or simply ideological.

There is much evidence from his speeches and publications that Karimov has viewed independent Islam as one of the greatest security threats to the nascent state. The government has positioned this strand of faith as something to be carefully maintained and controlled, perceiving the events in Afghanistan and Tajikistan as evidence that those with Islamic leanings can topple secular systems if leaders do not take proper precautions. Borrowing from the Russian model, Uzbekistan’s approach toward Islam thus took the form of co-opting religious principles to solidify national identity and, more important, repressing the independent elements that do not fit this mold.

**IMPLEMENTATION**

Throughout these various eras, the treatment of independent Islam has varied from relative freedom to strict regulation to laxity and back to freedom again. During each period of stricter regulation, the government has utilized specific tools to push its agenda, including the use of rhetoric, the legal framework, and policing practices.

**Narrative and Rhetoric**

A strong narrative, propagated by the central government through speeches, publications, and statements, is essential for bolstering a strong collective and assuring its citizens that “we” belong together as citizens of the new state, so that widespread dissent does not take place.<sup>19</sup> Countries that have lacked such a narrative have suffered from crippling sectarianism and an emphasis on regional demands

6 Gunn, 390

7 Ibid.

8 Gunn, 390

9 Gunn, 390

10 Crews, Robert, “For Prophet and Tsar: Islam & Empire in Russia and Central Asia.” Harvard College, 2006. USA

11 Gunn, 405

12 Crews, Robert, “For Prophet and Tsar: Islam & Empire in Russia and Central Asia.” Harvard College, 2006. USA

13 Khalid, Adeeb. “Islam after Communism: Religion and Politics in Central Asia.” University of California Press, 2007

14 Gunn, 400

15 HRW 14

16 HRW, 14

17 Khalid, Adeeb. A secular Islam: Nation, State, and Religion in Uzbekistan. International Journal of Middle Eastern Studies, 2003. 35:4 573-598

18 Megoran, Nick. “Framing Andijon, Narrating a Nation: Islam Karimov’s Account of the events of 13 May 2005.” Central Asian Survey, Volume 27, Issue, March 2008, 17

19 Kendzior, Sarah. “Inventing Akromiya: The Role of Uzbek Propagandists in the Andijon Massacre.” Demokraizatsiya; Fall 2006, Vol. 14, Issue 4, 550

at the expense of national cohesion.<sup>20</sup> To Karimov, the president has the job of shrinking the space for counter-narratives and ensuring that his viewpoint prevails. If this is not done, the body politic could become “weak and invaded by alien ideologies.”<sup>21</sup> In order to legitimize the presence of the Uzbek government, Karimov formulated a strong state identity, claiming that, “Uzbekistan is the fulfillment of the historical destiny of the Uzbek people” and that as president, he had taken on the task of overseeing its development and protecting it from myriad dangers.<sup>22</sup> According to public statements from the capital city of Tashkent, this Uzbek identity has been many years in the making and is now finally able to be realized in the Karimov administration.

To this end, Karimov has framed independent Muslims, especially those who are vocal about their beliefs, as Wahhabis; this term is used pejoratively to denote those whose ideology derives from the Wahhabi sect of Islam in Saudi Arabia.<sup>23</sup> Although the practice of most independent Muslims in Uzbekistan bears little resemblance to that of the Middle East, Tashkent’s use of this word strikes a chord with everyday Uzbeks, who do not want to be labeled as “outsiders rejecting their native Islam.”<sup>24</sup> The use of terminology such as “Wahhabi” and “extremist” cast overtly pious Muslims and those not ascribing to state beliefs as not being authentic Uzbeks and thus not deserving of full citizenship benefits, including freedom

from state harassment. In short, the government has implied that a rejection of state Islam in favor of following Wahhabi practices “equates with a rejection of the Uzbek people.”<sup>25</sup>

This frame denies the government a share of the blame for Uzbekistan’s domestic issues and foists responsibility for security disturbances on Uzbek citizens who have clearly been influenced by pernicious foreign doctrines. It gives the government authority to treat dissenters as “enemies of the state, regardless of how moderate or apolitical their beliefs and activities might be.”<sup>26</sup> Several groups, including political parties such as Akromiya and Eryk, likely have had few links to real violence; however, because they posed an ideological and political threat to the government, they were cast as terrorist groups and shut down.<sup>27</sup> Although ostensibly committed to pursuing a policy of nonviolence, the group Hizbut Tahrir (HuT) has also been banned, as its mention of a caliphate was taken as excuse enough for a *de jure* ban and denial of opportunity to register as a legally operating organization.

#### Legal Framework

One obvious avenue through which Uzbekistan’s control over independent religion manifests itself is through the legal system. Whether codified in the constitution or in ensuing acts, legislation regarding religion has formed the basis for much of the government’s efforts to control Islam. Even a cursory analysis of law in Uzbekistan demonstrates the dual nature of the legislation passed: Early laws appear to provide for separation of religion and state, while later legislation deliberately restricts the influence of religion on state power.

The latter body of law is far more extensive, thus effectively abrogating the protections espoused in the former. The subsequent section looks at the legal protections afforded to the citizenry as well as independent religious practice.

#### Protections

The concept of separation between religion and state is present from the very first years of Uzbekistan’s statehood, as the government sought to establish itself as a new democratic power with a government that had a distinct identity apart from Russia. Far from denying religious organizations’ right to existence, Article 61 of the Uzbek constitution grants them explicit powers, calling them “separate from state and equal before law.”<sup>28</sup> This clause, which undeniably exists to protect the state from being overrun by religious organizations, also appears to protect such organizations from undue interference by the state. Another clause in Article 61 stipulating that “the state does not interfere in the activities of religious associations” provides further assurance to independent organizations that the government will allow them freer range of operation than they were given under the Soviet Union. In addition, the 1998 Law of the Republic of Uzbekistan on Freedom of Worship and Religious Organizations also provides for a policy of non-interference in law-abiding religious organizations, mandating that there be no “granting privileges or imposing restrictions upon any individual religion.”<sup>29</sup> This legislation, coupled with the fact that Uzbekistan was a signatory to the International Covenant on Civil and Political Rights in 1995, appears to suggest that the Uzbek government would break from Soviet

precedent to ensure that no one religion was promoted at the expense of another, and that the government would not choose to propagate or regulate a particular expression of religion.<sup>30</sup>

#### Regulations

Although the Uzbek constitution and other legislation do contain provisions supporting a policy of religious non-interference, taken as a whole, Uzbekistan has produced far more legislation aimed at restricting and controlling religion. A separate statutory framework controls the formation of ideology and free speech and imposes restrictions on common Islamic practices and gatherings.

The formation of government-sponsored regulatory bodies also serves to extend the government’s reach into the heartland of the country. The Religious Affairs Committee, responsible for coordinating religious organizations and the state, conducts censorship and “expert assessment” of all religious literature, essentially authorizing documents that are fit to be read. The Spiritual Directorate for Muslims, like the Spiritual Directorate of Central Asia established in 1943 by Stalin, controls sermons, educational institutions, and Hajj participation.<sup>31</sup> These organizations implement the provisions of religious legislation in daily life and maintain the Soviet structure of religious control in modern-day Uzbekistan. Effectively, these laws nullify any promised protections and form a major pillar of the government’s comprehensive policy toward independent Islam.

#### Ideology and Speech

The legal framework as constructed in Uzbekistan currently includes many provisions restricting ideology and speech.

20 Pakistan, Sudan, and many other failed and failing states suffer from this problem, as their citizens have more loyalty to their clans than to the central government.

21 Megoran, 19

22 Megoran, 16

23 Kendzior, 551

24 Zanca, 75

25 Kendzior, 553

26 Gunn, 407

27 HRW, 17

28 Fox, 8

29 Fox, 8

30 HRW, 32

31 HRW, 14

The Karimov administration, much like the leadership of other Central Asian states,<sup>32</sup> has made a priority of propagating its unique vision for Uzbekistan's identity and repressing alternate ideologies that could potentially threaten this monologue. The ability to espouse independent ideologies is limited by legislation such as Article 244-1 of the Criminal Code, which bans "religious or other fanaticism and extremism and actions aimed at stirring up hostility between" religions.<sup>33</sup> By using such loaded terms as fanaticism and extremism, the government imposes a value judgment on ideas and curtails the ability of citizens to have such thoughts, much less express them. Under this law, possessing any belief that does not fit into moderated state versions of Islam can be deemed extremist and be subject to regulation.

The Criminal Code also bans certain types of religious speech, including "actions aimed at converting believers."<sup>34</sup> This limits the ability of independent groups to recruit new members or grow, as an increase in membership is perceived as threatening the government's stability. Regarding speech as having the potential to incite terrorist action, Uzbekistan bans the "use of religion for anti-state and anti-constitution propaganda" and cites "destabilizing ideas" as illegal.<sup>35</sup> As the state asserts control over its own stability, it implicitly controls any elements perceived to be destabilizing, leaving it up to the arbitrary discretion of the government to decide which speech is acceptable. "Anti-state" in

Karimov's Uzbekistan therefore connotes any speech not approving of the government's policy. This framework has implicated the actions of several democracy-building human rights groups and countless other individuals that have no ties to extremism.

Control over free speech extends to a complete control of literature publication, which the government views as a tool that foreigners use to propagandize their brand of Islam. Wary of influence from countries such as Saudi Arabia, which built conservative mosques and funded missionaries in the region during the early 1990s, the Uzbek government manages all tracts and literature to ensure that Uzbek nationals are not unduly influenced by radical ideas that are not indigenous to the relatively lax Islamic practice of the country.<sup>36</sup> Freedom of the press is portrayed as likely to cause heightened security problems in Uzbekistan, and the Karimov administration ensures that independent Islamists are not given the right to publish divergent interpretations of religion and society that stray from what is "truly Uzbek." Uzbekistan's Agency of Press and Information has revoked the right to publish of several Islamist publications, including religious periodicals *Irmoq* and *Yetti Iqlim*, by alleging that they are linked to banned religious organizations.<sup>37</sup> By controlling the use of the public space for disseminating independent ideas, the government thus maintains control of religion in the public sphere and forces all religious activity underground.<sup>38</sup>

### Assembly

Karimov strictly controls the gathering of Uzbek citizens for religious purposes, including banning religious political parties and refusing registration of religious organizations based on technical grounds.<sup>39</sup> Keeping religion out of the political sphere, a practice echoed by all Central Asian states except Tajikistan, removes the possibility of citizens uniting under a banner of religious unity and shifting power from Karimov's secular administration toward Islamists by democratic means.

Even more far-reaching are the restrictions on registering an independent group; this process is nearly impossible unless members have elite ties to the administration.<sup>40</sup> Without such registration, the government bans groups from "forming, holding services or persuading others to join"; if they do, members may be arrested or harassed.<sup>41</sup> Such restrictions have the effect of forcing groups to either try in vain to get registered, cease operations, or operate in secret. As the third choice is often the best for most groups, it is obvious how the government "creates criminals" with such a policy. Out of the approximately 1,000 mosques in Namangan, only 240 were granted legal re-registration, forcing the remaining mosques to shut down, operate out of private homes, or risk facing police action.<sup>42</sup> The figures from Namangan represent a general trend in the country; overall, the number of mosques in the country has been halved since

the early 1990s.<sup>43</sup> Although some of these mosques potentially had terrorist connections, the possibility that all or even most of them were linked to violence is minute. The government's control over independent mosques and the gathering of Muslims targets not only extremists, but also moderates as well.

### Policing

The most obvious way the Uzbek government regulates independent Islam is through policing tactics, including random mass arrests, harassment, and the routine use of torture and violence in police stations and jails—despite Uzbekistan's accession to the United Nations' Convention against Torture on September 28, 1995, which obligated the country to not commit torture of any kind. Several Western organizations<sup>44</sup> have reported actions taken by Uzbek security forces, including extensive abuses against religious leaders and their families, who are carefully monitored by the government. These arrests are a response to terrorist incidents and are the government's primary way of asserting control and reassuring the population (and perhaps themselves) that an attack did not entail a lack of control on the government's part.

In the early 1990s, the arrest rate was lower; it increased dramatically in 1999, with the "highest number of mass arrests of ordinary Muslims in the past 50 years"<sup>45</sup> following the failed assassination attempt on President Karimov in Tashkent on February 16, 1999. The rate of arrests rose steeply in 2001 after another attack, slowed down in 2002–2003 as the government released

32 Fox, 12. Turkmenistan is arguably more restrictive than Uzbekistan; mosques are limited to one per city and ideology is more strongly controlled.

33 Forum 18, 2

34 Fox, 9

35 Fox, 9

36 Megoran, 20

37 Forum 18, 1

38 It should be noted that the regime adopts the same policy toward other religious publications, including Baptist ones, proving that the state seeks to protect itself against publications other than "Islamist terrorist entities" but against the effects of any outside entity that could incite domestic citizens to threaten its control.

39 Fox, 10

40 Fox, 10

41 Fox, 10

42 Blagov, Sergei, "Terrorism's eastward expansion," *Asia Times*, March 31, 2004. Pg. 4 [http://www.atimes.com/atimes/Central\\_Asia/FC31Ag01.html](http://www.atimes.com/atimes/Central_Asia/FC31Ag01.html) (accessed April 2, 2009)

43 Fox, 11

44 Among human rights organizations, Human Rights Watch, Forum 18, and Amnesty International have much to say about the arrests, listing individuals and specific details about their cases.

45 Zanca, 74

several hundred prisoners, and sharply increased following the Andijan incident, in which Uzbek Interior Ministry and National Security Service troops fired into a crowd of protestors, killing hundreds. Religious leaders who choose not to limit sermons to the specified list of topics dictated by the state, or those who do not give proper thanks to Karimov on Fridays, are labeled Wahhabis or extremists and harassed or arrested.<sup>46</sup> This persecution extends beyond religious leadership, and peaceful but observant Muslims who do not “defer to government policy in their religious practices, expression, or beliefs”<sup>47</sup> are also targeted.

The jailing of 23 businessmen prior to the Andijan incident is but one example of the Uzbek government imprisoning known religious community members and charging them with terrorism based on questionable evidence: The alleged founder of the group Akromiya published a small book on purely religious themes. A complete lack of mention by security forces prior to Andijan implies that Akromiya was not the great security concern that Karimov made it out to be. Whether the men belonged to Akromiya, which many scholars allege does not really exist,<sup>48</sup> or merely observant Muslims raising funds for charity, the government’s crackdown on their actions is merely one prominent incident in a larger phenomenon of what Human Rights Watch claims has been happening for a decade: “the arrest, torture, public degradation, and incarceration” of approximately 7,000 people.<sup>49</sup> This illustrates the

government’s perspective that a perceived loss of control must be countered with definitive action and force. Policing frequently takes a top-down approach of citizen intimidation at the state and local level.

### Intimidation

Human-rights defenders condemn the Uzbek government for its actions; scholars, including Zanca, assert that “there are two types of terrorism in Uzbekistan today, one committed sporadically in the home of Islam, and the other carried out on a daily basis by state authorities.”<sup>50</sup> “Excessive piety,” in the form of simple actions such as praying five times per day—a practice that much of the Muslim world follows—is strongly discouraged, and those that choose to wear beards are branded as radicals and closely monitored.<sup>51</sup> The government’s arguments that these activities are alien to the native Islam in Uzbekistan correspond with their suspicion of pious Muslims as subversives who are potentially foreign operatives. For this reason, the number of Uzbeks allowed to undertake the compulsory religious pilgrimage of the Hajj is restricted to 5,000 participants every year. This quota is not set by Saudi authorities, who allow approximately 25,000 participants given Uzbekistan’s population, but by the Religious Affairs Committee in Tashkent.<sup>52</sup>

The practice of identifying radicals by outward religious behaviors or appearance creates conditions that make the public fearful of being viewed as observant, and curtails their right to free expression.<sup>53</sup> More strikingly, it may be a pointless and even counterproductive activity,

as many observant Muslims are nonviolent. Targeting the greater population of independent Muslims for crimes committed by a small percentage may backfire, creating animosity where there was none before. In addition, the government’s tactic may not even catch who is truly guilty, as followers of groups such as HuT are often discouraged from keeping long beards and told to wear Western clothes.<sup>54</sup>

### Local Level

This intimidation continues at the local level, as the Karimov administration utilizes tactics to maintain control over Islam that “differ little from methods used during Soviet times.”<sup>55</sup> Mosque leaders are encouraged to report particularly religious members to security services; if they refuse, they may be arrested or otherwise harassed.<sup>56</sup> Local administrators and citizen-based *moballa* committees are under “increased pressure to monitor and inform on citizens’ behavior,” reporting to the government what is said in local mosques.<sup>57</sup> As Uzbek communities are built largely around local communal divisions, this type of spying and control has proved quite effective, and such networks have yielded hundreds of arrests, especially after the Tashkent bombings in 1999. The appointment of a *posbon* or neighborhood guardian who reports residents’ behavior to the police solidifies this local spy role into a paid government position. This creates a situation where citizens are fearful of local religious leaders acting as monitors on behalf of the government.

The following sections look at the possible effects of the state policy toward religion on

domestic security. Evidence in favor of the linkage between state repression and increased violence is presented, as well as evidence that points to the success of state repression in reducing violence and terrorism.

## POSSIBLE EFFECTS ON DOMESTIC SECURITY

Although the individual elements of Uzbekistan’s policy toward religion have been denounced by many as repressive and didactic,<sup>58</sup> if their total effect is a reduction of violence and an increased security situation in the country, it is possible that the policy could be deemed a relative success. It is difficult to examine the effects of Uzbekistan’s approach toward controlling the free practice of independent Islam, as many of the long-term results of the post-1999 policy have yet to surface. The Karimov administration is not particularly forthcoming with statistics on security-related matters, often bristling at any possibility of outside criticism.

Due to the international reprobation and criticism the regime suffered post-Andijan, some analysts believe Karimov may have realigned Uzbekistan away from the West and toward Russia after 2005. While the European Union and the United States issued statements condemning Uzbekistan’s human rights abuses, Russia continued to provide aid and cooperation without any preconditions on human rights.<sup>59</sup> In addition, a change in the security situation may be attributed to outside factors, including economic conditions, that have little to do with the administration’s policy toward religion. Nonethe-

46 HRW, 17

47 HRW, 7

48 Sarah Kendzior and T. Jeremy Gunn are among those who are skeptical of the group’s existence or stated purpose.

49 HRW, 5

50 Zanca, 72

51 HRW, 8

52 Forum 18, 2

53 Zanca, 72

54 Asia Times, 3

55 Zanca, 75

56 HRW, 7

57 HRW, 16

58 HRW, 30

59 Heathershaw, John. “Worlds Apart: the making and remaking of geopolitical space in the U.S.-Uzbekistani strategic partnership.” *Central Asian Survey*, Vol. 26, Issue 1

less, the disparity between the position of the administration, which alleges that repression of independent sects is necessary for the stability of Uzbekistan, and human rights organizations, which claim that such repression makes the country all the more unstable, necessitates an analysis of each position.

***In Support of the Possibility that Uzbek Repression Leads to Violence***

*Repression erodes the national identity*

In order to gain legitimacy, the Uzbek government has sought to solidify the national identity by controlling independent practice of religion, a policy that has likely had the effect of eroding the national identity rather than strengthening it. As the government attempts to control official Islam it will seem less credible to the population, leaving an ideological void to be filled in the absence of a vibrant religious or civil society.<sup>60</sup> A discredited state version of Islam likely weakens the state identity by downplaying or restricting a major commonality among citizens; as a result, Islamism may fill the void. Describing populations as a “vessel waiting to be filled,” Gunn asserts that the interference of foreign ideas in Central Asian affairs may incite populations to be swayed by Islamist movements. This is quite probable because Uzbek citizens may look to the outside world for what their government will not provide for them.

*No forum for expression leaves sects with no choice but to express themselves in violent ways*

Since the Uzbek government has effectively curtailed all modes of

expression, including hushing the press, banning religious political parties, kicking out NGOs, and regulating speech, gathering and publication, groups espousing an independent ideology have no forum left to express themselves. If they want to be heard, they have only one option: to break the law, whether by gathering illegally, producing illicit publications, or inciting violence. This turns organizers into criminals and “enemies of the state,” and increases the likelihood that they will express themselves violently in the future, “either in Uzbekistan or among radicalized Uzbek refugees throughout Central Asia.”<sup>61</sup> Ahmed Rasheed, among others, estimates that the greatest threat posed by regulating expression will occur not in Uzbekistan itself, but in neighboring countries as Uzbek nationals attack foreign interests. The August 1999 hostage-taking by IMU militants in Kyrgyzstan is evidence of the fact that repression did not necessarily lead to a decrease in domestic stability but to a decrease in regional stability—a far more serious prospect.<sup>62</sup>

*Groups and individuals who have suffered under this policy will lash back in the short term, trying to gain back the rights they have just lost*

In the short run, as people are exposed to more restrictive policies that curtail their daily activities, they may push back against the government implementing such policies. Alienation and repression breed anger toward the government, and “the most powerful recruiting tool of the Islamists” may be the “actions of

the governments themselves.”<sup>63</sup> In early 1998, Karimov gave a pointed speech condemning Islamists, vowing to crack down on the IMU, and sentencing leader Juma Namangani to death in absentia. The 1999 Tashkent car bombings, which constituted the first major terrorist incident in the new state, may have been a reaction against this proclamation and government repression that occurred as a result of the 1998 Law on Freedom of Conscience and Religious Organizations. The government’s reaction to the bombings—a series of heightened arrests of nearly 8,000 people and vehement public denunciations of independent Muslim groups as “terrorists”—heightened tensions and eroded security conditions. “Such governmental efforts, however, appear to be exacerbating the very Islamist threat that they seek to contain.”<sup>64</sup> In November 2000, human rights organizations reported that 4,000 to 5,000 Muslim men had been imprisoned over the past 3 years with evidence of torture. Just six months after the release of the report, the IMU attacked government troops in southern Uzbekistan and infrastructure in Kyrgyzstan.<sup>65</sup>

The best-known example of negative security effects stemming from government policies is the incident at Andijan, which not only provided evidence of repression failing to do its job, but also gave an indication that Karimov’s greatest fear—public mobilization against the government policies—could become a reality. After 23 businessmen were broken out of prison and the public gathered to protest in the city

center, security forces responded by subduing the crowd. Up to 500 people were killed, although the official number is 187.<sup>66</sup> In the year following Andijan, Uzbek leaders went to great lengths to eliminate most elements of civil society in the country, representing the most stringent period of repression thus far. Government attention focused on “stamping out all sources of independent information, muzzling the media and closing down foreign non-governmental organizations.”<sup>67</sup> The effects of Andijan on the overall security situation are yet to be seen, but most likely it will culminate in further violence as opposition groups regain strength and strike back.

*Repression pushes independent sects underground, which makes them more difficult to monitor. They may regroup in the long run and cause major instability*

Repression perpetrated by the government forces all independent religious activity underground, making it harder to control. In this situation, radical preachers are not grandstanding from mosques but rather whispering in private homes, making their intentions all the more difficult to decipher. There have been no major incidents since 2005, but who knows what will happen in 2011? It is quite possible that some groups have been biding their time before perpetrating violence. This potential outcome is supported by the attacks in 2004, which followed a period of relative quiet and decreased arrests. The March 2004 suicide

60 Gunn, 407

61 Blank, Stephen, “The Future of Uzbekistan after Andijan,” *Terrorism Monitor*, Volume 3, Issue 11, May 2005 [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=495](http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=495) (accessed April 5, 2009)

62 Timeline Uzbekistan. Algis.com 05/2003 <http://timelines.ws/countries/UZBEKISTAN.HTML> (accessed April 2, 2009)

63 Gunn, 407

64 Gunn, 415

65 Timeline Uzbekistan. Algis.com 05/2003 <http://timelines.ws/countries/UZBEKISTAN.HTML> (accessed April 2, 2009)

66 HRW, 19

67 Kucera, Josh. “One year after Andijan: US lawmakers take action to punish Uzbekistan.” *EurasiaNet*, 11 May 2006. [http://www.unhcr.org/refworld/country\\_EURASIANET\\_USA\\_4562d94e2\\_46c58ee728\\_0.html](http://www.unhcr.org/refworld/country_EURASIANET_USA_4562d94e2_46c58ee728_0.html) (accessed March 28, 2009)

bombings, police attacks, and explosion at an illicit bomb-making factory came after the rate of arrests and police repression had slowed down.<sup>68</sup> Public denunciation of Wahhabis and terrorists had dropped off from its peak in 1999–2001. The timing of the attacks suggests that terrorists may wait until the government drops its guard to incite violence.

***In Support of the Possibility that Uzbek Repression is Not Linked to Violence***

In spite of a large body of evidence showing that repression is likely to lead to violence in the short-term, there is much to suggest that stability could potentially be enhanced by restrictive security policies as long as the government is willing to go far enough.

*Historical precedent shows that other countries perpetuated abuses against human rights and never truly suffered from large-scale terrorism*

Human rights activists, including Human Rights Watch, Amnesty International, and International Crisis Group, allege that recent repression has led directly to terrorism because “terrorism was foreign to the republics of Central Asia” until a decade ago.<sup>69</sup> However, the Soviets carried out many of the same programs that inspired the Uzbek campaign, and their security situation was not worsened as a result. The Chinese have carried out harsh policies against Tibetans and Uighurs for years while retaining control and stability in their country. Jeremy Gunn alleges that this is because the USSR and China

achieved the “correct” level of constraint through the adoption of completely repressive policy. In contrast, many democracies enact only *partially* repressive policies.<sup>70</sup> Since Uzbekistan’s policy is more restrictive than most, its policies should stem any uprisings in much the same way. So far this has proved true; when the government is willing to go far enough, it can suppress any security threat. In the most “severe” case of repression at Andijan, Uzbek security and police forces used harsh methods to diffuse a dangerous situation for the regime and the security situation of the country. The protesting crowd was dispersed by the quick action of security forces, even if they violated human rights in the process.<sup>71</sup> After such brutal repression, one might assume that terrorist attacks would sharply increase due to the population being “radicalized” by the events. Instead, since Andijan it can be said that no major terrorist attacks have occurred. Perhaps as the Uzbek government has crossed the threshold from moderate to extreme repression, it has actually helped the national security situation.<sup>72</sup>

*Governments that do not repress their populations are also plagued by terrorism*

An examination of countries that are less repressed by their governments shows that they still suffer from terrorist incidents. Thus, even a stronger

democratic background and human rights record are not sufficient conditions to maintain a strong security situation. Kyrgyzstan has a strong militant Islamist presence despite the fact that government repression occurs to a lesser degree, and “state authorities don’t routinely violate religious citizens’ rights or resort to torture.”<sup>73</sup> This signifies that government repression may not be the only factor that influences Islamist militancy in Central Asia.

*Other factors may contribute largely to terrorism besides repression*

Other factors such as economic deprivation and violence in neighboring states such as Afghanistan may be far better predictors of future domestic security than government policies and actions. Poor economic conditions often create dissatisfaction with governments, and citizens may seek a counter-narrative to give them hope and purpose. Zanca alleges that “recruitment to militarily religious organizations in Central Asia is directly proportional to the economic failure of the state,” as high unemployment and limited access to resources can lead to the kind of frustration that gives way to acting out with force.<sup>74</sup> Political instability in neighboring countries, which spills over into Uzbekistan’s border regions, can also provide a potential indicator of increased terrorist activity. Central Asian borders are notoriously porous, and the crossover of ethnic Uzbek militants from battle-weary Afghanistan is not uncommon. Bringing their weapons and recruiting into the country, these foreign militants seem to lend credibility to Tashkent’s complaints about foreign ideologies being a major

factor in upsetting the domestic security balance.

## CONCLUSION

In analyzing Uzbekistan’s actions toward independent Islam, it is clear that the government has formulated a systematized and comprehensive policy to regulate the activities of religious groups that do not fit inside the state model of acceptability. Since 1998–1999, events that transpired in neighboring countries convinced Tashkent that measures should be taken to prevent “foreign elements” from taking over Uzbekistan. Following the historical precedent of the Soviets, the Karimov administration has developed specific measures to implement this policy, including inventing a state narrative, codifying restrictions in the legal framework, and giving local and national security forces permission to arrest, harass, and torture citizens. In spite of a lack of causal data to analyze whether this policy has decreased or increased domestic security, a large body of literature supports the possibility that government repression has led to a decrease in stability by eroding the national identity and stifling free expression.

On the other hand, there is much to question about automatically linking government actions to the security situation, including the experience of neighboring countries and the presence of such important indicators as the state of the economy. It must be noted, however, that terrorism did not originally appear in Uzbekistan as a result of widespread government oppression; the first bombs fell in 1999 with no prior repression except a few sentences in the Constitution, which were hardly implemented at the time, and only one public speech by Karimov denouncing a specific group. Instead, terrorism came much as the government said it

70 Gunn, T. Jeremy, 50

71 “Uzbek security forces fire on crowd in Uzbekistan,” EurasiaNet, April 20, 2009. <http://www.eurasianet.org/departments/insight/articles/pp051305.shtml> (accessed April 2, 2009)

72 Blank, Stephen, “The Future of Uzbekistan after Andijan,” Terrorism Monitor, Volume 3, Issue 11, May 2005 [http://www.jamestown.org/single/?no\\_cache=1&tx\\_ttnews%5Btt\\_news%5D=495](http://www.jamestown.org/single/?no_cache=1&tx_ttnews%5Btt_news%5D=495) (April 5, 2009)

73 Zanca, 80

74 Zanca, 77

68 Timeline Uzbekistan. Algis.com 05/2003 <http://timelines.ws/countries/UZBEKISTAN.HTML> (accessed April 5, 2009)

69 Bakker, 108

did: from foreign elements that introduced radical ideas into the liberal Islam practiced by most Uzbeks. After the initial terrorist incident, repressive government responses have likely exacerbated this new threat. Although the Soviets pursued the same types of policies, Islam had not globalized and produced radical sects that advocate violence to the extent that it has today; therefore, past repression did not produce the same increased security problems that the Uzbek repression likely does now.

Despite the limiting factors of analyzing cause and effect, in total it could be said that Karimov's policies decreased domestic stability in the immediate short run, increased stability in the medium term, and likely will have the effect of decreasing stability in the long run. Looking at specific acts of repression and the terrorist incidents that followed, the short-term effects are the most easily measured. As the public grew accustomed to increased affronts on their freedoms in the medium term, there was a lull in violence

from 2001 to 2003, which is also true of the period directly following Andijan from 2005 to 2009.

In the future, more analysis needs to be conducted to determine the long-term effects of the government response at Andijan, the biggest test of whether repression will yield further violence. Since then no major terrorist attacks have been reported, but the domestic security situation in Uzbekistan should be closely monitored. It is likely that violence will rise again after dissenters have had time to

regroup. Further analysis is also necessary to examine the actions of Uzbek nationals in other countries, who may be increasing transnational operations as an indirect result of the government restrictions in their own country. Terrorism did not begin with government repression in Uzbekistan but it continues with it, and the cycle of violence will not cease until the government either adopts a wholly draconian mindset that prohibits independent thought or ceases entirely to restrict independent belief.

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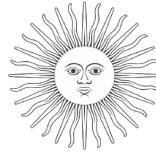
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# argentina's foreign policy paradox: Lessons Learned?

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## ABSTRACT

**L**IKE MANY LATIN American countries, Argentina experienced dramatic economic and political swings during the twentieth century. These changes directly affected the country's foreign policy, which as a result has been characterized as inconsistent and sometimes antagonistic. This paper analyzes the forces shaping Argentina's historic and recent foreign policy to reveal strengths and weaknesses. It includes analysis of leaders and of bilateral, regional, and global policies. It concludes with recommendations for a more nuanced approach toward foreign policy that will only be effective if it is stable through different administrations. While Argentina is facing high levels of uncertainty leading up to its 2011 elections, a successful and stable foreign policy has the potential to move the country toward a regional leadership position that will lend it credibility in its dealings with the international community.

## INTRODUCTION

Many observers have characterized Argentine foreign policy as inconsistent and antagonistic, and they argue that the country's leaders should be more realistic about Argentina's place in the international arena. This paper examines these claims and analyzes historic and current policies to determine the strengths and weaknesses of Argentina's foreign relations. These methods reveal a constantly changing foreign policy that is often the result of conflicting political personalities and an almost messianic view of Argentina as the great Latin American leader. Clashes with the United States and sporadic involvement in important regional groups have thwarted Argentina's realization of this goal. However, the seeds for a more constructive foreign policy do exist, and we conclude by advocating for a "middle path" approach that may help these seeds take root.

This paper is organized in five sections, each of which can be seen as a building block for understanding and critiquing

Argentine foreign policy. The first section is a historical analysis of important policy trends in Argentina, focusing primarily on the presidencies of Carlos Menem and Nestor and Cristina Kirchner. The second section is a more detailed look at these three personalities, who together represent the driving political forces in Argentina for the past 20 years. Third, we present a selection of bilateral, regional and global policies that are characteristic of Argentina's interactions with the rest of the world. Using these policies as a benchmark, the fourth section analyzes the strengths and weaknesses of current Argentine foreign policy. Finally, the conclusion offers three policy recommendations that envision Argentina implementing a more moderate, consistent approach toward foreign policy.

#### EXCEPTIONALISM AND SOVEREIGNTY: THE HISTORY OF ARGENTINE FOREIGN POLICY

In order to understand current Argentine foreign policy, it is im-

portant to examine the historical evolution of the domestic and geopolitical factors that affect the Argentine political landscape. While this retrospective approach is probably useful in analyzing any country's policy, it is especially appropriate for the Argentine case, given the country's tumultuous track record.

A historical method reveals several influential features of Argentina's foreign policy strategy. First, distrust and antagonism has often characterized Argentine foreign policy toward other countries in the Western hemisphere—especially the United States. Many analysts attribute this attitude to the prevalence of a so-called exceptionalist belief in Argentina's rightful role as a regional—and even world—power. Second, policymakers increasingly use regional political and economic integration to "lock in" domestic policy programs in an effort to forge continuity and stability in a country renowned for its lack of both qualities. However, these efforts run directly counter to another force in domestic Argentine politics: Argentina has long

been divided by the widespread dilemma that pits national sovereignty against international interests in domestic and international policy. The interplay of these factors has largely determined Argentina's foreign policy over the last two decades.

This section will follow these tendencies throughout Argentina's history, focusing especially on Carlos Menem's presidency and the new "leftist course" as defined by presidents Nestor and Cristina Kirchner, all of whom have utilized various international policy strategies to consolidate Argentina's place as a regional leader in Latin America.

The desire to establish regional dominance has long roots in Argentina's political history. This battle has most often manifested itself in a contentious relationship with the United States. Beginning as early as the first Pan-American Conference in 1889, Argentine anti-Americanism was marked by grudging acknowledgement of the United States' dominant hemispheric role and subsequent scheming to determine how to best position Argentina against its giant neigh-

bor to the north (Kanner, 2001). Although anti-Americanism is by no means an Argentine phenomenon, these sentiments are fueled inordinately by a feeling of “exceptionalism”; that is, the belief that Argentina is “an exceptional country” with “a particular destiny” (Mullins, 2006). Argentina’s superiority complex dominated foreign policy well into the twentieth century, and many important policy decisions can be traced directly to this line of thinking. For instance, Argentina only declared war on the Axis powers in 1945 in an attempt to emphasize the country’s antipathy toward the United States. When President Juan Perón came to power the following year, he espoused his “Third Position Doctrine” as a means to shield his country from the looming specter of U.S. global hegemony (Vacs, 2003). This form of “pragmatic anti-Americanism” continued to dominate Argentine foreign policy until 1989, when Carlos Menem was elected president of the republic.

Despite his political affiliation with the Peronist party, Menem worked quickly to improve relations with the United States. In contrast to his party’s founder, the new president pushed the doctrine of *realismo periférico*, which dictated that weaker countries should seek closer relations with hegemonic powers rather than attempting to gain power by antagonizing them (Mullins, 2006). This was a fundamental break from Argentina’s past foreign policy positions, whose “aim was prestige... an attitude favored by the ruling elite which inevitably led to confrontations (with the United States, with our neighbors, and in time with Great Britain)” (Cisneros, 1996). While Menem is often credited with effecting a sea change in this aspect of Argentine foreign policy, his position does not indicate any political or ideological affinity with the United States. To the contrary,

he adopted a friendlier stance precisely to strengthen his country’s position against the world’s superpower and other powers in the region. The most striking example of Menem’s political pragmatism was his establishment of the Southern Cone Common Market, Mercosur. For Menem—and for the Brazilian president at the time, Fernando Collor—Mercosur was a means for the less developed countries of the south to battle as a strengthened economic bloc for market dominance on the international stage (Kanner, 2001). However, at the end of his two terms, Menem left his country with staggering fiscal problems and an untenable convertibility system. The resulting crisis in 2001 and 2002 left the door open for old-school anti-American sentiment, which the new president, Nestor Kirchner, used to his advantage.

The presidencies of both Nestor and Cristina Kirchner herald a return to pre-Menem relations with the United States, and Mercosur continues to be the vehicle of choice for promoting developing-country influence. Nestor Kirchner was especially overt about reducing U.S. regional influence when he supported Venezuela’s accession into the subregional trading body (Latinnews Daily, 2008). The Kirchners have also supported Hugo Chávez’s project, El Banco del Sur, a financial institution aimed at reducing developing countries’ dependence on such international financial institutions (IFIs) as the International Monetary Fund and World Bank (Bank Information Center, 2008). Far from being an isolated case of affinity for multilateralism, then, Argentina’s involvement in Mercosur is evidence of a wider tendency to utilize multilateral and international channels to promote Argentine interests. This holds true for both Menem and the Kirchners, despite their divergent views of Argentina’s role in the international arena. The

transition from Menem’s *realismo periférico* to the new presidents’ much more aggressive stances is also indicative of the policy instability that characterizes Argentine politics. Policymakers often use foreign policy, and specifically relationships with multilateral organizations, as a means to combat this uncertainty.

Throughout most of the twentieth century, Argentina’s precarious relationship with powers such as the United States, coupled with inconsistencies in political prerogatives, prevented significant foreign-policy progress. Given this instability, politicians have been forced to find new tools to ensure policy continuity. One especially efficacious strategy has been to “lock in” policy decisions by implanting them in the context of international and multilateral agreements.

Mercosur provides the most obvious case of this domestic and international hedging, as Carlos Menem devised the group to provide substance and resiliency to his free-trade agenda (Kanner, 2001). As part of the same agenda, in the early 1990s, Argentina made uncharacteristically generous concessions in the WTO’s General Agreement on Trade in Services (GATS). Officials involved in formulating these offers explained their decisions as an attempt “to send a strong signal of commitment to economic reform and to ‘increase the costs’ of future policy reversals” (Bouzas & Soltz, 2005). Although the Kirchners have taken a more cautious approach to multilateral institutions (especially IFIs), they have not wholly rejected them. Instead, their focus has been on creating “a democratization of the decision-making system at international organizations, which in practical terms means effective participation by developing states in managing multilateral mechanisms of the world financial system” (Yakovlev, 2008). This stance

implies that the Kirchners and their foreign-policy team understand the historic importance of multilateral institutions, and will likely use Argentina’s relationship with them to bolster their own domestic and international policy regimes. Regardless of their motives for incorporating Argentina into the multilateral and international realm, though, Argentine politicians must be acutely aware of the dangers inherent in such an approach.

In the past two decades, Argentine politicians and bureaucrats have grown accustomed to working with multilateral institutions to establish domestic and foreign policy. This trend is especially prevalent because Argentina has relied heavily on funding from IFIs, which in turn demand that the country implement specific reforms aimed at market liberalization and transparency. The implicit conflict, however, lies in the pressure that politicians face from their constituencies to ignore multilateral policy prescriptions. This dichotomy came into full focus in the late 1990s, when the IMF’s recommendation to cut government expenditures and scrap the convertibility regime was met with fierce domestic opposition, making it impossible for policymakers to implement changes needed to avoid economic implosion (Sturzenegger & Zettelmeyer, 2006). In fact, the country did experience a sharp economic downturn, and the resulting public outcry against the IMF has provided the Kirchners with a political impetus to take a hard stance against IFIs and Argentina’s dependence on their money. For many analysts, though, the financial-dependence argument goes only partway in explaining Argentina’s willingness to surrender a great degree of national sovereignty in making important policy decisions.

In addition to ostensibly providing fiscal guarantees and economic stability, multilateral

relationships in Argentina have helped augment a weak knowledge base and bolster the effectiveness of domestic institutions. This has been especially important considering the country's dearth of technocratic expertise and sustainable bureaucratic knowledge (Teichman, 2001). This trend started as early as the Alfonsín administration (1983–1989), when the president realized that “most domestic problems, including stagnation, inflation, debt crisis, social tensions and relative weakness of the fledgling democratic system, could not be solved without relying on a considerable degree of external support” (Vacs, 2003). In other words, Argentine politicians have often viewed the involvement of supranational organizations in the domestic sphere as an inevitability. Unfortunately, this has left most policy decisions open to severe scrutiny and backlash, as domestic forces accuse politicians of “selling out” their country to foreign interests. Policy officials have generally justified their actions by pointing out the need for economic and political stability, which they claim can only be achieved by utilizing these outside resources. This conflict of opinion has been vital in shaping Argentine policy throughout the country's history, and remains important in the wake of a deep economic crisis.

Argentine foreign policy has often been characterized by tensions between forces seeking to open the country to outside influence, and those who would prefer to see Argentina make its own way in the international arena. This conflict is exacerbated by the widely held belief that Argentina is destined for greatness, and the antagonism that this attitude produces toward other regional powers. With this historical context in mind, we will now take a look at the contemporary personalities who are responsible for forming Argentina's relationship with the world.

## WHO ARE THESE PEOPLE?

Carlos Saúl Menem, a persistently tan, smiling lawyer, served as Argentina's president from 1989 to 1999. He was the Justicialist (Peronist) governor of the province of Rioja for three terms before entering the national stage as president. His campaign pledges included wage increases for the working class and other, more vague promises. However, Menem faced a serious financial crisis as well as several problems caused by the military when he assumed office. Unlike the presidents who would follow him, Menem was not keen on prosecuting military generals involved in the Dirty War—a period of state-sponsored violence from 1976 until 1983. Instead, he granted military officials several pardons in exchange for their promise not to interfere with his term. Menem aligned himself quite closely with the U.S. out of necessity and practicality. He also cured some of Argentina's economic woes for a time, and was popular enough to be re-elected in 1989. After his second term, he ran for president two more times before returning to provincial-level politics. In 2007, he announced that he would run for president again but withdrew his candidacy. He is twice divorced and currently faces numerous corruption charges. Menem has become something of a tragic figure in Argentine history.

The next important player in Argentina's history is Nestor Kirchner, a lawyer and politician who was president from 2003 to 2007. However, his political work began much earlier when he was a member of the “Young Peronists” working against the atrocities of the final military dictatorship in Argentina. During his youth Kirchner studied at National University of La Plata, where he earned his law degree and cultivated a radical “leftist” ideology. After working as a pub-

lic servant in Santa Cruz for some time, Nestor Kirchner was elected governor of Santa Cruz where he governed for two terms and realigned his political affiliation with a non-Menemist branch of the Justicialist (Peronist) Party.

Amid the political chaos that ensued after Argentina's economic collapse of the early 2000s, Kirchner ran for president under the Front for Victory brand of the Justicialist Party and won. He and his Finance Minister, Roberto Lavagna, implemented policies that helped the Argentine economy recover. In addition, he overturned pardons that Menem had granted to several members of the military involved in the Dirty War. Menem also distanced himself from the U.S. and the institutions that promulgated the neoliberal policies that had brought Argentina to its knees. However, he is best characterized as critical of neoliberal policies rather than as “anti-market” or “anti-capitalist.” Kirchner's style of governing and interacting with his counterparts was highly personalistic. Kirchner concentrated a great deal of authority in the executive office and freely used the power of decree. He has also been characterized as a “populist” because of the measures he implemented to increase the minimum wage and benefits to government employees. He has also been accused of corruption, but he continued to work for the Justicialist Party until his death in October 2010.

Like her late husband, Cristina Fernández de Kirchner, the current president of Argentina, is a lawyer and politician. She acquired political experience prior to her presidency in the province of Santa Cruz, where she worked at the local level and as a senator. She and her husband gather most of their support from the province of Santa Cruz on behalf of the Justicialist (Peronist) Party. Fernández de Kirchner's life story, personality, and ideology are similar to her husband's.

She too was a member of the Young Peronists. She spent most of her political life and retains most of her political capital in Santa Cruz. In addition, Fernández de Kirchner ran for president under the Front for Victory brand of the Justicialist Party.

During her time in office, she has displayed a personalistic style of governing much like her late husband's. Similarly, Fernández de Kirchner has faced allegations of corruption. The U.S. investigation into “Maleta Gate” brought Fernández de Kirchner's ferocity to the forefront, and she has employed anti-American rhetoric ever since. She also appears to have aligned herself with Hugo Chávez to a degree by nurturing relations with Venezuela and adopting some of his rhetoric. Early in her term, Fernández de Kirchner showed a tougher side by admonishing agrarian protestors. She has traveled extensively in the hopes of restoring Argentina to a place of importance in the international community. The Argentine president is a highly charismatic figure who continues to have an affinity for human rights issues. However, she has also inherited an extremely difficult economic situation that her administration may not be equipped to handle. Her husband's sudden death completely altered the Argentine political landscape near the end of her term, and only time will tell if her strong character, ideology, and political skills will help Cristina Kirchner end her term successfully and guarantee a victory for her party in the 2011 elections.

## BILATERAL, REGIONAL, AND GLOBAL POLICIES

### *One-on-one: Bilateral Relations*

The two countries with which Argentina has had the most bilateral relations are the United

States and Brazil. Both countries are large economic and political powers from which Argentina, a much smaller player in the hemisphere, can gain a great deal. However, Argentina has attempted different approaches with each country at the same time that it seeks to expand its global presence.

Argentina's relations with the U.S. have shifted drastically according to changes in presidential administrations. The changes since the consolidation of democracy in Argentina have been quite dramatic due to the major economic crisis Argentina experienced in 2001. Before the 2001 crisis, Carlos Saúl Menem's administration espoused extremely pro-U.S. policies. Domingo Cavallo, Menem's influential finance minister, was not only Harvard-educated, but he maintained strong ties with Washington and Wall Street. Under Menem, Argentina even sent troops to help the United States in the First Gulf War. After Menem's term and the collapse of the Argentine economy in 2001, however, President Nestor Kirchner was more distant from the U.S. This is not surprising given that many Argentines blamed the IMF and Washington for not intervening with a rescue package to save their economy from implosion. A few years later, in 2003, the Kirchner administration refused to support the U.S. invasion of Iraq and resisted U.S. efforts to negotiate a Free Trade Area of the Americas.

Kirchner also irked the United States with his refusal to condemn Cuba at the United Nations, and with his repeated visits and agreements with Hugo Chávez. Kirchner's anti-American rhetoric was particularly unhelpful given that Argentina still had to renegotiate its debt with the IMF, but since Venezuela eventually helped refinance the debt, Kirchner's plan seemed to have worked. Since assuming office in 2007, Cris-

tina Fernández de Kirchner has continued to employ anti-American rhetoric and boasts close ties with Hugo Chávez. For good or for ill, Argentina's leadership is the fountain for its policies related to the United States, and one can expect that the country's leaders will continue to forge a unique foreign policy toward the world's largest economy. (Pang 2002, 106-110).

Argentina's foreign policy toward Brazil, on the other hand, has been steadier throughout different administrations in the context of strong economic ties between the two countries and Argentina's ardent if unrealistic dream of being a major player in Latin American politics. Since Argentina wishes to become a major regional and global actor but lacks the economic and political influence to achieve this goal on its own, it has aligned with Brazil on a number of issues. The most important of these issues is trade by means of Mercosur. Brazil, a founding member of Mercosur, is the largest economy in Latin America; historically, it has lent its economic might to benefit Argentina despite the fact that the two countries compete in agriculture and other industries. In addition, Buenos Aires has fought alongside Brasilia in FTAA trade negotiations. Together, these two countries succeeded in frustrating the hemisphere-wide negotiations in the hopes of gaining more concessions from the United States. While Argentina does not possess the economic or political importance to live out its exceptionalist ideology at this time, it has attempted to lay the foundation for gaining regional and global clout by aligning itself with Brazil.

Argentina has other less prominent but important bilateral relations with members of the European Union, its second largest trading partner. In addition, Argentina receives approximately half of its foreign direct

investment (FDI), especially for the auto industry, from the EU. Aside from the fact that Argentina refuses to concede defeat to Britain on the Falklands/Malvinas Islands issue, the country maintains good relationships with several European trading partners. France is particularly key to Argentina's relationship with Europe, and Argentina is important for France's relationship with South America. President Fernández de Kirchner visited the French president during the early part of her term, but relations between the two countries remain tenuous because Argentina still owes the Paris Club \$6 billion. At the same time, Argentina is expanding its presence in the Maghreb region of Africa where it hopes to diversify its target markets and generate South-South solidarity as it emerges from the self-imposed isolation of the first Kirchner administration.

Although Nestor Kirchner harmed bilateral relations with the United States, Argentina is attempting to emerge from isolation by expanding its global presence while maintaining relations with the United States and Brazil. Argentina's bilateral relations have fluctuated with changes in presidential administrations, and they will continue to do so. However, the degree to which they change will be determined by Argentina's leaders' ability to pursue the long-term goal of gaining salience in the international arena without severing ties with other countries.

### ***Neighborhood Watch?: Argentina's Regional Policies***

While the Argentine people are often criticized for not considering themselves culturally Latin American, their leaders have taken great strides toward regional integration. Argentina is a member of the Rio Group, the Organization of American States (OAS), Mercosur, and sev-

eral other regional organizations through which it works with other Latin American countries. While it might still be somewhat isolated from the international arena, Argentina's high level of participation in regional organizations over the past quarter-century has earned it a membership slot in the "South American Neighborhood Watch"—symbolized by the region's increased number of regional organizations and efforts to cultivate stronger regional solidarity.

Argentina works to promote Latin American political, economic, social, scientific and technological cooperation and integration through the Rio Group. It also works for the preservation of democracy through the OAS, despite the fact that it has a comparatively short 25-year democratic tradition. Argentina also symbolically upholds the importance of democracy in economic relations via Mercosur. In the OAS, Argentina pushed for action to protect democracy in several instances. For example, during the Haitian crises of 1991 and 1994, Argentina supported action in accord with Resolution 1080.<sup>1</sup> During the 1991 crisis, it was an Argentine, Dante Caputo, who represented the OAS and served as the United Nations Secretary General's Special Envoy to Haiti. After a democratic crisis in Paraguay in 1999, Argentina was among a number of OAS members who supported enhancing the mechanisms through which Resolution 1080 could be enforced. In addition, Argentina condemned the Carmona government as illegitimate after the brief 2002 coup in Venezuela.

### ***Argentine Anti-Terror Efforts***

Another less prominent but important initiative in which

<?> Resolution 1080, adopted in 1991, established a mechanism for the OAS to respond to an illegal interruption of the democratic process in any member state.



Argentina participates in the Three-Plus-One program. Established in 1998, this initiative brings together Argentina, Brazil, Paraguay, and the United States to fight terrorism and narcotics trafficking in the “Tri-border Area” where Argentina, Brazil, and Paraguay converge. The Tri-border Area is known as a hub for Hizballah and Hamas activities such as arms and drug trafficking, money laundering, smuggling, piracy, etc. Although rumors have arisen of an al-Qaeda presence in the Tri-border Area, they have not been substantiated with intelligence.

The Three-Plus-One program is particularly important to Argentina because of the 1992 bombing of the Israeli embassy in Buenos Aires and the 1994 bombing of the Argentina-Israeli Community Center. Argentina has prosecuted suspects in these incidents and proved itself to be cooperative in George W. Bush’s “war on terror.” Argentina has participated in UN and OAS anti-terror initiatives, and was a leader in coordinating anti-terror efforts not only in Brazil and Paraguay but also in Uruguay, Bolivia, and Chile.

### ***Banco del Sur o Banco Roto?***

Borne of many South American countries’ frustration with neoliberal policies, the Banco del Sur hopes to be an alternative to the IMF, World Bank, and Inter-

American Development Bank. The foundational documents were signed in December 2007 by Argentina, Brazil, Paraguay, Uruguay, Venezuela, Bolivia, and Ecuador, but the Banco still has many obstacles to overcome. There is continuing discussion about whether or not votes should be completely equal or based upon capital contributions.

These issues have not been resolved, and the Banco’s launch is well behind schedule. There are also administrative hurdles, since nearly all South American countries still face serious obstacles linked to corruption. Overall, it remains unclear whether Banco del Sur will get off the ground as efforts to implement the plan have proceeded in unpromising fits and starts. This initiative, like many pursued during Nestor Kirchner’s administration, was launched in conjunction with Venezuela; this fact may or may not be to Argentina’s benefit as Hugo Chávez continues to lose oil revenues and international legitimacy in equal measure.

### ***The Cuban Conundrum***

As with its other foreign policies, Argentina’s policy toward Cuba has fluctuated with changes in administration. While Cuban-Argentine relations have usually been friendly, Argentina has tended to use its stance on Cuba as a way of subtly opposing the United States. However, support for the Castro regime seems contradictory to the support for democracy that Argentina has displayed quite prominently through its work in the Rio Group, OAS, and Mercosur. In the past Argentina has considered distancing itself from Cuba, but now that the current Kirchner administration has amped up its anti-American rhetoric, Argentina has once again aligned

itself with Hugo Chávez and Fidel Castro. On several occasions, Argentina has opted not to condemn Cuba in UN votes. Trade between the two countries has fluctuated throughout the past two decades, but it does not seem to play a pivotal role in Argentina’s foreign policy toward Cuba. In sum, Argentina’s relations with Cuba are uncertain and seem to ebb and flow with the political bent of Argentine presidential administrations.

### ***Mercosur***

The Mercado Común del Sur (Mercosur) has proven one of the better products of Argentina’s regional foreign policy. It was created in 1991 with the Treaty of Asunción, which included Argentina, Paraguay, Uruguay, and Brazil. The latter, as the largest economy in South America and Argentina’s largest trading partner, lent a great deal of clout to the organization, and it has evolved successfully despite a few setbacks.

In 1994, the Mercosur countries established a common external tariff that gave them more negotiating power vis-à-vis other countries and trading blocs. Between 1991 and 1997, trade within the region grew nearly four-fold, while FTAA talks in 1998 proved unsuccessful in gaining the Mercosur countries’ strong commitment. Argentina in particular was threatened by the FTAA talks, and it opted to strengthen regional ties rather than align its interests with Washington’s. This is not surprising given that Nestor Kirchner was president at the time. Argentina remained steadfast in its cooperation with Brazil to demand U.S. concessions on agriculture and to resist U.S. efforts to gain agriculture concessions from Latin American countries. However, Brazil suffered a currency devaluation in 1999 and Argentina had its

own economic crisis in 2001. Regional and bilateral trade suffered a great deal after these crises, and in the wake of other major economic downturns. In addition, the admission of Venezuela as a full member to Mercosur has sparked controversy in the region and tension with the United States. Despite these setbacks, Mercosur recently celebrated its twentieth anniversary and is now the fourth-largest trading bloc in the world. While it still has not achieved its goal of becoming a customs union, it has had limited success in helping countries reduce tariff and non-tariff barriers, open up their markets, and gain a small amount of bargaining power vis-à-vis NAFTA, the EU, and the rest of the world.

### ***The Long View: Argentina’s Regional Leadership***

Argentina’s emphasis on its European heritage has led to a cultural distancing from its neighbors, but despite this fact, Argentine leaders have demonstrated they are team players when it comes to regional initiatives. In the past, Argentina’s high level of participation in the Rio Group, OAS, and Mercosur has proven its ability to work with and, on occasion, to lead other Latin American countries. Its initiatives in the major regional organizations, the Three-Plus-One mechanism, and the Banco del Sur demonstrate that while culturally unique, Argentina is contributing to Latin America’s improvement via multilateral institutions. Its foreign policy stances are sometimes perplexing, but they are nonetheless generally cooperative in nature and often helpful.

### **FIRST SOUTH AMERICA, THEN THE WORLD: GLOBAL FOREIGN POLICY**

As with its bilateral and regional foreign policies, Argentina's global foreign policy has shifted dramatically from Menem to Fernández de Kirchner: from open and participatory under Menem to isolationist under Kirchner to more rhetorically belligerent under Cristina Fernández de Kirchner. Through it all, Argentina has maintained exceptionalist undertones that indicate it still seeks its "rightful position" as an important global player.

In some ways, though, Argentina's global foreign policies have proved more stable than its regional stances. As a member of the United Nations, Argentina has been traditionally supportive of peacekeeping missions. It sent troops to Croatia during the Menem years, and in 2002, it repeatedly offered material support for UN peacekeeping missions in Afghanistan and other places despite its poor domestic economic health. In support of the United Nations Stabilization Mission in Haiti (MINUSTAH), Argentina has approximately 600 peacekeeping troops in Haiti. On the other hand, it has also refused to condemn Cuba and, like many other countries, refused to support the 2003 U.S. invasion of Iraq. However, Argentina's participation in the UN has been largely productive and cooperative.

On the economic front, Argentina is a member of the CAIRNS group: a consortium of 19 countries established in 1986 to work for more equitable agricultural trading policies. Since its inception, the CAIRNS group has acted as a WTO watchdog and an advocate for member countries that often face unfair subsidies and trade barriers in relation to more developed countries. During the Doha Round of WTO negotiations, it has fought for the liberalization of trade in agriculture, which may help countries that rely heavily on

trade in agricultural products.

### THE UPS AND DOWNS OF ARGENTINE FOREIGN POLICY

While it is inevitable that a country's foreign policy will fluctuate with changes in administration, Argentina's shift in foreign policy during the period from Menem to Fernández de Kirchner has been quite dramatic and at times impractical. The country's exceptionalist attitude has proven harmful to its leaders' judgment in creating foreign policy. Our recommendations are based on the idea that several aims ought to be kept in mind as foreign policy is hatched, enacted, and assessed. These aims include a diplomatic attitude and neutral rhetoric that promote economic interests.

During the Menem era, Argentina's foreign policy was successful in promoting the country's economic interests. Menem was respectful of other countries, including the United States, and he actively engaged his counterparts. Unfortunately, his seemingly idealistic view of the U.S. led to insistence on the peso's convertibility with the dollar that ultimately led to the 2001 economic crisis. While Nestor Kirchner understandably distanced himself from the U.S. after the Argentine economy collapsed, his increasingly personal relationship with Hugo Chávez was a risky maneuver. The world was certainly aware that Argentina needed economic and political support, but Argentina's attempts to build a highly personalistic relationship with Venezuela's president hurt its reputation at a time when it needed to maintain credibility for debt renegotiation. The agreements that resulted from Kirchner's repeated visits to Venezuela were short-term and may have helped Argentina

overcome temporary commodity shortages, but Argentina's legitimacy may have sustained damaged. Kirchner later "freed" Argentina of its debt to the IMF only to renegotiate it with Venezuela, an unstable country with severe corruption issues. Cristina Fernández de Kirchner's stance and rhetoric have become even more belligerent against the U.S. Her ties to Hugo Chávez have strengthened, and "Maleta Gate" was testimony to the idea that the Kirchners' dealings with Chávez are not necessarily in Argentina's best interest.

However, Menem and the Kirchners' support for Mercosur has proved fruitful despite the fact that Argentina and Brazil resisted U.S. negotiations for the FTAA. Both countries have large agriculture sectors that they could not afford to liberalize. Brazil and Argentina took a principled stance against the U.S. version of the FTAA and stood their ground to produce favorable results. In this case, Argentina did not need to resort to anti-American rhetoric or a confrontational attitude toward the U.S., and it protected important domestic assets. For Argentina, this balancing of interests may be the most effective way to go about making foreign policy.

In contrast to its questionable judgment with regard to foreign policy toward the U.S. and Venezuela, Argentina has done a better job of maintaining a balanced foreign policy toward its largest trading partner, Brazil. Despite some disagreements with Brazil regarding Mercosur, Argentina has worked through these conflicts in a constructive way, through continuous dialogue. Argentina might consider aiming for a similar level of consistent engagement with the rest of its trade partners, including the EU and the U.S.

Argentina's foreign policies toward the EU have been stymied

by Argentina's conflict-avoidant attitude toward its debt with the Paris Club. Maintaining dialogue and transparency with the EU in regards to the debt would be more difficult but ultimately more constructive for Argentina's reputation and economy. Perhaps Argentina's hubris is so strong that it makes the country reluctant to reach out and ask for help; by the time it does, there are often few viable options. Fernández de Kirchner may have begun to move in a more productive direction on her recent trip to France, but more needs to be done to cultivate Argentina's relationship with the EU.

In contrast to its bilateral relations with the U.S. and EU, Argentina has cultivated better regional and global foreign policies. As a member of the South American "Neighborhood Watch," its participatory attitude in the Rio Group, OAS, Mercosur, and perhaps Banco del Sur has proven fruitful in cultivating relationships with other South American countries. It is working on its regional reputation, and it seems to be making some headway in establishing closer relationships with other countries in the region. Argentina's participatory attitude has prompted it to take a leadership position in many instances. If it continues to be a productive leader in these regional groups, Argentina has the potential to further the development of South America; this badge of honor would help it gain legitimacy in the global arena as well. Argentina's cooperative actions with regard to UN peacekeeping missions have also been constructive, and its participation in the CAIRNS group has helped the country build a solid reputation by taking a principled stance on an issue that has important ramifications for its citizens and economy.

While Menem and the Kirchners have established certain

polymaking patterns at the bilateral, regional, and global levels, there are two issue areas that do not fit neatly into the assessments made above: Argentina's Cuba policies and the Three-Plus-One program. As mentioned earlier, Argentina's stance on Cuba has fluctuated without real rhyme or reason. Its recalcitrance on the Cuba issue seems to serve as a symbol of continuing resistance to U.S. hegemony as opposed to a principled stance on the issue. With the growth of Fernández de Kirchner's anti-American rhetoric, Cuba has again served as a symbol—but not necessarily a useful one. The weakness of Argentina's Cuba policy is that it serves little purpose while calling Argentina's judgment into question.

Fernández de Kirchner might consider focusing her efforts on more productive policies like the Three-Plus-One program, which has engendered consistent cooperation with the United States. Argentina's leadership position in the Three-Plus-One program should be commended.

#### POLICY RECOMMENDATIONS: A "MIDDLE PATH"

The preceding analysis of policies in Argentina's relationship with the outside world should leave the reader with three impressions. First, inconsistency has plagued Argentine foreign policy historically. The stark differences between the Menem and Kirchner administrations are perhaps the most relevant for our discussion, but this variance is by no means a recent phenomenon; Perón's treatment of the Axis and Allied Powers during World War II shows a troublesome uncertainty even within one administration. In most cases, these wild policy fluctuations are the result of a misguided realist vision of the international political landscape, in which Argentine leaders attempt to use

foreign policy to get ahead but somehow always end up behind.

The second defining foreign policy characteristic is perhaps a product of the first, but bears mentioning on its own: Argentine leaders have failed to establish an advantageous, sustainable relationship with the United States. Though Menem broke ranks with his predecessors to pursue *realismo periférico*, his dream of leveraging a friendly—some would say subservient—relationship with the giant to the north ultimately ended in disaster with the 2001 economic crisis. Finally, despite holding significant economic and political clout within Latin America, Argentina has failed to position itself as a consistent regional leader in important areas. These three characteristics point to a need for a well-planned change in Argentina's approach to foreign policy.

The final section of this paper makes four policy recommendations aimed at resolving the problems listed above. First, Argentina should distance itself from Hugo Chávez. Second, Argentine leaders should work to find a compromise position on relations with the United States that lies somewhere between *menemismo* and the Kirchners' current stance. Third, policymakers should seek to build up Argentina's image as a regional leader through increased participation in multilateral bodies like the OAS and Mercosur.

#### *The Chávez Question*

For many Latin American leaders, Hugo Chávez and his petro-dollars are a fierce temptation. Friendly relations with Venezuela mean cheap oil, a boon for Latin American countries hungry for growth and development. Unfortunately, these friendships come at a price, as the Venezuelan president uses his economic strength to advance his "Bolivarian Revolution" throughout the region. In one sense, the Kirchners'

affinity for Chávez makes sense: The debilitating effects of the 2001 crisis left Argentina's political elite struggling for ways to stop the economic bleeding and bring stability back to their country, and Venezuela's oil money seemed to be an easy answer. Chávez sweetened the deal with his Banco del Sur proposal, which was received warmly by Argentines who saw their own economic problems as the result of careless IMF policies.

The Kirchners have erred, though, in throwing so much political weight behind Chávez, rather than taking a more nuanced approach. For instance, both have often adopted *chavista* rhetoric of anti-Americanism and anti-capitalism. What the Kirchners must realize is that this rhetoric—even if it is used only to gain Chávez's favor—hurts Argentina's reputation abroad and damages relationships with important partners such as the U.S. The benefits enjoyed as a result of close ties to Venezuela may be fleeting, especially given the volatility of oil prices and Chávez's flagging support in his own country.

What we suggest here is not an irreconcilable split with Chávez, because this type of extremist policymaking has often left Argentina behind other countries in the international arena. Instead, current and future leaders should gradually distance themselves from the Venezuelan *caudillo*, and avoid the "anti" rhetoric that has become a staple of Chávez's regime. In choosing this middle ground, Argentina may be able to positively influence institutions like the Banco del Sur. Under Chávez's leadership, the Banco has become a symbol of limiting economic dominance from the outside, but Argentina could use its clout to emphasize the bank's positive role as an organic effort by Latin American countries to ensure their region's well-being. Another obvious benefit of a

shift in stance toward Venezuela would be the increased opportunity for a thaw in U.S.-Argentine relations.

#### *The U.S.: Between Menem and the Kirchners*

As this analysis has shown, anti-Americanism is a strong tradition in Argentina, and Carlos Menem's foray into positive U.S.-Argentine relations was in fact an anomaly. Because many Argentines blame the IMF and the United States for their plight after the 2001 crisis, it has been far too easy for the Kirchners to use anti-Americanism as a political tool. That the two presidents have adopted this stance for domestic political gain shows they do not truly understand their situation. Argentina is a relatively small country emerging from a deep economic crisis, and despite strong growth over the past five years, the current global situation does not bode well for the country's fate. Given the circumstances, Argentine leaders should be cultivating relationships with countries that have proven economic and political strengths. The U.S., as the regional and world superpower, is the most obvious place to start.

Again, this recommendation does not imply the extreme acquiescence that Menem envisioned. Rather, Argentina should work to strike a balance in U.S. relations that gives the larger and more powerful country reason to take interest. At one point, Argentina was the "success story" of the IMF, and the United States looked on the country as an important regional ally. Argentina need not send troops to Iraq in order to regain this confidence. Instead, leaders can enact simple steps by increasing relations between bureaucratic agencies with common interests. Positive signs for a more balanced approach have emerged, such as Argentina's active participation in antiterror operations

in the tri-border area. However, Cristina Kirchner's assaults on American-style capitalism and Nestor Kirchner's hosting of an anti-Bush rally during the American president's Latin America visit erode the significance of more incremental steps. To find this elusive middle ground, then, Argentine leaders should first halt the rhetoric, then work with various agencies to identify common interests and begin rebuilding trust with the U.S.

### **Consolidation of Regional Leadership**

The thread of exceptionalism runs throughout Argentina's political and cultural history. However, the sense that Argentina is somehow destined to become a great regional leader rarely plays out in foreign-policy reality. Although the country participates in several regional organizations, Argentine leaders seem reluctant to take any sort of leadership role. Whatever the roots of this hesitation, Argentina is missing an opportunity to consolidate its role as a regional leader. Thus, future administrations should focus on reenergizing the country's participation in multilateral bodies,

and should concentrate specifically on the OAS and Mercosur.

The OAS's program for democracy promotion is a likely candidate for Argentina's resurgence on the multilateral scene. Although the Argentine democratic tradition is relatively young, the country is a comparatively well-functioning democracy for Latin America. Argentine officials should use this stability as a means to seek leadership roles in the OAS, and to promote democracy throughout the region. Recent events have demonstrated that democracy may not be the "only game in town" in Latin America, and Argentina could demonstrate its leadership abilities through increased participation in the OAS. There is certainly precedent for this type of activity; as mentioned above, the 1990s were a period of strong Argentine involvement in the OAS's defense of democracy activities. Although internal support has wavered in recent years, the Latin American soil seems ripe for Argentina to resume a leader role in the democracy movement.

Mercosur represents another avenue for Argentina to improve its regional standing. When Argentina cofounded Mercosur,

the principal goal was to create a trading bloc powerful enough to negotiate concessions from economic giants like the U.S. and EU. Twenty years later, the deal has failed to evolve into a customs union, and the group has not made as much progress as it ought to have in convincing developed countries to lower trade barriers on agricultural goods. Although advancing Mercosur will not be an easy task, Argentina stands to gain a great deal from decreased trade barriers. In addition, if Argentine policymakers are able to drive these changes, they will further consolidate their country's position as a potential regional leader. Of course, Mercosur and the OAS are not the only important regional groups in which Argentina may build leadership clout, but they are a good launch pad since their activities are extremely visible throughout Latin America.

### CONCLUSIONS

This paper has explored current Argentine foreign policy, analyzed the geopolitical and domestic roots of these policies, and attempted to make a judgment on their efficaciousness for promoting Argentina's interests.

Without a doubt, the inconsistencies mentioned at the outset have been a defining characteristic of Argentina's relationship with the world, and these radical swings have often undermined the positive effects of what may have been good policies. The current global economic crisis makes political moves all the more difficult, but this paper has suggested that President Cristina Kirchner and future leaders pursue a more moderate path to improve important relationships, such as those with the United States, the EU, and the rest of Latin America.

Instituting these policies—and perhaps more important, ensuring that they continue with leadership changes—will not be easy. But to say that it is impossible for Argentina to pursue such a strategy ignores the various precedents for cooperation and regional leadership in the country. Looking ahead, Argentine leaders would benefit from cultivating their nation's exceptionalist opinion of itself, and use this self-confident identity to establish more harmonious relationships that may eventually lead to Argentina's long-awaited ascendancy as an important power.

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# international environmental claims under the Alien Tort Claims Act

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## ABSTRACT

**T**HIS PAPER examines problems pertaining to the regulation of environmental harm through international law. Included is a discussion of different strategies attorneys from the United States have attempted to apply to international environmental issues abroad using domestic environmental regulations. The focus of this analysis is the Alien Tort Claims Act, also known as the Alien Torts Statute (ATS). Specifically, this paper examines the general historic application of the ATS, a recent success story for plaintiffs in Nigeria, and its application to environmental harms. It closes with policy recommendations that detail how environmental claims can be more successfully asserted under the ATS, and provides suggestions for alternative environmental litigation strategies.

## INTRODUCTION

The fragile and damaged state of the environment has rapidly become not only something the politically liberal or those labeled “environmentalists” discuss. Environmental issues have become front-page news. Environmental policies are debated as pressing political issues, and we expect our political leaders to not only speak to, but act on environmental issues. World-wide forums, such as the 2009 Climate Change Summit held in Copenhagen, Denmark, are centered on environmental threats to our planet. To say that the environment is important is a gross understatement, and to think that it is not a pressing area of international concern is simply foolish. However, laws regulating the environment on an international level are surprisingly inadequate to manage such significant issues. Ironically, as we live in the second millennia with more technology and knowledge than the world has ever known, some attorneys in the United States are turning to an ancient American statute in the hopes of finding success in international environmental litigation.

This paper will examine problems regulating environ-

mental harm through international law. Included is a discussion of different strategies that attorneys from the United States have attempted to apply to international environmental issues abroad using domestic environmental regulations. The focus of the paper is devoted to the Alien Tort Claims Act, also known as the Alien Torts Statute (ATS). Specifically, this analysis will examine the general historic application of the ATS, a recent success story for plaintiffs in Nigeria, and its application to environmental harms. In conclusion, policy recommendations are offered for the successful assertion of environmental claims under the ATS, and suggestions are presented for alternative environmental litigation strategies.

### REGULATING ENVIRONMENTAL HARMS THROUGH INTERNATIONAL LAW

#### Legal characterization of the issue

Conceptually, a major hurdle in regulating environmental problems through current international law is the characteriza-

tion of the claim itself. As Hari M. Osofsky has written,

Advocates seeking to address environmental harm to humans at an international level must contend with the inherently multifaceted nature of such harms. Although the various negative impacts implicate several areas of law, they do not fit neatly into any one of those areas. No matter how the problems are characterized ... the description of them will be incomplete.<sup>1</sup>

While international environmental law focuses on the actual harm to and deterioration of the natural environment, international human rights focus on the actual human harm. Often the harms to the environment and human rights abuses are inextricably linked. Neither is necessarily the right or wrong approach, but how the issues are characterized has significant effects on the framing of the claim and ultimately the potential remedies.

#### Issues Concerning Sovereignty and Immunity of Defendants

The sovereignty of each independent state can be a major hurdle for plaintiffs seeking recourse concerning environmental harms, just as it is with the regulation of most international laws. The general concept of sovereignty is that a state should be able to do as it pleases to its people and natural resources within the confines of its geographical boundaries. International law has developed and exists today because we, as an evolved species, hold some things to be universally unacceptable even within the bounds of a single state. Osofsky further distinguishes the difference between international environmental law and international human rights law as they apply to sovereignty.<sup>2</sup> What we universally hold to be unacceptable varies under these differing regimes, and thus the treaties and customary international law under each regime also varies. While multiple environmental principles have been addressed in various treaties and conferences, “international environmental law constrains international intervention when behavior lacks transboundary

or global commons impact.”<sup>3</sup> If the environmental harm in turn causes human harm, there are more avenues under current human rights law to intervene in such situations.<sup>4</sup> As a global community we will sooner intrude on a state’s sovereignty because the population is being significantly harmed, than intrude to tell another state how to better regulate their natural resources.

### Alien Tort Claims Act

Included in the Federal Judiciary Act of 1789 enacted by the first United States Congress was the Alien Tort Claims Act (ATS) stating: “The district court ... shall also have cognizance, concurrent with the courts of the several States, or the circuit courts, as the case may be, of all causes where an alien sues for a tort only in violation of the law of nations or a treaty of the United States.”<sup>5</sup> The ATS remains nearly unchanged today: “The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States.”<sup>6</sup>

This section will discuss a brief history of the Alien Tort Claims Act, the primary elements and defenses of a prima facie claim, influential ATS cases, and the application of cases involving environmental claims under the ATS.

### A Brief History of the ATS

The lack of formal legislative history and Congressional records has led to debate over the meaning and purpose of the statute.<sup>7</sup> The ATS derives its powers from the Diversity Clause and the “Arising Under” clause of Article III of the U.S. Constitution.<sup>8</sup> Jurisdiction was intentionally reserved in the federal courts, as state courts at the time of adoption were outwardly biased toward foreigners.<sup>9</sup> Founders such as Alexander Hamil-

ton recognized the existence of these biases and knew it was imperative for national security to establish an impartial arena for foreigners to be heard.<sup>10</sup> “Acutely recognizing that denials of justice could provide a major excuse for a European power to launch a full-scale attack on our nation,” the Founders successfully enacted the ATS affording foreigners access to unbiased American federal courts.<sup>11</sup>

A curious and ancient statute by American standards, the ATS lay nearly dormant for two centuries, only being invoked 21 times.<sup>12</sup> Claims under the ATS have more than doubled in the last quarter century after a Second Circuit Decision in 1980 reintroduced the ATS into modern-day jurisprudence. The case, *Filartiga v. Pena-Irala*, discussed below, “immeasurably expanded the reach of international law by allowing foreign nationals to pursue human rights violations in U.S. district courts even though they took place outside the United States.”<sup>13</sup> The scope of the ATS was not addressed by the U.S. Supreme Court (USSC) until 2004. Legal scholars had speculated that, “[T]he statute was enacted to provide extraterritorial jurisdiction over the crimes of piracy, slave trading, violations of safe conduct, and the kidnapping of ambassadors.”<sup>14</sup> These acts were recognized as the sole violations of international law when the statute was enacted in 1789. In *Sosa v. Alvarez-Machain* in 2004, the USSC held that the scope of the ATS covered claims concerning violations of the law of nations recognized within the common law at the time the ATS was enacted.<sup>15</sup> However, the Court did acknowledge that as the world advances and new sensitivities give rise to the level of jus cogens and customary international law, the scope may expand to include new violations.<sup>16</sup> Treaty-based international law was recognized in 1789, thus ATS claims can also arise for viola-

tion of a provision contained in a ratified treaty or a self-executing treaty of which the United States is a signatory.<sup>17</sup>

### PRIMA FACIE CASE AND COMMON DEFENSES OF THE ATS

In order for a plaintiff to make a prima facie case to recover damages for personal injuries pursuant to international law or customary international law, the plaintiff has the burden to prove the following: 1) that the plaintiff is an individual alien or a foreign national, who is not a U.S. citizen nor a person owning permanent allegiance to the U.S., 2) the claim asserted is for a tortious personal injury that constitutes a violation of the Law of Nations or a treaty of the United States; and 3) causation—the tortious conduct of the alien violator must be the cause of the harm the plaintiff actually suffered.<sup>18</sup>

A basic overview of the creation of international law is illustrative. There are numerous ways international law can be created, but the majority of law is based on treaties, customary international law, and jus cogens. Treaties are essentially contracts between states obligating each state to act in certain ways toward other contracting states. Treaties are negotiated, agreed to, then must be ratified by Congress before they can become binding. Treaties are important not only because they bind their signatories, but also because when certain provisions or themes are continually replicated in treaties around the world, for example the right to be free from torture, those themes often evolve into customary international law.

Customary international law is in essence the basic common law for the international community, and evolves in a similar way to our domestic common law; it is the way countries conduct themselves out of obligation. Basically, if enough countries

feel obligated to act in a certain way, or refrain from acting in a certain way, the act becomes customary international law. If a country sees the rest of the world beginning to act in a unified manner and does not want to be obligated to act in such a way, the country may object persistently and not be bound.

Jus cogens are international norms that were moral values at the time international law was created, including piracy and slavery. These acts are clearly against international law and must be respected as preemptory norms by all states.

### SIGNIFICANT ALIEN TORT CLAIMS ACT CASES

*Filartiga* and *Sosa* are two modern cases that have significantly influenced the jurisprudence of the ATS. *Wiwva* is an example of a recent success story in which ATS litigation resulted in a large settlement for injured plaintiffs.

#### *Filartiga v. Peña-Irala*: The revitalization of the ATS

The plaintiffs in *Filartiga* were Paraguayan nationals who filed an ATS claim against another citizen of Paraguay for the torture and wrongful death of their 17-year-old son. The plaintiffs were strong opponents of the president in power, and claimed their son was tortured and murdered because of the family’s differing ideologies.<sup>20</sup>

The claim was dismissed on jurisdictional grounds. Because the claim did not arise under a treaty to which the United States was a party, “the threshold question on the jurisdictional issue is whether the conduct alleged violates the law of nations.”<sup>21</sup> On appeal, the Second Circuit held that torture did violate the law of nations because of the many international agreements that nearly universally denounce torturous practices. The universal

condemnation was evidence that the prohibition of torture had become a norm of human rights constituting international law.<sup>22</sup>

The second prong of the jurisdictional analysis is whether the claim the plaintiffs assert exceeds the scope of the district court's authority to act under Article III of the U.S. Constitution. The Second Circuit held, "The law of nations forms an integral part of the common law, and a review of the history surrounding the adoption of the Constitution demonstrates that it became a part of the common law of the United States upon the adoption of the Constitution. Therefore, the enactment of the Alien Tort Statute was authorized by Article III."

Thus, *Filartiga* breathed new life into an old statute. The factual scenario surrounding torture, which was not a recognized violation of international law when the statute was enacted, gave the court an opportunity to analyze the scope of the ATS in modern times. Additionally, this court clearly held that an ATS claim was within the Constitutional powers of the district courts to hear. The main threshold issue then becomes whether or not the action upon which the claim is based constitutes a violation of international law or a treaty to which the United States is party.

#### **Sosa v. Alvarez-Machain: Test for Customary International Law**

"The courts following *Filartiga* generally agreed that the ATS provided not only a jurisdictional grant, but also a substantive cause of action for violations of U.S. treaties and the law of nations."<sup>23</sup> It was not until 2004, when the U.S. Supreme Court heard the case of *Sosa v. Alvarez-Machain*, that this liberal view of the ATS was truncated.

In *Sosa*, a Mexican national who had been abducted and brought to the United States for murder charges he was later ac-

quitted of, brought an ATS claim against the Mexican nationals involved in his abduction.<sup>24</sup> The USSC looked to the Congressional Congress, the writings of Blackstone and Oliver Ellsworth, and the writings and intent of the Framers of the Constitution in attempts to discern the intended scope of the ATS—a statute dubbed by Judge Henry Friendly as a "legal Lohengrin; no one seems to know whence it came."<sup>25</sup> The Court recognized the jurisdictional grant of the statute but was hesitant to say its scope extended as far as the court in *Filartiga* suggested. "The jurisdictional grant is best read as having been enacted on the understanding that the common law would provide a cause of action for the modest number of international law violations with a potential for personal liability at the time."<sup>26</sup> The Court believed the First Congress contemplated Blackstone's three primary international offenses, including piracy, violations of safe conducts, and infringements of the rights of ambassadors when enacting the statute.<sup>27</sup> Concerning modern times and present-day international law the Court stated, "[w]e think courts should require any claim based on the present-day law of nations to rest on a norm of international character accepted by the civilized world and defined with a specificity comparable to the features of the 18th-century paradigms we have recognized."<sup>28</sup> The plaintiff's ATS claim failed in *Sosa*; the alleged conduct of arbitrary arrest and detention did not rise to the level of a "universally recognized norm of international law," as the harm complained of lasted only one day.

*Sosa* set forth the current test for determining if a customary international law will give rise to an ATS claim. "Under *Sosa*, a customary international law norm must be (1) universally accepted by the civilized world; (2) defined with a specificity comparable to the eighteenth-century norms

regarding piracy, the right of safe passage, and offenses against ambassadors; and (3) abided or acceded to by States out of a sense of legal obligation and mutual concern."<sup>29</sup>

#### **Wiwa et al. v. Royal Dutch Petroleum (Shell): An ATS success story?**

A look at the Niger Delta region of Nigeria reveals a long history of corporate environmental and human rights abuses revolving around oil extraction. The devastating environmental practices including gas flaring and major oil spills into the ecologically significant delta region has included pervasive harm to humans. Ken Saro-Wiwa, an activist in the Ogoniland region of the Niger Delta, was hanged on November 5, 1995. Wiwa founded the Movement for the Survival of the Ogoni People (MOSOP), a pacifist grassroots organization promoting democratic awareness and protection of the Ogoniland environment, and sought to empower his local community in their struggles with big oil.<sup>30</sup> Along with other activists, Wiwa was arrested and found guilty for the incitement of the murders of four Ogoni chiefs. The trial continues to be harshly criticized as a show trial, a direct repercussion of organizing activism against Shell and the Nigerian government.

The *Wiwa* case actually refers to four different cases: *Wiwa v. Royal Dutch Petroleum*, *Wiwa v. SPDC*, *Wiwa v. Shell Petroleum Development Co. of Nigeria Ltd.*, and *Wiwa v. Anderson*. These cases were bought by the families of the executed MOSOP activists, and filed by the Center for Constitutional Rights and Environmental Rights International. They were settled in 2009 and as part of the settlement agreement, all claims brought in these cases by were dismissed.

Immediately preceding the June 2009 settlement there were two significant district court holdings that arguably

pushed Shell toward the settlement. First, the Second Circuit Court of Appeals reversed and remanded the *Wiwa v. Shell Petroleum Development Co. of Nigeria*, wherein defendants had successfully challenged the admission of late discovery materials. The underlying issue was the personal jurisdiction of Shell Nigeria, and the discovery materials remanded as admissible provided evidence of sufficient minimal contacts for personal jurisdiction. The substantial importation of Shell oil from Nigeria, an extensive public-relations campaign, and employee recruitment in the United States were all part of the evidence submitted to establish personal jurisdiction.<sup>31</sup>

The second decision preceding the settlement came from the U.S. District Court in New York, where the defendants' motion to dismiss the ATS claim was denied. The court preliminarily applied the *Sosa* test to the three claimed violations of customary international law: summary execution; cruel, inhuman, and degrading treatment (CIDT); and arbitrary arrest and detention.<sup>32</sup> The court cited the Torture Victims Protection Act and the Geneva Convention to support that summary execution could arguably be customary international law.<sup>33</sup> For the CIDT claim the court looked to the case of *In re South African Apartheid Litigation*, which held CIDT to be a violation of international law and defined the elements necessary to prevail on a CIDT claim.<sup>34</sup> Finally, the defendants argued that *Sosa* held arbitrary arrest and detention was not customary international law, or alternatively if it was international law that *Wiwa* did not factually meet the *Sosa* test. The court dismissed this argument citing *Kiobel*, which held *Sosa* to be a "very narrow" holding concluding that a single day of detention did not violate a norm of international law.<sup>35</sup>

These holdings arguably pushed the June 2009 settlement of \$15.5 million in which Shell

paid a portion to the victims' families and a portion to a trust for the Ogoni people. Jennie Green, a Center for Constitutional Rights attorney who initiated the lawsuit in 1996, said of the settlement, "This was one of the first cases to charge a multinational corporation with human rights violations, and this settlement confirms that multinational corporations can no longer act with the impunity they once enjoyed."<sup>36</sup> Will this settlement really have any altering effect on the practices of multinational corporations, including Shell Nigeria? Shell posted over \$31 billion in profits in 2008.<sup>37</sup> Does a \$15.5 million settlement have any punitive or deterring effects? On the company's Website, Shell announced the settlement with the following title: "Shell settles Wiwa Case with humanitarian gestures."<sup>38</sup> Shell adamantly denies any involvement in the executions, asserting that they were "tragic events" and that the company had tried to "persuade the government of the day to grant clemency."<sup>39</sup>

#### Environmental Claims Asserted Under the ATS

What if Ken Saro-Wiwa and his fellow activists had never been executed? What if Shell and the Nigerian government had never attempted to silence opposition to the oil-extraction practices in Ogoniland? If we compartmentalize the human rights violations from the environmental harms, would an ATS claim brought against Shell for the environmental degradation have had similar results? Probably not. The following cases examine independent environmental claims under the ATS. Thus far, none have been successful, but a review of a sample of cases is demonstrative of the shortcomings the ATS can have in environmental cases.

Shortcomings aside, Richard Herz, in his article titled "Litigating Environmental Abuses un-

der the Alien Tort Claims Act: A Practical Assessment," suggests the ATS as an avenue that may allow for recovering damages for environmental torts suffered abroad because of the unique characteristics of the ATS.<sup>40</sup>

#### Amlon Metals, Inc. v. FMC Corp.

Amlon Metals, an English corporation, sued Delaware corporation FMC under the ATS for the shipment of materials containing significant amounts of toxic xylene, after an English court dismissed the case holding the actions took place in the United States and U.S. law would apply.<sup>41</sup> This was the first case in which "a court directly addressed an environmental claim under the ATS."<sup>42</sup> Plaintiffs brought a Resource Conservation and Recovery Act (RCRA) claim and an ATS claim against FMC.<sup>43</sup> The RCRA claim was quickly disposed of by the district court due to the lack of congressional intent to apply RCRA extraterritorially.<sup>44</sup>

The ATS claim was based on Principle 21 of the Stockholm Declaration and the Third Restatement of Foreign Relations. Principle 21 of the Stockholm Declaration, of which the U.S. is a signatory, states: Nations have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.<sup>45</sup> The Restatement holds that if a nation is the cause of environmental harm to other nations, "the state of origin is obligated to accord to the person injured or exposed to such risk access to the same judicial or administrative remedies as are available in similar circumstances within the state."<sup>46</sup> Because Prin-

ciple 21 was not binding law and because the Restatement represented only American thoughts on foreign relations as oppose to universally accepted ideas, the court rejected both arguments.<sup>47</sup>

#### Aguinda v. Texaco

Ecuadorian nationals, in numbers exceeding 30,000, were the plaintiffs in *Aguinda* and sued Texaco for "inadequately disposing of hazardous waste," which resulted in environmental damage in areas relied upon for subsistence to indigenous peoples of the Amazon basin.<sup>48</sup> The case was dismissed on grounds of *forum non conveniens*, or international comity, and failure to join indispensable parties.<sup>49</sup> Had the case been brought properly in front of the district court, the holding indicates the plaintiffs would have lost nonetheless. "Not all conduct which may be harmful to the environment, and not all violations of environmental laws, constitutes violations of the law of nations."<sup>50</sup>

This case not only reiterates that all local judicial remedies must be exhausted prior to bringing an ATS claim in the United States, but also that even if causation element can be met, more often than not, the violation will not rise to the level of customary international law.

#### Sarei v. Rio Tinto PLC

Residents of Papa New Guinea filed multiple claims against the British and Australian mining company Rio Tinto alleging they had suffered environmental harms as a direct result of the defendants' mining actions.<sup>51</sup> A specific claim involved the significant harm to the oceanic fish population they relied upon for subsistence. This claim was based on the United Nations Convention on the Law of the Sea (UNCLOS), which obligates signatories to take "all measures ... necessary to prevent, reduce and control pollution of the marine environment that involves

hazards to human health, living resources and marine life through the introduction of substances into the marine environment."<sup>52</sup>

The case was vacated after several procedural motions but not before both the district court and the Ninth Circuit Court of Appeals concluded UNCLOS to be customary international law actionable under the ATS in large part because 166 nations have ratified the agreement.<sup>53</sup> The case is significant for at least two other reasons: "1) the court's application of the ATS to environmental torts not directly related to human rights violations, and 2) the court's decision to not absolutely require the plaintiffs to exhaust their local remedies before pursuing their claims in federal courts."<sup>54</sup>

#### SOLUTIONS FOR VICTIMS OF ENVIRONMENTAL INJUSTICE ABROAD

There has never been a successful environmental ATS claim to date. That being the case, is the ATS the best domestic solution to attempt to bring environmental justice to victims of corporate pollution around the world? How can an environmental ATS claim be improved? What are alternate avenues to litigate international environmental issues?

#### Alternatives to ATS claims

Alternatives fall into two major veins of law; the domestic laws of the United States and in international courts.

#### Domestic Claims

During the 1970s, the United States Congress with nearly unprecedented bipartisanship passed sweeping domestic environmental regulations, including the National Environmental Policy Act and the Endangered Species Act. These Acts, too, have failed to be successfully applied to environmental claims abroad

because of the strong presumption that domestic law will not be applied extraterritorially.<sup>55</sup>

If, however, the *transnational* effects of pollution that affects the United States and its territories can be shown, our domestic environmental laws would be the appropriate and most effective claims by which to sue. With advancements in technology, it may become possible to trace specific pollutants to their original sources, helping satisfy the causation element and pinpoint specific polluter defendants. Domestically, we have already seen cases against automakers for the harmful effects of greenhouse gases. Theoretically U.S. plaintiffs could allege the same of international industry.

#### *An International Court Solution*

While the ATS is the “best among weak alternatives,” an international court specializing in environmental law would be the most desirable way to prosecute egregious environmental practices abroad.<sup>56</sup> In an article arguing the necessity for an International Court of Environment, the Italian Supreme Court Justice Amedeo Postiglione stated:

“[T]he human right to the environment, must have, at the international level, a specific organ of protection for a fundamental legal and political reason: the environment is not a right of States but of individuals and cannot be effectively protected by the International Court of Justice in the Hague because the predominantly economic interests of the States and existing institutions are often at loggerheads with the human right to the environment.”<sup>57</sup>

Creating an international court would clearly be a costly endeavor. The benefits to plaintiffs would presumably include far less affirmative and procedural defenses than an ATS claim brought in U.S. courts.

#### *The ATS as the best solution*

The ATS is a remarkably unique statute. One can only speculate if the Founding Fathers contemplated the extension of this statute to potentially be the best solution for environmental injustices abroad. But as is similar to other founding documents and early legislation, the authors were incredibly thoughtful and precise with each word they wrote. Had the authors intended to limit the ATS to only the law of nations in 1789, they could have specifically enumerated the statute to reflect the small list of international laws. Instead, the plain language of the ATS arguably allows for universally evolving notions of justice and the law of nations.

To more successfully litigate environmental claims under the ATS, environmental law should continue to be pushed and argued as customary international law, and treaties with environmental components need to be binding on signatory states. Increasing the validity of ATS claims in these ways also increases the success and likelihood that polluters will seek to mediate solutions outside of court. Cases alleging transnational harms will also further the success of environmental ATS claims, as sovereignty presents a much lesser hurdle.

#### *Pollution and other forms of environmental degradation are violations of Customary International Law*

A strong argument can be made that we are very close to customary international law recognizing some sort of right to a clean environment. As domestic laws and state constitutions increasingly provide for environmental regulations and protections, so do numerous treaties, resolutions, and compacts incorporate environmental concerns. Furthering the push for recognition of an environmental right as customary international

law is the notion of different “generations” of human rights discussed by scholars. The first generation, created by the “soft law” of the Universal Declaration of Human Rights Article 3, states: “Everyone has the right to life, liberty, and security of person”; the second generation focused more on economic, social, and cultural rights.<sup>58</sup> The third and current generation has been termed the “Eco-Peace-Feminist Movement.”<sup>59</sup> “In essence, this third generation of rights addresses the problem of poverty as a social (and hence legally redressable) ill that lies at the core of environmental problems and violations.”<sup>60</sup>

#### *Treaty Obligations with Significant Enforcement Provisions*

Stringent treaty obligations will also make the ATS more successful. Violations of clear treaty obligations of the United States can bypass the *Sosa* analysis of customary international law, and an ATS claim can move forward and be heard on its merits.

#### *Mediation*

While success under the ATS for environmental plaintiffs has yet to be seen, a serious claim may spur a corporation into mediate the situation.<sup>61</sup> “It could try to persuade the multinational parent to mediate the dispute before a neutral facilitator, in lieu of engaging in a painfully protracted and prohibitively costly lawsuit under the ATS.”<sup>62</sup> This may be particularly true post-*Wawa*. Calculating the difference between the litigation that exceeded a decade and the ultimate settlement might encourage similarly situated companies to negotiate earlier.

#### *The Transnational Affects of Alleged Environmental Degradation*

Lastly to strengthen environmental claims under the ATS, if it appears that the harm could be transnational, plaintiffs should

clearly articulate this broach of another state’s sovereignty. Many international agreements, such as the Stockholm Declaration discussed above, include specific provisions with stringent obligations that states owe other nations regarding pollution. Expending the additional cost to provide scientific and statistical evidence of the effects of the polluter is essential. This is especially important in cases concerning water and air pollution where the elements affected move quickly across political boundaries.

## CONCLUSION

Ultimately, a fundamental shift in the way we look at environmental issues needs to occur if our species is going to curb its destructive ways. At some point in human history a division arose between humans and nature. Before that humans saw themselves, correctly so, as a part of nature. The understanding of an inextricable link between people and their environment was known universally. As we have industrialized, this link has been severed. We see nature and the environment as separate from us. People who are “environmentalists” understand this link and seek to restore a thought process and lifestyle of environmental connectivity in which humans play an integral part.

A fundamental shift in our thinking would remove the classification issues regarding international environmental law. No longer would we need to be concerned with how to frame the issue, because the standard would evolve to be that knowingly causing environmental degradation does humans harm and therefore is a human rights violation. If a paradigm shift like this occurred, there would be no need for a new environmental international court. Cases could be brought and settled in our existing system if we thoughtfully closed the gap between environmental law and human rights.

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