

BERKELEY JOURNAL OF INTERNATIONAL LAW

VOLUME 30

2012

NUMBER 2

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Jodie A. Kirshner

Recommended Citation

Jodie A. Kirshner, *Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute*, 30 BERKELEY J. INT'L LAW. 259 (2012).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol30/iss2/1>

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Why is the U.S. Abdicating the Policing of Multinational Corporations to Europe?: Extraterritoriality, Sovereignty, and the Alien Tort Statute

Jodie A. Kirshner *

ABSTRACT

The United States has policed the multinational effects of multinational corporations more aggressively than any other country, but recent decisions under the Alien Tort Statute indicate that it is now backtracking. Europe, paradoxically, is moving in the other direction. Why do some countries retract extraterritorial jurisdiction while others step forward? The article traces the opposing trends through corporate human rights cases and suggests that the answer may lie in attitudes towards national sovereignty. The developments raise important questions regarding the position of the United States in a globalizing world and its role in upholding international norms.

INTRODUCTION

For several decades, the United States has acted as the global leader in imposing accountability on multinational corporations in the area of human rights. Recently, however, U.S. courts have declined jurisdiction to police their extraterritorial abuses. In September 2010, the Federal Court of Appeals for the Second Circuit held that corporations fall outside the purview of the key legal mechanism used to hold them accountable, the Alien Tort Statute (ATS).¹ The

*The author wishes to thank Professors John Coffee and Katharina Pistor for hosting her as a Scholar in Residence at Columbia Law School during completion of the research. She also would like to thank Professors Curtis Milhaupt, Gillian Metzger, Paul Stephan, David Sloss, Chimene Keitner, and Brian Cheffins for helpful comments.

1. *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111 (2d Cir. 2010). Since the *Kiobel* decision, other circuit courts have considered whether the ATS allows for extraterritorial jurisdiction over corporate defendants. Conflicting authorities have resulted. *Compare Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co.*, 643 F.3d 1013 (2011); *Sarei*

ruling deprived residents of the Ogoni region of Nigeria of their legal claim against Royal Dutch Petroleum and Shell Transport and Trading Company, though military forces the corporations hired to suppress environmental protesters had shot and killed some civilians, and had beaten and raped others.²

The retraction in the willingness of U.S. courts to exercise extraterritorial jurisdiction over multinationals is occurring just as the courts of many European member states are becoming more open to it. The English High Court recently took review of the *Monterrico* case, which involves claims of thirty-two indigenous Peruvians that an English corporation, owned by a Chinese consortium and headquartered in Hong Kong, aided and abetted their torture by the Peruvian Police.³ The District Court in The Hague, meanwhile, will adjudicate the claims of four Nigerian villagers who allege that oil spills caused by Royal Dutch Shell deprived them of their livelihood, even though a similar proceeding is advancing in Nigeria.⁴

For now, the United States has pursued more cases than any EU member state, but the attitudes reflected in the corporate human rights jurisprudence of the two regions appear to be evolving in opposite directions.⁵ The question of

v. Rio Tinto, PLC, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011); see also *Aziz v. Alcolac Inc.*, 658 F.3d 388, 394 n.6 (4th Cir. Sept. 19, 2011) (declining to reach question of corporate liability and dismissing on alternative grounds). To address the developing split, the Supreme Court will review *Kiobel*, and it is widely predicted to, at a minimum, narrow corporate jurisdiction under the statute. See, e.g., Daniel Fisher, *Supreme Court to Decide if 1789 Law Applies to Shell in 2012*, FORBES, Dec. 20, 2011, <http://www.forbes.com/sites/danielfisher/2011/12/20/supreme-court-to-decide-if-1789-law-applies-to-shell-today/> (“The Roberts Court is also likely to trim the sails of plaintiff lawyers who want to use the 1789 Alien Tort Claims Act to pursue 21st-century class actions.”); Stephen M. Nickelsburg & Erin Louise Palmer, *Supreme Court To Decide Corporate Liability Under Alien Tort Claims Act*, THE METROPOLITAN CORPORATE COUNSEL, Dec. 2011, at 6, available at <http://www.metrocorpocounsel.com/articles/16694/supreme-court-decide-corporate-liability-under-alien-tort-claims-act> (“Even if the Supreme Court concludes that corporations can be liable under the ATCA, however, numerous questions regarding the statute’s interpretation continue to vex the lower courts and could limit corporate liability.”); Lisa Ann T. Ruggiero, Joseph E. Hopkins & Anthony Molloy, *What Were They Thinking? How a Circuit Split Over Mens Rea Could Resolve the Alien Tort Statute Corporate Liability*, 207 N.J. L.J. 503 (2012) (“Indeed, even if *Kiobel* is overturned by the Court, not all will be lost for corporations if the Court subsequently reviews *Doe v. ExxonMobil*.”).

2. *Kiobel*, 621 F.3d. at 123.

3. *Guererro et al. v. Monterrico Metals PLC*, [2009] EWHC (QB) 2475 (Eng.), subsequently settled out of court, see, e.g., Dan Collins, *UK Firm Agrees to Pay Compensation to Peruvian Farmers*, BBC, July 20, 2011, <http://www.bbc.co.uk/news/world-latin-america-14227670>; *Peruvian Torture Claimants Compensated by UK Mining Company*, LEIGH DAY & CO. (July 20, 2011), <http://www.leighday.co.uk/News/2011/July-2011/Peruvian-torture-claimants-compensated-by-UK-minin>.

4. Court of the Hague, Docket Number HA ZA 09-579 (*Oguru v. Royal Dutch Shell PLC*) (Neth.). See, e.g., *The People of Nigeria Versus Shell: The Course of the Lawsuit*, MILIEUDEFENSIE (Dec. 2009), <http://milieudedefensie.nl/publicaties/factsheets/the-course-of-the-lawsuit/view>.

5. See *supra* Sections III and IV. See also *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, OXFORD PRO BONO PUBLICO, 332-33, 338-40 (Dec. 3, 2008), <http://www2.law.ox.ac.uk/opbp/Oxford-Pro-Bono-Publico-submission-to-Ruggie-3-Nov-2008.pdf>;

why, in an increasingly interconnected world, the United States is growing less tolerant of extraterritorial adjudication just as EU member states are entering the field, is what this article seeks to explain.

What happened? Thanks to an innovative application of the Alien Tort Statute, the United States emerged as a staunch protector of foreign plaintiffs.⁶ Throughout recent decades, no nation did more to enforce universally recognized international norms against multinational corporations. However, not only have U.S. courts recently called into doubt the applicability of the ATS to corporations,⁷ but they also have recently decided that corporations cannot be sued under the Trafficking Victims Protection Act,⁸ that the Racketeer Influenced and Corrupt Organization Act does not apply to extraterritorial corporate activities,⁹ and that the principal antifraud provision of the federal securities laws does not apply extraterritorially to foreign transactions, even when fraudulent conduct has occurred within the United States.¹⁰

What is compelling here is not that the United States is acting inconsistently.¹¹ Rather, what is puzzling is why EU member states are increasingly a driving force behind the enforcement of corporate standards and why the United States is reversing course. The paradox of a leader potentially lagging behind warrants exploration.

The aim of this article is wider than simply describing the trend. Instead, the article is focused on understanding the reasons behind the U.S. evolution in comparative perspective. While many articles have criticized the recent U.S. approach to extraterritoriality, none has considered the moves made by U.S. courts in global context. Part II discusses the attributes of the corporate form that make it susceptible to human rights abuses and establishes why extraterritorial jurisdiction is necessary for regulating the conduct of multinational corporations. Part III examines case law under the ATS leading up to the decision that the statute does not apply to corporations. Part IV investigates the means through which EU member states are beginning to address the foreign conduct of

Liesbeth F.H. Enneking, *Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases*, 40 *Geo. Wash. Int'l L. Rev.* 903, 903-05 (2009).

6. 28 U.S.C. § 1350 (2006).

7. *Kiobel v. Royal Dutch Petroleum*, 621 F.3d 111, 149 (2d Cir. 2010).

8. *Mohamad v. Rajoub*, 634 F.3d 604 (D.C. Cir. 2011).

9. *Norex Petroleum Ltd. v. Access Indus., Inc.*, 631 F.3d 29, 33 (2d Cir. 2010).

10. *Morrison v. Nat'l Austl. Bank Ltd.*, 130 S. Ct. 2869, 2883 (2010) (applying a statutory presumption against extraterritoriality and interpreting the scope of section 10(b) of the Securities Exchange Act of 1934 and Securities and Exchange Commission Rule 10b-5).

11. In a few instances, the United States has expanded extraterritorial jurisdiction. *See, e.g.*, Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, § 929P, 124 Stat. 1376, 1964 (2010); *Hoffman-La Roche Ltd. v. Empagran S.A. (Empagran I)* 542 U.S. 155 (2004) (interpreting the scope of the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6(a) (2006)). *See generally* Jennifer Zerk, *Extraterritorial Jurisdiction: Lessons for the Business and Human Rights Sphere from Six Regulatory Areas* 5-10 (John F. Kennedy School of Government, Harvard University, Working Paper No. 59, 2010).

corporations, without an equivalent statute providing extraterritorial jurisdiction over causes of action in customary international law. Part V suggests that different cultural attitudes towards sovereignty, rooted in history, animate the current approach each region takes towards extraterritoriality. The article concludes by proposing that instead of depending on U.S. courts to adjudicate extraterritorial claims, even as they grow increasingly hostile to them, alternative forums could develop human rights norms in international law to achieve accountability.

The developments in the United States raise fundamental questions about its position in a globalized world. Among them: Should the United States seek to project a moral example beyond its borders? What is the correct scope of extraterritorial jurisdiction within the U.S. legal system? To what extent should the United States accept constraints on its sovereignty and join international regulatory initiatives?

I.

POLICING THE MULTINATIONAL EFFECTS OF MULTINATIONAL CORPORATIONS REQUIRES EXTRATERRITORIAL JURISDICTION

As corporations have become increasingly transnational, they have outgrown the national corporate law regimes designed to govern them.¹² The modern multinational corporation, bearing little resemblance to the archetypal sole trader operating alone within his own country or the early corporation selling shares to individual investors, is now difficult to hold accountable in spite of the susceptibility of corporations to human rights abuses.¹³ To fill the resulting governance gap, extraterritorial jurisdiction has become necessary.¹⁴

12. See, e.g., Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 20 BERKELEY J. INT'L L. 45, 58 (2002) ("Regulatory schemes are largely domestic, based on national laws, administrative bodies, and with judicial systems, while transnationals operate across borders"); Wayne Ellwood, *Multinationals and the Subversion of Sovereignty*, 246 NEW INTERNATIONALIST 4, 7 (1993) ("companies are less attached today than ever to their country of origin").

13. See Fiona McLeay, *Corporate Codes of Conduct and the Human Rights Accountability of Transnational Corporations: A Small Piece of a Larger Puzzle*, in TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS 5 (De Schutter ed., 2006).

14. There are few international bodies with enforcement power over companies. U.N. committees can investigate in conjunction with the Torture Convention, the Optional Protocol to the International Covenant on Civil and Political Rights (ICCPR), and the Convention on the Elimination of All Forms of Discrimination Against Women. The Convention for the Protection of Human Rights and Fundamental Freedoms is enforced by the European Court of Human Rights; the American Convention on Human Rights is overseen by the Inter-American Commission and the African Charter on Human and Peoples' Rights is implemented by the African Commission. The French delegation led efforts to include corporate liability in the Rome Statute of the International Criminal Court, but consensus was impossible. See Per Saland, *International Criminal Law Principles*, in THE INTERNATIONAL CRIMINAL COURT: THE MAKING OF THE ROME STATUTE 189, 199 (Lee ed., 1999).

A. Modern multinational corporations transcend national jurisdiction

Today roughly 80,000 multinational corporations with ten times as many subsidiaries operate on a global scale, far beyond the borders of any single territory, but this was not always the case.¹⁵ Intercorporate stock ownership originally was outlawed in the United States and Europe.¹⁶ The first holding company act, which allowed corporations to buy and hold stock in other corporations, was not adopted until 1888.¹⁷

Over time, corporations used their rights of intercorporate ownership to cluster separate corporations into global networks of subsidiaries, achieving levels of transnationality and economic power at odds with territorially based laws.¹⁸ Cross-shareholding, inter-enterprise contracts, linked directorships, and concentrated voting rights became common.¹⁹ While the interlocking, international structures of the modern enterprises enabled more efficient delivery of goods and the standardization of products, the scope and financial strength of the networks now threatens to overshadow individual states.²⁰ Separate legal regimes continue to govern each national unit of multinational corporations, in spite of the broader international strategy that each jointly

15. Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *Business and Human Rights: Further Steps toward Operationalization of the "Protect, Respect, Remedy" Framework*, ¶ 82, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010).

16. See, e.g., *Central R.R. v. Collins*, 40 Ga. 582 (1869); *Hazelhurst v. Savannah*, Griffin & N. Ala. R.R., 43 Ga. 13 (1871); *First National Bank v. Nat'l Exch. Bank*, 92 U.S. 122, 128 (1875) ("Dealing in stocks is not expressly prohibited; but such a prohibition is implied from the failure to grant the power"); *Franklin Co. v. Lewiston Inst. for Sav.*, 68 Me. 43, 46 (1877); *Rumänischen Eisenbahn case of 1881*, 3 RGZ 123 (Ger.); *Petroleum case of 1913*, 82 RGZ 308 (Ger.). See also René Reich-Graef, *Changing Paradigms: The Liability of Corporate Groups in Germany*, 37 CONN. L. REV. 785 (2005) (discussing fact corporate stock ownership outlawed in Europe and German law unique in changing this in German Stock Corporation Act of 1965).

17. 1888 N.J. Laws 385-86; 1888 N.J. Laws 445-46. See also Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CAL. L. REV. 195, 203 (2009) ("In 1988, New Jersey was the first state to grant permission for any corporation chartered in the state to own stock in any other").

18. See, e.g., Olivier De Schutter, *Extraterritorial Jurisdiction as a Tool for Improving the Human Rights Accountability of Transnational Corporations*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE 40 (Nov. 3-4, 2006), <http://www.business-humanrights.org/Links/Repository/775593> (background paper to the seminar organized in collaboration with the Office of the UN High Commissioner for Human Rights in Brussels) ("the multinational corporation appears as a coordinator of the activities of its subsidiaries, which function as a network of organizations working along functional lines").

19. See, e.g., José E. Antunes, *The Liability of Polycorporate Enterprises*, 13 CONN. J. INT'L L. 197, 205 n.29 (1999) (citing *Inv. Trust Corp. v. Sing. Traction Co.*, [1935] Ch. 615 (Eng.) (one share can outvote 399,999 shares)); MELVIN EISENBERG, *THE STRUCTURE OF THE CORPORATION: A LEGAL ANALYSIS* (1976).

20. See, e.g., Detlev Vagts, *The Multinational Enterprise: A New Challenge for. Transnational Law*, 83 HARV. L. REV. 739 (1970); Vivien A. Schmidt, *The New World Order, Incorporated: The Rise of Business and the Decline of the Nation State*, 124 DAEDALUS 75, 75 (1995) (nation-state becoming less powerful than business); Stephens, *supra* note 12, at 56.

pursues.²¹

B. Limited liability and separate legal personality insulate multinational corporations from accountability

The national corporate law systems governing the individual units originated prior to the proliferation of interconnected multinational groups and do not translate well to them.²² While countries generally want to attract investment from multinationals in order to gain access to foreign capital, international markets, and new technologies and training, the same advantages make them difficult to hold accountable under national corporate laws.²³ Their ability to abuse the corporate form, however, is by now well known. Delegated decision making, asset partitioning, and other corporate attributes make them susceptible to abuse by actors who treat human rights norms lightly. From I.G. Farben during World War II to Union Carbide in Bhopal, they have long caused significant harm.²⁴ Many multinational corporations operate in conflict-affected regions where “bad things are known to happen,” structuring their risky ventures to avoid liability.²⁵

The lack of correspondence between the corporate form designed for single corporate enterprises and the integrated economic form of multinational

21. See, e.g., Detlev F. Vagts, *The Corporate Alien: Definitional Questions in Federal Restraints on Foreign Enterprise*, 74 HARV. L. REV. 1489, 1526-30 (1961) (corporations string together corporations created by the laws of different states).

22. See, e.g., Beth Stephens, *supra* note 12 at 54 (“Multinational corporations have long outgrown the legal structures that govern them, reaching a level of transnationality and economic power that exceeds domestic law’s ability to impose basic human rights norms”); ANDREAS LOWENFELD, *INTERNATIONAL LITIGATION AND THE QUEST FOR REASONABLENESS: ESSAYS IN PRIVATE INTERNATIONAL LAW* 81 (1996) (“the law has not kept up with reality . . . law was developed with a view to a single firm operating out of a single state, owned by shareholders who . . . were not other corporations”).

23. See, e.g., John Ruggie, *Global Markets and Global Governance: The Prospects for Convergence*, in *GLOBAL LIBERALISM AND POLITICAL ORDER: TOWARD A NEW GRAND COMPROMISE?* 33 (Steven Bernstein and Louis W. Pauly eds., 2007) (“the territorial state is not their cardinal organizing principle”); Joseph E. Stiglitz, *Multinational Corporations: Balancing Rights and Responsibilities*, Ninth Annual Grotius Lecture at the Annual Meeting of the American Society of International Law (ASIL), 101 ASIL PROCEEDINGS 3, 15 (2007); Joseph E. Stiglitz, *Regulating Multinational Corporations: Towards Principles of Cross-Border Legal Frameworks in a Globalized World Balancing Rights with Responsibilities*, 23 AM. U. INT’L L. REV. 451, 454 (2007-2008); McLeay, *supra* note 13, at 5.

24. See, e.g., Jonathan A. Bush, *The Prehistory of Corporations and Conspiracy in International Criminal Law: What Nuremberg Really Said*, 109 COLUM. L. REV. 1094, 1105, 1198 (2009); *In re Union Carbide Corp.*, 634 F. Supp. 842 (S.D.N.Y. 1986) (Gas Plant Disaster at Bhopal, India in December 1984), *aff’d and modified* 809 F.2d 195 (2d Cir. 1987).

25. John Ruggie, Keynote Presentation, EU Presidency Conference on the “Protect, Respect and Remedy” Framework, Stockholm, November 10-11, 2009 at 6, *available at* <http://www.reports-and-materials.org/Ruggie-presentation-Stockholm-10-Nov-2009.pdf> (last visited August 4, 2011); *see also* Stiglitz (2007), *supra* note 23, at 49.

corporations makes the corporate fiction problematic.²⁶ The act of incorporation carries with it an artificial separate legal personality, dividing the incorporated enterprises and their shareholder-owners into separate spheres and bestowing limited liability on the owners.²⁷ The theory of limited liability developed to encourage individuals to invest, so that corporations could pool capital and put it to efficient use.²⁸ Limited liability, however, continues to apply to corporate owners within multinational corporations, without distinguishing their incentives from those of human investors.²⁹

While the doctrines of separate legal personality and limited liability protect individual shareholders against losses that exceed their initial investments, thus encouraging them to invest, the doctrines have different consequences when they apply to corporations.³⁰ Multinationals can exploit them to shield parent corporations from liability for human rights abuses committed by their foreign subsidiaries.³¹ If they strategically insulate dangerous activities within separate entities,³² the corporate fiction ensures that each one remains legally separate in spite of their economic interdependence, and limited liability protects the parent corporations against responsibility.³³

26. See, e.g., Phillip I. Blumberg, *Accountability of MNCs: The Barriers Presented by Concepts of the Corporate Juridical Entity*, 24 HASTINGS INT'L & COMP. L. REV. 297 (2001); Stephens, *supra* note 12, at 88.

27. See, e.g., *Burnet v. Clark*, 287 U.S. 410, 415 (1932) ("A corporation and its stockholders are generally to be treated as separate entities"); *Anderson v. Abbott*, 321 U.S. 349, 362 (1949) ("Normally the corporation is an insulator from liability on claims of creditors"); see also Aktiengesetz [AktG] [Stock Corporation Act], Sept. 6 1965, BGBL. § 1; art. 5 French loi du 24 juillet 1966; English Companies Act, 1985, §§ 1, 13 (Eng.). For examples of limited liability legislation, see, 1830 Mass. Acts 325, 329, Act of Feb. 23, 1830 ch. 53, S 8; Limited Liability Act, 1855, 18 & 19 Vict., c. 133; Joint Stock Companies Act, 1856, 19 & 20 Vict., c. 47.

28. WILLIAM A. GROENING, *THE MODERN CORPORATE MANAGER: RESPONSIBILITY AND REGULATION* 11 (1981); Henry G. Manne, *Our Two Corporation Systems: Law And Economics*, 53 VA. L. REV. 259 (1967); Frank H. Easterbrook and Daniel R. Fischel, *Limited Liability and the Corporation*, 52 U. CHI. L. REV. 89 (1985); Reinier Kraakmann, *The Economic Functions of Corporate Liability*, in *CORPORATE GOVERNANCE AND DIRECTORS' LIABILITIES* 178 (Klaus J. Hopt & Gunther Teubner eds., 1985).

29. See, e.g., Andreas Lowenfeld, *supra* note 22 at 83-85.

30. P. BLUMBERG, *THE LAW OF CORPORATE GROUPS* 7 (1995).

31. See, e.g., De Schutter, *supra* note 18, at 36.

32. Stiglitz (2007-2008), *supra* note 23, at 474; José Engrácia Antunes, *Enterprise Forms and Enterprise Liability – Is There a Paradox in Modern Corporation Law?* in: II REVISTA DA FACULDADE DE DIREITO DA UNIVERSIDADE DO PORTO 187, 217 (2005) (187-225) ("In some cases MNCs take a country's natural resources, paying but a pittance while leaving behind an environmental disaster. When called upon by the government to clean up the mess, the MNC announces that it is bankrupt: All of the revenues have already been paid out to shareholders. In these circumstances, MNCs are taking advantage of limited liability").

33. See, e.g., Lowenfeld, *supra* note 22, at 82. For a private international law perspective on gaps in governance, see Horatia Muir-Watt, *Private International Law as Global Governance: Beyond the Schize, from Closet to Planet*, (2011), available at http://works.bepress.com/horatia_muir-watt/1.

C. Accountability requires extraterritoriality

In this way, multinational corporations challenge the effectiveness of national corporate law systems, and a recognition has emerged that their regulation demands legal liability beyond national borders and across corporate groups.³⁴ Extraterritoriality, a legal doctrine that allows judicial systems to exercise authority outside the typical jurisdiction, has become a tool for countering the accountability gap that globalization has caused.³⁵ Extraterritorial jurisdiction can be used to impose responsibility in situations where no single system has the capacity to find multinationals at fault.³⁶

Without extraterritoriality, the host countries of the subsidiaries that committed human rights abuses generally would take jurisdiction over their actions within the national territory.³⁷ Often, however, multinational corporations can manipulate territorially based jurisdiction to evade liability.³⁸ To begin with, they can distribute actions that collectively amount to illegalities across many separate entities, so that each individually has operated within the law.³⁹ If the harmful conduct is carried out in countries other than where its effects are felt, evading the competence of the territorial jurisdiction becomes even easier.⁴⁰ Second, even if liability could be imposed on one unit of a multinational, the unit can shift its financial assets within the corporate group, exhausting the funds that would otherwise have been recoverable in the territorial jurisdiction.⁴¹

34. See, e.g., Schutter, *supra* note 18, at 21 (“the interdependencies created by the activities of such transnational actors, and the need to devise an adequate reaction”); Zerk, *supra* note 11, at 5; Michael Addo, *Human Rights and Transnational Corporations – an Introduction*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS 11 (Michael Addo ed., 1999) (“Of all the characteristics of the law it is its predominantly domestic focus which impedes its effectiveness in the regulation of transnational corporations of today”).

35. See, e.g., De Schutter, *supra* note 18.

36. *Id.* at 2-7; *Exploring Extraterritoriality In Business And Human Rights: Summary Note Of Expert Meeting Tuesday*, Sept. 14 2010, Mossavar-Rahmani Center for Business & Government, Harvard Kennedy School, at 3, available at <http://www.business-humanrights.org/media/documents/ruggie-extraterritoriality-14-sep-2010.pdf> (last viewed Aug. 4, 2011).

37. On the principle of territorial jurisdiction, see U.N. Charter art. 1, para. 2, art. 2, para. 4; *Am. Banana Co. v. United Fruit Co.*, 213 U.S. 347, 357 (1909); see also Stephens, *supra* note 12, at 82.

38. See, e.g., Michael Addo, *supra* note 34, at 11.

39. Amnesty International, *Comments In Response To The Un Special Representative Of The Secretary General On Transnational Corporations And Other Business Enterprises' Guiding Principles – Proposed Outline* 19 (Oct. 2010), available at <http://www.amnesty.org/fr/library/info/IOR50/001/2010/en>; Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, *supra* note 15, at 20 (“challenge is the attribution of responsibility among members of a corporate group”).

40. See, e.g., De Schutter, *supra* note 18, at 21.

41. *Universal Jurisdiction: The Duty Of States To Enact And Enforce Legislation*,

In addition, in a territorial system, even if a single entity acting within a single national jurisdiction has committed a wrong, and even if the entity has not protected its assets by transferring them outside of the jurisdiction, multinational corporations can still rely on their economic strength to evade liability.⁴² In many cases, the countries where the harm occurred will not have made the actions of the corporations illegal so as not to discourage foreign investment.⁴³ Even if the actions are illegal, the multinationals can still wield their power to avoid punishment: they can pressure local authorities not to prosecute them, offering continued investment. Local authorities, moreover, frequently have been complicit in wrongdoing.⁴⁴ When prosecutions do proceed, the host countries often lack functioning legal systems or may not have sufficient resources to bring multinationals to justice.⁴⁵

Extraterritoriality surmounts some of the difficulties by enabling litigation to take place in alternative jurisdictions, either through the direct horizontal application of international laws, as is the case under the ATS in the United States, or through a vertical collapsing of the separation between the parent corporations and the subsidiaries that they own, as has become prevalent in Europe.⁴⁶ The former can be justified under a theory of supranational liability, which assumes that multinational corporations are no longer closely connected to any particular country and have outgrown the exclusive jurisdiction of the territory in which the human rights abuses took place.⁴⁷ The latter mechanism of accountability reflects an enterprise theory of liability and presumes that multinationals, though aggregates of legally separate corporations, are organized as single economic units, so every act of the subsidiaries may be imputed to

Introduction, AMNESTY INTERNATIONAL, 17 (Aug. 31, 2001), <http://www.amnesty.org/en/library/asset/IOR53/002/2001/en/be2d6765-d8f0-11dd-ad8c-f3d4445c118e/ior530022001en.pdf>; Stiglitz (2007-2008), *supra* note 23, at 474.

42. On jurisdiction generally, *see* CEDRIC RYNGAERT, JURISDICTION IN INTERNATIONAL LAW (2008); MARKO MILANOVIC, EXTRATERRITORIAL APPLICATION OF HUMAN RIGHTS TREATIES (2011).

43. G.A. RES. 60/251, at 16, U.N. Doc. A/HRC/4/35/Add.2 (Feb. 15, 2007) (“the state lacks both the ability and inclination to exercise jurisdiction, particularly where it seeks to encourage companies registered on its territory to expand their overseas operations”); Beth Stephens, *Translating Filártiga: A Comparative and International Law Analysis Of Domestic Remedies For International Human Rights Violations*, 27 YALE J. INT’L L. 1, 32 (2002) (“the local municipal law might not recognize the underlying facts as a tort at all”).

44. *See, e.g.*, Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon: An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT’L L. 91, 91-92 (2002).

45. *See* McLeay, *supra* note 13, at 5.

46. 28 U.S.C. § 1350 (2006); *infra* Section III.A.

47. *See, e.g.*, Larry Catá Backer, *Multinational Corporations as Objects and Sources of Transnational Regulation*, 14 ILSA J. INT’L & COMP. L. 499, 505-507 (2008); Noah Sachs, *Beyond the Liability Wall: Strengthening Tort Remedies in International Environmental Law*, 55 UCLA L. REV. 837 (2008); Steven R. Ratner, *Corporations and Human Rights: A Theory of Legal Responsibility*, 111 YALE L.J. 443 (2001).

their parent corporations.⁴⁸ The enterprise theory differs from the usual entity-based approach, in which the separate legal personality of subsidiaries only can be overlooked when they display no will or existence of their own, which is determined through scrutiny of the relationship between the subsidiaries and their parent corporations.⁴⁹

Extraterritoriality, however, remains controversial.⁵⁰ Some argue that it is improper to interfere in the domestic affairs of territorial jurisdictions and suggest that each deserves the opportunity to develop local institutions to address local problems.⁵¹ The criticisms assume that multinational corporations can be held accountable within a single jurisdiction, even though the wrongdoing may have taken place across multiple countries, evading any territorially bounded prohibition. Other critics defend the interests of the multinationals themselves, stressing that extraterritoriality forces them to comply with conflicting requirements of multiple jurisdictions, leading to legal uncertainty and additional expense.⁵² These arguments, however, overlook the fact that foreign subsidiaries generally form part of integrated corporate groups under common management. The public relates to multinational corporations at the level of the parent corporations that control each separate unit, and so the parents can be expected to run them in compliance with the laws of the parent jurisdictions. Indeed, multinationals targeted in boycotts and divestment campaigns have not denied that they were doing business in foreign territories

48. Adolf Berle advocated using an economic enterprise theory and disregarding the corporate form in favor of economic substance. See Adolf A. Berle, *The Theory of Enterprise Entity*, 47 COLUM. L. REV. 343, 344 (1947); see also Meredith Dearborn, *Enterprise Liability: Reviewing and Revitalizing Liability for Corporate Groups*, 97 CALIF. L. REV. 195 (2009).

49. Phillip I. Blumberg, *The Increasing Recognition Of Enterprise Principles In Determining Parent And Subsidiary Corporation Liabilities*, 28 CONN. L. REV. 295, 297 (1996) (“This view of the corporation as a separate juridical entity with its own rights and duties distinct from those of its shareholders is entity law.”). For veil-piercing standards in various countries, see, e.g., Sandra K. Miller, *Piercing the Corporate Veil Among Affiliated Companies in the European Community and in the U.S.: A Comparative Analysis of U.S., German and U.K. Veil-Piercing Approaches*, 36 AM. BUS. L.J. 73 (1998); Thomas J. Heiden, *The New Limits of Limited Liability: Differing Standards and Theories for Measuring a Parent/Shareholder’s Responsibility for the Operations of Its Subsidiary*, 823 PRACTICING L. INST. 7 (1993) (discussing typical entity-based approach that relies on veil-piercing). See, e.g., *Consol. Sun Ray, Inc. v. Oppenstein*, 335 F.2d 801, 806 (8th Cir. 1964) (parent company exerted complete control over subsidiary, rendering it “mere conduit, instrumentality or adjunct” of its parent); *Steven v. Roscoe Turner Aeronautical Corp.*, 324 F.2d 157, 161 (7th Cir. 1960) (although stock control and common officers and directors are factors in applying the instrumentality rule, they represent common business practice and without other misconduct, corporate structure will not be disregarded).

50. See, e.g., Luc Reydam, *Universal Jurisdiction in Context*, 99 AM. SOC’Y INT’L L. PROC. 118, 119 (2005); *Business and Human Rights: The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations with Respect to Human Rights, Background Notes*, BUSINESS & HUMAN RIGHTS RESOURCE CENTRE, 8 (Nov. 8-9, 2007), <http://www.reports-and-materials.org/Copenhagen-8-9-Nov-2007-backgrounder.pdf>; Henry A. Kissinger, *The Pitfalls of Universal Jurisdiction*, 80 FOREIGN AFF. 86, 87 (2001).

51. De Schutter, *supra* note 18, at 7, 10.

52. See, e.g., Ruggie, *supra* note 25, at 5.

by suggesting that only their independent subsidiaries conducted activities there.⁵³

II.

THE ATS OVERCAME THE OBSTACLES TO ACCOUNTABILITY, BUT MOUNTING RESISTANCE TO EXTRATERRITORIAL JURISDICTION HAS CULMINATED IN POTENTIAL IMMUNITY FOR CORPORATE DEFENDANTS

In the United States, the ATS offered a cause of action in international law coupled with extraterritorial jurisdiction to overcome many of the obstacles to liability described in the previous section.⁵⁴ Although not its original purpose, *Filártigav. Peña-Irala* and *Doe v. Unocal* construed the statute as a tool foreign plaintiffs could use to hold transnational corporations accountable for human rights abuses abroad.⁵⁵ The claims always have been difficult to bring, however, and they increasingly appear to occupy an uncomfortable position within the U.S. legal system.⁵⁶ In *Sosav. Alvarez-Machain*, the Supreme Court restricted the range of international laws that may enter U.S. courts through the statute, emphasizing separation of powers concerns with extraterritorial jurisdiction.⁵⁷ *Kiobel v. Royal Dutch Petroleum*, recently handed down in the Second Circuit, narrowed the statute to exclude corporate defendants, reflecting similar uneasiness with nondomestic laws and extraterritoriality.⁵⁸

A. The ATS brings international laws into U.S. courts for external application against foreign defendants

The ATS allowed U.S. courts to consider external international rules and exercise extraterritorial jurisdiction, and thus enabled the adjudication of claims concerning the multinational effects of multinational corporate wrongdoing. Though this was an unintended use of the statute, U.S. courts initially condoned it, reflecting U.S. leadership in human rights.⁵⁹

53. See, e.g., Lowenfeld, *supra* note 22, at 99-105.

54. See, e.g., Lucien J. Dhooze, *The Alien Tort Claims Act and the Modern Transnational Enterprise: Deconstructing the Mythology of Judicial Activism*, 35 GEO. J. INT'L L. 3, 7-8 (2003).

55. *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997), *aff'd in part, rev'd in part*, 395 F.3d 932 (9th Cir. 2002), *vacated*, 403 F.3d 708 (9th Cir. 2005); *Filartiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980).

56. See, e.g., *Gonzalez v. Chrysler Corp.*, 301 F. 3d 377, 381-84 (5th Cir. 2002); *Polanco v. H.B. Fuller Co.*, 941 F. Supp. 1512, 1529 (D. Minn. 1996); *Torres v. S. Peru Copper Corp.*, 965 F. Supp. 899, 900 (S.D. Tex. 1996); *Ernst v. Ernst*, 722 F. Supp. 61, 64-68 (S.D.N.Y. 1989). See also U.N. G.A., Human Rights Council, *supra* note 43, at 20; Oxford Pro Bono Publico, *supra* note 5, at ii; Part III C.

57. *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004).

58. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010).

59. De Schutter, *supra* note 18, at 6.

Enacted in 1789 with little surviving legislative history,⁶⁰ the ATS states: “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.”⁶¹ Its original purpose appears to have been to assure other governments that foreign diplomats and merchants living in the United States would have access to legal remedies.⁶²

First used in actions against foreign officials and repressive regimes, and then applied to corporate defendants, the ATS prior to *Kiobel* offered foreign plaintiffs the ability to hold any defendant accountable in the United States, provided they could make out a cause of action under international law.⁶³ The statute applied to foreign subsidiaries with separate legal personalities and the harms they caused outside of the United States.⁶⁴ The legislation therefore has functioned in both an inward and an outward direction: it has conveyed international causes of actions *into* federal common law, and it has allowed U.S. courts to impose jurisdiction *outward* over foreign claims so that they may be adjudicated in the United States.

After nearly two hundred years of nonuse, in *Filártiga v. Peña-Irala* the ATS enabled a Paraguayan father and his daughter to redress the kidnapping and torture of his son by a Paraguayan police officer.⁶⁵ The domestic suit they had brought in Paraguay stalled when the defendant-police officer arrested and threatened their lawyer and another person falsely pleaded guilty.⁶⁶ The ATS, however, provided U.S. federal court as an alternative. The Second Circuit found federal question jurisdiction over the claim between Paraguayan citizens because “the law of nations . . . has always been a part of the federal common law.”⁶⁷ The court found torture to be a violation of the law of nations, citing the Universal Declaration of Human Rights and other UN documents, and therefore

60. *IIT v. Vencap, Ltd.*, 519 F.2d 1001, 1015 (2d Cir. 1975) (“no one seems to know whence it came”).

61. 28 U.S.C. § 1350 (2006).

62. Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 16 ST. THOMAS L. REV. 607, 609 (2004). This view, further described in Curtis A. Bradley, *The Alien Tort Statute and Article III*, 42 VA. J. INT’L L. 587, 588 (2002), remains subject to dispute; *but see* William R. Casto, *The Federal Courts’ Protective Jurisdiction Over Torts Committed in Violation of the Law of Nations*, 18 CONN. L. REV. 467, 490-93 (1986); William S. Dodge, *The Historical Origins of the Alien Tort Statute: A Response to the “Originalists,”* 19 HASTINGS INT’L & COMP. L. REV. 221, 234 (1996).

63. *See Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 115-16 (2d Cir. 2010).

64. *See, e.g., Bowoto v. Chevron Corp.*, 621 F.3d 1116, 1124-28 (9th Cir. 2010); *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009).

65. *Filártiga v. Peña-Irala*, 630 F.2d 876 (2d Cir. 1980). On nonuse, *see Kiobel*, 621 F.3d at 115-16; Katherine Gallagher, *Civil Litigation and Transnational Business: An Alien Tort Statute Primer*, 8 J. INT’L CRIM. JUST. 745, 748 (2010).

66. *Filártiga*, 630 F.2d at 878 (2d Cir. 1980).

67. *Id.* at 885.

actionable under the statute.⁶⁸

Filártiga transformed the ATS into a tool for remedying human rights violations committed abroad.⁶⁹ The opinion endorsed the domestic integration of international laws and extraterritorial jurisdiction, stating that the federal common law incorporates new international norms as “part of an evolutionary process” and that “[i]t is not extraordinary for a court to adjudicate a tort claim arising outside of its territorial jurisdiction.”⁷⁰ The court aspired to make torture “an enemy of all mankind.”⁷¹

A flurry of cases against foreign officials and repressive regimes followed *Filártiga*.⁷² The cases offered no real prospect of recovery, but their documentary and symbolic functions elicited approval, at least outside of the D.C. Circuit.⁷³ Law review articles dissecting the cases also supported the role of the statute in stimulating the development of international law.⁷⁴ Overall, the new use of the statute seemed well received, perhaps because the need to allege a violation of the law of nations and to withstand motions asserting *forum non*

68. *Id.* at 879-83.

69. *See, e.g.*, Matt A. Vega, *Balancing Judicial Cognizance and Caution: Whether Transnational Corporations Are Liable for Foreign Bribery Under the Alien Tort Statute*, 31 MICH. J. INT'L L. 385, 388 (2010) (describing “explosion of ATS litigation centered almost exclusively on human Rights”).

70. *Filártiga*, 630 F.2d at 885, 887.

71. *Id.* at 890.

72. *See, e.g.*, Flores v. S. Peru Copper Corp., 414 F.3d 233 (2d Cir. 2003); Khulumani v. Barclay Nat. Bank Ltd., 504 F.3d 254 (2d Cir. 2007); Beanal v. Freeport-McMoRan, Inc., 969 F. Supp. 362 (E.D. La. 1997); Almog v. Arab Bank, PLC, 471 F.Supp.2d 257(E.D.N.Y. 2007); *See also* Sinan Kalayoglu, *Correcting Mujica: The Proper Application of the Foreign Affairs Doctrine in International Human Rights Law*, 24 WIS. INT'L L. J. 1045, 1045-1046 (2007).

73. Chimène I. Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L. J. 61, 103 (2008) (“ATS judgments against individual defendants provide invaluable symbolic vindication for plaintiffs and can deter human rights abusers from entering or remaining in the United States, but money judgments against these defendants are notoriously difficult, if not impossible, to collect. Defendants might not have significant assets in the United States, and U.S. judgments can be difficult to enforce abroad”); Daniel Abebe & Eric A. Posner, *The Flaws of Foreign Affairs Legalism*, 51 VA. J. INT'L L. 507, 516 (2011) (“In ATS litigation, American courts have heard cases brought by aliens on account of human rights violations. This litigation has produced some successes, including both symbolic victories against judgment-proof individuals and monetary settlements with corporations allegedly complicit in human rights abuses committed by governments. Human rights treaties have famously weak enforcement mechanisms—some create toothless committees or commissions, others create nothing at all—and litigation in the United States provides a potential avenue for enforcement that is both procedurally sound and more likely to produce tangible victories. For this reason, Koh supports this litigation”); Brian Seth Parker, *Applying the Doctrine of Superior Responsibility to Corporate Officers: A Theory of Individual Liability for International Human Rights Violations*, 35 HASTINGS INT'L & COMP. L. REV. 1, 3 (2012) (“Beyond monetary redress, ATS litigation provides plaintiffs with symbolic vindication and empowerment while serving as a deterrent against future corporate complicity in international law violations”).

74. Beth Stephens, *Upsetting Checks and Balances: The Bush Administration's Efforts to Limit Human Rights Litigation*, 17 HARV. HUM. RTS. J. 169, 175 (2004) (“Hundreds of law review articles analyzing the *Filártiga* doctrine were overwhelmingly favorable”).

conveniens or sovereign immunity limited the number of claims that could proceed to judgment.⁷⁵

The D.C. Circuit alone took a more hostile view of the statute and sought to restrict the scope of international law that could come into domestic courts for extraterritorial application. In *Tel-Oren v. Libyan Arab Republic*, a claim by Israeli citizens against a Palestinian organization for a terrorist attack in Haifa, Judge Bork stated in a split-panel decision that only Congress could create causes of action.⁷⁶ It therefore followed, he said, that the ATS could not incorporate new causes of action within the meaning of the law of nations as it evolved.⁷⁷ Judge Bork would have limited the incorporation of international laws into U.S. law to the few norms recognized in 1789, when Congress adopted the ATS.⁷⁸ All three judges on the *Tel-Oren* panel declined to impose judgment extraterritorially over events that took place in Israel.⁷⁹ Doing so, they wrote, would amount to the conduct of foreign relations, which separation of powers principles reserve exclusively for the political branches.⁸⁰ Both arguments have reappeared in more recent decisions involving corporations.⁸¹

B. The ATS extended extraterritorial jurisdiction to multinational corporate defendants

Corporations provide easier targets for ATS claims than individuals or repressive regimes, and litigators seized the opportunity. The 2001 *Doe v. Unocal* case offered to charge them with complicity in human rights abuses.⁸² Suits against corporations have reached actions taken by many individuals that only collectively amount to illegalities.⁸³ Sovereign immunity has not protected

75. 28 U.S.C. § 1404. *See also* *In re Union Carbide Corp.*, 634 F. Supp. 842 (S.D.N.Y. 1986) *aff'd*, 809 F.2d 195 (2d Cir. 1987) (Gas Plant Disaster at Bhopal, India in December, 1984); *Aguinda v. Texaco, Inc.*, 303 F.3d 470 (2d Cir. 2002); *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 578 F.3d 1283 (11th Cir. 2009). The doctrine of foreign sovereign immunity developed in the common law prior to the enactment of the Foreign Sovereign Immunities Act, 28 U.S.C.A. § 1602. *See* *Carpenter v. Republic of Chile*, 610 F.3d 776 (2d Cir. 2010); *Belhas v. Ya'alon*, 515 F.3d 1279 (D.C. Cir. 2008); *Argentine Republic v. Amerada Hess Shipping Corp.*, 488 U.S. 428 (1989).

76. *Tel-Oren v. Libyan Arab Republic*, 726 F.2d 774, 801-05 (D.C. Cir. 1984) (Bork, J., concurring).

77. *Id.* at 808-19.

78. *Id.* Subsequent courts in other circuits, however, initially followed *Filártiga*, not *Tel-Oren*, and continued to assume the power to recognize causes of action. *See, e.g.*, *Xuncax v. Gramajo*, 886 F. Supp. 162, 179 (D. Mass. 1995) (referring to *Filártiga* as “the wellspring of modern § 1350 case law”); *Iwanowa v. Ford Motor Co.*, 67 F. Supp. 2d 424, 441-42 (D. N.J. 1999); *Forti v. Suarez-Mason*, 672 F. Supp. 1531, 1539-40 (N.D. Cal. 1987).

79. *Tel-Oren*, 726 F.2d at 775-76, 798-99, 823-27.

80. *Id.* at 799, 803-804, 823-827.

81. *See infra* section B.

82. *See* *Doe v. Unocal Corp.*, 963 F. Supp. 880 (C.D. Cal. 1997); 248 F.3d 915 (9th Cir. 2001), *vacated* 403 F.3d 708 (9th Cir. 2005).

83. For cases involving suing a corporation to reach the actions of many individuals, *see, e.g.*,

corporations as it has governments.⁸⁴ Most large corporations have maintained permanent presences within the United States, making it possible to establish personal jurisdiction over them.⁸⁵ Corporations also have had more substantial recoverable assets and stronger incentives to settle claims to avoid negative publicity than other defendants.⁸⁶

In *Doe v. Unocal*, a federal court reviewed for the first time whether the ATS applied to corporate complicity in human rights abuses, relying on an earlier case, *Kadic v. Karadzic*.⁸⁷ While liability under international laws generally necessitates state action, the *jus cogens* crimes of slave trading, genocide, and war crimes do not require it.⁸⁸ In *Kadic*, the Second Circuit found that nonstate actors also violate international laws when they commit crimes that further a separate *jus cogens* crime.⁸⁹ The court therefore allowed an ATS claim alleging genocide against the leader of the Bosnian-Serb Republic, even though the Bosnian-Serb Republic did not qualify as a state.⁹⁰

In *Doe v. Unocal*, the Ninth Circuit endorsed ATS suits against corporations, largely on the basis that *Kadic* already implicitly allowed claims against private actors.⁹¹ The case concerned allegations that a subsidiary of Unocal was complicit with its security partner, the Myanmar military, in the assault, rape, torture, and murder of villagers in Burma.⁹² The full circuit voted for *en banc* review to determine the correct standard for aiding and abetting liability, vacating the judgment of the prior panel.⁹³ Before the *en banc* opinion issued, however, the parties settled the case.⁹⁴

Khulumani v. Barclay Nat'l Bank Ltd., 504 F.3d 254, 262 (2d Cir. 2007); *Bigio v. Coca-Cola*, 448 F.3d 176, 179 (2d Cir. 2006); *Doe v. Nestle, S.A.*, 748 F.Supp.2d 1057, 1063, 10744 (C.D. Cal. 2010).

84. Inés Tófaló, *Overt and Hidden Accomplices: Transnational Corporations' Range of Complicity for Human Rights Violations* 5 (NYU Sch. of Law, Global Law Working Paper No. 01/05, 2005).

85. See, e.g., *Bauman v. DaimlerChrysler Corp.*, 644 F.3d 909, 911-12 (9th Cir. 2011); but see, e.g., *Singh v. Crompton Greaves Ltd.*, No. 10-13224, 2001 WL 2433396, at *3 (E.D. Mich. May 24, 2011).

86. See, e.g., Jenny Strasburg, *Saipan Lawsuit terms OK'd: Garment Workers Get \$20 Million*, S.F. Chron., Apr. 25, 2003, at B1.

87. *Kadic v. Karadzic*, 70 F.3d 232, 239 (2d Cir. 1995).

88. Theoretically, violations of *jus cogens* do not amount to sovereign acts at all because they reflect the disregard of norms the community of states has established and thus do not receive sovereign immunity. See, e.g., Evan J. Criddle & Evan. Fox-Decent, *A Fiduciary Theory Of Jus Cogens*, 34 YALE J. INT'L L. 331 (2009); Sévrine Knuchel, *State Immunity And The Promise Of Jus Cogens*, 9 NW. U. J. INT'L HUM. RTS. 149 (2011); Lee M. Caplan, *State Immunity, Human Rights and Jus Cogens: A Critique of the Normative Hierarchy Theory*, 97 AM. J. INT'L L. 741, 772 (2003).

89. *Kadic*, 70 F.3d at 240, 242.

90. *Id.* at 251.

91. *Doe v. Unocal Corp.*, 395 F.3d 932, 945-55 (9th Cir. 2002).

92. *Id.*, at 936-37.

93. *Doe v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003).

94. Press Release, Unocal Corp., Settlement Reached in Human Rights Lawsuit, (Dec. 13,

Since *Unocal*, plaintiffs have sued corporations under the ATS and extracted a few large payouts, although they have rarely won at trial. To date roughly 150 individual lawsuits, a majority of the ATS claims filed, have named corporate defendants.⁹⁵ Only four of the cases have proceeded to trial, and only one has ended in a judgment against the corporation.⁹⁶ Most have failed on the grounds of subject matter jurisdiction, statute of limitations, or *forum non conveniens*.⁹⁷ These impediments, however, have not precluded substantial settlements. Royal Dutch Petroleum/Shell, for example, agreed to pay \$15.5 million after years of litigation over the *Wiwa* case.⁹⁸ The large recoveries have appeared to provoke opposition.⁹⁹

C. Increasing hostility towards extraterritoriality culminated in Kiobel v. Royal Dutch Shell Petroleum

Assorted opponents of the ATS challenged the recognition of new causes of action that brought increasing amounts of international law into U.S. courts, as well as the foreign policy implications of the judiciary using the law to impose judgments abroad.¹⁰⁰ *Business Week* reported that corporate advocacy groups met in November 2002 to plot a strategy to limit the application of the statute to corporations.¹⁰¹ Some participants claimed that corporations became susceptible to suit just by investing in a foreign country.¹⁰² Ten separate

2004) (on file with author); see also L. Girion, *Unocal to Settle Human Rights Lawsuit*, L.A. TIMES, Dec. 14, 2004, at A1; F. Quigley, Editorial, *Nigerians Get Their Day in Court to Fight Oil Companies*, INDIANAPOLIS STAR, Dec. 15, 2008, at A9.

95. See, e.g., *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1263 (11th Cir. 2009); *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163 (2d Cir. 2009); *Abagninin v. AMVAC Chem. Corp.*, 545 F.3d 733 (9th Cir. 2008); *Romero v. Drummond Co.*, 552 F.3d 1303 (11th Cir. 2008); *Vietnam Ass'n for Victims of Agent Orange v. Dow Chem. Co.*, 517 F.3d 104 (2d Cir. 2008); *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007); *Sarei v. Rio Tinto, PLC*, 487 F.3d 1193 (9th Cir. 2007); *Doe v. Exxon Mobil Corp.*, 473 F.3d 345 (D.C. Cir. 2007); *Aldana v. Del Monte Fresh Produce, N.A.*, 416 F.3d 1242 (11th Cir. 2005); *Flores v. S. Peru Copper Corp.*, 414 F.3d 233 (2d Cir. 2003). See also Brief for the National Foreign Trade Council, USA et al. as Amici Curiae Supporting Petitioner at 4, *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004) (No. 03-339), WL 162760.

96. *Chowdhury v. WorldTel Bangladesh Holding, Ltd.*, 588 F. Supp. 2d 375 (E.D.N.Y. 2009) (jury awarding Plaintiff Chowdhury \$1.5 million); *Jama v. Esmor Corr. Servs.*, 2009 U.S. App. LEXIS 107950 (3d Cir., Aug. 12, 2009); *Bowoto v. Chevron*, 312 F. Supp. 2d 1229 (N.D. Cal. 2004); *Rodriguez v. Drummond Co.*, 256 F. Supp. 2d 1250 (N.D. Ala. 2003).

97. See, e.g., *Estate of Abtan v. Blackwater Lodge and Training Center*, 611 F. Supp. 2d 1 (D.D.C. 2009); *Al Shimari v. CACI Premier Technology, Inc.*, 657 F. Supp. 2d 700 (E.D.Va. 2009); Harold Hongju Koh, *Separating Myth from Reality about Corporate Responsibility Litigation*, 7 J. INT'L ECON. L. 263, 269 (2004).

98. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88 (2d Cir. 2000), cert. denied, 121 S. Ct. 1402 (2001); Paul Magnusson, *A Milestone for Human Rights*, BUS. WEEK, Jan. 24, 2005.

99. See *infra*, Part IV.

100. Stephens, *supra* note 74, at 179.

101. Paul Magnusson, *Making a Federal Case Out of Overseas Abuses*, BUS. WEEK, Nov. 25, 2002, at 78.

102. *Id.*

lawsuits filed in 2002 alleging complicity in human rights abuses against corporations that conducted business with the apartheid government in South Africa further inflamed dissent.¹⁰³ A book published in 2003 labeled the statute an “awakening monster” and argued that ATS litigation “could have profound consequences for the world economy.”¹⁰⁴ Senator Dianne Feinstein proposed legislation limiting claims against corporations, then withdrew the bill eight days later; she refused to disclose whether she had consulted with interest groups.¹⁰⁵ Growing discomfort with the claims ultimately seemed to reveal itself in briefs of the executive branch and increasingly narrow judicial holdings such as *Sosa v. Alvarez-Machain*.¹⁰⁶

Amicus briefs and letters to the court evidence the evolution in attitude towards the extraterritorial character of the ATS. The Carter administration supported the view of the Second Circuit in *Filártiga* that the statute permits the judiciary to incorporate new causes of action in “international law as it has evolved over time” and impose the law on foreign defendants.¹⁰⁷ In its amicus brief in *Filártiga*, the Department of Justice discounted concerns over extraterritoriality, stating that “there is little danger that judicial enforcement will impair our foreign policy efforts.”¹⁰⁸ In *Trajano v. Marcos*, an amicus brief filed by the Reagan administration agreed that enforcing a judgment against former Prime Minister Ferdinand Marcos “would not embarrass the relations between the United States and the Government of the Philippines.”¹⁰⁹ In *Kadic*, a statement of interest filed by the Clinton administration also maintained that “dismissal of these cases at this stage under the ‘political question’ doctrine is not warranted.”¹¹⁰ The Department of Justice during the first Bush administration, however, began to urge limitations on the scope of international law that could be used to create new causes of action under the statute.¹¹¹

103. See *Ntzebesa v. Citigroup, Inc.*, 02 Civ 4712 (S.D.N.Y. 2002); *Khulumani v. Barclays National Bank*, Case No. 02-CV5952 (S.D.N.Y. 2002); *Digwamaje v. Bank of America*, Case No. 02-CV-6218 (S.D.N.Y. 2002); see also Stephens, *supra* note 74, at 179.

104. GARY CLYDE HUFBAUER & NICHOLAS K. MITROKOSTAS, *AWAKENING MONSTER: THE ALIEN TORT STATUTE OF 1789* vii (2003).

105. S. 1874, 109th Cong. (1995) (introduced Oct. 17, 2005) (limiting ATS suits to those “asserting a claim of torture, extrajudicial killing, genocide, piracy, slavery, or slave trading if a defendant is a direct participant acting with specific intent to commit the alleged tort”).

106. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739 (2004); see *infra*.

107. Memorandum for the United States as Amicus Curiae, Submitted to the Court of Appeals for the Second Circuit, *Filártiga v. Pena-Irala*, 630 F.2d 876 (2d Cir. 1980) (No. 79-6090), available at <http://homepage.ntlworld.com/jksonc/docs/filartiga-us-amicus-brief-19800529.html> at 3.

108. *Id.* at 23.

109. Memorandum for the United States as Amicus Curiae, *Trajano v. Marcos*, 878 F.2d 1439 (9th Cir. 1989) (table disposition), see text in 1989 WL 76894.

110. Statement of Interest of the United States, *Jane Doe I v. Karadzic* (2d Cir. Sept. 13, 1995) (No. 94-9035).

111. Indeed, the first Bush administration initially opposed passage of the TVPA and was concerned it risked provoking retaliatory lawsuits against U.S. officials. See Brief for U.S. Reps. as Amici Curiae, Relating to Issues Raised by the United States in Its Motion to Vacate October 21,

Nevertheless, President George H. W. Bush signed into law the Torture Victims Protection Act, which allowed for extraterritorial jurisdiction over claims of torture and extrajudicial killing.¹¹² In a speech at the time, he supported extraterritorial goals, stating, “In this new era, in which countries throughout the world are turning to democratic institutions and the rule of law, we must maintain and strengthen our commitment to ensuring that human rights are respected everywhere.”¹¹³

The Department of State and Department of Justice in the administration of President George W. Bush, however, pursued a comprehensive attack against the ATS, reprising arguments against admitting international laws into U.S. courts for judicial imposition abroad and raising new challenges to the extraterritorial basis of the statute itself. In *Sarei v. Rio Tinto*, the Department of State submitted a letter that said “continued adjudication of the claims . . . would risk a potentially serious adverse impact . . . on the conduct of our foreign relations.”¹¹⁴ It filed another letter in *Doe v. Exxon Mobil* making the same assertion and attached an affidavit from the Indonesian ambassador.¹¹⁵ The affidavit stated that Indonesia “cannot accept” a suit against an Indonesian government institution and U.S. courts should not be adjudicating “allegations of abuses of human rights by the Indonesian military.”¹¹⁶ In *Doe v. Unocal*, an amicus brief of the Department of Justice first argued that only law that has “been affirmatively incorporated into the laws of the United States” can come into U.S. courts and that “the ATS . . . raises significant potential for serious interference with the important foreign policy interests of the United States, and is contrary to our constitutional framework and democratic principles . . . [because] open[ing] our courts to right every wrong all over the world . . . has not been assigned to the federal courts.”¹¹⁷ The brief then opposed the entire line of human rights cases developed under the statute: “The ATS has been wrongly interpreted to permit suits requiring the courts to pass factual, moral,

2002, Matters and Statement of Interest or, in the Alternative Suggestion of Immunity at IV, Plaintiffs A, B, et al. v. Zemin et al., (June 9, 2003) (No. 02-7530).

112. H.R. REP. NO. 102-367, at 3 (1992).

113. Statement on Signing the Torture Victim Protection Act of 1991, Mar. 12, 1992, *reprinted in* 28 WEEKLY COMP. PRES. DOC. 465, 466 (Mar. 16, 1992), *quoted in* Stephens, *supra* note 74, at 189.

114. Letter from William H. Taft IV, Legal Adviser of the Dep’t of State, to J. Robert D. McCallum (Oct. 31, 2001), in *Sarei v. Rio Tinto*, No. 00-11695 (MMM) (AIX) (C.D. Cal. 2001).

115. Letter from William H. Taft IV, Legal Adviser of the Dep’t of State, to J. Louis F. Oberdorfer (July 29, 2002), in *Doe v. Exxon Mobil Corp.*, No. 01-1357 (LFO) (D.D.C. 2002) (“adjudication . . . would risk a potentially serious adverse impact on significant interests of the United States”).

116. Letter from Soemadi Brotodiningrat, Ambassador, Embassy of the Republic of Indon., to Richard L. Armitage, Deputy Sec’y of State, U.S. Dep’t of State (July 15, 2002), *available at* <http://courtappendix.com/kiobel/protests/>.

117. Brief for the United States of America as Amici Curiae, *Doe v. Unocal Corp.*, 473 F.3d 345 (No. 00-56603), at 4, 11, *available at* www.earthrights.org/sites/default/files/legal/Unocal-doj-brief.pdf.

and legal judgment on . . . foreign acts[.]”¹¹⁸ It further stated, “[A] statute is presumed to apply only within the territory of the United States . . . [and] nothing in the ATS or in its contemporaneous history . . . furnish[es] a foundation for suits based on conduct occurring within other nations.”¹¹⁹ President George W. Bush took additional measures to curb the litigation and issued an executive order that provided immunity to corporations doing business in Iraq.¹²⁰

The Bush administration lobbied for Supreme Court review of *Sosa v. Alvarez-Machain*, and the decision the Court ultimately handed down narrowed the reach of the ATS significantly.¹²¹ Its brief in support of the petition for certiorari maintained that “the ATS cannot properly be construed to permit suits requiring United States courts to pass factual and legal judgment on these foreign acts.”¹²² The judgment of the Court did not go as far, but it did confine the statute to claims in international law that contain principles that have been “universally” and “obligator[il]y” defined to include the “specific” conduct alleged.¹²³ Concerns with extraterritoriality appeared to motivate the decision:

It is one thing for American courts to enforce constitutional limits on our own State and Federal Governments’ power, but quite another to consider suits under rules that would go so far as to claim a limit on the power of foreign governments over their own citizens, and to hold that a foreign government or its agent has transgressed those limits. . . . Since many attempts by federal courts to craft remedies for the violation of new norms of international law would raise risks of adverse foreign policy consequences, they should be undertaken, if at all, with great caution.¹²⁴

The claim of a Mexican physician that he had been abducted at the behest of the U.S. Drug Enforcement Agency and detained for one day therefore did not succeed. The Court found that while detention commanded universal condemnation, insufficient evidence indicated that the general prohibition against it included the specific conduct in dispute, captivity for one day.¹²⁵

Cases following *Sosa*, although often inconsistent, continued to narrow the range of international laws that could sustain a cause of action in a U.S. court

118. *Id.* at 21-22.

119. *Id.* at 29.

120. Exec. Order No. 13303, 68 Fed. Reg. 31931 (May 22, 2003), reprinted in Earth Rights International, *Executive Order 13303: Instituting Immunity* (Aug. 13, 2003), <http://www.earthrights.org/publication/earthrights-international-examines-eo-13303>; Claire Kelly, *The War on Jurisdiction: Troubling Questions About Executive Order 13303*, 46 ARIZ. L. REV. 483, 484-87 (2004).

121. Brief for the United States in Support of the Petition for a Writ of Certiorari, *Sosa v. Alvarez-Machain*, 542 U.S. 692 (2004) (No. 03-339).

122. *Id.* at 25.

123. See *Sosa*, 542 U.S. at 732 (noting that “[a]ctionable violations of international law must be of a norm that is specific, universal, and obligatory” (citing *In re Estate of Ferdinand Marcos Human Rights Litigation*, 25 F.3d 1467, 1475 (9th Cir. 1994))).

124. *Id.* at 727-28.

125. *Id.* at 737-38.

and the circumstances under which the court could impose a judgment abroad. The Second Circuit, for example, added a purposefulness requirement for corporate liability.¹²⁶ The Eleventh Circuit excluded all nontorture cases involving cruel, inhuman, or degrading treatment.¹²⁷ The Ninth Circuit required a claim to be exhausted abroad, thereby constraining the most aggressive extraterritorial application of the ATS.¹²⁸ Judge Reinhart wrote in dissent that “neither the Supreme Court nor any circuit has ever imposed an exhaustion requirement.”¹²⁹

Kiobel v. Royal Dutch Petroleum marks the latest move in the retrenchment. The Second Circuit based the decision on an application of *Sosa* and found that the limited causes of action in international law that can come into court through the statute do not sustain actions against corporations.¹³⁰ A footnote in *Sosa* made the circumstances in which courts could impose judgments on foreign corporations subject to the same test it set out for recognizing a cause of action.¹³¹ The Second Circuit found that corporate liability “has not attained [the] discernible, much less universal acceptance among nations of the world” that *Sosa* required.¹³² Royal Dutch Petroleum therefore avoided responsibility for abuses government forces perpetrated against civilians in the wake of environmental protests in Nigeria.¹³³ The judgment conflicted with earlier decisions of the Eleventh Circuit, as well as two district courts of the Second Circuit.¹³⁴

In a petition for panel rehearing of the case, the chief judge of the Circuit expressed what now seems to be the prevailing attitude towards extraterritorial jurisdiction:

[F]oreign companies are creatures of other states. They are subject to corporate governance and government regulation at home. They are often engines of their national economies, sustaining employees, pensioners and creditors, and paying

126. *Compare* *Khulumani v. Barclay Nat. Bank Ltd.*, 504 F.3d 245, 287-88 (2d Cir. 2007) (stating that a plaintiff may “plead a theory of aiding and abetting liability” under the ATS), *with* *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 453 F. Supp. 2d 633, 666-68 (S.D.N.Y. 2006) (stating that aiding and abetting liability requires corporations to have acted with the purpose of facilitating the violation of international law).

127. *Aldana v. Del Monte Fresh Produce N.A., Inc.*, 416 F.3d 1242 at 1245, 1247 (11th Cir. 2005).

128. *Sarei v. Rio Tinto, PLC*, 550 F.3d 822 at 824 (9th Cir. 2008) (en banc).

129. *Id.* at 841 (Reinhardt, J., dissenting).

130. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 at 120 (2d Cir. 2010);

Sosa v. Alvarez-Machain, et. al. 542 U.S. 692, 732, n20 (2004) (question is “whether international law extends the scope of liability for a violation of a given norm to the perpetrator being sued, if the defendant is a private actor such as a corporation or individual”). *See also* *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 289-91 (2011).

132. *Kiobel*, 621 F.3d at 145.

133. *Id.*

134. *Romero v. Drummond Co., Inc.*, 552 F.3d 1303, 1315 (11th Cir. 2008); *In re Agent Orange Prod. Liab. Litig.* 373 F. Supp. 2d 7, 55, 58-59 (E.D.N.Y. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc. (Talisman I)*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

taxes. . . . American courts and lawyers [do not] have the power to bring to court transnational corporations of other countries, to inquire into their operations in third countries, to regulate them, and to beggar them by rendering their assets into compensatory damages, punitive damages, and (American) legal fees.¹³⁵

III.

EUROPE INCREASINGLY POLICES THE EXTRATERRITORIAL ACTIONS OF MULTINATIONAL CORPORATIONS

Meanwhile, in Europe both the individual member states and the European Union are taking steps in the opposite direction to address foreign corporate human rights abuses. While the ATS provided causes of action in international law and extraterritorial jurisdiction, the courts of some member states, and particularly the United Kingdom, are circumventing the need for both by emphasizing contributing infringements of their domestic tort laws by domestic parent corporations.¹³⁶ Member states that incorporate international humanitarian principles into national statutes offer new causes of action against multinational corporations. Extraterritorial jurisdiction is also expanding in Europe through EU regulations and national criminal legislation with extraterritorial effect.

A. Contributing torts of domestic parent corporations supply national causes of action and national jurisdiction

In the United Kingdom and other European countries, courts are finding jurisdiction over corporate human rights cases by characterizing actions or omissions of national parent corporations as contributing factors in abuses that took place abroad.¹³⁷ The negligence claims address the role of parent corporations in allowing their foreign subsidiaries to cause harm, but the judgments affect the conduct of the subsidiaries.¹³⁸ The cases express an enterprise theory of liability in which multinational corporations appear as single entities, headed by parent corporations that control the entire business.¹³⁹

Framing the illegal acts in terms of the failure of the parent corporations to exercise oversight of their subsidiaries avoids the difficulties posed by the doctrine of separate legal personality and opposition to extraterritoriality. The plaintiffs do not have to establish abuse of the corporate form, as they would if

135. *Kiobel v. Royal Dutch Petroleum Co.*, 642 F.3d 268, 270 (2011).

136. Note that this approach was explicitly rejected by the U.S. Supreme Court in *Sosa*, 542 U.S. at 703-11.

137. See, e.g., Ramasastry, *supra* note 44, at 93; *Obstacles to Justice and Redress for Victims of Corporate Human Rights Abuse*, *supra* note 5, at 284.

138. See, e.g., Jessica Woodroffe, *Regulating Multinational Corporations in a World of Nation States*, in *HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS*, 138 (Michael K. Addo ed., 1999).

139. On enterprise liability theory in the U.S. context, see, e.g., Blumberg, *supra* note 49.

the illegalities were articulated as wrongs committed by subsidiaries for which the parents should bear responsibility.¹⁴⁰ Nor do the courts have to exercise extraterritorial jurisdiction, as they can review the actions of national parent corporations under domestic rules.¹⁴¹ Although holding corporations present within the jurisdiction accountable for failing to oversee their foreign subsidiaries has extraterritorial effects, it provokes less controversy than directly claiming jurisdiction over subsidiaries in other territories.¹⁴²

Lawsuits related to human rights abuses have proceeded in the United Kingdom in tort against several domestic parent corporations.¹⁴³ In *Sithole v. Thor*, the English Court of Appeal found jurisdiction over mercury poisoning among employees at a mining subsidiary in South Africa by reviewing the failure of the English parent corporation to prevent it.¹⁴⁴ The case settled for 1.3 million pounds, far exceeding the recovery in a parallel South African claim.¹⁴⁵ Cases against the English parent corporations of the mining corporation Rio Tinto and the energy corporation Cape confirmed that English courts will exercise jurisdiction over domestic parent corporations when foreign subsidiaries that cause harm abroad have implemented their policies.¹⁴⁶ The High Court also found jurisdiction in *Guerrero v. Monterrico Metals* over the assault and detention of protestors by Peruvian police at a subsidiary mining site in Peru by focusing on the responsibility of the parent corporation to prevent the harm.¹⁴⁷ In *Motto & ORS v. Trafigura*, the High Court took jurisdiction over the claims of 30,000 citizens of the Ivory Coast for illness arising from exposure to toxic waste because an English arm of the metals and energy corporation

140. Piercing the corporate veil generally requires mixing of assets (Germany, Italy, Romania, Slovenia, France), or the abuse of the separate legal personality of the subsidiary or parent to defeat the rights of stakeholders or to commit other illegalities (France, Slovenia, Italy).

141. See, e.g., Schutter, *supra* note 18, at 41 (discussing argument in *Connelly v. RTZ* [1997] UKHL 30, [1998] A.C. 854 (appeal taken from Eng.)).

142. See, e.g., HOUSE OF LORDS & HOUSE OF COMMONS JOINT COMMITTEE ON HUMAN RIGHTS, ANY OF OUR BUSINESS? HUMAN RIGHTS AND THE UK PRIVATE SECTOR, REPORT 2009-10, H.L. 5-I, H.C. 64-I, ¶ 205 (U.K.) (finding “parent-based” regulation less intrusive than direct extraterritorial jurisdiction).

143. See, e.g., Stephens, *supra* note 43, at 39 (discussing domestic tort suits in country where firm is incorporated); Richard Meeran, *Accountability of Transnationals for Human Rights Abuses*, 148 NEW L.J. 1706 (1998).

144. *Sithole and Ors v. Thor Chemicals Holdings Ltd and Anon* [1999] All ER (D) 102; see also, Nicola Jägers, *The Legal Status of the Multinational Corporation Under International Law*, in HUMAN RIGHTS STANDARDS AND THE RESPONSIBILITY OF TRANSNATIONAL CORPORATIONS, 268 (Michael K. Addo ed., 1999).

145. Neil Hodge, *Future Imperfect: Should Companies Exporting Potentially Dangerous Materials to the Developing World Take Responsibility for Their Actions Whatever the Legislation Enforces?*, 64 INT’L BUS. NEWS 49, 51 (2010).

146. *Connelly v. RTZ* [1997] UKHL 30, [1998] A.C. 854 (appeal taken from Eng.); *Lubbe and Ors v. Cape Plc. and Related Appeals*, [2000] UKHL 41, [2000] 4 All E.R. 268, [2000] WLR 1545.

147. *Guerrero v. Monterrico Metals PLC*, [2009] EWHC 2475 (QB).

chartered the ship that carried the waste to Africa.¹⁴⁸

Dutch courts have used a similar approach and exercised jurisdiction over national parent corporations for human rights violations committed abroad. In 2009, the Minister of Foreign Trade commissioned a study to identify the questions a civil court must ask in order to assess the liability of parent corporations for abuses by their subsidiaries.¹⁴⁹ Later that year, the Hague District Court found jurisdiction over three cases Nigerian fisherman and farmers brought against Royal Dutch Shell claiming that the parent corporation had been negligent in failing to ensure that its Nigerian subsidiary carried out oil production carefully.¹⁵⁰

Additional cases addressing foreign abuses through the contributions of national parent corporations have enabled jurisdiction in other European countries, including Switzerland and Germany. The Geneva Court of First Instance reviewed claims of five orphaned Roma children against IBM, the U.S. computing corporation, because the European corporate headquarters were located there during World War II.¹⁵¹ The case alleged that IBM had aided and abetted the murders of the parents of the children by providing computer technology to the Nazis.¹⁵² Human rights organizations in Germany brought a domestic false advertising claim against Lidl Corporation, the German discounter, to draw attention to abusive labor practices at its foreign subsidiaries.¹⁵³ The corporation described its commitment to labor rights in its

148. *Trafigura Beheer v. Golden Stavraetos Maritime Inc.* [2003] 4 All ER 746; *Deadly Toxic Waste Dumping in Côte d'Ivoire Clearly a Crime – UN Environmental Agency*, UN News Centre, September 29, 2006, www.un.org/apps/news/story.asp?NewsID=20083&Cr=ivoire&Cr1; Press Release, Trafigura and the Probo Koala (August 16, 2007), available at www.trafigura.com/our_news/probo_koala_updates.aspx; David Jolly, *Ivory Coast Toxic-Dump Case Settled, Company Says*, N.Y. Times, Sept. 21, 2009, http://www.nytimes.com/2009/09/21/business/global/21iht-toxic.html?_r=1&scp=13&sq=trafigura&st=nyt (affirming that up to 30,000 injured Ivory Coast residents could be compensated).

149. Alex Geert Castermans & Jeroen Van der Weide, *The legal liability of Dutch parent companies for subsidiaries' involvement in violations of fundamental, internationally recognized rights* (Working Paper, 15 December 2009), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1626225

150. Court of the Hague, Docket Number HA ZA 09-579 (Oguru v. Royal Dutch Shell PLC) (Neth.); *The People of Nigeria Versus Shell: The Course of the Lawsuit*, *supra* note 4.

151. Ian Traynor, *Gypsies Win Right to Sue IBM Over Role in Holocaust*, THE GUARDIAN, June 23 2004; Swiss Court: *Extrait de l'arrêt de la Ire Cour civile dans la cause Gypsy International Recognition and Compensation Action (GIRCA) contre International Business Machines Corporation (IBM) (recours en réforme) 4C.113/2006*, Aug. 14 2006; Anita Ramasastry, *A Swiss Court Decides to Allow Gypsies' Holocaust Lawsuit to Proceed*, FINDLAW'S WRIT, July 8, 2004, available at <http://writ.news.findlaw.com/ramasastry/20040708.html>.

152. Cohen, Milstein, Hausfeld & Toll, *Cohen, Milstein, Hausfeld & Toll, P.L.L.C. Files Class Action Lawsuit Against IBM*, Feb. 11, 2001; *Gypsies Ask IBM for Holocaust Reparation*, BBC NEWS, June 10 2001.

153. *See, e.g.*, European Center for Constitutional and Human Rights, *Successful Complaint Against Consumer Deception – Lidl Retracts Advertisements*, available at <http://www.ecchr.eu/lidl-case/articles/lidl-retracts-advertisements.html>.

advertisements, in spite of poor conditions at foreign plants.¹⁵⁴

B. Causes of action supporting corporate human rights claims grow more prevalent in Europe as routes to liability through customary international laws narrow under the ATS

The domestic tort suits discussed in the previous section bypassed the need for causes of action in international law such as the ATS has provided, and other causes of action suitable for corporate human rights cases are proliferating in Europe. Some member states automatically allow international law claims in their national courts.¹⁵⁵ Many do not require a specific domestic cause of action to review alleged violations of international laws.¹⁵⁶ Others recently have adopted criminal remedies that incorporate international law principles, providing domestic pathways for corporate liability.¹⁵⁷

While hostility to judicial absorption of new principles of customary international law into the federal common law has intensified in the United States, the availability of an explicit cause of action is now irrelevant in many European member states. All customary international laws form part of the English common law; the Swedish penal code provides blanket illegality for serious humanitarian violations; and tort rules in civil law countries contain general prohibitions that include abuses of international laws.¹⁵⁸ Where

154. See, e.g., Jürg Rupp, *Ethics in Garment Production*, RUPP REPORT, Apr. 13, 2010; Labour Behind the Label, *LIDL: Forced to Retract 'Ethical' claims*, Sept. 14, 2010.

155. E.g., England, *see infra*.

156. E.g., Sweden, *see infra*.

157. *See infra*. Note that imposing corporate liability through criminal laws has been widely criticized in American legal scholarship. For law and economics literature prioritizing civil liability for corporations instead, see, e.g., Albert W. Altschuler, *Two Ways of Thinking about the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359 (2009); Daniel Fischel & Alan Sykes, *Corporate Crime*, 25 J. L. STUD. 319 (1996); John C. Coffee, "No Soul to Damn: No Body to Kick": *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 405, 408 (1981); Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. L. STUD. 833, 848-49 (1994); C.M.V. Clarkson, *Corporate Culpability* (1998), available at <http://webjcli.ncl.ac.uk/1998/issue2/clarkson2.html>; but see Donald Francis Donovan and Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT'L L. 142, 155 (2006).

158. R v. Bow Street Metropolitan Stipendiary Magistrate, ex parte Pinochet Ugarte (No. 3), [2000] 1 A.C. 147, 276 ("Customary international law is part of the common law, and accordingly I consider that the English courts have and always have had extraterritorial criminal jurisdiction in respect of crimes of universal jurisdiction under customary international law."); *see also* Human Rights Committee, International Law Association (English Branch), *Report on Civil Actions in the English Courts for Serious Human Rights Violations Abroad*, 2 EUR. HUM. RTS. L. REV. 129, 158 (2001); 22 ch. § 6 Brottsbalken (Swed.) (Criminal Code); Liesbeth F.H. Enneking, *Crossing the Atlantic? The Political and Legal Feasibility of European Foreign Direct Liability Cases*, 40 GEO. WASH. INT'L L. REV. 903, 922 (2009) ("the continental European systems of tort (delict), which are based on Grotius's natural law concept that every act that is contrary to that which people in general, or considering their special qualities, ought to do or ought not to do, and that causes damage, potentially gives rise to an obligation under civil law to compensate such damage").

considerations of justice support doing so, Austria, Belgium, Estonia, the Netherlands, Portugal, Romania, France, Germany, Luxembourg, and Poland allow jurisdiction over claims that do not fall within any domestic cause of action.¹⁵⁹ Belgium and the Netherlands have viewed the jurisdiction as necessary for compliance with the European Convention on Human Rights, which guarantees the right to a fair trial.¹⁶⁰

Several European countries have drafted new criminal laws for corporations, creating additional avenues for human rights claims against them.¹⁶¹ Corporate criminal liability in the United Kingdom predated its introduction to the United States, and the majority of other European member states have recently adopted it.¹⁶² Austria, for example, instituted criminal liability for corporations in 2006.¹⁶³ Denmark amended its criminal code in

159. In accordance with the doctrine of *forum necessitatis*, a general principle of law that has developed in EU law to require jurisdiction even if it would otherwise be lacking in order to avoid the denial of justice, *see* http://ec.europa.eu/civiljustice/news/docs/study_residual_jurisdiction_en.pdf at 64-66; *see, e.g.*, art. 9(b)-(c) Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure) (Neth.), available at http://www.st-ab.nl/wetten/0471_Wetboek_van_Burgerlijke_Rechtsvordering_Rv.htm.

160. Art. 11, New Code of Private International Law in 2004.91 (“Irrespective of the other provisions of the present Code, Belgian judges have jurisdiction when the case has narrow links with Belgium and when proceedings abroad seem to be impossible or when it would be unreasonable to request that the proceedings are initiated abroad.”); art. 9(b), (c) Wetboek van Burgerlijke Rechtsvordering (Code of Civil Procedure) (Neth.).

161. *See, e.g.*, Allens Arthur Robinson, ‘Corporate Culture’ as a Basis for the Criminal Liability of Corporations (report prepared for the United Nations Special Representative of the Secretary-General on Human Rights and Business) (Feb. 2008), available at <http://198.170.85.29/Allens-Arthur-Robinson-Corporate-Culture-paper-for-Ruggie-Feb-2008.pdf>; *but see* discussion of problems in countries where only prosecutors can initiate proceedings, *e.g.*, Hervé Ascensio, *Extraterritoriality as an Instrument*, Contribution to the work of the UN Secretary-General’s Special Representative on human rights and transnational corporations and other businesses, at 5, available at <http://www.business-humanrights.org/media/documents/ruggie/extraterritoriality-as-instrument-ascensio-for-ruggie-dec-2010.pdf> (describing dismissal of a complaint filed by seven farmers from Cameroon against a French company for illicit trade and bribery for this reason).

162. Birmingham & Gloucester Railway Co., [1842] 3 Q.B. 223 (finding corporation liable for failure to fulfill statutory duty); Gt North of England Railway Co., [1846] 9 Q.B. 315 (finding vicarious liability); Moore v. Bresler [1944] 2 All E.R. 515 (finding direct corporate liability); R. v. ICR Haulage Ltd. [1944] K.B. 551 (finding direct corporate liability); DPP v. Kent and Sussex Contractors Ltd [1944] All E.R. 119 (finding direct corporate liability); Tesco Supermarkets v. Natrass [1972] AC 153 (finding that human actions can represent the will of the corporation). Most civil law countries previously followed the principle of *societas delinquere non potest*, a Roman law theory that immunized abstract entities from criminal liability because they had no physical bodies to punish. *See* A. Weissmann and D. Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L. J. 411, 419-20 (2007); New York Central & Hudson R.R. Co. v. U.S., 212 U.S. 481 (1909); *see, e.g.*, T. Weigend, *Societas Delinquere Non Potest?: A German Perspective*, 6 J. INT’L CRIM. JUST. 927, 955-74 (2008).

163. The Law on the Responsibility of Associations (Verbandsverantwortlichkeitsgesetz, VbVG) was passed in 2005 and entered into force on January 1, 2006. *See Business Crimes and Compliance Criminal Liability of Companies Survey*, at 6 (Lex Mundi Publication prepared by the Lex Mundi Business Crimes and Compliance Practice Group) (Feb 2008), available at

2002 to extend every offense to corporations.¹⁶⁴ Belgium reintroduced corporate criminal liability in 1999, having removed it in 1934, and then expanded it in 2007.¹⁶⁵ Seventeen member states now provide for corporate criminal liability.¹⁶⁶

The criminal provisions have been used to address the complicity of multinational corporations in several human rights suits in France and in other countries.¹⁶⁷ Three human rights organizations brought charges against DLH France, the Dutch-owned timber corporation, for the French crime of “*recel*,” which prohibits handling or profiting from illegally obtained goods.¹⁶⁸ DLH had imported timber from Liberian suppliers who did not have harvesting rights, thereby funding the civil war in Liberia.¹⁶⁹ French citizens brought a criminal complaint against Trafigura, the Dutch metals and energy corporation, alleging corruption, involuntary homicide, and physical harm leading to death based on the pollution that gave rise to the English civil case *Sithole v. Thor*, discussed in section IV.A.¹⁷⁰ Burmese plaintiffs also settled a criminal case in France against

www.lexmundi.com/images/lexmundi/PDF/Business_Crimes/Criminal_Liability_Survey.pdf.

164. DANISH CRIM. CODE § 306 (DJØF Publishing, 2d ed. 2003); DUTCH PENAL CODE ¶ 51; see S. Beale & A. Safwat, *What Developments in Europe Tell Us About Western Critiques of Corporate Criminal Liability*, 8 BUFF. CRIM. L. REV. 89, 110 (2005).

165. BELGIAN PENAL CODE art. 5; The Act of 4 May 1999 (reintroducing corporate criminal liability into Belgian law); M. Faure, *Criminal Responsibilities of Legal and Collective Entities: Developments in Belgium*, in CRIMINAL RESPONSIBILITY OF LEGAL AND COLLECTIVE ENTITIES 105 (Eiser, Heine, Huber, eds. 1999).

166. Austria, Belgium, Cyprus, Denmark, Estonia, Finland, France, Hungary, Ireland, Latvia, Lithuania, Luxembourg, the Netherlands, Portugal, Romania, Slovenia, Spain, and the United Kingdom. See, e.g., Guy Stessens, *Corporate Criminal Liability: A Comparative Perspective*, 43 INT'L & COMP. L.Q. 493, 499-520 (1994); see also Stephens, *supra* note 12, at 66 (noting that countries without criminal liability frequently penalize the same behavior administratively, such as through the German Gesetz über Ordnungswidrigkeiten).

167. See, e.g., Günter Heine, *New Developments in Corporate Criminal Liability in Europe: Can Europeans Learn from the American Experience - or Vice Versa*, 1998 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 173 (1998).

168. Béatrice Héraud, *DLH accusé d'avoir financé la guerre au Liberia*, NOVETHIC, 19 Nov. 2009, available at http://www.novethic.fr/novethic/entreprise/pratiques_commerciales/presence_dans_les_pays_litigieux/dlh_accuse_avoir_finance_guerre_liberia/122353.jsp; *International timber company DLH accused of funding Liberian war*, GLOBAL WITNESS, 18 Nov. 2009, available at <http://www.globalwitness.org/library/international-timber-company-dlh-accused-funding-liberian-war>.

169. See, e.g., *Bankrolling Brutality: Why European timber company DLH should be held to account for profiting from Liberian conflict timber*, GLOBAL WITNESS, 18 Nov. 2009, available at <http://www.globalwitness.org/library/bankrolling-brutality-why-european-timber-company-dlh-should-be-held-account-profiting>.

170. See, e.g., *Case Profile: Trafigura lawsuits (re Côte d'Ivoire)*, Business and Human Rights Resource Center (Mar. 22, 2012), available at <http://www.business-humanrights.org/Categories/Lawlawsuits/Lawsuitsregulatoryaction/LawsuitsSelectedcases/TrafiguralawsuitsreCtedIvoire>; Business and Human Rights European Cases Database, European Center for Constitutional and Human Rights, available at http://www.ecchr.de/index.php/conference_en.html (last visited Nov. 2008).

Unocal, the U.S. oil corporation, for the actions in Burma litigated under the ATS in *Doe v. Unocal*, discussed in Section III.B.¹⁷¹ Greenpeace filed a criminal complaint against the French oil corporation Total Fina Elf for pollution in Siberia under German criminal provisions outlawing polluting water and causing bodily harm with fatal consequences.¹⁷²

Some European penal codes also include international laws and enable domestic prosecutions of corporations for international crimes, where corporate liability is available.¹⁷³ Belgium, Germany, the Netherlands, Spain, and the United Kingdom, for example, criminalize genocide, crimes against humanity, and war crimes within their national laws.¹⁷⁴ A Dutch judgment against Frans Van Anraat, a businessman who supplied chemicals to the former Iraqi regime, confirmed the applicability of the rules to corporations: “[p]eople or companies that conduct (international) trade, for example in weapons or raw materials used for their production, should be warned that—if they do not exercise increased vigilance—they can become involved in most serious criminal offences.”¹⁷⁵ The statutes have primarily been used against individuals, however, securing convictions of two nuns in Belgium for their participation in the Rwandan genocide, four Bosnian Serbs in Germany for their involvement in ethnic cleansing, and an Afghan terrorist in the United Kingdom for torture and hostage taking overseas, among others.¹⁷⁶ In member states that allow

171. Plaintiffs claimed “séquestration”, Art. 224(1) C. PÉN. (Code pénal) (Fr.) (covering illegal confinement); see http://birmanie.total.com/fr/controverse/p_4_2.htm; Cour d’appel [CA] [regional court of appeal] Versailles, Jan. 11, 2005, Chambre de l’instruction, 10^{ème} Chambre, § A.

172. Polluting waters under §§ 324 I StGB (Penal Code) (Gr.) (covering pollution of waters); §§ 324 III, 13 I StGB (covering pollution of waters by neglect); §§ 223 I, 224 I Nr. 1 StGB (causing bodily harm); §227 I StGB (causing bodily harm with fatal consequences); European Center for Constitutional and Human Rights, *Business and Human Rights European Cases Database*, November 2008.

173. See, e.g., *Business and Human Rights: The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations with Respect to Human Rights*, Background Notes, Copenhagen, 8-9 Nov. 2007, at 8, available at <http://www.reports-and-materials.org/Copenhagen-8-9-Nov-2007-backgroundunder.pdf>. Note that criminal prosecutions proceed differently among different countries. In France, a victim can join a criminal prosecution as a *parties civile* and receive compensation and rights of appeal; in Spain, a victim “may appear as a civil claimant or as a private prosecutor in criminal proceedings”, see, e.g., Luc Reydam, *Universal Jurisdiction in Context*, 99 Proceedings of the Annual Meeting (ASIL) 118, 119 (2005); Jonathan Doak, *Victims’ Rights in Criminal Trials: Prospects for Participation*, 32 J. L. & SOC’Y 294, 310-11 (2005); Judge Anita Ušack, *Building the International Criminal Court*, 23 MCGEORGE GLOBAL BUS. & DEV. L.J. 225, n.66 (2011); Enrique Carnero Rojo, *National Legislation Providing for the Prosecution and Punishment of International Crimes in Spain*, 9 J. INT. CRIM. JUST. 699, 709-10 (2011).

174. Report of the International Commission of Jurists Expert Legal Panel on Corporate Complicity in International Crimes, *Corporate Complicity & Legal Accountability Volume 2: Criminal Law and International Crimes*, 52 n.191 (2008), available at <http://icj.org/dwn/database/Volume2-ElecDist.pdf>.

175. Appeal Judgment, Case of Frans Van Anraat, Court of Appeal of The Hague, 9 May 2007, Case No. BA6734 at #16, available at <http://www.haguejusticeportal.net/eCache/DEF/7/548.html>.

176. State Department Report, *Country Report on Human Rights Practices*, 4 Mar. 2002, available at <http://www.state.gov/j/drl/rls/hrrpt/2001/af/8398.htm>; Bayerisches Oberstes

corporate liability and have ratified the Rome Statute of the International Criminal Court (ICC) into domestic law, such as Belgium and the Netherlands, plaintiffs can pursue corporations for international ICC crimes, even though the Rome Statute itself does not apply to them.¹⁷⁷

Others have introduced national causes of action based on additional provisions of international law.¹⁷⁸ Greenpeace, for example, used a Luxembourg statute implementing the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal to hold Euronav, the Luxembourgian shipping company, accountable for selling a tanker for destruction without first decontaminating it, exposing workers in Bangladesh to hazardous materials.¹⁷⁹ The *Trafigura* case in the United Kingdom, discussed in part IV.A, also relied on domestic incorporation of the Basel Convention.¹⁸⁰

Landesgericht [BayObLG] [Bavarian Higher Regional Court] May 23, 1997, 1998 Neue Juristische Wochenschrift [NJW] 392 (Djajić); Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 30, 1999, 1999 Neue Zeitschrift für Strafrecht [NSTZ] 396, Int'l L. Domestic Cts. [ILDC] 132 (Eng. trans.); Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Dec. 12, 2000, 2001 Juristen-Zeitung [JZ] 975; Jorgić v. Germany, App. No. 74613/01, Eur. Ct. H.R. (2007); BGH, Revision Judgment, Feb. 21, 2001, NJW 2728, ILDC 564 (Sokolović); BGH, Revision Judgment, Feb. 21, 2001, NJW 2732 (Kusljić); R v. Zardad [2007] All ER (D) 90, available at <http://www.redress.org/downloads/news/zardad%207%20apr%202004.pdf>, <http://www.redress.org/downloads/news/zardad%205%20oct%202004.pdf>.

177. Netherlands International Crimes Act (“This Act consolidates into national legislation the international crimes of genocide, crimes against humanity and war crimes falling under the Rome Statute of the ICC. It repeals the Genocide Convention Implementation Act and the Torture Convention Implementation Act, and criminalizes for the first time crimes against humanity under Dutch law. The definitions of crimes are based on definitions provided by the Rome Statute.”); Rome Statute of the International Criminal Court, U.N. Doc. A/CONF.183/9, 39 I.L.M. 999 (1998), adopted 17 July 1998. Art 25(1) restricts ICC jurisdiction to natural legal persons. France extended liability to corporations in 2004 pursuant to Article 121-2 of the Criminal Code, and Act 2010-930 of August 2010 added the Rome Statute of the International Criminal Court to the list of conventions justifying the extraterritorial application of French Criminal Law, see Law No. 2010-930 of 09.08.2010 (adapting the French criminal law); see also Robert C. Thompson, Anita Ramasastry, and Mark B. Taylor, *Translating UNOCAL: The expanding web of liability for business entities implicated in international crimes*, 40 GEO. WASH. INT’L L. REV. 841, 851-852 (2009); Damien Vandermeersch, *Prosecuting International Crimes in Belgium*, 3 J. INT’L CRIM. JUST. 400, 402 (2005).

178. The process varies by country. In the Netherlands, an example of the *monist* model of international law, no national order is required to convert international law into national law. In the United Kingdom, an example of the *dualist* model of international law, a treaty must be incorporated into national law to have effect.

179. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, Mar. 22, 1989, arts. 4(3), 9(5), 1673 U.N.T.S. 57, 132, 137; European Center for Constitutional and Human Rights, *Business and Human Rights European Cases Database*, November 2008, at 26.

180. *Trafigura Beheer v. Golden Stavraetos Maritime Inc.*, [2003] 2 Lloyd’s Rep. 201; see also www.greenpeace.org/international/news/ivory-coasttoxic-dumping/toxic-waste-in-abidjan-green; www.un.org/apps/news/story.asp?NewsID=20083&Cr=ivoire&Cr1; Official Statement of 16 August 2007, TRAFIGURA: OUR NEWS, available at www.trafigura.com/our_news/probo_koala_updates.aspx.

Although the European Union does not have legislative powers over human rights matters, the European Parliament nevertheless has attempted to enact rules that would address corporate abuses committed abroad, and European courts have enforced judgments against corporations and state actors responsible for them.¹⁸¹ The European Parliament has called upon the European Commission to develop a mandatory “European multilateral framework governing companies’ operations worldwide.”¹⁸² It also has sought to “standardize corporate liability and the law of corporate groups[.]”¹⁸³ Unsuccessful proposals, had they been enacted, would have regulated the conduct of foreign subsidiaries.¹⁸⁴ The European Court of Justice has ruled that private corporations bear human rights responsibilities, and the European Court of Human Rights has found member states responsible for allowing corporations to cause other harms, offering legal theories that could extend to abuses by subsidiaries of multinational corporations.¹⁸⁵

181. See, Daniel Augenstein, *Study of the Legal Framework on Human Rights and the Environment Applicable to European Enterprises Operating Outside the European Union*, 17, *Study conducted for the European Commission, Directorate-General for Enterprise and Industry*, University of Edinburgh (“The European Union does not have an explicit general (internal or external) competence to legislate on human rights.”) (June 2010), available at http://ec.europa.eu/enterprise/policies/sustainable-business/corporate-social-responsibility/human-rights/index_en.htm#h2-1.

182. Resolution of EU Standards for European Enterprises Operating in Developing Countries: Towards a European Code of Conduct, 1999 O.J. (C 104); see also Ratner, *supra* note 47, at 446.

183. *Liability of Enterprises for Offenses, Recommendation No. R (88)*, adopted by the Committee of Ministers of the Council of Europe on 20 October 1988 at the 420th meeting of the Ministers’ Deputies (never passed by the Member States); see *Communication from the Commission to the Council and the European Parliament: Modernising Company Law and Enhancing Corporate Governance in the European Union - A Plan to Move Forward*, at n.21, COM (2003) 284 final (May 21, 2003) (“A draft ‘Ninth Company Law Directive on the Conduct of Groups containing a Public Limited Company as a Subsidiary’ was circulated by the Commission in December 1984 for consultation. According to its Explanatory Memorandum, the Directive was intended to provide a framework in which groups can be managed on a sound basis whilst ensuring that interests affected by group operations are adequately protected. Such a legal framework, adapted to the special circumstances of groups, was considered to be lacking in the legal system of most Member States.”).

184. See Klaus Bohlhoff & Julius Budde, *Company Groups - The EEC Proposal For A Ninth Directive in the Light of the Legal Situation in the Federal Republic of Germany*, 6 J. COMP. BUS. & CAPITAL MKT. L. 163, 181-92 (1984); Christine Windbichler, “Corporate Group Law for Europe”: *Comments on the Forum Europaeum’s Principles and Proposals for a European Corporate Group Law*, 1 EUR. BUS. ORG. REV. 265 (2000); *Communication from the Commission to the Council*, *supra* note 183, at 18-20. Menno Kamminga, *Holding Multinational Corporations Accountable for Human Rights Abuses: A Challenge for the EC*, in *THE EU AND HUMAN RIGHTS* 566 (Philip Alston, ed., 1999).

185. Case 36/74, *Walrave & Koch v. Assoc. Union Cycliste Int’l*, 1974 E.C.R. 1405 (corporations obliged not to discriminate); Case 43/75, *Defrenne v. Sabena*, 1976 E.C.R. 455 (corporations bear human rights responsibilities); *Guerra and Others v. Italy*, App. No. 14967/89, 7 Eur. Ct. H.R. (1998) (finding Italy liable for failing to inform local population about potential accidents at a chemical factory); *Lopez Ostra v. Spain*, App. No. 16798/90, 303-C Eur. Ct. H.R. (ser. A) (1994) (Spain liable for failing to protect residents from environmental problems at nearby waste treatment facility).

C. Extraterritorial jurisdiction over corporate human rights claims expands in Europe as it narrows under the ATS

The European Union and the member states are deliberately expanding jurisdiction for the causes of action discussed in the previous section, while the ATS has narrowed in the United States, in conjunction with limitations on international claims.¹⁸⁶ The European Union has instituted extraterritorial jurisdiction within Europe, and many member states now allow access to national courts in the interests of justice.¹⁸⁷ New criminal laws that apply to corporations also permit extraterritorial jurisdiction, and other Member State courts seem effectively to offer it through liberal interpretations of jurisdictional rules.¹⁸⁸ The United States, however, restricted extraterritorial corporate human rights cases in Belgium by urging it to revoke broad jurisdictional rules.¹⁸⁹

The European Union has indicated willingness to enlarge the coverage of the Brussels Regulation, which currently allows for extraterritorial jurisdiction over intra-European claims.¹⁹⁰ In accordance with the Regulation, member states can adjudicate all civil claims against domestic corporations independent of the nationality of the victims or the jurisdiction in which the harm occurred.¹⁹¹ The European Commission raised the possibility of extending the

186. See also, e.g., Menno Kamminga, *Universal Jurisdiction: Is It Legal? Is it Desirable?*, 99 PROCEEDINGS OF THE ANNUAL MEETING OF THE AMERICAN SOC'Y OF INT'L L. 123, 124 (2005) ("The European Commission . . . has specifically stated that it is not opposed to the exercise of universal jurisdiction in tort cases even though the Commission obviously realized that this competence enables U.S. courts to exercise jurisdiction over European companies. In its amicus brief in *Sosa*, the Commission did not argue against extraterritorial jurisdiction, instead it merely urged that jurisdiction in such cases should be exercised with due respect for the limitations imposed by international law.").

187. The European Union has supported broad jurisdiction over international tort claims. In other areas, such as terrorism, human trafficking, sex crimes, and the environment, it also has implemented new extraterritorial measures, see, e.g., Council Framework Decision of 13 June 2002 on combating terrorism, 2002 O.J. (L 164) 3; Council Framework Decision 2002/629/JHA of 19 July 2002 on combating trafficking in human beings; Council Framework Decision 2004/68/JHA of 22 December 2003 on combating the sexual exploitation of children and child pornography; Council Framework Decision 2003/80/JHA of 27 January 2003 on the protection of the environment through criminal law. While the European Union no longer emphasizes framework decisions, they nevertheless evidence support for extraterritorial jurisdiction. See *infra*.

188. See *infra*.

189. See *id*.

190. See Council Regulation (EC) No. 44/2001 of 22 Dec 2000, on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters, 2001 O.J. (L 12/1); see also Augenstein, *supra* note 181, Executive Summary.

191. See Council Regulation (EC) No. 44/2001, art 2, 2001 O.J. (L12/3) ("[P]ersons domiciled in a Member State shall, whatever their nationality, be sued in the courts of that Member State."); Holger Haibach, *Human Rights and Business Report*, Doc. No. 12361, at ¶ 99, Council of Europe, Parliamentary Assembly (Sept. 27, 2010), ("[the Brussels Regulation] allows cases to be brought against companies in all civil proceedings, whereas the Alien Tort Claims Act can only be relied on for an alleged violation of the law of nations"), available at <http://assembly.coe.int/Main.asp?link=/Documents/WorkingDocs/Doc10/EDOC12361.htm>; Ascensio, *supra* note 161, at 7.

Regulation to claims against foreign subsidiaries of European parent corporations in a Green paper; however, residual member state laws presently govern jurisdiction over non-European entities.¹⁹²

Residual rules frequently suffice for extraterritorial jurisdiction over foreign subsidiaries.¹⁹³ Most member states provide for jurisdiction in cases where subsidiaries have secondary establishments or assets in Europe.¹⁹⁴ Many member states also allow for jurisdiction either where damage was caused or where it was sustained.¹⁹⁵ Lawsuits have therefore proceeded against foreign subsidiaries in European courts based on causal events that occurred in Europe.¹⁹⁶

Connections to other countries that have blocked many potential ATS cases from adjudication in the United States have rarely prevented European courts from finding jurisdiction over international human rights claims.¹⁹⁷ The Brussels Regulation determines jurisdiction without regard to them, and they do not affect residual jurisdictional rules in civil law countries.¹⁹⁸ The member states that provide jurisdiction over foreign claims when justice requires doing so, discussed in section IV.B., review cases wholly connected to other places.¹⁹⁹

Recent national criminal legislation expressly provides for extraterritorial jurisdiction.²⁰⁰ The penal codes of Denmark, Finland, France, and Sweden, for example, allow for jurisdiction over actions committed abroad by defendants of any nationality that are “covered by international conventions.”²⁰¹ Dutch

192. See *Commission Green Paper on the Review of Council Regulation (EC) No 44/2001 on Jurisdiction and the Recognition and Enforcement of Judgment in Civil and Commercial Matters*, COM (2009) 175 final (Apr. 21 2009); Brussels I Regulation, art. 4(1).

193. On residual rules, see, e.g., A. Nuyts et al, *Study on Residual Jurisdiction*, European Commission Study LS/C4/2005/07-30-CE)0040309/00-37 (3 Sept. 2007); B. Hess et al, *Report on the Application of Regulation Brussels I in the Member States*, European Commission Study JLS/C4/2005/03 (Sept. 2007).

194. See Augenstein, *supra* note 181, at 69.

195. See *id.*

196. See *id.*

197. For discussions of the operation of *forum non conveniens* in the United States and Europe see, e.g., Kathryn Lee Boyd, *The Inconvenience of Victims: Abolishing Forum Non Conveniens in U.S. Human Rights Litigation*, 39 VA. J. INT’L L. 41, 58-67 (1988) (U.S. federal court); David W. Robertson and Paula K. Speck, *Access to State Courts in Transnational Personal Injury Cases: Forum Non-Conveniens and Antisuit Injunctions*, 68 TEX. L. REV. 937, 948-53 (1990) (U.S. state court); Wendy Kennett, *Forum Non Conveniens in Europe*, 54 CAMBRIDGE L.J. 552, 552-54 (1995) (Brussels Regulation); see also, *infra* Section IV.A.

198. See, e.g., Case C-281/02, Andrew Owusu v. N.B. Jackson, 2005 E.C.R. I-(1.3.2005); Oxford Pro Bono Publico, *supra* note 5, at 107-110; DECLINING JURISDICTION IN PRIVATE INTERNATIONAL LAW 7-10 (J.J. Fawcett ed., Oxford: OUP 1995).

199. E.g., Austria, Belgium, Estonia, the Netherlands, Portugal, Romania, France, Germany, Luxembourg, and Poland.

200. See, e.g., Business and Human Rights: The Role of States in Effectively Regulating and Adjudicating the Activities of Corporations with Respect to Human Rights, *supra* note 50, at 8.

201. STRAFFELOVEN [STRFL] [Penal Code] § 8(5) (Den.) (“[A]cts committed outside the

domestic legislation incorporating the Rome Statute offers universal jurisdiction.²⁰²

The English system has permitted additional routes to jurisdiction over foreign defendants that have resulted in extraterritorial jurisdiction over human rights claims against individuals in the Middle East. In the United Kingdom, jurisdiction depends on the ability of plaintiffs to serve defendants.²⁰³ The Companies Act 2006 allows service of foreign corporations in any English place of business identified with them.²⁰⁴ The English Rules of Civil Procedure also enable service abroad in specific instances, such as when a claim has a close connection to the United Kingdom.²⁰⁵ Some courts have interpreted connections broadly: In *Al-Adsani v. Kuwait*, the Court of Appeal permitted a plaintiff to serve the Government of Kuwait with charges of unlawful detention and torture at the instigation of the royal family, finding a connection through mental health problems he experienced afterwards in England.²⁰⁶ In *Jones v. Saudi Arabia*, the Court allowed jurisdiction over allegations of torture in Saudi Arabia by the Saudi Minister of Interior and other Saudi Arabian officials, based on the same justification.²⁰⁷

The United States has, however, pressured Belgium to repeal very broad extraterritorial provisions, underscoring the significance of extraterritorial jurisdiction for holding corporations accountable for human rights violations.²⁰⁸

territory . . . shall also come within Danish criminal jurisdiction, irrespective of the nationality of the perpetrator . . . where the act is covered by an international convention”); Criminal Code 626/1996 c. 1 § 7 (Fin.) (“Finnish law shall apply to an offence committed outside of Finland where the punishability of the act, regardless of the law of the place of commission, is based on an international agreement”); CODE DE PROCÉDURE PÉNALE [C. PR. PÉN.] art. 689-1 (Fr.) (“In accordance with the international conventions . . . a person guilty of committing any of the offences listed by these provisions outside the territory of the Republic and who happens to be in France may be prosecuted and tried by French courts.”); BROTTSBALKEN [BRB] [Criminal Code] 2:3(6) (Swed.) (“[C]rimes committed outside the Realm shall be adjudged according to Swedish Law and by a Swedish court: . . . if the crime is . . . a crime against international law”).

202. Netherlands Bill on International Crimes, International Crimes Act (June 19, 2003), available at <http://www.iccnw.org/documents/NL.IntCrAct.pdf> (containing rules concerning serious violations of international humanitarian law).

203. See, e.g., HUMAN RIGHTS COMMITTEE, INTERNATIONAL LAW ASSOCIATION (ENGLISH BRANCH), REPORT ON CIVIL ACTIONS IN THE ENGLISH COURTS FOR SERIOUS HUMAN RIGHTS VIOLATIONS ABROAD, reprinted in 2 EUR. HUM. RTS. L. REV. 129, 139 (2001).

204. Companies Act, 1985, c. 6, § 695 (U.K.); see also PETER T. MUCHLINSKI, MULTINATIONAL ENTERPRISES AND THE LAW 141 (2007).

205. Civil Procedure Rules, 1998, S.I. 1998/3132, Rule 6.20(8) (U.K.).

206. *Al-Adsani v. Government of Kuwait*, 107 I.L.R. 536, 538-39 (C.A. 1996); see Stephens, *supra* note 43, at 17 (calling *Al-Adsani* a “*Filartiga*-style civil lawsuit”); Donald Francis Donovan & Anthea Roberts, *The Emerging Recognition of Universal Civil Jurisdiction*, 100 AM. J. INT’L L. 142, 150 (2006).

207. *Jones v. Saudi Arabia*, [2004] EWCA (Civ) 1394 (Eng.).

208. See, e.g., Steven R. Ratner, *Belgium’s War Crimes Statute: A Postmortem*, 97 AM. J. INT’L L. 888, 888 (2003); Sean Murphy, ed., *U.S. Reaction to Belgian Universal Jurisdiction Law*, 97 AM. J. INT’L L. 984, 986-87 (2003).

Prior to 2004, Belgium offered jurisdiction over all humanitarian claims, regardless of whether the crimes had any connection to the country, regardless of the nationality of the plaintiffs or defendants, and regardless of the absence of defendants from the proceedings.²⁰⁹ A Belgian court therefore accepted review of a case brought by Greenpeace against Total Fina Elf, the French oil corporation, for complicity in crimes against humanity committed by the Burmese military junta during construction and operation of a gas pipeline.²¹⁰ In the aftermath of other controversial cases against high-ranking foreign officials, however,²¹¹ the United States threatened to move the NATO headquarters out of Brussels unless Belgium restricted the rules.²¹² In the aftermath of the revocation, the Belgian court could no longer adjudicate the claims against Total Fina Elf.²¹³ Without the extraterritorial jurisdiction that they had offered, it could not pursue allegations brought by Burmese citizens against a French company for abuses in Burma²¹⁴

209. Loi du 16 juin 1993 relative à la répression des infractions graves aux conventions internationales de Genève du 12 août 1949 et aux Protocoles I et II du 8 juin 1977, additionnels à ces conventions [Grave Breaches of International Humanitarian Law Act], of June 16, 1993, MONITEUR BELGE [M.B.] [Official Gazette of Belgium], Aug. 5, 1993.

210. The case ultimately was dismissed by the Court of Cassation. See, Jan Wouters & Cedric Ryngaert, *Litigation for Overseas Corporate Human Rights Abuses in the European Union: The Challenge of Jurisdiction*, 40 GEO. WASH. INT'L L. REV. 939, n. 102. See also Joan Condijs, *Les Birmans Déboutés: Total L'emporte, Le Soir en ligne*, Mar. 5, 2008, available at <http://www.lesoir.be/actualite/monde/la-justice-met-fin-aux-2008-03-05-582191.shtml>.

211. See, e.g., *New War Crimes Suits Filed Against Bush, Blair in Belgium*, DEUTSCHE PRESSE-AGENTUR, June 20, 2003; Marlise Simons, *Sharon Faces Belgian Trial After Term Ends*, N.Y. TIMES, Feb. 13, 2003, at A14.

212. See, e.g., Philip Reeker, Dep't of State Deputy Spokesman, U.S. Dep't of State Daily Press Briefing at 6 (May 14, 2003) (quoting chairman of the Joint Chiefs of Staff considering need to relocate NATO headquarters), <http://2001-2009.state.gov/r/pa/prs/dpb/2003/20584.htm>; David Wastell, *America Threatens to Move NATO After Franks Is 'Charged'*, SUNDAY TELEGRAPH, May 18, 2003, at 31; David Rumsfeld, Secretary of Defense, U.S. Dep't of Defense News Transcript (June 12, 2003), <http://www.defense.gov/releases/release.aspx?releaseid=5455>; Vernon Loeb, *Rumsfeld Says Belgian Law Could Imperil Funds for NATO*, WASH. POST, June 13, 2003, at A24; Richard Boucher, Dep't of State Spokesman, U.S. Dep't of State Daily Press Briefing at 10-11 (June 13, 2003), <http://2001-2009.state.gov/r/pa/prs/dpb/2003/21566.htm> ("Secretary of State has raised these concerns in public and in private with the Belgians. The Secretary of Defense has raised them in public and in private with the Belgians. The goal is to get them to change the law, and none of these other questions will arise."); Lorna McGregor, *The Need to Resolve the Paradoxes of the Civil Dimension of Universal Jurisdiction*, 99 ASIL 125, 128 (2005); *Belgium Universal Jurisdiction Law Repealed*, Hum. Rts. News (Aug 1, 2003), <http://www.hrw.org/news/2003/08/01/belgium-universal-jurisdiction-law-repealed>.

213. Loi modifiant la loi du 16 juin 1993 relative à la repression des violations graves du droit international humanitaire et l'article 144ter du Code judiciaire [Law amending the law of June 16, 1993, concerning the prohibition of grave breaches of international humanitarian law and article 144ter of the judicial code] of Apr. 23, 2003, MONITEUR BELGE [M.B.][OFFICIAL GAZETTE OF BELGIUM], May 7, 2003.

214. HUMAN RIGHTS WATCH, UNIVERSAL JURISDICTION IN EUROPE – THE STATE OF THE ART, Volume 18, No. 5(D) 37-38 (June 2006), available at <http://www.hrw.org/sites/default/files/reports/ij0606web.pdf>.

IV.

DIFFERENT VIEWS ON SOVEREIGNTY ACCOUNT FOR DIVERGING U.S. AND
EUROPEAN APPROACHES TO EXTRATERRITORIALITY

Contrary attitudes towards national sovereignty may explain why U.S. courts have withdrawn extraterritorial jurisdiction just as the European Union and several member states have begun to extend it.²¹⁵ Extraterritorial jurisdiction depends on a flexible approach to sovereignty; it entails reaching into the territory of another country to impose a judgment. The United States initially used the ATS to facilitate jurisdiction over aggressive extraterritorial claims and to enforce human rights norms against multinational corporations. But the United States increasingly has appeared to interpret intrusions on national sovereignty as a threat to democracy. It has prioritized domestic laws that express the popular democratic will. U.S. suspicion of international laws is linked to the narrowing scope of extraterritorial jurisdiction under the statute. The courts must read causes of action in international law into the federal common law before they can impose a judgment abroad. Hostility towards international law has therefore narrowed the range of extraterritorial judgments. In contrast, the European member states have appeared to regard conceding national sovereignty as necessary for safeguarding democracy. They have surrendered authority to supranational institutions to enable external protect and enforce baseline standards of behavior. Having done so, the member states have grown increasingly open to international rules. Enforcing them extraterritorially has become an expression of the potential of Europe for human rights leadership.

A. U.S. courts have prioritized laws of elected domestic officials and constraints on international laws have narrowed extraterritorial jurisdiction

Popular sovereignty has long been a touchstone in U.S. jurisprudence. After breaking from England to establish a republic based on direct democracy, the new government restricted the judiciary from making new laws.²¹⁶ To protect the fundamental freedoms of the people, it has instead applied rules

215. See, e.g., Fleur E. Johns, *The Invisibility of the Transnational Corporation: An Analysis of International Law and Legal Theory*, 19 MELB. U. L. REV. 893, 912 (1994) (describing the perception of “ever more intrusive activities of home-states seeking to regulate” multinational corporations as a “threat to state sovereignty”). See also, Guglielmo Verdirame, *The Divided West: American and European International Lawyers*, 18 EUR. J. INT’L L. 553 (2007) (tracing the emergence of different assumptions about sovereignty between “the two sides of the Atlantic”).

216. See, e.g., *Medellin v. Texas*, 552 U.S. 491, 515 (2008) (citing U.S. Const. art. I, § 7, art. II, § 2). 488 U.S. 361, 417 (1989) (Scalia, J., dissenting) (“[T]he power to make law cannot be exercised by anyone other than Congress, except in conjunction with the lawful exercise of executive or judicial power.”); 4 Reg. Deb. 349 (1828) (statement of Sen. Rowan); THE FEDERALIST NOS. 78-82 (Alexander Hamilton).

enacted by elected legislators.²¹⁷ International laws do not derive from publicly-accountable officials and the laws increasingly have appeared to be regarded as antidemocratic.²¹⁸ The judiciary lately has limited the jurisdiction of the courts to consider them, leading to the retraction of extraterritorial jurisdiction over corporate human rights claims.²¹⁹

The United States has enjoyed a history of political stability, which has seemed to engender a sense of self-sufficiency. Powerful and geographically separate, it rarely has needed to accept subversions of its authority.²²⁰ It never faced the threat of foreign invasion, never risked succumbing to fascism or dictatorship.²²¹

The secure environment nurtured a robust, plaintiff-friendly legal system, capable of driving progress in the area of human rights. Early decisions, such as *Marbury v. Madison*, established the role of the judiciary in protecting individuals.²²² U.S. courts made redress by victims more favorable by providing devices such as class action lawsuits, pretrial discovery, and default judgments.²²³ The courts facilitated access to counsel through contingency fee arrangements and punitive damages.²²⁴ An active plaintiffs' bar and tradition of pro bono developed.²²⁵ Radovan Karadzic, the leader of the Bosnian Serbs, faced genocide and war crimes charges in the United States, not in Europe.²²⁶ Royal Dutch Shell defended its actions towards the Ogoni people of Nigeria in the United States, too, in spite of efforts to transfer the litigation to the United

217. See, e.g., *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 78-80 (1938); *Texas Industries, Inc. v. Radcliff Materials, Inc.*, 451 U.S. 630, 640 (1981) (federal courts may formulate federal common law only when "Congress has given the courts the power to develop substantive law"); Robert J. Pushaw, Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 NOTRE DAME L. REV. 447 (1994); Hamilton, *supra* note 216.

218. See, e.g., JEREMY RABKIN, LAW WITHOUT NATIONS? WHY CONSTITUTIONAL GOVERNMENT REQUIRES SOVEREIGN STATES (2005). But see, e.g., Sarah Cleveland, *Our International Constitution*, 31 YALE J. INT'L L. 1 (2006) (rejecting the claim that the use of international law is antidemocratic and establishing that international law has properly been used to construe the Constitution).

219. See, e.g., Michael Ramsey, *International Law as Part of Our Law: A Constitutional Perspective*, 29 PEPP. L. REV. 187, 191-94 (2001).

220. See, e.g., Michael Ignatieff, *Introduction: American Exceptionalism and Human Rights*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 11-12 (Michael Ignatieff ed., 2005).

221. *Id.* at 17.

222. See *Marbury v. Madison*, 5 U.S. 137 (1803).

223. See U.N. Human Rights Council, 14th Sess., 3d agenda item at 21, U.N. Doc. A/HRC/14/27 (Apr. 9, 2010) (discussing the importance of these instruments to legal actions against multinational corporations).

224. SARAH JOSEPH, CORPORATIONS AND TRANSNATIONAL HUMAN RIGHTS LITIGATION 16-17 (2004); Gary Clyde Hufbauer & Nicholas K. Mitrokostas, *International Implications of the Alien Tort Statute*, 7 J. INT'L ECON. L. 245, 252 (2004).

225. See, e.g., Jonathan C. Drimmer, *Think Globally, Sue Locally: Out-of-Court Tactics Employed by Plaintiffs, Their Lawyers, and Their Advocates in Transnational Tort Cases*, U.S. CHAMBER INSTITUTE FOR LEGAL REFORM, June 2010, at 17.

226. See *Kadic v. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

Kingdom or the Netherlands.²²⁷

These and other claims under the ATS reflected the U.S. commitment to upholding fundamental rights, but the United States has increasingly appeared to emphasize its domestic rules. The language of Supreme Court decisions has tracked the general trajectory: In 1988, in *Thompson v Oklahoma*, the Court considered “views that have been expressed by . . . other nations that share our Anglo-American heritage, and by the leading Members of the West European community.”²²⁸ More recent opinions, however, have stated that U.S. courts “should not impose foreign moods, fads, or fashions,” and “discussion of . . . foreign views is meaningless [and] dangerous dicta.”²²⁹

The United States lately has refused to ratify international rights conventions, unlike the European member states that have incorporated them into national law. The United States rarely has contravened international standards; it has seemed reluctant to cede its sovereignty to external regimes.²³⁰ It voted against the Kyoto Protocol, withdrew from the Anti-Ballistic Missile Treaty, and unsigned the Rome Statute of the ICC. Its use of military commissions rather than international tribunals to try foreign terror suspects appears to reject established systems of international law.²³¹

The theory of “integrity-anxiety” may offer an explanation of why the

227. *Wiwa v. Royal Dutch Petroleum Co.*, 226 F.3d 88, 99-108 (2d Cir. 2000); *see also* Declaration of Richard Meeran (filed before Magistrate Judge Henry B. Pitman on May 5, 1998); Two Declarations of Peter Duffy (filed before Magistrate Judge Henry B. Pitman on Aug. 26, 1997 and May 5, 1998); Three Declarations of Lawrence Collins (filed before Magistrate Judge Henry B. Pitman on Mar. 26, 1997, May 16, 1997, and Sept. 26, 1997).

228. *Thompson v. Oklahoma*, 487 U.S. 815, 830 n.31 (1988).

229. *Foster v. Florida*, 537 U.S. 990, 990 n.* (2002) (Thomas, J., concurring) (denying certiorari); *see also* *Lawrence v. Texas*, 539 U.S. 558, 598 (2003) (Scalia, J., dissenting). *Compare* *Trop v. Dulles*, 356 U.S. 86, 102-03 (1958), *with* *Coker v. Georgia*, 433 U.S. 584, 593 n.4 (1977).

230. *See, e.g.*, John R. Bolton, *Should We Take Global Governance Seriously?*, 1 CHI. J. INT'L L. 205, 221 (2000) (describing “reduced constitutional autonomy” and “impaired popular sovereignty” as costs of global governance); Jeremy Rabkin, *Is EU Policy Eroding the Sovereignty of Non-Member States?*, 1 CHI. J. INT'L L. 273, 278 (2000).

231. *See, e.g.*, Conference of the Parties to the Framework Convention on Climate Change: Kyoto Protocol, Dec. 10, 1997, 37 I.L.M. 22 (1998); S. Res. 98, 105th Cong. (1997): A resolution expressing the sense of the Senate regarding the conditions for the United States becoming a signatory to any international agreement on greenhouse gas emissions under the United Nations Framework Convention on Climate Change; Joshua P. O'Donnell, *The Anti-Ballistic Missile Treaty Debate: Time for Some Clarification of the President's Authority to Terminate a Treaty*, 35 VAND. J. TRANSNAT'L L. 1601 (2002) (exploring the legal issues surrounding a president's unilateral withdrawal from a treaty); Emily K. Penney, *Is That Legal?: The United States' Unilateral Withdrawal from the Anti-Ballistic Missile Treaty*, 51 Cath. U. L. Rev. 1287 (2002); John Bolton, *U.S. Letter to U.N. Secretary-General Kofi Annan*, CNN (May 6, 2002, 6:32 PM), <http://archives.cnn.com/2002/US/05/06/court.letter.text/index.html> (Letter from John Bolton, under Sec'y of State for Arms Control and Int'l Sec., to Kofi Annan, UN Sec'y Gen. announcing decision to unsign the Rome Statute); Edward T. Swaine, *Unsigning*, 55 STAN. L. REV. 2061, 2061-62, 2064 (2003); Harold H. Koh, *The Case Against Military Commissions*, 96 AM. J. INT'L L. 337 (2002); Neal K. Katyal & Laurence H. Tribe, *Waging War, Deciding Guilt: Trying the Military Tribunals*, 111 YALE L. J. 1259 (2002).

United States has increasingly excluded international laws.²³² The American identity, the theory postulates, derives from the constitution and national laws.²³³ In a pluralistic society, decisions based on constitutional principles and congressional legislation receive more popular legitimacy than those that draw from boundless outside authorities.²³⁴ Domestic courts therefore keep disagreements in check by applying only domestic rules.²³⁵ Foreign, international laws threaten the integrity of the system.²³⁶

Perhaps for this reason a nationalist school seems to have prevailed, and the increasingly strict interpretations of separation of powers principles have resonated in the recent opinions construing the ATS.²³⁷ It has become “antidemocratic” for the federal government to delegate lawmaking authority to outsiders unaccountable to the U.S. electorate.²³⁸ And it therefore has been “countermajoritarian” for U.S. courts to develop and apply international laws.²³⁹

232. See FRANK I. MICHELMAN, *Integrity-Anxiety?*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 241 (Michael Ignatieff ed., 2005).

233. See, e.g., *id.*

234. *Id.*; see LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 93-144 (2004). See generally, JOHN ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 73-104 (1980); AMY GUTMANN & DENNIS THOMPSON, WHY DELIBERATIVE DEMOCRACY? 1-63 (2004).

235. See MICHELMAN, *supra* note 232; see also, Philip R. Trimble, *A Revisionist View of Customary International Law*, 33 UCLA L. REV. 665, 727-31 (1986) (explaining why customary international law lacks popular legitimacy in the United States); Michael D. Ramsey, *International Law as Non-preemptive Federal Law*, 42 VA. J. INT'L L. 555, 584 (2002) (“federal courts cannot apply international law at all unless it is affirmatively incorporated into state or federal law by Congress”).

236. See, e.g., John O. McGinnis, *Foreign to the Constitution*, 100 NW. U. L. REV. 303, 313-18 (2006); Joan L. Larsen, *Importing Constitutional Norms from a ‘Wider Civilization’: Lawrence and the Rehnquist Court’s Use of Foreign and International Law in Domestic Constitutional Interpretation*, 65 OHIO ST. L.J. 1283 (2004) (reflecting how some Americans feel threatened by international law); JOSÉ E. ALVAREZ, INTERNATIONAL ORGANIZATIONS AS LAW-MAKERS 630-40 (2005); Robert Howse, *Transatlantic Regulatory Cooperation and the Problem of Democracy*, in TRANSATLANTIC REGULATORY COOPERATION 469 (George A. Bermann et al. eds., 2000).

237. See Justice Antonin Scalia, *Keynote Address: Foreign Legal Authority in the Federal Courts*, 98 Am. Soc’y Int’l L. Proc. 305, 307 (2004); Donald J. Kochan, *No Longer Little Known but Now A Door Ajar: An Overview of the Evolving and Dangerous Role of the Alien Tort Statute in Human Rights and International Law Jurisprudence*, 8 CHAP. L. REV. 103, 131 (2005); John Gerard Ruggie, *Exemptionalism and Global Governance*, in AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 325 (Michael Ignatieff ed., 2005); but see Justice Ruth Bader Ginsburg, “*A Decent Respect to the Opinions of (Human)kind*”: *The Value of A Comparative Perspective in Constitutional Adjudication*, 99 AM. SOC’Y INT’L L. PROC. 351, 357-59 (2005); ANNE-MARIE SLAUGHTER, A NEW WORLD ORDER (2004); Stephen Breyer, *Keynote Address*, 97 AM. SOC’Y INT’L L. PROC. 265, 265 (2003); Sandra Day O’Connor *Keynote Address*, 96 AM. SOC’Y INT’L L. PROC. 348, 350 (2002).

238. See, e.g., Jed Rubenfeld, *Unilateralism and Constitutionalism*, 79 N.Y.U. L. REV. 1971, 2006-21 (2004); John O. McGinnis & Ilya Somin, *Democracy and International Human Rights Law*, 84 NOTRE DAME L. REV. 1739, 1747-48 (2009), but see Steven P. Croley, *The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law*, 62 U. CHI. L. REV. 689, (1995).

239. See, e.g., Roger P. Alford, *Misusing International Sources To Interpret the Constitution*,

Judges do not have lawmaking powers, so they have not been permitted to incorporate customary international laws into the federal common law as the ATS has required.²⁴⁰ The permanent representative to the United Nations during the Bush administration, John Bolton, described mechanisms for extraterritorial jurisdiction, such as the statute as allowing “‘offenses’ by ‘the common enemies of mankind’ that do not readily fit within . . . [the law] . . . [to] be subject to creative interpretations . . . , whether slow-witted national legislators ever vote on them or not.”²⁴¹ U.S. courts lately have been held to have jurisdiction to adjudicate only U.S. legislation.²⁴²

If the U.S. Constitution is the supreme law of the land, excluding any reference to outside authority, the customary international laws on which ATS claims depend no longer seem to have a place in domestic courts. Congressional testimony has bemoaned “substantial litigation abuse . . . [in] the importation of foreign claims into U.S. courts.”²⁴³ The extraterritorial reach of the ATS, a statute the Congress drafted in 1789 to provide jurisdiction over violations of international laws, has been narrowed precisely because it requires U.S. judges to apply international laws.²⁴⁴

B. Europe instead relinquished sovereignty to protect democracy and solidifies its identity in promoting international rights

Europe, because of its history, has regarded intrusions on national sovereignty as a safeguard for democracy. The member states united to form the European Union to constrain antidemocratic tendencies within a transnational network.²⁴⁵ Their participation in the regional system familiarized them with

98 AM. J. INT’L L. 57, 58-61 (2004); Lea Brilmayer, *International Law in American Courts: A Modest Proposal*, 100 YALE L.J. 2277, 2309 (1991).

240. Curtis A. Bradley & Jack L. Goldsmith, *Commentary, Federal Courts and the Incorporation of International Law*, 111 HARV. L. REV. 2260 (1998); John Cerone, ‘*Dangerous Dicia*’: *The Disposition of U.S. Courts Toward Recourse to International Standards in Gay Rights Adjudication*, 32 WM. MITCHELL L. REV. 543, 551-54 (2006); Melissa A. Waters, *Creeping Monism: The Judicial Trend Toward Interpretive Incorporation of Human Rights Treaties*, 107 COLUM. L. REV. 628, 660-61 (2007); but see A.M. Weisburd, *State Courts, Federal Courts, and International Cases*, 20 YALE J. INT’L L. 1, 48-56 (1995). See also *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938).

241. Bolton, *supra* note 230, at 213.

242. See, e.g., *The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation Between Justice Antonin Scalia and Justice Stephen Breyer*, 3 INT’L J. CONST. L. 519 (2005).

243. *Can We Sue Our Way to Prosperity?: Litigation’s Effect on America’s Global Competitiveness: Hearing on H. Subcomm. on the Constitution, Comm. on the Judiciary*, 112th Cong. 2 (2011), available at <http://judiciary.house.gov/hearings/pdf/Beisner05242011.pdf> (testimony of John H. Beisner on Behalf of the U.S. Chamber Institute for Legal Reform).

244. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 118-120 (2d Cir. 2010).

245. See, e.g., *Summaries of EU Legislation – Treaty establishing the European Coal and Steel Community*, ECSC Treaty, EUROPA http://europa.eu/legislation_summaries/institutional_affairs/treaties/treaties_ecsc_en.htm (last updated Oct. 15, 2010); ROBERT

restrictions on their national authority, and they grew more accustomed to conforming to outside rules. As the European project has encountered obstacles and they have sought a new purpose for the union, they have begun to locate a European identity in the extraterritorial promotion of international standards for human rights.²⁴⁶

The experience of World War II educated Europe in the precariousness of democratic systems.²⁴⁷ In its wake, sovereign European countries agreed to cede national authority.²⁴⁸ They empowered external institutions, such as the European Court of Justice, to restrain the will of the people and guard basic rights.²⁴⁹ The Universal Declaration of Human Rights established a floor for fundamental rights, and the European Convention on Human Rights has mandated their protection.²⁵⁰

SCHUMAN, THE SCHUMAN DECLARATION (1950), available at http://europa.eu/abc/symbols/9-may/decl_en.htm.

246. See, e.g., Samantha Besson, *The European Union And Human Rights: Towards A Post-National Human Rights Institution?*, 6 HUM. RTS. L. REV. 323, 324 (2006) (positing that “economic integration is to a large extent exhausted as a vision for further integration in the European Union” and “the prospects of enlargement have further contributed in the last few years to identifying national, regional and global threats to human rights and hence to conscientise the EU’s vision of itself as a global entity, whose ‘one boundary is democracy and human rights’”).

247. See, e.g., Charles Leben, *Is There A European Approach to Human Rights?*, in THE EU AND HUMAN RIGHTS (Philip Alston ed., 1999) (“awareness, arising out of the tragic history of the 1930s and 1940s of the need actively to defend human rights”).

248. See, e.g., Jodie A. Kirshner, *‘An Ever Closer Union in Corporate Identity?: A Transatlantic Perspective on Regional Dynamics and the Societas Europaea*, 84 ST. JOHN’S L. REV. 1273, 1280 (2010); Victoria Curzon, THE ESSENTIALS OF ECONOMIC INTEGRATION: LESSONS OF EFTA EXPERIENCE 28-29 (1974) (“The end of World War II was a time of heroic plans for institutionalizing inter-state relations so as to bring order into international affairs and thus blot out the danger of another war. Nowhere were these feelings expressed more strongly than in Western Europe, where a federation of European states was considered by many to be the only sound basis upon which to build a lasting peace”).

249. Treaty Establishing the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140 (also established the European Court to Justice).

250. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217 (III) (Dec. 10, 1948); European Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, 213 U.N.T.S. 221; see, e.g., Philip Alston & J.H.H. Weiler, *An ‘Ever Closer Union’ in Need of a Human Rights Policy: The European Union and Human Rights*, in THE EU AND HUMAN RIGHTS 1 (Philip Alston ed., 1999); Iris Halpern, *Tracing The Contours Of Transnational Corporations’ Human Rights Obligations In The Twenty-First Century*, 14 BUFF. HUM. RTS. L. REV. 129, 137 (2008). The history of the development of the European Convention of Human Rights and the European Union is substantially intertwined. Both are part of the project of European integration. After direct experience of serious rights violations during World War II, many European citizens gathered at the Hague Congress in 1948 to call for the development of a regional system of Human Rights and for the creation of a European Assembly, in order to avoid the serious rights violations that took place during the War and to protect against Communism. Winston Churchill presided over a discussion at the Conference about developing European political cooperation. The Council of Europe was founded in 1949 by ten European countries (Belgium, Denmark, France, Ireland, Italy, Luxembourg, the Netherlands, Norway, Sweden and the UK.), and the European Coal and Steel Community came into being in 1951. The Convention on Human Rights was drafted in Strasbourg in 1949, under the auspices of the Council of Europe. (The

The establishment of the European Union has exposed the member states to nondomestic laws and extraterritorial enforcement. European member states must routinely accept regulations drafted in Brussels and interpreted in Luxembourg, in spite of the intrusion on national sovereignty.²⁵¹ Instead of the apparent U.S. ideal of a discreet body of domestic rules, the European member states have implemented supranational directives and invalidated conflicting national legislation.²⁵²

The incorporation of external laws has extended to international conventions. The member states have ratified them into national legal codes without concern for their “countermajoritarian” status.²⁵³ When the national constitutions of Germany and France blocked participation in the ICC, both countries amended their constitutions.²⁵⁴

Although the European Union developed social rights provisions to organize the relationships among its institutions, member states, and citizens, the Union has primarily followed a program of economic integration.²⁵⁵ The focus

Council of Europe now includes every European country but Belarus, Kazakhstan, and Vatican City, 47 member states. All are party to the Convention). The European Court of Human Rights enforces the Convention. Although the Court of Justice of the European Union is a separate institution, it is bound by the decisional law of the Court of Human Rights. Because the European Union and all of the EU Member States are signatories to the Convention, the ECJ also refers cases to the Court of Human Rights and views the Convention as integral to EU law. Both the European Union and its member states are subject to the Convention and external monitoring of their human rights activities. EU institutions are also bound under article 6 of the EU Treaty of Nice to conform to the Convention. In 2007, the Council of Europe and the European Union signed an agreement to cooperate to advance shared values.

251. See, e.g., Anna Triponel, *Business and Human Rights Law: Diverging Trends in the United States and France*, 23 AM. U. INT’L L. REV. 855, 907 (2007). On Brussels and Luxembourg as the locations of the legislature and court, see, e.g., *Lesson 4: How Does the EU Work?*, EUROPA http://europa.eu/abc/12lessons/lesson_4/index_en.htm.

252. For example, The Human Rights Act 1998 incorporated the European Convention on Human Rights into UK law.

253. See discussion in Section IV.B. But see M. Ličková, *European Exceptionalism in International Law*, 19 EUR. J. INT’L L. 463 (2008) (suggesting that the European Member States only “embrace” their EU obligations without “infringing international ones” by negotiating exceptions from international standards).

254. See, e.g., Rabkin, *supra* note 230, at 278.

255. See, e.g., Council Directive 68/151, 1968 O.J. (L 65) 8 (EC) (information disclosure, contracts, and dissolution); Council Directive 77/91, 1976 O.J. (L 26) 1 (EC) (capitalization of public companies); Council Directive 78/855, 1978 O.J. (L 295) 36 (EC) (mergers of public limited liability companies); Council Directive 78/660, 1978 O.J. (L 222) 11 (EC) (annual accounts); Council Directive 82/891, 1982 O.J. (L 378) 47 (EC) (divisions of public limited liability companies); Council Directive 83/349, 1983 O.J. (L 193) 1 (EC) (consolidated accounts); Council Directive 79/1072, 1979 O.J. (L 331) 11 (EC) (refund of value added tax); Council Directive 89/666, 1989 O.J. (L 395) 36 (EC) (company branches and disclosure); Council Directive 89/667, 1989 O.J. (L 395) 40 (EC) (private limited liability companies). See also Gerard Quinn, *The European Union and the Council of Europe on the Issue of Human Rights: Twins Separated at Birth?*, 46 MCGILL L.J. 849, 858 (2001); Carlos A. Ball, *The Making of a Transnational Capitalist Society: The Court of Justice, Social Policy and Individual Rights Under the European Community’s Legal Order*, 37 HARV. INT’L L.J. 307, 308-10 (1996) (“The primary concern of the Community has always been

made support from disparate political groups possible and elided cultural differences.²⁵⁶ After unifying the coal and steel industries, the European Union gradually expanded to a broader common market.²⁵⁷

As possibilities for further expansion of the common market approach a limit, however, and the prospect of financial default among the member states throws economic plans into disarray, the European Union has appeared to look to human rights promotion to provide a new rallying purpose.²⁵⁸ Difficulty ratifying the Maastricht and the Lisbon treaties weakened the popular legitimacy of the union.²⁵⁹ A sense that the potential for economic harmonization had been exhausted has led to calls for a new project, one that would be less technocratic and easier for European citizens to understand and support.²⁶⁰

The prospect of federalizing under the banner of human rights seems to provide a potentially compelling “raison d’etre” for the European Union.²⁶¹ European elites have talked openly of rights promotion as a means of relevance.²⁶² The NGO community has agitated for treaty revisions that would make human rights central.²⁶³

Increasingly, the European Union has seemed to see itself not just as an

economic integration; issues relating to social policy are viewed as secondary, to be addressed only to the extent that they impact upon economic integration. Economic integration, however, has not occurred in a political or social vacuum, and it is generally agreed that the Community has developed a social policy component that arises from, and is consistent with, its broader economic objectives.”).

256. See, e.g., BEN ROSAMOND, *THEORIES OF EUROPEAN INTEGRATION*, 2, 7, 10, 30 (2000); Kirshner, *supra* note 248, at 1282; Sionaidh Douglas-Scott, *The European Union and Human Rights After the Treaty of Lisbon*, 11 *HUM. RTS. L. REV.* 645, 647-8 (2011); John Donahue & Mark Pollack, *Centralization and its Discontents: The Rhythms of Federalism in the United States and the European Union*, in *THE FEDERAL VISION* 95-98 (Kalypso Nicolaidis & Robert Howse, eds. 2001).

257. E.g., Treaty Establishing the European Economic Community, 25 March 1957, 298 U.N.T.S. 11; Single European Act, 1987 O.J. (L. 169)1, [1987] 2 C.M.L.R. 741.

258. But see Alston & Weiler, *supra* note 250; Gráinne de Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 *AM. J. INT’L L.* 649 (2011) (arguing that the current EU human rights system is less robust and less ambitious than that envisaged in the 1950s, such that the EU’s aspiration to be taken seriously as a global normative actor is hindered by the double standard created by its internal and external human rights policies).

259. See, e.g., Gráinne de Búrca, *If at First You Don’t Succeed: Vote, Vote Again: Analyzing the Second Referendum Phenomenon in EU Treaty Change*, 33 *FORDHAM INT’L L.J.* 1472, 1483-84 (2010); Brendon S. Fleming, Book Note, 15 *COLUM. J. EUR. L.* 561, 562-63 (2009).

260. See, e.g., Armin von Bogdandy, *The European Union as a Human Rights Organization? Human Rights and the Core of the European Union*, 37 *COMMON MKT. L. REV.* 1307, 1308 (2000).

261. But see *id.* at 1338.

262. Andrew T. Williams, *Taking Values Seriously: Towards a Philosophy of EU Law*, 29 *OXFORD J. LEGAL STUD.* 549, 576-77 (2009) (“[M]erely preserving the EU is no longer sufficient. Its survival must also reflect a ‘moral politics’ that respects articulated values in a concrete fashion.”); Samantha Besson, *The European Union and Human Rights: Towards a Post-national Human Rights Institution?*, 6 *HUM. RTS. L. REV.* 323, 326 (2006) (arguing “for a conception of the EU *qua* a post-national institution of global justice”).

263. See, e.g., EU Select Committee, Eighth Report: EU Charter of Fundamental Rights, 1999-2000, H.L. 67, 161 at 172-74 (U.K.).

economic project, but as a force for good, and it has advanced a more visible human rights policy.²⁶⁴ The European Court of Justice ruled that it could shape general principles of Community law from international human rights, and the European Parliament succeeded in enacting a charter of fundamental rights.²⁶⁵ Concern for promoting human rights abroad has begun to appear in judicial opinions and in new documents and treaties.²⁶⁶ Their reach has extended as the European Union enlarges and participates in international development projects.²⁶⁷

Unlike the United States, in which a U.S. identity appears to arise from a unique set of national rules that flow only from the Constitution and from the Congress, Europe seems to be finding an identity through a deliberate process of human rights promotion. It has tolerated sublimation of national sovereignty to absorb international conventions and has broadcast its commitment to them. Its rhetoric has promoted its extraterritorial goals: the 2003 Athens Declaration described the European Union as “a project to share our future as a community of values,” which would “uphold and defend fundamental human rights, both inside and outside the European Union”²⁶⁸

CONCLUSION

Multinational corporations expose the limits of territorially based legal

264. COMITÉ DES SAGES, EUROPEAN UNIVERSITY INSTITUTE, LEADING BY EXAMPLE: A HUMAN RIGHTS AGENDA FOR THE EUROPEAN UNION FOR THE YEAR 2000: AGENDA OF THE COMITÉ DES SAGES AND FINAL PROJECT REPORT (1998). *But see* Andrew Clapham, *Where Is the EU's Human Rights Common Foreign Policy, and How Is It Manifested in International Fora?*, in *THE EU AND HUMAN RIGHTS* 83 (Philip Alston ed., 1999).

265. Case 4/73, *Nold v. Comm'n*, 1974 E.C.R. 491; Case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, 1989 E.C.R. 2609; Charter of Fundamental Rights of the European Union, Dec. 18, 2000, 2000 O.J. (C 364) 1.

266. *See, e.g.*, Case 11/70, *Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel*, 1970 E.C.R. 1125; Case 4/73, *Nold v. Comm'n*, 1974 E.C.R. 491; Case 5/88, *Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, 1989 E.C.R. 2609; Case C-260/89, *ERT v. DEP*, 1991 E.C.R. I-2925; Consolidated Version of the Treaty on European Union, 2010 O.J. (C 83) 13, arts. 6(1), 6(2), 7, 11, 46, 49, 177; *Laeken Declaration on the Future of the European Union*, EUROPEAN COUNCIL, <http://european-convention.eu.int/pdf/lnken.pdf>. *See also* Bruno de Witte, *The Past and Future Role of the European Court of Justice in the Protection of Human Rights*, in *THE EU AND HUMAN RIGHTS* 859 (Philip Alston ed., 1999).

267. *See, e.g.*, Fourth ACP-EEC Convention, 1991 O.J. (L 229) 3 (EC); *On the Inclusion of Respect for Democratic Principles and Human Rights in Agreements Between the Community and Third Countries*, COM (95) 216 final (May 23, 1995); Partnership Agreement Between the Members of the African, Caribbean, and Pacific Group of the One Part, and the European Community and its Member States, of the Other Part, 2000 O.J. L (317) 43; European Initiative and Programme in Democracy and Human Rights; *Accession Criteria*, EUROPEAN COMMISSION, http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm. *See also* Besson, *supra* note 262, at 324.

268. Athens Declaration of 16 Apr. 2003, Informal European Council, 2003 O.J. (L 236), available at <http://www.eu2003.gr/en/articles/2003/4/16/2531/index.asp?>

systems. Single states applying national laws within national jurisdictions lack the capacity to police interconnected, international corporate groups. To hold them accountable, the legal structure must match the economic structure. The enforcement of human rights standards has demanded a flexible approach to sovereignty and openness to extraterritorial jurisdiction.²⁶⁹

Landmark opinions endorsing the use of the ATS have acknowledged the difficulties individual, territorial legal systems have in making multinational corporations responsible for human rights. The statute has enabled U.S. courts to navigate at the margins of other legal systems and interact with international law. Its extraterritorial character has offered jurisdiction concomitant to globalized business and allowed claims to reach human rights abuses of foreign subsidiaries.

The retraction of extraterritorial jurisdiction in the United States has generated concern that the governance gap will reemerge.²⁷⁰ U.S. courts have narrowed the ATS out of concern for encroachments on national sovereignty and related discomfort with international laws.

Instead, the European Union and many of its member states have stepped forward, offering nascent mechanisms of extraterritorial accountability. The economic interdependence of multinational corporate groups has parallels to the political interdependence of Europe itself. The European Union has achieved some common goals through cooperation,²⁷¹ and member state courts have appeared more comfortable with intrusions on national sovereignty and extraterritoriality.²⁷²

The climate therefore presents new avenues for judicial redress of corporate human rights abuses. Developments in Europe counterbalance the shift taking place in the United States. As U.S. courts grow less open to extraterritorial cases, recognition of the broader global context gains importance. Continuing to bring extraterritorial claims in U.S. courts wastes resources. Even if egregious cases can achieve favorable outcomes, the litigation risks the piecemeal development of inconsistent law.

If international human rights norms grow more established within European judicial forums, they eventually could achieve sufficient momentum to pave the way for renewed recognition in U.S. courts. Justice Breyer cited the

269. See, e.g., THE ECONOMICS OF GLOBALIZATION (A. Razin & E. Sadka eds., 1998).

270. See, e.g., U.N. General Assembly, Human Rights Council, 8th Sess., Agenda Item 3, U.N. Doc. A/HRC/8/5, at 3 (7 Apr. 2008) (“root cause of the business and human rights predicament today lies in the governance gaps created by globalization – between the scope and impact of economic forces and actors, and the capacity of societies to manage their adverse consequences”).

271. See, e.g., Jodie Adams Kirshner, *An Ever Closer Union in Corporate Identity?: A Transatlantic Perspective on Regional Dynamics and the Societas Europaea*, 84 ST. JOHN’S L. REV. 1273, 1274, 1276 (2010).

272. See, e.g., Andrew Moravcsik, *Conservative Idealism and International Institutions*, 1 CHI. J. INT’L L. 291, 305 (2000) (“Today we can afford a broader, more flexible understanding of sovereignty – one that permits us to profit from interdependence . . .”).

European Commission in order to interpret the ATS, and the English Court of Appeal later referenced his opinion to support extraterritorial jurisdiction.²⁷³ The interlocking citations evidence shared values and a joint willingness to support fundamental rights, in spite of diverging attitudes towards extraterritoriality.

273. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 763 (2004) (Breyer, J., concurring); *Jones v. Ministry of Interior Al-Mamlaka Al-Arabiya as Saudiya (the Kingdom of Saudi Arabia) and others*, [2004] EWCA (Civ) 1394, [60] (Eng.); *see also* Menno Kamminga (2005), *supra* note 186, at 124; Donald Francis Donovan, *Introductory Remarks*, 99 AM. SOC'Y INT'L L. PROC. 117, 117 (2005).

2012

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Theodora Nikaki

Bariş Soyer

Recommended Citation

Theodora Nikaki and Bariş Soyer, *A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves?*, 30 BERKELEY J. INT'L LAW. 303 (2012).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol30/iss2/2>

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A New International Regime for Carriage of Goods by Sea: Contemporary, Certain, Inclusive AND Efficient, or Just Another One for the Shelves?

By
Dr. Theodora Nikaki* and Professor Barış Soyer**

I. INTRODUCTION

For decades, sea carriers—taking advantage of their superior bargaining power—insisted on the inclusion of clauses into contract of carriage that exempted them even from their basic common law liability. National-level legislation attempted to curtail such unlimited freedom of contract¹ but proved to be insufficient. Therefore, at the turn of the last century, the international community recognized that for international trade to flourish it would be essential to create an international legal regime that could accommodate two purposes: (i) flexibility to allocate risks in line with their commercial needs, and, (ii) prevention of abuse and protection for the parties in a weaker bargaining position. This led to the drafting and implementation of the Hague Rules in 1920s,² which was the first ever international convention to unify certain rules

* Member of the Institute of International Shipping and Trade Law, Swansea University, United Kingdom.

** Director of the Institute of International Shipping and Trade Law, Swansea University, United Kingdom.

1. *See, e.g.*, Harter Act 1893, 46 U.S.C. app. §§ 190-96 (U.S.); Canadian Water Carriage Act, 10 Edw. 7 (1910) (Can.); Australian Sea-Carriage of Goods Act, 4 Edw. 7 (1904) (Austl.). *See also* discussion in SIR GUENTER TREITEL & FRANCIS M.B. REYNOLDS, *CARVER ON BILLS OF LADING* ¶ 9-062 (Sweet & Maxwell et al. eds., 3d ed. 2011).

2. The International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, and Protocol of Signature, Aug. 25, 1924, 51 Stat. 233, 120 L.N.T.S. 155, commonly known as the Hague Rules, was adopted under the auspices of the Comité Maritime International (“CMI”) and was opened for signature in 1924. For the list of the Contracting States to the Hague Rules, *see Status of the Ratifications of and Accessions to the Brussels International Maritime Law Conventions*, 2010 COMITÉ MAR. INT’L, Y.B. 569 [hereinafter 2010 CMI Yearbook], available at <http://www.comitemaritime.org/Uploads/Yearbooks/Yearbook%202010.pdf> (last visited Sept. 1,

relating to bills of lading and set forth a minimum protection for the cargo interests.

Presently, the most prominent regime that governs a large majority of international shipments is an amended version of the original Hague Rules, the Hague-Visby Rules.³ The Hamburg Rules,⁴ which were later developed as an alternative to the Hague-Visby regime with a view to redressing the balance between the interests of the shippers and carriers, have so far failed to attract the support of major shipping powers.⁵ As a result, the Hamburg Rules frustrated the hopes of achieving worldwide uniformity in this field by creating yet another international carriage regime that applies to a truncated proportion of international shipping contracts.

Once it became apparent that the Hamburg Rules had failed to provide a uniform replacement for the Hague-Visby regime, lobbying began afresh for the establishment of an alternative system. A variety of international bodies criticized the Hague-Visby regime as out-of-step with modern shipping and international trade practices.⁶ The preliminary work on the new regime was carried out by the Comité Maritime International (“CMI”) until the end of 2001,

2011).

3. The Hague Rules were altered in 1968 and then in 1979 following an intensive consultation carried out by the CMI in an attempt to modernize the rules in light of developments in container transport and also to increase the limitation limits. *See* Protocol to Amend the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Feb. 23, 1968, 1412 U.N.T.S. 127 and Protocol Amending the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Dec. 21, 1979, 1412 U.N.T.S. 146. The amended version of the Hague Rules, which is commonly known as the Hague-Visby Rules, has been adopted by a wide majority of trading states, representing approximately two-thirds of world trade, whilst the United States remains a Hague country. *See* Carriage of Goods by Sea Act (“COGSA”), 46 U.S.C. § 30701 (2006). Also, the Nordic countries have developed the Scandinavian Codes, adopted by Denmark, Finland, Norway and Sweden; these are based on the Hague-Visby Rules but have deleted the catalogue of defenses that were originally included in Article IV, r.2 of the Hague Rules. It should also be noted that some countries, like Australia and Canada, have enacted the Hague-Visby Rules by national legislation without ratifying the Convention. *See* Australian Carriage of Goods by Sea Act 1991 (Act No. 160/1991), sch. 1 (Oct. 1, 1991, as subsequently amended); Canadian Marine Liability Act, S.C. 2001, c.6, pt. 5, sch. 3 (Aug. 8, 2001). The list of the contracting states to the Hague-Visby Rules is available in the 2010 CMI Yearbook, *supra* note 2, at 575, 577.

4. Officially known as the United Nations Convention on the Carriage of Goods by Sea. *See* G.A. Res. 48/34, U.N. Doc. A/RES/48/34 (Dec. 9, 1993) [hereinafter Hamburg Rules].

5. As of 1 September 2011, only thirty-four countries have ratified or acceded to the Hamburg Rules; however, these countries represent only a small proportion of world trade. For the list of the contracting countries, *see* Status: 1978 – United Nations Convention on the Carriage of Goods by Sea – the “Hamburg Rules,” UNCITRAL (2012), *available at* http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html.

6. One of the main criticisms directed towards the Hague-Visby regime is that it was negotiated in the early days of the container revolution when contracts for door-to-door/multimodal transport were not in constant use. Also, it is often voiced that the Hague-Visby regime does not accommodate the developments in electronic commerce. *See, e.g.*, Rep. of the U.N. Comm. on Int’l Trade Law, 29th Sess., ¶ 210, 1996, U.N. Doc. A/51/17 (June 14, 1996); U.N. GAOR, 51st Sess., Supp. No. 17, ¶ 210, U.N. Doc. A/CN.9/421 (1996) [hereinafter Report of the U.N. Comm’n on Int’l Trade Law on Twenty-Ninth Session].

and was eventually passed on to the United Nations Commission on International Trade Law (“UNCITRAL”), which finalized the draft text of a new convention following almost a decade of intensive work.⁷ In December 2008, the General Assembly of the United Nations formally adopted the new carriage convention, the United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (“Convention”).⁸ The Convention was then formally opened to signature at Rotterdam on September 23 2009, after which it has since been popularly christened the Rotterdam Rules.⁹

In recent years, the potential impact of the Rotterdam Rules has been the source of intense academic¹⁰ and industry debate. Whereas the Rotterdam Rules do have their supporters,¹¹ a number of organizations have expressed strong opposition.¹² Inevitably, the debate has moved into the political arena with the

7. The CMI official working documents are published in the 2000 and 2001 CMI Yearbooks, available at <http://comitemaritime.org/Yearbooks/0,2714,11432,00.html>, whilst the UNCITRAL respective documents may be found on UNCITRAL’s website, available at <http://www.uncitral.org/uncitral/en/index.html>.

8. United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, G.A. Res. 63/122, U.N. GAOR, 63d Sess., U.N. Doc. A/RES/63/122, Annex (Feb. 2, 2009) [hereinafter Rotterdam Rules].

9. See *id.* For a comprehensive review of the stages see Michael F. Sturley, *Transport Law for the Twenty-First Century: An Introduction to the Preparation, Philosophy, and the Potential Impact of the Rotterdam Rules*, 14 J. INT’L MAR. L. 461 (2008), reprinted in A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA – THE ROTTERDAM RULES I (D. Rhidian Thomas ed., 2009) [hereinafter THE ROTTERDAM RULES].

10. Most notable contributions are: Michael F. Sturley, Tomotaka Fujita, Gertjan van der Ziel, THE ROTTERDAM RULES (Sweet & Maxwell 2010) [hereinafter Sturley et al., THE ROTTERDAM RULES]; THE ROTTERDAM RULES, *supra* note 9; THE ROTTERDAM RULES 2008, (Alexander von Ziegler, Johan Schelin and Stefano Zunarelli eds., 2010) [hereinafter Ziegler et al., THE ROTTERDAM RULES 2008]; Francesco Berlingieri, *Revisiting the Rotterdam Rules*, LLOYD’S MAR. & COM. L.Q. 585 (2010) [hereinafter Berlingieri, Revisiting the Rotterdam Rules], Anthony Diamond, *The Rotterdam Rules*, LLOYD’S MAR. & COM. L.Q. 445 (2009) [hereinafter Diamond, The Rotterdam Rules], Michael F. Sturley, *The UNCITRAL Carriage of Goods Convention: Changes to Existing Law*, 2007-08 COMITÉ MAR. INT’L, Y.B. 254 [hereinafter Sturley, The UNCITRAL Carriage of Goods Convention: Changes to Existing Law].

11. The following organizations have expressed support for the Rotterdam Rules: The European Community Shipowners’ Association (“ECSA”), the Baltic and International Maritime Council (“BIMCO”), the International Chamber of Shipping (“ICS”), the World’s Shipping Council, the National Industrial Transportation League (“NITL”) and the World Shipping Council (“WSC”). See Press Release, Int’l Chamber of Shipping et al., ICS / ECSA / BIMCO / WSC Press Release: The Rotterdam Rules, Wide Support by States at Signing Ceremony in Rotterdam, UNCITRAL (Sept. 23, 2009), available at http://www.uncitral.org/pdf/english/news/ICS_ECSA_BIMCO_WSC_press_release.pdf (last visited Sept. 1, 2011).

12. Most notably, the International Federation of Freight Forwarders Association (“FIATA”) and the European Association for Forwarding Transport Logistics and Customs Services (“CLECAT”), as well as the European Shippers’ Council, all of whom have been very vocal. See Freight Forwarders Ass’n, *FIATA Position on the UN Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the “Rotterdam Rules”)*, UNCITRAL (Aug. 11, 2009), available at http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/FIATApaper.pdf (last visited Sept. 1, 2011); European Ass’n for Forwarding, Transport, Logistic and Customs

European Parliament urging member states to adopt the Rules without delay.¹³ This is, in fact, the venue that will likely determine the future of the Rotterdam Rules. Ultimately, however, ratification of the Rotterdam Rules at the national level remains a political decision, and the views and lobbying efforts of relevant interest groups such as traders, carriers, terminal operators and insurers active within that jurisdiction will influence ratification. Like any other political decision, prior to determining its ultimate position on the Rotterdam Rules, each state will also consider factors such as their national interests, the stand taken by their main trading partners, and the consequences of having various carriage regimes for the development of their economy, as well as the impact of the Rotterdam Rules on their judicial sector. It is obvious that some groups will be discontent whatever stand a state takes on the matter; but, of course, that is the inevitable consequence of any political decision making process.

As the day of reckoning for the Rotterdam Rules approaches,¹⁴ there is an increasing need to broaden the debate by considering the wider implications, particularly social and economic, of the Rotterdam Rules rather than merely engaging in a microanalysis of the Rotterdam Rules from a legal perspective. The main aim of this Article is to contribute to the debate carried out at the political decision making level by considering the implications of the Rules not only on the shippers and carriers, but also on traders, banks, insurers, lawyers and other sectors providing support services to the maritime sector. The starting point will be to assess the extent to which the implementation of the Rotterdam Rules will achieve the objectives identified in its preamble.¹⁵

Priorities may vary from state to state and fulfillment of certain objectives might carry more weight in one state's decision making process than another. For instance, much will depend on whether a country is mainly cargo or carrier-

Services, *Position Paper RE: 2008 - United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules")*, CLECAT (May 29, 2009), available at <http://www.clecat.org/dmdocuments/PP0100MAma090529PosPapRottRules.pdf> (last visited Sept. 1, 2011); European Shippers' Council, *View of the European Shippers' Council on the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea also known as the 'Rotterdam Rules'* (Mar. 1, 2009), available at http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ESC_PositionPaper_March2009.pdf (last visited Sept. 1, 2011).

13. See Resolution of 5 May 2010 on Strategic Goals and Recommendations for the E.U.'s Maritime Transport Policy Until 2018, EUR. PARL. DOC. A7-0114/2010 (2010).

14. As of 1 September 2011, only Spain has ratified the Rotterdam Rules. In all significant jurisdictions, politicians with the aid of industry experts, lawyers and academics are currently assessing the merits of implementing the Rotterdam Rules into their own legal systems. It is expected that states will formulate their official positions within the next two to three years as a result of the consultations currently taking place. For the status of the Rotterdam Rules, see Status: 2008 – United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea – the “Rotterdam Rules,” UNCITRAL (2012), available at http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html (last visited Sept. 1, 2011).

15. See Rotterdam Rules, *supra* note 8, at Preamble.

oriented. Nevertheless, this Article focuses on each objective identified in the preamble from a neutral perspective, taking into account current shipping practices and the nature of international trade as well as economic and legal considerations.

The drafting expectations underpinning the Rotterdam Rules are that adoption of the rules will contribute to:

- a) Promotion of legal certainty;
- b) Harmonization and modernization of the rules governing international contract of carriages;
- c) Promotion of the development of trade in an equal and mutually beneficiary manner;
- d) Enhancement of efficiency.¹⁶

Each of these will be evaluated in the context of the parameters set out above.

II. THE PROMOTION OF LEGAL CERTAINTY

One of the main objectives for any international instrument attempting to regulate international trade is enhancing legal certainty. The Rotterdam Rules were driven by the same desire. Thus, the drafters expended considerable effort to ensure that the new Convention's final text would be as clear as possible so as to assist in enhancing efficiency and predictability in the context of cargo transportation.¹⁷ These improvements should, in turn, reduce some of the transaction costs and litigation arising out of sea contract of carriages.

Applying a single body of law to the entire contract of carriage undoubtedly will promote some degree legal certainty.¹⁸ But accomplishing this in the modern context is not as easy as it once was, given that it is now customary practice in the liner trades for carriers to undertake responsibility under a single contract for both the carriage of goods by sea and also for the inland legs of the journey that precede or follow sea transportation.¹⁹ In order to promote legal certainty and predictability, the Convention's drafters had to consider whether the new set of rules should also apply to other modes of transport with respect to inland carriage contracts. In spite of objections raised during the Convention's negotiations, the drafters decided that they should

16. *Id.*

17. *Id.*

18. *See also* statement in *Norfolk S. Ry. Co. v. James N. Kirby Pty Ltd.*, 543 U.S. 14, 29 (2004).

19. *See, e.g.*, facts in *Kirby*, 543 U.S. at 18-19, 25-26; *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 130 S. Ct. 2433, 2439 (2010). *See also* remarks made in U.N. Comm'n on Int'l Trade Law (UNCITRAL), Working Grp. on Transp. Law, Rep. of the Working Grp. on Transp. Law on the Work of its Ninth Session (New York, Apr. 15-26, 2002), ¶ 26, U.N. Doc. A/CN.9/510 (May 7, 2002) [hereinafter UNCITRAL Working Group III, Report of Ninth Session].

broaden the application of the Rotterdam Rules.²⁰ As a result, the Convention applies not only to contracts for carriage of goods by sea but also to contracts for the transportation of cargo by sea and any other transport mode, the expanded scope of application being referred to as “maritime plus.”²¹ Likewise, to encompass the possibility of sea-land contracts of carriage, the duration of the carrier’s responsibility extends to the entire period for which the carrier is in charge of the cargo, as such period may be defined in the contract of carriage.²² In “wet multimodal” contracts this period may range from “door-to-door” or “terminal-to-terminal,” whereas in simple sea carriage contracts this period may be restricted to the more limited “tackle-to-tackle.”²³

Though the Rotterdam Rules, in terms, go beyond the existing sea carriage conventions,²⁴ they are not as revolutionary as they seem. Modern contracts of carriage by sea often extend the application of the Hague regimes to inland transport as a matter of contract.²⁵ Arguably, the Rules enhance legal certainty by making it clear that the new regime is to apply *ex proprio vigore* to “wet multimodal” contracts for carriage of goods.²⁶ Moreover, since the Rules explicitly clarify when they apply verses when they give way to international instruments on carriage by other transport modes,²⁷ there will be less room for dispute over the applicability of national regimes to the inland portion of multimodal shipments.²⁸

20. The Rotterdam Rules were originally conceived as a port-to-port instrument but were later extended to also cover door-to-door contracts. Rep. of the U.N. Comm. on Int’l Trade Law, 34th Sess., U.N. Doc. A/56/17 (June 25-July 13, 2001); U.N. GAOR, 56th Sess., Supp. No. 17, ¶ 345 (2001); Rep. of the U.N. Comm. on Int’l Trade Law, 35th Sess., June 17-28, 2002, U.N. Doc. A/57/17 (July 23, 2002); U.N. GAOR, 57th Sess., Supp. No. 17, ¶ 224 (2002). For the objections to the multimodal/door-to-door scope of application of the Rotterdam Rules, see discussion in UNCITRAL Working Group III, Report of Ninth Session, *supra* note 19, ¶¶ 26-32.

21. Rotterdam Rules, *supra* note 8, at arts. 1.1, 5.

22. *Id.*, at art. 12; see also *infra*, at 15-16 (discussing the interpretation of Article 12).

23. *Id.*; see also art. 12.3 (setting limits on the contractual freedom of the parties to agree on the carrier’s period of responsibility).

24. See Hague and Hague-Visby Rules, *supra* notes 2-3, applying to “tackle-to-tackle” transport operations (art. I(e)), and Hamburg Rules, extending to port-to-port transport (arts. 1.6, 4).

25. See, e.g., Multimodal Transport Bill of Lading, The Baltic and International Maritime Council, ICC Publication No. 481, cl.25 (1995); see also *Kawasaki Kisen Kaisha*, 130 S. Ct. 2433 at 2439.

26. See also Sturley, *The UNCITRAL Carriage of Goods Convention: Changes to Existing Law*, *supra* note 10, at 257.

27. See *infra* Part II discussion on arts. 26, 82.

28. See e.g., the disputes arising in the United States over the applicability of the Carmack Amendment, 49 U.S.C. § 11706 (2006) (rail carriage), 49 U.S.C. § 14706 (2006) (motor carriage), to the inland legs of sea-land transport operations to which COGSA applied by the agreement of the parties. The disputes have been resolved to a certain extent by the recent decision of the Supreme Court in *Kawasaki Kisen Kaisha*, 130 S. Ct. 2433. In this case, the Supreme Court ruled that the Carmack Amendment did not apply to the rail leg of an overseas import shipment under a single through bill of lading. See *id.* at 2446. However, the case left open the issue of whether the Carmack Amendment applies to rail carriage within the United States under an outbound ocean through bill of

Clear provisions that guide carriers and shippers through their respective rights and obligations under the contract of carriage also promote legal certainty. To that end, the Rotterdam Rules set forth the carrier's obligations and also introduce a comprehensive and detailed set of provisions outlining the shipper's corresponding obligations to the carrier. Thus, the new rules exceed existing sea carriage conventions²⁹ to regulate obligations and liabilities that have traditionally been governed by the applicable national law³⁰ or contractual terms.³¹ Prime examples of such innovative provisions include the shipper's duty to deliver the goods ready for carriage and in a safe condition, a duty that is not restricted to dangerous goods;³² the obligations to properly stow the cargo in containers³³ and to properly and carefully perform the operations of loading, stowage and discharge of the goods it has assumed under a Free-In-and-Out ("FIO") or a similar clause;³⁴ as well as the obligation to provide information, instructions and documents in a wider context than that specified in the Hague and Hague-Visby system³⁵ and Hamburg³⁶ system.³⁷ Also, conducive to

lading. *Id.* at 2444. This issue was addressed recently by one of the lower federal courts, where it was decided that the Carmack Amendment governed the inland leg of a multimodal shipment originating within the United States and traveling on to Australia on a through bill of lading. *See Am. Home Assur. Co. v. Panalpina, Inc.*, No. 07 CV 10947(BSJ), 2011 WL 666388 (S.D.N.Y. Feb. 16, 2011). *See also* the conflicting decisions issued by the American courts before *Kawasaki, e.g., Sampo Japan Ins. Co. of Am. v. Union Pacific R. Co.*, 456 F.3d 54 (2d Cir. 2006) (abrogated by *Kawasaki Kisen Kaisha Ltd.*) (holding that the Carmack Amendment did apply to the rail segment of a shipment originating overseas covered by a through bill of lading); *Contra Shao v. Link Cargo (Taiwan) Ltd.*, 986 F.2d 700 (4th Cir. 1993); *Am. Road Serv. Co. v. Consol. Rail Corp.*, 348 F.3d 565 (6th Cir. 2003); *Capitol Converting Equip., Inc. v. LEP Transp., Inc.*, 965 F.2d 391 (7th Cir. 1992); *Altadis USA, Inc. ex rel. Fireman's Fund Ins. Co. v. Sea Star Line, LLC*, 458 F.3d 1288 (11th Cir. 2006).

29. Hague and Hague-Visby Rules, *supra* notes 2-3, at arts. III, r.5 and IV, r.3, r.6; Hamburg Rules, *supra* note 4, at arts. 12-13, 17.1.

30. *See, e.g., Sw. Sugar & Molasses Co. v. The Eliza Jane Nicholson*, 138 F. Supp. 1, 3 (S.D.N.Y. 1956) (holding that the shipper owed to the carrier the duty not to ship defective goods that could cause damage to other cargo). The court found that general maritime law imposed such an obligation on the shipper, or was implied by the Carriage of Goods by Sea Act. *Id.*

31. *See, e.g.,* CONLINEBILL 2000 (as amended Jan. 1950; Aug. 1952; Jan. 1973; July 1974; Aug. 1976; Jan. 1978; Nov. 2000), cl. 17; COMBICONBILL 95 (as adopted by the Baltic and International Maritime Council in Jan. 1971 (as revised 1995)), cl.17.

32. Rotterdam Rules, *supra* note 8, at art. 27.1. Dangerous goods are dealt with separately. *See id.* at art. 32.

33. *Id.* at art. 27.3.

34. Variations on such clauses include the: Free-In-and-Out Stowed ("FIOS") and Free-In-and-Out Stowed Trimmed ("FIOST"). *See* Rotterdam Rules, *supra* note 8, at art. 27.2. A FIOS or similar clause transfers the cost and/or risk of loading, stowage and discharge of the goods from the carrier to the shipper or the consignee.

35. Hague-Visby Rules, *supra* notes 2-3, art. III, r.5.

36. Hamburg Rules, *supra* note 4, at art. 17.1.

37. Rotterdam Rules, *supra* note 8, at arts. 28-29, 31. *See generally* Simon Baughen, *Obligations Owed by the Shipper to the Carrier*, in *THE ROTTERDAM RULES*, *supra* note 10, at 169 (discussing the shipper's duties under the Rotterdam Rules).

certainty is the two-way mandatory approach for shipper's obligations and liabilities adopted in the Rotterdam Rules, which only allows for derogations from the relevant provisions in cases where the terms of the Convention grant contractual freedom to the parties to the contract of carriage.³⁸

In addition, the Rotterdam Rules will end the ambiguity over the division of responsibilities between the carrier and the shipper or the consignee. For years, the courts in the major jurisdictions have been split over whether the responsibility for the operations of loading, stowage and discharge of the goods may be validly transferred from the carrier to the shipper or the consignee and, in turn, whether FIOs and similar clauses incorporated in bills of lading are valid.³⁹ The Rotterdam Rules restore legal certainty in this matter by expressly allowing the carrier and the shipper to agree that the shipper, documentary shipper or consignee may perform the loading, handling, stowing or unloading of cargo, thus validating the commonly used FIO and similar clauses.⁴⁰

Another provision that imparts legal certainty is the automatic Himalaya-type protection provided in Article 4.1 of the Rotterdam Rules, which confers the carrier's protection to certain classes of third parties that assist the carrier in performing the contract of carriage. This provision designed to cure any ambiguity with respect to both the scope of the third-party beneficiaries and the type of Himalaya protection afforded to them.⁴¹ To accomplish this purpose, Article 4.1 provides that only specific categories of third parties, such as maritime performing parties, as further defined in Article 1.7,⁴² and their

38. Rotterdam Rules, *supra* note 8, at art. 79.2. *See, e.g., id.* at art. 27.1.

39. On the one hand, English courts have held that the obligations of loading, stowage and discharge of the goods may be transferred to the shipper or the consignee. *See, e.g., Jindal Iron & Steel Co. Ltd. v. Islamic Solidarity Shipping Co. Jordan Inc.*, [2004] UKHL 49 (H.L.) (Eng.). On the other hand, the American Courts are divided, with the majority of the courts in the Second Circuit and the United States Court of Appeals for the Fifth Circuit ruling that the carrier is ultimately responsible for improper loading and stowage in all circumstances, and that any attempt to shift responsibility for the loading, stowage and discharge of the cargo to the cargo owners runs contrary to COGSA, Section 1303 (8). *See e.g., Demsey & Assoc., Inc. v. S/S Sea Star*, 461 F.2d 1009 (2d Cir. 1972) (in dictum), *on remand to* 1974 AMC 838 (S.D.N.Y. 1973), *aff'd* 500 F.2d 409 (2d Cir. 1974); *Tubacex, Inc. v. M/V Risan*, 45 F.3d 951 (5th Cir. 1995) (in dicta). By contrast, one district court within the Second Circuit, the United States Court of Appeals for the Ninth Circuit, and the Western District of Kentucky, have reached the opposite conclusion on the basis that a carrier remains liable for its negligence (or the negligence of its agents) in loading and stowage for as long as it in fact control those processes. *See e.g., Sumitomo Corp. of Am. v. M/V Sie Kim*, 632 F. Supp. 824 (S.D.N.Y. 1985); *Atlas Assurance Co. v. Harper, Robinson Shipping Co.*, 508 F.2d 1381 (9th Cir. 1975); *Sigri Carbon Corp. v. Lykes Bros. S.S. Co., Inc.*, 655 F. Supp. 1435 (W.D. Ky. 1987).

40. Rotterdam Rules, *supra* note 8, at art. 13.2. *See also id.* at art. 17.3(i).

41. *See also* Theodora Nikaki, *The Statutory Himalaya-Type Protection Under the Rotterdam Rules – Capable of Filling the Gaps?* J. BUS. L. 403 (2009).

42. A maritime performing party is a performing party to the extent that it performs or undertakes to perform any of the carrier's obligations during the period between the arrival of the goods at the port of loading of a ship, and their departure from the port of discharge. An inland carrier is a maritime performing party only if it performs or undertakes to perform its services exclusively within a port area. Rotterdam Rules, *supra* note 8, at art. 1.7.

employees, the carrier's employees and the master, crew or any other person that performs services on board the vessel, may benefit from its protection. Hence, by avoiding any reference to general classes of persons such as "independent contractors" or "agents" employed by the carrier, the Rotterdam Rules minimize disputes over whether a person is entitled to rely on their statutory Himalaya-type protection. Such terms, which are found in a typical Himalaya clause,⁴³ frequently have been the crux of controversial litigation over the years, usually in the context of who is or is not an "agent" or "independent contractor."⁴⁴ Article 4.1 also sets out clear rules on the scope of the automatic Himalaya-type protection afforded to the third-party beneficiaries, as the third parties referred to in Article 4.1 are entitled to benefit from the protection provided in *any provision* of the Rotterdam Rules on the carrier's *defenses* and *limits of liability*.⁴⁵ This means that any variations of the contract of carriage, such as contractual agreements between the carrier and the shipper waiving defenses or increasing the limits of liability, have no prejudicial or binding effect on third parties' rights.⁴⁶ This is because the "provisions" of the Rotterdam Rules and not just the "defenses and limits of liability of the carrier" define the scope of the Himalaya protection.

The Rotterdam Rules will also reinstate legal certainty over the exceptional circumstances that justify the loss of the carrier's right to limit its liability, which has been diluted by the development in the United States of the obscure doctrines of the "quasi-deviation"⁴⁷ and the "fair opportunity."⁴⁸ (Indeed,

43. See, e.g., CONLINEBILL 2000, cl. 15(b) (2000), available at http://maritimeknowhow.com/English/Know-How/Bill_of_Lading/types_of_bill_of_lading/onlinebill_2000.html (last visited Mar. 30, 2012); COMBICONBILL 95, cl. 14(4) (1995), available at https://www.bimco.org/en/Chartering/Documents/Bills_of_Lading/COMBICONBILL.aspx (last visited Mar. 30, 2012).

44. See, e.g., *Homburg Houtimport BV v. Agrosin Private Ltd. (The Starsin)* [2003] UKHL 12, [2004] 1 A.C. 715, 742-45, 748-49, 759 (H.L.) (Eng.) (disputing whether a shipowner qualifies as an "independent contractor" for the purposes of the Himalaya clause that protected "a servant or agent of the carrier, including every independent contractor" of the carrier); *Certain Underwriters at Lloyd's v. Barber Blue Sea Line*, 675 F.2d 266, 270 (11th Cir. 1982) (examining whether a carrier's agent, who stored and handled the cargo was protected by a Himalaya clause that referred to an "agent" or "independent contractor"). See also Theodora Nikaki, *Himalaya Clauses and the Rotterdam Rules*, 17 J. INT'L MAR. L. 20 (2011).

45. See also Rotterdam Rules, *supra* note 8, at arts. 19.1-2 (also conferring the same protection on maritime performing parties).

46. See, e.g., the position under § 2(1) of the English Contracts (Rights of Third Parties) Act, 1999, c.31 (Eng.), which makes such contractual agreements binding on third parties if certain preconditions are met. See also CARVER ON BILLS OF LADING, *supra* note 1, ¶ 7-078; Andrew Jamieson, *Shipping Contracts*, in PRIVACY OF CONTRACT ¶ 6.106 (Robert Merkin ed., 2000).

47. In the United States, the courts of the Second, Fourth, Fifth, Ninth and Eleventh Circuits have held that the pre-COGSA law survived the passage of the new Act, and therefore the carrier that is found liable for quasi-deviation (i.e., unauthorized deck carriage, overcarriage, vessel substitution and intentional destruction of the cargo) is not entitled to invoke the \$500 per package limitation. See *Jones v. The Flying Clipper*, 116 F. Supp. 386, 391 (S.D.N.Y. 1953) (as the leading

American courts have even been inconsistent in the application of both doctrines.⁴⁹) Article 61, which is the main provision on limitation of liability under the Rotterdam Rules, clarifies matters and sets only one precondition for the loss of the limitation right in both cases of loss or damage to the goods or delay in their delivery—namely the proof of “a personal act or omission of the party claiming the right.” Also, the only other instance in which the Rules deprive the carrier of the benefit of the limitation of liability is if it carries the cargo on deck in breach of an express agreement for deck carriage.⁵⁰

Under the Rotterdam Rules, exceptional circumstances based on common law doctrines developed with respect to the Hague regimes, like “fair opportunity” and “quasi deviation,” will play no role. When interpreting the requirements for the loss of the carrier’s right to limit, national courts will consider the international character of the Rotterdam Rules, as well as the need to promote the Convention’s uniform application.⁵¹ In addition, Article 24, a provision, which in its current form was introduced in the Rotterdam Rules upon the recommendation of the United States,⁵² reinforces the same message with

case); *Encyclopaedia Britannica, Inc. v. S. S. Hong Kong Producer*, 422 F.2d 7, 18 (2d Cir. 1969); *Spartus Corp. v. S.S. Yafo*, 590 F.2d 1310, 1313 (5th Cir. 1979); *Nemeth v. Gen’l S.S. Corp.*, 694 F.2d 609, 612-13 (9th Cir. 1982); *Unimac Co. v. C.F. Ocean Serv., Inc.*, 43 F.3d 1434, 1437 at n.5 (11th Cir. 1995) (in dicta); *Caterpillar Overseas, S.A. v. Marine Transp., Inc.*, 900 F.2d 714, 720-21 (4th Cir. 1990) (in dicta). By contrast, the Court of Appeal for the Seventh Circuit has ruled that COGSA abolished the pre-existing law, and therefore the \$500 per package limitation applies to unreasonable deviation because 46 U.S.C 1304 § 5 refers to “any event.” *Atl. Mut. Ins. Co. v. Poseidon Schiffahrt*, 313 F.2d 872, 874-75 (7th Cir. 1963); *see also Theodora Nikaki, The Quasi-Deviation Doctrine*, 35 J. MAR. L. & COM. 45-78 (2004).

48. Under the “fair opportunity” doctrine, a shipper must have had a “fair opportunity” to declare a higher liability value for its cargo in order for a carrier to limit its liability under COGSA. *See New York, N.H. & Hartford. R. Co. v. Nothnagle*, 346 U.S. 128, 135-36, (1953). The United States’ courts, with the exception of the Third Circuit in *Ferrostaal, Inc. v. M/V Sea Phoenix*, 447 F.3d 212 (3d Cir. 2006), agree that a carrier that has not given the shipper a “fair opportunity” to declare a higher value will lose its benefit of limitation of liability, but are divided over whether the notice requirement needs to be met. For instance, the Ninth Circuit holds that the mere incorporation of COGSA by reference in the bill of lading is not *prima facie* evidence of a fair opportunity to negotiate for a higher value. *See Pan Am. World Airways, Inc. v. Cal. Stevedore and Ballast Co.*, 559 F.2d 1173, 1177 (9th Cir. 1977). Other circuits have held that a clause paramount in the bill of lading is sufficient to afford the shipper the opportunity to declare excess value. *See Fireman’s Fund Ins. Co. v. Tropical Shipping and Const. Co., Ltd.*, 254 F.3d 987, 996 (11th Cir. 2001). Also, the Fifth Circuit requires the shipper to provide evidence that the shipper could have declared a higher value. *See Brown & Root, Inc. v. M/V Peisander*, 648 F.2d 415 (5th Cir. 1981). *See further discussion on the “fair opportunity” doctrine in Michael F. Sturley, The Fair Opportunity Requirement, in 2A BENEDICT ON ADMIRALTY ¶ 166, at 16-31 to 16-41 (7th rev. ed. 2009).*

49. *See supra* note 47.

50. Rotterdam Rules, *supra* note 8, at art. 25.5.

51. Rotterdam Rules, *supra* note 8, at art. 2. *See also* Michael F. Sturley, *Modernizing and Reforming U.S. Maritime Law: The Impact of the Rotterdam Rules in the United States*, 44 TEX. INT’L L.J. 427, 449-50 (2009).

52. *See* U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Grp. III, Preparation of a Draft Instrument on the Carriage of Goods [by Sea], Proposal by the United States, ¶¶ 37-38, U.N. Doc. A/CN.9/WG.III/WP.34 (Oct. 6-7, 2003) [hereinafter 2003 U.S. Proposal].

respect to the quasi-deviation doctrine by expressly ruling out quasi-deviation *per se* as one of the exceptional cases that validate the loss of the carrier's benefit of limitation of liability.⁵³ Hence, the Rotterdam Rules negate the operation of any of those doctrines, or, in turn, of any additional legal basis for the loss of a carrier's benefit of limitation of liability that do not derive from its text, remedying any ambiguity over the issue of the loss of the carrier's limitation of liability.

Although the Rotterdam Rules certainly constitute a step toward achieving predictability in the laws governing carriage of goods by sea, there are still provisions in the Convention that raise alarming uncertainties for prospective litigants. Ironically, one such clause is the cornerstone provision on the definition of the "contract of carriage,"⁵⁴ which in conjunction with Article 5.1, forms the basis for the scope of application of the Rules. The difficulty with Articles 1.1 and 5.1 is that while the Rotterdam Rules may only be invoked if the contract of carriage provides for international carriage of goods wholly or partly by sea, the Convention's text does not clarify what is required for this precondition to be met.⁵⁵ While this requirement will be easily satisfied if the parties to the contract of carriage have expressly agreed to transport the cargo in whole or in part by sea. But uncertainty will arise in situations where the parties do not make the contract of carriage "mode specific," or merely give the carrier the liberty or option to carry the goods by sea, and the goods are actually carried (wholly or partly) by sea—will the Rotterdam Rules apply then?⁵⁶ That is, will a loosely worded contract be deemed to "provide[] for carriage of goods by sea" and trigger the application of the Rotterdam Rules? The answer is probably not; drafters certainly assumed in the course of the negotiations that the key for determining the Rules' sphere of application should emerge from the contract of carriage and not the actual carriage of goods.⁵⁷ Moreover, the *travaux préparatoires* suggest that there must exist at least an implicit requirement of

53. In cases of quasi-deviation, the loss of the right to limit will only be lost if the preconditions set forth in Article 61 are met. Rotterdam Rules, *supra* note 8, at art. 24.

54. *See id.* at art. 1.1.

55. *Id.* at art. 1.1. *See also* U.N. Comm'n on Int'l Trade Law (UNCITRAL), Working Grp. on Transp. Law, Rep. of the Working Grp. on Transp. Law on the Work of its Fifteenth Session (Vienna, July 4-15, 2005), ¶¶ 33-34, U.N. Doc. A/CN.9/576 (May 13, 2005) [hereinafter UNCITRAL Working Group III, Report of Fifteenth Session] (rejecting the proposal for adding a clarification to cover cases where the contract of carriage contains an option to carry by sea only if the goods are in fact carried by sea).

56. U.N. Comm'n on Int'l Trade Law (UNCITRAL), Working Grp. on Transp. Law, Rep. of the Working Grp. on Transp. Law on the Work of its Twelfth Session (Vienna, Oct. 6-17, 2003), ¶¶ 62-63, U.N. Doc. A/CN.9/544 (Dec. 16, 2003) [hereinafter UNCITRAL Working Group III, Report of Twelfth Session]; UNCITRAL Working Group III, Report of Fifteenth Session, *supra* note 55, at ¶ 33. *See also* Diamond, *The Rotterdam Rules*, *supra* note 10, at 451-52, and Berlingieri, *Revisiting the Rotterdam Rules*, *supra* note 10, at 585.

57. UNCITRAL Working Group III, Report of Fifteenth Session, *supra* note 55.

such carriage.⁵⁸ Nevertheless, the point remains uncertain, and there is no guarantee of uniform interpretation of Article 1.1. In turn, there exists no guarantee of predictability with respect to the applicability of the Rotterdam Rules. This assumption is supported by a parallel to the interpretation of the definition of the “contract of carriage by road” in the application⁵⁹ of the Convention on the Contract for the International Carriage of Goods by Road (“CMR”).⁶⁰

The Rotterdam Rules generate further ambiguity concerning the extent of the period of the carrier’s responsibility in cases where the carrier or a performing party⁶¹ received the goods before the date agreed in the contract of carriage. Such cases leave unclear whether the carrier’s period of responsibility under the Rotterdam Rules commences when the carrier actually received the goods or at the time agreed upon in the contract. The pertinent provision is Article 12.3; however, this article provides only for the contractual agreements on the time of receipt and delivery of the goods without further clarifying its relationship with the general proviso in Article 12.1 on the carrier’s period of responsibility. Far-reaching consequences may arise depending on which provision of Article 12 is accorded interpretive priority.

One may construe Article 12.3 as prevailing over Article 12.1, resulting in the carrier’s responsibility under the Rotterdam Rules only during the period for

58. *Id.*

59. See *Quantum Corp Inc. v. Plane Trucking Ltd.*, [2002] EWCA (Civ) 350, [2002] C.L.C. 1002, 1008 (the English Court of Appeal, ruling that the CMR applies to contracts of carriage that leave the means of transport open, either entirely or as between a number of possibilities at least one of them being carriage by road, as well as to contracts under which the carrier may have undertaken to carry by some other means, but reserved either a general or a limited option to carry by road, provided that the goods were actually carried by road). *But see* *TNT Express Belgium, SA c. 1. Mitsui Sumitomo Insurance Company Europe Ltd, 2. Sony Service Centre Europe, SA 3. Sony Deitchland GmbH/4. Media Markt Tv-Hifi-Elektro GmbH*, Cour de Cassation [Cass.] [Court of Cassation], Nov. 8, 2004, AR C030510N, available at <http://www.cass.be> (Belg.) (holding the CMR inapplicable to a consignment though carried by road on the decisive ground that “application of the [CMR] requires the existence of a contract whose object is the carriage of goods by road”). The court found that this condition is not met if the contract does not specify the mode of transport and it is not clear from the circumstances of the case that the parties envisaged transport by road. *Id.* It thus derives from the case that, in contrast to what was decided in *Quantum*, the actual carriage of goods by road in cases of unspecified transport does not by itself trigger the application of the CMR.

60. Convention on the Contract for the International Carriage of Goods by Road, May 19, 1956, 399 U.N.T.S. 189 (as amended by Protocol to the Convention for the International Carriage of Goods by Road, July 7, 1978, 1208 U.N.T.S. 427) [hereinafter CMR]. For the list of the contracting states, *see* <http://www.unidroit.info/program.cfm?menu=contractingstates&file=instrument&pid=1&lang=en&do=states> (last visited Sept. 1, 2011).

61. A performing party is defined as a person other than the carrier who performs or undertakes to perform any of the carrier’s obligations under a contract of carriage with respect to the receipt, loading, handling, stowage, carriage, care, unloading or delivery of the goods, to the extent that such person acts, either directly or indirectly, at the carrier’s request or under the carrier’s supervision or control. Rotterdam Rules, *supra* note 8, at art. 1.6.

which agreement has been reached with the shipper.⁶² Such agreements are constrained only by the terms of Article 12.3, in that the parties cannot override the period of responsibility prescribed by the Rotterdam Rules, such as by contracting for a period shorter than “tackle-to-tackle.”⁶³ Thus, if such an interpretation is adopted, it will be the applicable national laws that will determine the carrier’s responsibility for the cargo prior to the start of the carrier’s period of responsibility under the Rotterdam Rules. This may, however, result in fluctuating obligations upon carriers, as different jurisdictions apply varying standards of liability.⁶⁴

A contrary interpretation suggests that Article 12.1 determines the period of the carrier’s responsibility under the Rotterdam Rules. In such case, the carrier assumes responsibility for the goods under the Convention from the time the carrier or a performing party actually receives the cargo, which may arise even before the time agreed to in the contract of carriage.⁶⁵ Under this interpretation, Article 12.3 only serves the purpose of protecting the cargo interests by invalidating contractual agreements that limit the carrier’s period of responsibility to exclude the time after the initial loading of the goods or prior to their final offloading.⁶⁶

The conflicting interpretations of Article 12.3, and their potential impact upon the duration of the carrier’s responsibilities, came to the attention of the UNCITRAL Commission at its 41st Session.⁶⁷ Notwithstanding the Commission’s extensive efforts to resolve the ambiguity, the Commission concluded that it had not been possible to reconcile the different interpretations of Article 12.3.⁶⁸ Lack of clarification on this point fails to promote legal certainty, as the extent of the carrier’s period of responsibility under the Rotterdam Rules will depend on the interpretation adopted by the national court hearing the case. Thus, in the absence of judicial clarification, in cases where the carrier has received the goods prior to the contractually-agreed-upon date, the

62. U.N. Comm’n on Int’l Trade Law (UNCITRAL), Rep. of the U.N. Comm’n on Int’l Trade Law on its Forty-First Sess. (New York June 16-July 3, 2008), U.N. Doc. A/63/17; U.N. GAOR, 63d Sess., Supp. No. 17 (2008), ¶ 40 [hereinafter Report of the U.N. Comm’n on Int’l Trade Law on its Forty-First Session].

63. *Id.*

64. For instance, under English law the carrier’s responsibility during that period is subject to the common law rules of tort or bailment, *see* CARVER ON BILLS OF LADING, *supra* note 1, at ¶ 9-129, whilst at least in one of the Canadian provinces (Quebec), the law (Civil Code of Québec, S.Q. 1994 (Can.)) imposes a standard of care higher than that of a bailee; i.e., close to that of an insurer, as “force majeure” is the only defense available to the carrier for the period that covers long-term port storage of goods by the carrier. *See also* William Tetley, MARINE CARGO CLAIMS 1263-82 (4th ed. 2008).

65. Report of the U.N. Comm’n on Int’l Trade Law on its Forty-First Session, *supra* note 62, at ¶ 41.

66. *Id.*

67. *Id.* at ¶¶ 39-43.

68. *Id.* at ¶¶ 42-43.

parties will not know definitively whether the carrier's period of responsibility had commenced under the Rotterdam Rules.

Further, given that the Rotterdam Rules extend to land, uncertainty may arise from potential conflicts between the Rotterdam Rules and international conventions on carriage by other transport modes that may also apply to the inland transport leg of a journey in the course of which the goods are lost, damaged, or delayed. The drafters explored the possibility of such conflicts throughout the preparation of the Rotterdam Rules and ultimately introduced provisions to that effect—namely Articles 26 and 82—into the Convention's text. The end result is unsatisfactory, however, as the relevant provisions fail to avoid all possible conflicts with pre-existing international regimes governing other modes of transport. This failure may create uncertainty over the applicable rules in particular situations.

For instance, Article 26 adopts a "limited" network system, which may prove inadequate in addressing potential conflicts arising during inland transportation. Under this approach the Rotterdam Rules will yield only to mandatory provisions on liability, limitation, and time for suit of the international unimodal instrument (international transport convention or mandatory regulation of regional organization) that would have applied to the inland leg where the loss, damage, or event causing the delay occurred.⁶⁹ Hypothetically, if during the inland leg the cargo is lost, damaged, or delivery is delayed, Article 26 would not thus resolve potential conflicts between the pertinent international unimodal instrument and the Rules on matters such as transport documents, delivery of goods, transfer of rights, rights of the controlling party, or issues of jurisdiction.⁷⁰ Similarly, Article 26 is not designed to address overlaps with unimodal transport conventions in cases where the cargo loss, damage, or delay was progressive. Instead, Article 26 deals only with cases where the loss of, damage to, or delay in delivery of the goods occurred "solely" in the course of a single inland leg.

By the same token, it is debatable whether Article 82 will also serve as a successful conflict-resolving clause, as its scope appears limited by the inclusion of the term "to the extent."⁷¹ If interpreted literally, the words "to the extent"

69. See e.g., the examples given in Tomotaka Fujita, *The Comprehensive Coverage of the New Convention: Performing Parties and the Multimodal Implication*, 44 TEX. INT'L L.J. 349, 360-62 (2009).

70. It should also be noted that as CMR art. 41§1 nullifies any direct or indirect derogation from any of their provisions, the Rotterdam Rules will overlap with its provisions on matters other than the carrier liability, limitation of liability and time for suit that are not identical to the respective provisions of the Rotterdam Rules.

71. See also Diamond, *The Rotterdam Rules*, *supra* note 10, at 453-55. *Contra* Berlingieri, *Revisiting the Rotterdam Rules*, *supra* note 10, at 587-89; Christopher Hancock, *Multimodal Transport Under the Convention*, in A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA – THE ROTTERDAM RULES, *supra* note 10, at 35, 48-50 (suggesting an expansive interpretation that would avoid such conflict, as it is the relevant inland convention rather than the Rotterdam Rules that would apply throughout the transport operation by sea and land).

seemingly suggest that the provisions of the CMR, the Convention Concerning International Carriage of Goods by Rail (“COTIF”) and its adjoining appendix—the Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (“CIM”)⁷²—and the Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (“CMNI”)⁷³ will prevail over the Rotterdam Rules only in relation to the sea carriage that is subject to their terms,⁷⁴ but not with respect to the road, rail, or inland water transportation preceding and/or following the sea leg, or of the non-localized damages occurring in the course of combined sea-rail/road/inland waterways carriage.⁷⁵ It would accordingly fall on Article 26 to address conflicts between the Rotterdam Rules and the aforementioned regimes arising out of the prior or subsequent carriage by road, rail, or inland waterway. As outlined above, however, Article 26 does not offer a panacea to all possible conflicts. Therefore, identifying the applicable legal regime in the case of a conflict between the Rotterdam Rules and specific unimodal conventions may constitute a matter of considerable uncertainty. Moreover, since the ambiguity of the Rules requires national courts to determine the outcome of any such conflicts, such equivocation may further jeopardize the twin objectives of legal certainty and harmonization of sea carriage laws, given the inherent risk of inconsistent judicial interpretations between jurisdictions.

Finally, problems may arise in the case of joint causation. Article 17 provides for the allocation of the burden of proof between carriers and cargo

72. Convention Concerning International Carriage of Goods by Rail (COTIF), app. B, (May 9, 1980); Uniform Rules Concerning the Contract for International Carriage of Goods by Rail (CIM) (as amended June 3, 1999) [hereinafter COTIF-CIM 1999]. COTIF-CIM 1999 has now largely superseded the earlier 1980 version as forty-five countries have now ratified COTIF-CIM 1999. For a full list of the countries that are parties to COTIF-CIM 1999, see *State of the Signatures, Ratification, Acceptances, Approvals, Accessions and Entry into Force*, Intergovernmental Organization for International Carriage by Rail, available at http://www.otif.org/fileadmin/user_upload/otif_verlinkte_files/07_veroeff/02_COTIF_99/Prot-1999-ratifications_07_07_2011_fde.pdf (last visited Sept. 1, 2011).

73. Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (Apr. 1, 2005) [hereinafter CMNI], available at <http://www.unece.org/fileadmin/DAM/trans/main/sc3/cmnicof/cmni.pdf>. For a list of the contracting states to the CMNI, see Budapest Convention on the Carriage of Goods by Inland Waterways, U.N. Econ. Comm’n for Eur., <http://live.unece.org/?id=4038> (last visited Mar. 11, 2012).

74. CMR, *supra* note 60, at art. 3.1; COTIF-CIM 1999, *supra* note 72, at art. 2.2; CMNI, *supra* note 73, at art. 2.2.

75. In such cases, the Rotterdam Rules will be in conflict with CMR, COTIF-CIM 1999 or CMNI, as such shipments are subject to both the Rotterdam Rules and the relevant inland transport convention. The Rotterdam Rules will apply to them as a default; by virtue of the Rotterdam Rules, *supra* note 8, at art. 26, they are only displaced if the cargo loss, damage or delay in delivery is solely identified in the inland leg. Also, the respective inland convention will be applicable since CMR, *supra* note 60, at art. 2.1, COTIF-CIM 1999, *supra* note 72, at art. 1.4, and CMNI, *supra* note 73, at art. 2.2, all do not make a distinction between localized and non-localized damages in multimodal transport shipments.

owners, and to a certain extent, codifies the burden-shifting system of the widely accepted Hague regimes (colloquially described as a “ping-pong” game because of the potential for the burden to continually shift between the sides).⁷⁶ It therefore addresses some of the ambiguities of existing regimes, such as the burden of proof of unseaworthiness.⁷⁷ However, while Article 17 overcomes some of the complexities of the previous regimes, it also has the potential to project ambiguity in a situation where a combination of causes results in loss, damage, or delivery delay—while exempting some but not all as “excepted perils.”⁷⁸ Such situations may arise in the context of Article 17.2-5, which relieves the carrier from all or part of the liability if one or more carrier-exempting-circumstances contributed to the loss, damage, or delay in delivery of the cargo. However, although Article 17 refers to the carrier’s relief “of all or part of its liability” or to the carrier’s liability “for all or part of the loss,” unnecessary uncertainty will nevertheless arise since Article 17 does not clarify allocation of liability for losses caused by a combination of causes.⁷⁹

Similarly, Article 17.6 is another provision that fails to provide clear rules on the apportionment of liability in case of partial liability of the carrier. Article 17.6 provides that “when the carrier is relieved of part of its liability, the carrier is liable only for that part of the loss, damage or delay that is attributable to the event or circumstance for which it is liable.” There is no further guidance on the apportionment of the loss, e.g., burden of proof, method of calculation, etc.⁸⁰ The drafters’ decision to defer to national courts in allocating liability in partial liability cases where multiple causes lead to the loss⁸¹ will lead to uncertainty insofar as national courts adopt divergent approaches to apportionment.

76. The Rotterdam Rules followed all the rules of the “ping-pong” game with the exception of the Vallescura Rule (*Schnell v. Vallescura*, 293 U.S. 296 (1934)), which was effectively dismissed in the Rotterdam Rules, *supra* note 8, at art. 7.6.

77. *E.g.*, the issue of the effect of unseaworthiness on the burden of proof under the fire defense in the United States. Whilst the Second Circuit, followed by the Fifth and Eleventh Circuits, have ruled that the proof of due diligence on the part of the carrier is not a condition precedent to the reliance on the fire exception, the courts of the Ninth Circuit have subordinated the fire exemption to the seaworthiness requirement. *See Asbestos Corp. v. Compagnie de Navigation Fraissinet et Cyprien Fabre*, 480 F.2d 669, 672-73 (2d Cir. 1973); *Westinghouse Elec. Corp. v. M/V Leslie Lykes*, 734 F.2d 199, 207-08 (5th Cir. 1984), *rehearing denied*, 739 F.2d 633 (5th Cir.), *cert. denied*, 469 U.S. 1077 (1984); *Sunkist Growers, Inc. v. Adelaide Shipping Lines Ltd.*, 603 F.2d 1327, 1341 (9th Cir. 1979), *cert. denied*, 444 U.S. 1012 (1980); *Banana Serv., Inc. v. M/V Tasman Star*, 68 F.3d 418, 420 (11th Cir. 1995).

78. *See also* Regina Asariotis, *Loss Due to a Combination of Causes: Burden of Proof and Commercial Risk Allocation*, in *A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA – THE ROTTERDAM RULES*, *supra* note 10, at 138; Diamond, *The Rotterdam Rules*, *supra* note 10, at 477.

79. *See* Asariotis, *supra* note 78, at 150; *see generally* Diamond, *supra* note 10.

80. *See* Asariotis, *supra* note 78, at 148; Diamond, *supra* note 10, at 477-78.

81. *See also* U.N. Comm’n on Int’l Trade Law (UNCITRAL), Rep. of Working III on Transp. Law on the Work of its Fourteenth Session (Vienna, Nov. 29-Dec. 10, 2004), 38th Sess., July 4-July 22, 2005, ¶ 74, U.N. Doc. A/CN.9/572 (Dec. 21, 2004) [hereinafter UNCITRAL Working Group III, Report of Fourteenth Session].

Of course, no international regime can achieve a degree of legal certainty such that national courts will never need to resolve difficulties stemming from the wording and terminology employed in the text. Of particular concern, however, is that the ambiguities embodied in the text of the Rotterdam Rules do not relate to merely technical matters. Instead, there are ambiguities at the substantive core of the Convention, such as its physical scope and the central provisions of liability. An opportunity to send a strong message on the ability of the Rotterdam Rules to promote an advanced degree of legal certainty may have been missed by shying away from resolving such issues, perhaps due to overarching political concerns.

III.

THE HARMONIZATION AND MODERNIZATION OF THE LEGAL REGIME GOVERNING THE INTERNATIONAL CARRIAGE OF GOODS BY SEA

Harmonizing the regime governing the international carriage of goods by sea, which is one of the Convention's foremost aims, entails the enactment of uniform rules that will be acceptable to at least the major shipping nations as a wholesale replacement for the existing Hague, Hague-Visby and Hamburg Rules.⁸² To achieve that objective, the Rotterdam Rules draw from the already existing rules but also amend them where necessary to take into account new commercial practices or technological advances.⁸³ In addition, the Rotterdam Rules cover a wide range of issues not currently regulated, such as door-to-door transport, electronic transport documents,⁸⁴ liability of third parties now falling into the category of maritime performing parties,⁸⁵ delay in delivery,⁸⁶ delivery

82. Rotterdam Rules, *supra* note 8, at art. 89.1.

83. *See, e.g., id.* at arts. 13-14 (based on the Hague Rules, *supra* note 2, at arts. 3.1-2, and the Hague-Visby Rules, *supra* notes 2-3, at arts. III.1-2); *see also* Rotterdam Rules, *supra* note 8, at art. 25 (following to some extent the Hamburg Rules, *supra* note 4, at art. 9).

84. Rotterdam Rules, *supra* note 8, at art. 12 (covering door-to-door transport); *id.* at arts. 1.17-22, ch. 3 (electronic transport records).

85. *See supra* note 42; Rotterdam Rules, *supra* note 8, at art. 19. Under national laws, third persons that assisted the carrier in the performance of its duties in the course of the port-to-port transport operation are liable in tort or bailment. *See, e.g.,* N.Z. Shipping Co. Ltd. v. A.M. Satterthwaite & Co. Ltd. (The Eurymedon) [1974] 1 NZLR 505 (P.C.) (against stevedores for negligent discharging of the cargo); Robert C. Herd & Co. v. Krawill Machinery Corp., 359 U.S. 297 (against stevedores for negligent loading); The Pioneer Container [1994] 2 A.C. 324 (P.C.) (appeal taken from H.K.) (action in sub-bailment against the subcontracting carrier); Philipp Bros. Metal Corp. v. S.S. Rio Iguazu, 658 F.2d 30 (2d Cir. 1981) (action in bailment against stevedores). It is worth mentioning that the Hamburg Rules, *supra* note 4, do cover the issue of the liability of third parties, at least in part, in Article 10 (actual carrier).

86. The widely accepted Hague and Hague-Visby Rules do not regulate delay in delivery and it is therefore the domestic legislation that governs this issue. The Hamburg Rules, *supra* note 4, at art. 5 provide for delay. The seminal cases in England on delay in delivery are Hadley v. Baxendale, [1854] EWHC Exch J70 and Koufos v. C Czarnikow Ltd (The Heron II), [1969] 1 AC 350, [1967] UKHL 4. For the United States, *see, e.g.,* Commercio Transito Inter. v. Lykes Bros. Steamship Co., 243 F.2d 683, (2d Cir. 1957).

of goods, rights of the controlling party, etc.⁸⁷ The advantage of this approach is that it fills in the gaps of the existing sea carriage regimes with uniform rules, while still promoting the consistent interpretation and application of the Rotterdam Rules, given that the courts in major jurisdictions have adopted a uniform interpretation at least with respect to most of the core provisions of the Hague regimes.⁸⁸ In addition, the uniformity of international sea transport laws will be further enhanced through new provisions of the Rotterdam Rules dealing with issues that fell within the scope of the Hague or the Hague-Visby Rules but led to conflicting decisions, such as the quasi-deviation doctrine, FIOS and similar clauses.⁸⁹

Moreover, the uniform rules on carriage of goods by sea provided in the Rotterdam Rules have also been drafted with the view to modernizing the existing sea transport laws.⁹⁰ To that end, the Rotterdam Rules account for technological and commercial developments that have taken place since implementation of the Hague, Hague-Visby and Hamburg Rules.⁹¹ This notably includes the use of containers, now almost universal in many trades, which allows the safe carriage of cargo consolidated in containers on the decks of specially designed containerships—something which makes nonsense of the traditional sidelining of so-called “deck cargo” in the Hague regimes.⁹² Additionally, there is the fact that arrangements for transportation more often than not envisage the use of different means of transport under a single contract,⁹³ thus calling into question the tradition of regarding sea transport as something separate from other modes. The Rotterdam Rules directly address both of these factors insofar as they apply to contracts of carriage by sea and other transport modes (“wet multimodal”/“door-to-door” scope of application of the Rotterdam Rules),⁹⁴ as well as to deck carriage of cargo “in or on containers or vehicles provided that the containers or vehicles are fit for deck carriage and

87. Rotterdam Rules, *supra* note 8, at ch. 9 (delivery of the goods), ch. 10 (rights of the controlling party).

88. *See, e.g.*, the decisions on the seaworthiness obligation: Northern Shipping Co v. Deutsche Seereederei GmbH (The Kapitan Sakharov), [2000] 2 Lloyd’s Rep 225 (P.C.); C. Itoh & Co. (America), Inc. v. M/V Hans Leonhardt, 719 F. Supp. 479 (E.D. La. 1989); Grain Growers Export Co. v. Canada S.S. Lines, 43 O.L.R. 330 (Ont. Ca. 1918), *upheld*, (1919) 59 S.C.R. 643 (Can.).

89. *See supra* Part II.

90. *See* Rotterdam Rules, *supra* note 8, at Preamble.

91. *Id.*

92. The Hague regimes expressly exclude deck carriage if the goods are actually carried on deck and the deck carriage is also stated in the bill of lading. *See supra* notes 2-3, at art. I(c); *see, e.g.*, Sideridraulic Sys. v. BBC Chartering & Logistic [2011] EWHC 3106 (Comm). The Hamburg Rules, *supra* note 4, at art. 9, allow deck carriage if certain preconditions are met.

93. UNCTAD Secretariat, Implementation of Multimodal Transport Rules, ¶ 7, U.N. Doc. UNCTAD/SDTE/TLB/2 (June 25, 2001); UNCITRAL Working Group III, Report of Ninth Session, *supra* note 19, at ¶ 26.

94. Rotterdam rules, *supra* note 8, at arts. 1.1, 12.

the decks are also specially fitted to carry such containers or vehicles.”⁹⁵ Moreover, the Rotterdam Rules establish in detail the carrier’s right to qualify shipper-furnished information regarding the contents and weight of a closed container or other vehicle. This reflects the reality that the carrier or its independent contractors, servants or agents usually will not open or inspect containers of consolidated cargo, in part because doing so often would not allow them to verify much information.⁹⁶

Similarly, in the last fifty years, ships have become faster and easier to load and unload, and cargo now often reaches the port of discharge before the bill of lading. As a result, the industry began to experience delays at the port of discharge because of the traditional rule that delivery is only possible against the bill of lading.⁹⁷ To avoid these unacceptable delays, the shipping industry substituted traditional paper bills of lading for electronic bills or, more radically, sea waybills along the lines of the CMR consignment note that do not have to be surrendered against the delivery of the cargo.⁹⁸ This led to unsatisfactory ambiguity in applying Hague and the Hague-Visby Rules to electronic documentation and to non-coverage with respect to sea waybills.⁹⁹

The Rotterdam Rules once again update the existing rules by setting forth a broad definition of the applicable transport documents and electronic transport records,¹⁰⁰ as well as by establishing comprehensive rules on electronic

95. *Id.*, at art. 25.1(b). It is worth noting that art. 25.1(b) is not breaking new ground in recognizing that vessel design may justify stowage and carriage on deck of containers as, to a certain extent, it codifies the existing case law on the carriage of containers on the deck of specially designed containerships. *See, e.g.*, *Du Pont de Nemours Intern. S.A. v. S.S. Mormacvega*, 493 F.2d 97, 102, (2d Cir. 1974). Also, although the Hamburg Rules, *supra* note 4, at art. 9, allow deck carriage, they do not expressly provide for the deck carriage of containers.

96. Rotterdam Rules, *supra* note 8, at art. 40.4. *See also* U.N. Comm’n on Int’l Trade Law (UNCITRAL), Rep. of Working Grp. III on Transp. Law on the Work of its Eighteenth Session (Vienna, Nov. 6-17, 2006), 40th Sess., June 25-July 12, 2007, ¶ 33, U.N. Doc. A/CN.9/616 (Nov. 27, 2006) [hereinafter UNCITRAL Working Group III, Report of Eighteenth Session].

97. On the presentation rule, *see, e.g.*, *Sze Hai Tong Bank v. Rambler Cycle Co.*, [1959] 2 Lloyd’s Rep. 114 (P.C.); *Kuwait Petroleum Corp. v. I&D Oil Carriers Ltd. (The Houda)*, [1994] 2 Lloyd’s Rep. 541 (A.C.); *Allied Chemical Intern. Corp. v. Companhia de Navegacao Lloyd Brasileiro*, 775 F.2d 476 (2d Cir 1985), *cert. denied*, 475 U.S. 1099 (1986); *Kanematsu GmbH v. Acadia Shipbrokers Ltd.*, [1999] 1999 A.M.C. 1533 (Fed. Ct.) (Can.) *rev’d on other grounds*, [2000] 259 N.R. 201 (Fed. Ct. C.A.).

98. The sea waybill is evidence of the contract of carriage and receipt of the goods but not a document of title. Rotterdam Rules, *supra* note 8, at arts. 1.1, 5.

99. Hague and Hague-Visby Rules, *supra* notes 2-3, at art. I(b). It is worthy to note that countries like Australia have implemented domestic laws that regulate electronic bills of lading, *e.g.*, the Australian COGSA applies to both negotiable and non-negotiable sea-carriage documents, whether in paper or electronic form. Australian Carriage of Goods by Sea Act 1991, *supra* note 3, at §7, sch. 1A.

100. The Rotterdam Rules apply to contracts for the international carriage of goods wholly or partly by sea, without regard to the issuance of transport documents. Rotterdam Rules, *supra* note 8, at arts. 1.1, 5. The issuance of transport documents comes into play only in limited instances, *i.e.*, to exclude charterparties and charterparties’ equivalents (in liner trade) and to include “on demand”

transport records that facilitate electronic commerce.¹⁰¹ In particular, the Rotterdam Rules go beyond the outdated Hague regimes to cover a wider range of transport documents by making reference to the generic terms “transport document” and “electronic transport record,” rather than “bill of lading,” as the latter term would have unjustifiably limited the Convention’s scope of application.¹⁰² Also, a document or electronic record qualifies as a transport document or electronic record for the purposes of the Rotterdam Rules, if it is evidence of the contract of carriage and also evidence of the carrier’s or a performing party’s receipt of goods under the contract.¹⁰³ Thus, unlike the Hague regimes, the Rotterdam Rules apply to transport documents or electronic records that serve the first two functions of the traditional bills of lading, but, like the sea waybills, do not necessarily qualify as documents of title.

Further, the Rotterdam Rules contain innovative provisions for negotiable and non-negotiable electronic transport records,¹⁰⁴ which are recognized as the “functional equivalent” of transport documents.¹⁰⁵ The Rotterdam Rules expressly recognize in Article 8 (and elsewhere) that electronic transport records may fulfill the same functions as traditional paper documents: anything that may be included in a transport document may be recorded in an electronic transport record, if the carrier and the shipper consent to an electronic transport record’s issuance and subsequent use.¹⁰⁶ The Rules also make clear that the issuance, exclusive control, or transfer of an electronic transport record has the same effect as the issuance, possession, or transfer of a transport document.¹⁰⁷ In substance, the new provisions on electronic transport records are carefully drafted to meet any future developments, as they are both “medium”¹⁰⁸ and “technology”¹⁰⁹ neutral, and thus adaptable to all types of systems (i.e., registry, open, or closed environment).¹¹⁰

carriage and charterparty bills of lading. *Id.* at arts. 6.1-2, 7.

101. The facilitation of e-commerce is one of the main objectives of the Rotterdam Rules. See Report of the U.N. Comm’n on Int’l Trade Law on Twenty-Ninth Session, *supra* note 6, at ¶ 210.

102. See, e.g., Rotterdam Rules, *supra* note 8, at arts. 1.14, 1.18.

103. *Id.*

104. *Id.* at arts. 1.18-1.20.

105. *Id.* at art. 8. Also noteworthy is that the term “electronic transport record” is used alongside the words “transport document” throughout the Rotterdam Rules. On electronic transport records, see generally Manuel Alba, *Electronic Commerce Provisions in the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea*, 44 TEX. INT’L L.J. 387 (2009); Miriam Goldby, *Electronic Alternatives to Transport Documents: A Framework for Future Development*, in A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA – THE ROTTERDAM RULES, *supra* note 10, at 225.

106. Rotterdam Rules, *supra* note 8, at art. 8.

107. *Id.*

108. *Id.*

109. *Id.* at arts. 9, 38.

110. Preamble to CMI Draft Instrument on Transport Law, 2001 COMITÉ MAR. INT’L, Y.B. 532, at 533.

These provisions suggest that, if implemented, the Rotterdam Rules would be well-placed to successfully meet the challenges of harmonizing and modernizing the carriage of goods by sea rules. This is because they offer a comprehensive, updated set of uniform rules for the international regime. But several other provisions suggest otherwise.

In terms of harmonization, a good step towards the unification of the international laws on carriage of goods by sea would have been the unification of rules on jurisdiction and arbitration. The Rotterdam Rules in Chapters 14 and 15 begin this process by establishing detailed rules on choice of forum and arbitration.¹¹¹ Succinctly, cargo claimants may litigate or arbitrate their claims only in one of the competent forums provided in the rules—i.e., either (i) the place of the domicile of the carrier, (ii) the place of receipt or delivery of the goods agreed in the contract of carriage, (iii) the port of the initial loading or discharge of the cargo, or (iv) the place designated in the choice of court/arbitration clause, if included in the contract of carriage.¹¹² Additionally, exclusive choice of court or arbitration clauses are enforceable against the shipper and third parties only in the case of volume contracts and only upon satisfaction of strict preconditions referred to in Articles 67 and 75.3-4.¹¹³ By standardizing jurisdiction and arbitration rules, the Rotterdam Rules fill in the gap left by the Hague regimes and put an end to the inconsistent treatment of the choice of forum and arbitration clauses under the national laws that govern them absent a relevant provision in the Hague and Hague-Visby Rules.¹¹⁴

There are, however, two possible factors against uniformity in this respect. First, are Articles 67.2 and 75.4 on the enforcement of exclusive forum selection and arbitration clauses against a party other than the shipper acquiring rights against the carrier. Here, the enforceability of such clauses also depends on whether the national jurisdiction or arbitration law of the court seized permits

111. For further discussion on jurisdiction and arbitration, see Yvonne Baatz, *Jurisdiction and Arbitration*, in *A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA – THE ROTTERDAM RULES*, *supra* note 10, at 258; Chester D. Hooper, *Forum Selection and Arbitration in the Draft Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea, or The Definition of Fora Conveniens Set Forth in the Rotterdam Rules*, 44 *TEX. INT'L L.J.* 417 (2009).

112. Rotterdam Rules, *supra* note 8, at arts. 66, 75.2.

113. See *infra* Part IV.

114. See, e.g., *Vimar Seguros y Reaseguros, S.A. v. M/V Sky Reefer*, 515 U.S. 528 (1995) (upholding the validity of arbitration clauses); *Acciai Speciali Terni USA, Inc. v. M/V Berane*, 181 F. Supp. 2d 458 (D. Md. 2002) (holding a forum selection clause enforceable under the *Sky Reefer* test). *Contra* Australian Carriage of Goods by Sea Act 1991, *supra* note 99, at § 11(1)-(2) (invalidating any agreement that precludes or limits the jurisdiction of Australia's federal, state or territorial courts in disputes arising out of sea carriage documents to which the Hague/Visby Rules apply, in respect of inbound and outbound shipments to and from Australia). See also *id.* at § 11(3) (permitting arbitration agreements in carriage cases only if under the agreement or provision, the arbitration is to be conducted in Australia). Similar provisions may be found in the laws of New Zealand (Maritime Transport Act 1994 (N.Z.) § 210). *But cf.* Hamburg Rules, *supra* note 4, at arts. 21-22 (on jurisdiction and arbitration).

that person to be bound by the exclusive jurisdiction or arbitration agreement.¹¹⁵

Second, it should be noted that the new rules on jurisdiction and arbitration are not made mandatory on states adopting the Convention: They are merely opt-in provisions.¹¹⁶ Even the states that have signed such a declaration may opt-out of the choice of court and arbitration rules at any time by withdrawing their previous declaration.¹¹⁷ Moreover, although it is almost certain that states like the United States that drove the drafting of the jurisdiction and arbitration provisions will make necessary declarations to opt-in,¹¹⁸ doing so will be more time-consuming and bureaucratic for the EU member states that are bound by the Brussels I Regulation.¹¹⁹ EU member states have to submit a request to the European Commission under Article 67 of the European Union Treaty and follow the relevant procedures.¹²⁰ Further, it is doubtful that all the contracting states will opt-in to the jurisdiction and arbitration provisions. During negotiations, some states expressed hostility toward adoption of these provisions. Thus, the final opt-in solution¹²¹ reflects a delicate compromise designed to improve the probability of adoption of the new convention.¹²²

The attempted harmonization of the sea transport rules will be further jeopardized by the failure of the Rotterdam Rules to define key terms of the

115. Rotterdam Rules, *supra* note 8, at arts. 67.2(d), 75.4(d).

116. The jurisdiction and arbitration provisions apply to contracting states that will declare, either at the ratification stage or later, that they wish to be bound by the relevant provisions on jurisdiction and arbitration. Rotterdam Rules, *supra* note 8, at arts. 74, 78, 91. *See also* William Tetley, *A Critique of and the Canadian Response to the Rotterdam Rules*, in *A NEW CONVENTION FOR THE CARRIAGE OF GOODS BY SEA – THE ROTTERDAM RULES*, *supra* note 10, at 285.

117. *See* Rotterdam Rules, *supra* note 8, at art. 91.5.

118. *See, e.g.*, 2003 U.S. Proposal, *supra* note 52, at ¶¶ 30-33; U.N. Comm'n on Int'l Trade Law (UNCITRAL), Working Grp. IV, Preparation of a Draft Instrument on the Carriage of Goods [by Sea], Proposal by the United States of America Regarding the Inclusion of "Ports" in Draft Article 75 of the Draft Convention in the Chapter on Jurisdiction, U.N. Doc. A/CN.9/WG.III/WP.58 (Nov. 28–Dec. 9, 2005); *see also* Mary Helen Carlson, *U.S. Participation in the International Unification of Private Law: The Making of the UNCITRAL Draft Carriage of Goods by Sea Convention*, 31 TUL. MAR. L.J. 615, 633-35 (2007) [hereinafter Carlson, *U.S. Participation in the International Unification of Private Law*].

119. Council Regulation 44/01, 2001 O.J. (L 12) 1, 8 (EC) (on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters).

120. Consolidated Version of the Treaty on European Union and of the Treaty Establishing the European Community, Dec. 29, 2006, 2006 (O.J. C 321/E/2) art. 67.

121. *See, e.g.*, UNCITRAL Working Group III, Report of Fourteenth Session, *supra* note 81, at ¶¶ 111, 130, 154; U.N. Comm'n on Int'l Trade Law (UNCITRAL), Working Grp. III, Preparation of a Draft Instrument on the Carriage of Goods [by Sea], Comments by the United Kingdom of Great Britain and Northern Ireland Regarding Arbitration, U.N. Doc. A/CN.9/WG.III/WP.59 (Nov. 18, 2005).

122. The "opt-in" approach was adopted as a compromise solution as it was felt that the mandatory application of the jurisdiction and arbitration provisions might have created barriers to states wishing to ratify the instrument. *See* U.N. Comm'n on Int'l Trade Law (UNCITRAL), Report of Working Grp. III on Transp. Law on the Work of its Sixteenth Session, ¶¶ 74-75, 81, 84, U.N. Doc. A/CN.9/591 (Dec. 2005); UNCITRAL Working Group III, Report of Eighteenth Session, *supra* note 96, at ¶¶ 246-52, 273.

previous conventions, especially in cases where their interpretation has resulted in conflicting decisions in the major trading jurisdictions. The most obvious example is that of the terms “package” and “unit,” which have been adopted throughout the international rules on carriage of goods by sea as a basis for calculating the carrier’s limitation of liability.¹²³ In fact, the plethora of conflicting decisions on interpreting those terms demonstrates the need to provide clear definitions for terms with such significant practical implications. Whereas the English,¹²⁴ American,¹²⁵ and Australian¹²⁶ courts have defined “package” as entailing some type of packaging of the cargo, the Canadian courts have construed the term so broadly as to exclude the need for wrapping or boxing the goods, thus equating even a large unpacked machine to a “package” within the meaning of the limitation rules.¹²⁷ There are instances even *within* some jurisdiction—namely, the federal maritime jurisdiction of the United States—where there is no consistency between circuits in defining a “package,” as occurs with respect to cases of goods not fully boxed or crated.¹²⁸

Compounding these difficulties, courts have issued irrational decisions on

123. Hague Rules and Hague-Visby Rules, *supra* notes 2-3, at art. IV, r.5; Hamburg Rules, *supra* note 4, at art. 6; Rotterdam Rules, *supra* note 8, at art. 59. Another example of a core term that has been interpreted inconsistently by the different courts is that of the perils of the sea. The U.S. courts, for one, have adopted different definitions on the “peril of the sea” from Australian courts. *See, e.g.,* The Giulia, 218 F.744, 746 (2d Cir. 1914) (discussing the extraordinary or irresistible nature of the peril); Great China Metal Indus. Co. Ltd. v. Malay Int’l Shipping Corp. Bhd. (The Bunga Seroja), [1998] 158 A.L.R. 1, 16 (High C. Austl.) (discussing foreseeable, or even foreseen, dangers may be perils of the sea and support a defense under the Rules). For Canadian courts, Canadian Nat’l Steamships Ltd. v. Bayliss, [1937] S.C.R. 261, 263 (discussing the unforeseeability and inevitability of the peril). For English courts, The Xantho, [1887] 12 App. Cas. 503, 509 (H.L.) (Eng.) (discussing the test of foreseeability and possibility of averting the danger).

124. *See, e.g.,* Bekol B.V. v. Terracina Shipping Corp., [1988] Q.B. (considering the meaning of “package” in the Hague Rules with reference to the Oxford English Dictionary, defining the terms as, “a bundle of things packed up, whether in a box or other receptacle, or merely compactly tied up”).

125. *Aluminios Pozuelo Lid. v. S.S. Navigator*, 407 F.2d 152, 155 (2d Cir. 1968) (following the Third, Fourth and Eleventh Circuits’ definition of “package” as “a class of cargo, irrespective of size, shape or weight, to which some packaging preparation for transportation has been made which facilitates handling, but which does not necessarily conceal or completely enclose the goods”); *see, e.g.,* Philips-Van Heusen Corp. v. Mitsui O.S.K. Lines Ltd., 2003 A.M.C. 2471, 2489 (M.D. Pa. 2002); *Maersk Line, Ltd. v. U.S.* 513, F.3d 418, 422-23 (4th Cir. 2008); *Fireman’s Fund Ins. Co. v. Tropical Shipping & Constr. Co.*, 254 F.3d 987, 996-97 (11th Cir. 2001); *Hartford Fire Ins. Co. v. Pac. Far East Line, Inc.*, 491 F.2d 960 (9th Cir. 1974) (adopting the definition but for the subjective purpose language part).

126. *Chapman Marine Pty Ltd. v. Wilhelmsen Lines A/S*, 1999 A.M.C. 1221, 1233 (Austl.).

127. *Falconbridge Nickel Mines Ltd. v. Chimo Shipping Ltd.*, [1974] S.C.R. 933, 952 (Can.).

128. *Compare, e.g.,* *Companhia Hidro Electrica do Sao Francisco v. S.S. Loide Honduras*, 368 F. Supp. 289, 291-92 (S.D.N.Y. 1974) (holding that semi-enclosed circuit breakers were “packages”), *with* *Gulf Italia Co. v. Am. Export Lines, Inc.*, 263 F.2d 135 (2d Cir. 1959) (finding that a not fully-enclosed caterpillar tractor was not shipped in a “package” within the meaning of a statute limiting liability to \$500 per package). *See also* Sturley, *Packages*, in 2A *BENEDICT ON ADMIRALTY*, *supra* note 48, at ¶ 167.

the construction of the words “*packages or other units* enumerated in the bill of lading as *packed*” in cases of goods that have been containerized, that seem to defeat the rationale of the limitation of liability.¹²⁹ The most famous—or infamous—decision is that of the Federal Court of Australia in *El Greco Pty Ltd v. Mediterranean Shipping Co.*,¹³⁰ where the court equated 200,945 posters and prints carried in a container under a bill of lading referring to “1 × 20 ft FCL/FCL general purpose containers said to contain 200,945 pieces posters and prints” to one “package” under the default rule for containers in Hague-Visby Rules, Article IV.5(c).¹³¹ The court examined the text of the Hague-Visby Rules, the *travaux préparatoires* of the Visby amendments, and relevant American authorities to conclude that the enumeration in the bill of lading did not disclose how and in what number the goods had been made up for transport *as packed* in the container.¹³² One of the fallacies of the court’s rationale, however, is that the prerequisite for enumeration of the units in the bill of lading “as packed” seems as indecisive as the concept of “unit” *per se*, since the term “packed” can also apply to fairly small unpackaged items.¹³³ Additionally, the decision seems to suggest that the unit must be packaged, a requirement that is inconsistent with the concept of “unit” that encompasses goods that do not qualify as packages.¹³⁴ The inconsistent interpretation of the terms “package” and “unit” will probably reappear with respect to the Rotterdam Rules, since the Rules do not define these terms and it is likely that the national courts will apply the interpretations they developed for the Hague and Hague-Visby Rules.¹³⁵ Thus, it appears that the drafters of the Rotterdam Rules missed the opportunity to define these core terms and thereby promote the uniform application of the new sea carriage Convention.

129. See also Marc A. Huybrechts, *Package Limitation as an Essential Feature of the Modern Maritime Transport Treaties: A Critical Analysis*, in *THE CARRIAGE OF GOODS BY SEA UNDER THE ROTTERDAM RULES* 119, 130-135 (D. Rhidian Thomas ed., 2010), reprinted in 17 J. INT’L MAR. L. 90, 98-103 (2011).

130. *El Greco Pty Ltd. v. Mediterranean Shipping Co.*, [2004] FCAFC 202 (Austl.). See also Cour d’Appel [regional court of appeal] de Rouen, Feb. 28, 2002, 2004 DROIT MARITIME FRANCAIS, 648 (holding that thirty-eight cartons containing 18,000 watches carried in a container counted as only thirty-eight packages for the limitation purposes, as the watches were not individually marked and could not be distinguished from each other; therefore, it could not be established whether the carrier considered the watches as “packages” when it accepted the cargo for carriage). See Huybrechts, in *THE CARRIAGE OF GOODS BY SEA UNDER THE ROTTERDAM RULES*, *supra* note 129, at 134-35, 17 J. INT’L MAR. L., *supra* note 129, at 102-03.

131. *El Greco Pty Ltd.*, [2004] FCAFC at 371 (Austl.).

132. *Id.* at 360-72.

133. Francis Reynolds, *The Package or Unit Limitations and the Visby Rules*, [2005] LLOYD’S MAR. & COM. L.Q. 1, 3.

134. CARVER ON BILLS OF LADING, *supra* note 1, at ¶¶ 9-261, 9-269.

135. See, e.g., U.N. Comm. on Intn’l Trade Law (UNCITRAL), Working Grp. III on Transp. Law, Transp. Law-Preliminary Draft Instrument on the Carriage of Goods by Sea, 9th Sess., Apr. 15-26, 2002, U.N. Doc. A/CN.9/WGIII/WP.21, Annex, art. 5, ¶ 60, art. 6.1.3, ¶ 78 (Jan. 8, 2002) [hereinafter UNCITRAL Prelim. Draft Instrument of Jan. 8, 2002].

Last but not least, although there is no doubt that the Rotterdam Rules will make some contribution towards the modernization of sea transport law, the innovative provisions concerning the “maritime plus” and “door-to-door” scope of the Convention’s application leave are unsatisfactory. In addition to the complications arising out of the possible conflicts between the Rotterdam Rules and the unimodal conventions, and the definition of the contract of carriage already analyzed in Part II, the Rotterdam Rules constitute a “maritime-plus” convention, rather than a fully-fledged regime on international multimodal transport. This means that the Convention’s application to multimodal transport will be triggered only if the contract of carriage provides for sea carriage in addition to carriage by other transport modes—and different national courts may interpret such a requirement inconsistently¹³⁶—but not if the contract of carriage contemplates carriage by any possible combination of transport modes. Therefore, the inevitable consequence of the Rotterdam Rules’ is that the addition to the array of international transport rules of another regime with a limited scope will further fragment international transport law. This may confuse rather than provide greater clarity to the transport industry.

Moreover, compatibility issues may exist between the door-to-door scope of application of the Rotterdam Rules and the long standing customary practice in the liner trade of “through” transport contracts.¹³⁷ Under such mixed contracts of carriage and freight forwarding, the carrier and the shipper agree that the carrier, acting as an agent of the shipper, will arrange the performance of a transport leg(s) by other carrier(s), while the carrier will remain responsible for the goods only while in its charge. However, under such an arrangement the carrier assumes responsibility only for certain parts of the transport operation. Upon the shipper’s request, it also usually issues a single transport document, which goes beyond the scope of its contract of carriage to cover the entire transport operation. This is because only a transport document that covers the entirety of the transit of goods satisfies good tender on the underlying contract of sale¹³⁸ and is an acceptable document under the Uniform Customs and Practice for Documentary Credits (UCP”), Article 19.¹³⁹ While, previous drafts of the Rules declared the validity of mixed contracts of carriage and forwarding and also expressly provided that the period of the performance of the carriage by the third party fell outside the scope of the period of the responsibility of the carrier,¹⁴⁰ the UNCITRAL Commission deleted the relevant provision in review,

136. See *supra* Part II.

137. See also Hamburg Rules, *supra* note 4, at art. 11 (on through carriage).

138. *Hansson v. Hamel & Horley, Ltd.*, [1922] 2 A.C. 36 (H.L.) (Eng.).

139. The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication No. 600 (July 7, 2007) [hereinafter UCP 600]. The UCP is a set of rules on the issuance and use of letters of credit that is utilized by bankers and commercial parties in trade finance, and the UCP 600 is its sixth revision. *Id.*

140. U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Grp. III on Transp. Law, Transp. Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], art. 9, U.N.

although it stated that it did not intend to “criticise or condemn the use of such types of contracts of carriage.”¹⁴¹

Such a statement does not, however, resolve the issue of the responsibility of the carrier while the goods are transported by the on-carrier. In particular, given that in the majority of the cases, the carrier will issue a transport document or electronic record covering the entire transport operation to meet the requirements of the underlying contracts, it does not answer the question of whether the period of such carriage falls outside the period of the carrier’s responsibility under the Rotterdam Rules. The combined reading of Article 12 and Chapter 9 would most probably lead to the conclusion that non-responsibility clauses included in the transport document or electronic transport record issued by the carrier, which cover periods during which the cargo is not in the carrier’s custody, will run contrary to Article 79. Indeed, even under the most flexible interpretation of Article 12.3,¹⁴² the parties are only free to agree on the time and location of receipt and delivery of the goods, which define the period of the carrier’s responsibility. They are not allowed to agree that the carrier will not be responsible for certain part(s) of the transport operation. Additionally, in cases where a negotiable document or a negotiable electronic transport record is issued, it is unlikely that delivery to the on-carrier will be equated to delivery to the consignee under Article 12 and Chapter 9, which will end the period of the carrier’s responsibility under the terms of the Rotterdam Rules.¹⁴³ It is unclear how the courts will deal with this issue and whether they will attempt to improvise a pragmatic solution to accommodate the common practice of through carriage. Nonetheless, the last minute deletion of the specific provision on “[t]ransport beyond the scope of the contract of carriage” was unwise, as the retention of the relevant article would have avoided possible future litigation over the liability of the contracting carrier for loss or damage to the goods or delay in their delivery which may be attributed to the on-carrier.

Doc. A/CN.9/WG.III/WP.32 (Sept. 4, 2003); U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Grp. III on Transp. Law, Transp. Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], art. 12, U.N. Doc. A/CN.9/WG.III/WP.56 (Sept. 8, 2005); U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Grp. III on Transp. Law, Transp. Law: Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], art. 12, U.N. Doc. A/CN.9/WG.III/WP.81 (Feb. 13, 2007); U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Grp. III on Transp. Law, Draft Convention on the Carriage of Goods [Wholly or Partly] [by Sea], art. 13, U.N. Doc. A/CN.9/WG.III/WP.101 (Nov. 14, 2007); U.N. Comm’n on Int’l Trade Law (UNCITRAL), Working Grp. on Transp. Law, Rep. of Working Grp. III on Transp. Law on the Work of its Twenty-First Session (Vienna, Jan. 14-25, 2008), Annex. art. 13, U.N. Doc. A/CN.9/645 (Jan. 30, 2008) [hereinafter UNCITRAL Working Group III, Report of Twenty-first Session].

141. Report of the U.N. Comm’n on Int’l Trade Law, Forty-First Session, *supra* note 62, at ¶ 53.

142. *Id.* at ¶ 40.

143. See Rotterdam Rules, *supra* note 8, at art. 47.

IV.

DEVELOPING TRADE IN AN EQUAL AND MUTUALLY BENEFICIAL MANNER

The implementation of international rules to promote equity and reciprocal benefits in international trade is another objective of the Rotterdam Rules, it being generally (and correctly) thought that the development of trade on the basis of equality and mutual benefit plays a fundamental role in promoting friendly relations among States.¹⁴⁴ To achieve this objective, the drafters of the Rotterdam Rules aimed to carry out a balancing exercise between potentially conflicting interests, such as carriers, shippers and third parties (such as consignees), and established a regime that aims to strike a fair balance between the interests of all parties concerned. Some might argue that the balance between carriers and shippers is relatively unimportant, and the only issue should be who insures what. This argument, however, presupposes that cargo insurance is the norm, which is not always the case. The impact of the Rotterdam Rules on insurance matters will be discussed in Part V.

Promoting equality among the parties involved in the carriage transaction entails eliminating the provisions of the existing sea carriage regimes that are seen as privileging the interests of one party without good reason. A notable instance of this in the Rotterdam Rules is the elimination of the venerable “navigational fault” exception in the Hague-Visby Rules¹⁴⁵ and the extension of the seaworthiness obligation to cover the whole of the voyage rather its mere commencement.¹⁴⁶ The premise underlying both of these old rules is the anachronistic assumption that the shipowner neither had control over the vessel once she sailed, nor sophisticated technical navigational aids once at sea¹⁴⁷—assumptions that clearly fail with respect to technical developments in communication and by institutions such as the International Management Code for the Safe Operation of Ships and for Pollution Prevention (“ISM Code”).¹⁴⁸

144. See Rotterdam Rules, *supra* note 8, Preamble. See also U.N. Convention on the Law of the Sea Preamble, U.N. Doc. A/CONF.62/L/78 (Aug. 28, 1981) (noting that the “realization of a just and equitable international economic order” and “the strengthening of peace, security, cooperation and friendly relations among all nations in conformity with the principles of justice and equal rights will promote the economic and social advancement of all peoples of the world”).

145. Hague-Visby Rules, *supra* note 3, at art. IV.2(a) (allowing carriers to exclude liability for losses caused by navigational error; i.e. loss from any act, neglect or default of the pilot, master or mariners in navigating the ship). The origins of the defense could be traced to the bills of lading issued in the nineteenth century. See, e.g., *Hayn v. Culliford*, [1878] 3 C.P.D. 410, *aff’d* [1879] 4 C.P.D. 182 (C.A.), *in re Carron Park*, [1890] 15 P.D. 203 (Eng.); *in re Accomac*, [1890] 15 P.D. 208 (C.A.) (Eng.); *Norman v. Binnington*, [1890] 25 Q.B.D. 475 (Eng.). It is also worth mentioning that this defense is not available to the carrier under the Hamburg Rules, *supra* note 4.

146. Rotterdam Rules, *supra* note 8, at arts. 14, 17.3.

147. Hague Rules, *supra* note 2, at arts. III, r.1, IV.2(a); Hague-Visby Rules, *supra* note 3, at arts. III.1, notes 2-3, IV.2(a); UNCTAD Secretariat, *The Economic and Commercial Implications of Entry into Force of the Hamburg Rules and Multimodal Transport Convention*, TD/B/C.4/3/5/Rev.1 (1991), ¶ 26.

148. See, e.g., International Management Code for the Safe Operation of Ships and for

Conversely, the Rotterdam Rules remove the curious pro-shipper rule, which many jurisdictions have characterized as depriving carriers of their right to limit and of the benefit of a number of excepted perils in the cases of “quasi deviation” and the “fair opportunity” doctrines.¹⁴⁹

The Rotterdam Rules’ provisions on arbitration, discussed above, also attempt to level the playing field between shippers and carriers. There is evidence that at present, cargo interests are prejudiced by the enforcement of boilerplate exclusive forum selection and arbitration clauses included in liner transportation bills that designate a forum with no connection to the contract of carriage against them.¹⁵⁰ Consequently, cargo claimants may tend to settle for considerably less when faced with litigating or arbitrating in an inconvenient jurisdiction.¹⁵¹ The Rotterdam Rules address the inequity of the Hague regimes arising out of such situations and protect cargo claimants from such abusive practices by prohibiting the inclusion of exclusive jurisdiction and arbitration clauses in standardized carriage of goods by sea contracts.¹⁵² As mentioned above, under the new regime, exclusive jurisdiction and arbitration clauses are valid between the carrier and the shipper only if they are freely negotiated. In particular, an exclusive jurisdiction or arbitration clause will bind only the original parties to volume contracts (which denote individual negotiation of the terms anyway) and only if such clause is contained in a volume contract, which is either individually negotiated or contains a prominent statement that it contains such a provision.¹⁵³

Further, a third party holder of a transport document or electronic record issued under a volume contract (e.g., a consignee) also receives protection. Exclusive jurisdiction or arbitration clauses may be enforced against the third party holder only if certain strict prerequisites, which aim to ensure that it is not

Poluttion Prevention (“ISM Code”), arts. 5, 10. The ISM Code is one of the latest international instruments related to the prevention of human injury or loss of life and avoidance of damage to the environment, particularly to the marine environment, and to property. It was adopted by the International Maritime Organization (“IMO”) on November 4, 1993, and later incorporated into the International Convention for the Safety of Life at Sea Convention (“SOLAS”) 1974. *See also* UNCITRAL Prelim. Draft Instrument of Jan. 8, 2002, *supra* note 135, at art. 5.61.

149. *See supra* Part II.

150. *See, e.g., Vimar Seguros y Reaseguros, S.A.*, 515 U.S. 528, *supra* note 114 (arbitration clauses); *Acciai Speciali Terni USA, Inc. v. M/V Berane*, 181 F. Supp. 2d 458 (D. Md. 2002) (forum selection clauses). There is a good chance that the U.S. will declare itself bound by the jurisdiction and arbitration provisions since U.S. negotiators of the Rotterdam Rules actively supported their inclusion in the Rules. *See* Carlson, *U.S. Participation in the International Unification of Private Law*, *supra* note 118, at 633-35.

151. *See* Robert Force & Martin Davies, *Forum Selection Clauses in International Maritime Contracts*, in *JURISDICTION AND FORUM SELECTION IN INTERNATIONAL LAW* 1, 10 (Martin Davies ed., 2005); Carlson, *U.S. Participation in the International Unification of Private Law*, *supra* note 118, at 633-34.

152. Rotterdam Rules, *supra* note 8, at arts. 67.1, 75.3, 80.

153. *Id.* at arts. 67.1, 75.3. In the case of choice of forum clauses, the designated venue or venues must be located in a contracting state. *Id.*

dragged into litigation at a place that has no connection with the dispute or without adequate notice, are met.¹⁵⁴ *Inter alia*, the relevant clause must be included in the transport document or electronic transport record, the forum or place of arbitration should be located in a place convenient for it (i.e., a place that has a connection with the contract of carriage), and the third party must be made aware of the exclusive jurisdiction or arbitration clause and the forum or place of arbitration in the form of a “timely and adequate notice.”¹⁵⁵ For instance, a CIF buyer will be bound by an exclusive jurisdiction clause if: (i) the jurisdiction clause provides for litigation before the courts of one of the places designated in Article 66(a); (ii) the agreement is contained in the transport document or electronic transport record; (iii) the law of the court seized recognizes that it may be bound by the exclusive choice of court agreement; and (iv) the buyer receives notice that the jurisdiction of that court is exclusive as well as notice of the court before which it must bring its action before it is irrevocably committed to the contract of carriage.¹⁵⁶

The Rotterdam Rules also promote the development of trade on the basis of equality and mutual benefit through provisions that establish an appropriate balance between freedom of contract, which allows for commercial flexibility, and the adequate protection of the contracting parties. For instance, Article 12.3 expressly allows for the freedom of the parties to determine the carrier’s period of responsibility under the Rotterdam Rules by agreeing on the time and place of the receipt and delivery of the cargo. At the same time, it protects the cargo interests from abusive practices on the part of the carrier by invalidating any agreement that provides that the time of receipt of the goods will be after the beginning of their initial loading, and the time of delivery of the goods will be before the completion of their final unloading.

Similarly, the Rotterdam Rules recognize that today cargo owners are not always the weaker party in the contract of carriage.¹⁵⁷ Cargo owners do not need the protection of a mandatory law if they are in the position to negotiate the terms of their contract of carriage with the carrier. Therefore, the Rotterdam Rules allow sophisticated shippers to enter into customized contracts for the carriage of a specified quantity of goods in a series of shipments during an

154. Rotterdam Rules, *supra* note 8, at arts. 67.2, 75.4.

155. *Id.* See also Hooper, *supra* note 111, at 421 (discussing the requirement of the “timely and adequate notice”).

156. It is, however, unclear when this requirement is met. One may argue that it is satisfied in a case in which the buyer receives the transport document/electronic record, which contains the exclusive jurisdiction clause before its bank pays for the goods under an irrevocable letter of credit. See Sturley et al., *THE ROTTERDAM RULES*, *supra* note 10, at ¶¶ 10, 12-056. It may be, however, also argued that a CIF buyer is irrevocably committed to the contract of carriage once it has agreed to buy the cargo.

157. A multinational company that imports and exports large quantities of goods every year is not the weaker party to the contract of carriage.

agreed period of time (volume contracts).¹⁵⁸ Under such contracts, carriers and shippers may opt-out of most of the provisions of the new regime,¹⁵⁹ and accordingly, agree on greater or lesser rights, obligations and liabilities than under the Rotterdam Rules.¹⁶⁰ The presumption is that rates will reflect the reduced or increased liability.

However, there is always the risk that unlimited freedom of contract might deprive smaller or less sophisticated shippers of any protection against unreasonable unilateral terms imposed on them by carriers. To address this concern, the Rotterdam Rules set forth strict conditions that aim to ensure that both the shipper and the consignee are adequately protected against possible abuse of the volume contracts.¹⁶¹ The main prerequisite is the conclusion of a volume contract requiring a “series of shipment” during a specified period of time, and in turn a larger shipper that will ship more than one cargo. But shippers are further protected through Article 80.2, which ensures that smaller shippers will not lose the protection of the Rotterdam Rules by being forced into concluding a standardized volume contract with the carrier. The Rotterdam Rules accomplish this goal by requiring volume contracts containing derogations to be “individually negotiated” or to “prominently specify the sections of the volume contract containing the derogations.”¹⁶² The Rotterdam Rules further stipulate that valid derogations can be “neither incorporated by reference from another document . . . nor included in a contract of adhesion that has not been negotiated.”¹⁶³ Moreover, for derogations from the Rotterdam Rules to be binding on a shipper, the shipper must also have an opportunity and notice of the opportunity to negotiate the terms of the contract, in that it should have a choice between concluding a contract of carriage on either a lower freight rate based on volume contract derogations, or a much higher freight rate based on the full Rotterdam Rules.¹⁶⁴ Finally, if the shipper decides to enter into a volume contract, the Rotterdam Rules require the carrier to include a prominent statement in the contract that it derogates from the terms of the Rotterdam Rules.¹⁶⁵

Third parties other than the shipper (e.g., consignees) are also protected, as they are not automatically bound by valid derogations in the volume contract by

158. “Volume contracts,” which were included in the Rotterdam Rules following the recommendation of the United States, are based on the concept of “service contracts” regulated in the United States Shipping Act 1984, 46 U.S.C. §§ 1701 et seq., subsec. 3.19 (as amended by Ocean Reform Act, 112 Stat. 1902 (1998)). See 2003 U.S. Proposal, *supra* note 52, at ¶¶ 18-29.

159. The “opt out” option does not apply to the “super-mandatory” provisions, such as Rotterdam Rules, *supra* note 8, at arts. 14(a)-(b), 29, 32, 61; see also *id.* at art. 80.4.

160. Rotterdam Rules, *supra* note 8, at arts. 1.2, 80.1.

161. *Id.* at art. 80.2.

162. *Id.* at art. 80.2(b).

163. *Id.* at arts. 80.2(b), (d).

164. *Id.* at art. 80.2(c).

165. *Id.* at art. 80.2(a).

simply becoming parties to the contract of carriage at a later stage. The volume contract and its terms opting-out of the provisions of the Rotterdam Rules apply to such third parties only if they were able to make an informed decision to that effect. This condition will be satisfied in a case where a consignee has expressly consented in writing or by electronic communication after receiving information that prominently states the derogations.¹⁶⁶ For instance, such derogations will have a binding effect on a CIF buyer if the buyer received the information that prominently stated the terms of the contract of carriage that deviate from the Rotterdam Rules from the CIF seller or the carrier, and if it gave its express consent to the carrier.¹⁶⁷ To further protect the third party—the hypothetical buyer—the Rotterdam Rules clearly state that its consent has to be given separately and cannot be set forth in a carrier’s public schedule of prices and services, transport document, or electronic transport record.¹⁶⁸

Perhaps the innovative provisions of Articles 1.2 and 80 will achieve the objective of setting forth satisfactory safeguards for the protection of small shippers with unequal bargaining power to that of the carrier and of consignees. Much depends on the construction of the definition of “volume contract” by the courts, as the definition itself does not set forth a threshold for the operation of volume contracts.¹⁶⁹ A restrictive interpretation¹⁷⁰ alone will not, however, deprive the shippers of the application of the Rotterdam Rules, as all of the preconditions set forth in Article 80 also need to be satisfied for a valid derogation from the provisions of the Rotterdam Rules. What will complicate matters is the possibility of litigation over the interpretation of the requirements included in Article 80. Therefore, the scope of the protections provided by these safeguards remains uncertain until courts settle the interpretation of terms like “contract of adhesion” (a term that is not to be found in all jurisdictions or may be unclear), “subject to negotiation” or “express consent.”¹⁷¹

166. *Id.* at arts. 3, 80.5(a).

167. *Id.* at arts. 80.5(a)-(b).

168. *Id.* at art. 80.5(b).

169. See the suggestion made in the course of the negotiations of the Rotterdam Rules to adjust the definition of volume contracts to provide for a specific number of shipments or containers or a specific amount of tonnage of cargo. *E.g.*, UNCITRAL Working Group III, Report of Twenty-first Session, *supra* note 140, at ¶ 246; Report of the U.N. Comm’n on Int’l Trade Law on its Forty-First Session, *supra* note 62, at ¶ 32.

170. It is debatable whether a contract for the carriage of goods in a series of two shipments in a period of a year qualifies as a volume contract. Diamond argues for this opinion, while Honka argues that it is not a volume contract. Diamond, *The Rotterdam Rules*, *supra* note 10, at 487. Hannu Honka, *Validity of Contractual Terms*, in Ziegler et al., *THE ROTTERDAM RULES 2008*, *supra* note 10, at 331, 341-42.

171. Philippe Bonnevie, *Evaluation of the New Convention from the Perspective of Cargo Interests*, 2009 *TRANSPR* 361, 364 (2009); Diamond, *The Rotterdam Rules*, *supra* note 10, at 488. See also the concerns expressed by the European Shipper’s Council. View of the European Shipper’s Council on the Convention on Contracts for the International Carrying of Goods Wholly or Partly by Sea also Known as the ‘Rotterdam rules.’ European Shipper’ Council, (Mar. 1, 2009), available at http://www.uncitral.org/pdf/english/texts/transport/rotterdam_rules/ESC_PositionPaper_March2009.

Finally, the Rotterdam Rules promote international trade by providing pragmatic solutions to problems commonly encountered in modern shipping practice. An example is the unavailability of the bills of lading for presentation to the carrier at the port of discharge,¹⁷² a problem that is often overcome through the delivery of the goods against a letter of indemnity—which is not always satisfactory in practice.¹⁷³ The Rotterdam Rules have recognized the difficulties arising from such situations and the lack of international regulation, and they aim to eliminate the problems resulting from goods that arrived at the place of destination prior to the arrival of the bill of lading. As mentioned, one solution is facilitating the use of electronic transport records and non-negotiable transport documents,¹⁷⁴ which will accelerate cargo delivery. The novel provision of Article 47.2 provides a statutory solution to the delivery of the goods without the production of the negotiable document. It simply discharges the carrier of the delivery obligation under the contract of carriage by delivering the cargo under instructions received from the shipper or the documentary shipper. It accomplishes this even without the surrender of the negotiable transport document or the required identification of the holder of the electronic transport record under Article 9.1. Article 47.2 is triggered only when goods cannot be delivered because the consignee does not claim delivery, does not hold the proper documentation, or cannot be located by the carrier after reasonable effort. However, the carrier can only employ the Article 47.2 option if the parties have agreed to allow the carrier to deliver the goods without surrendering the negotiable transport document or electronic transport record, and if the transport document or electronic transport record contains an express statement to that effect (e.g., “delivery clause”).

Article 47.2 arguably provides a practical and pragmatic solution that balances the interests of all concerned parties. This is first achieved through the contractual “opt-in” system, which ensures that delivery of the goods without the surrender of the negotiable transport document or electronic transport record is allowed under the Rotterdam Rules only by agreement of the parties to the contract of carriage. Further, Article 47.2 also protects potentially affected third parties, such as banks and subsequent holders of the negotiable transport document or electronic transport record, as the “delivery clause” in the transport document or electronic transport record gives them notice and hence operates as

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172. Such situations can arise in cases where the bill of lading cannot be surrendered to the carrier due to delays occurring in the course of the financing of the sale contract system, or also in trades, like the oil trade, because it is not possible to make the bill of lading available at the port of offloading since the goods are resold several times during their transit.

173. Risks associated with delivery against a letter of indemnity include the additional cost of obtaining such a letter (i.e., guarantee costs), the risk of insolvency of the person claiming delivery without the bill of lading/indemnifier, and the risk of non-enforceability of the letter of indemnity in some jurisdictions. For a comprehensive analysis on the legal position of letters of indemnity, see Richard Williams, *Letters of Indemnity*, 17 J. INT'L MAR. L. 394 (2009).

174. Rotterdam Rules, *supra* note 8, at arts. 1.14, 1.16-1.22, ch. 3.

a warning that the goods may be delivered without the surrender of the relevant transport document or electronic transport record.¹⁷⁵ Consequently, as Article 47.2 protects only the bona fide acquirer of the negotiable transport document or electronic transport record, such a notice affords third parties the opportunity to take an action to protect their interests (e.g., a prospective holder of a bill of lading who is unsure about whether the cargo has already been delivered must contact the carrier and clarify this issue before obtaining the bill of lading).¹⁷⁶

In addition, Article 47.2 secures protection for the interests of all parties involved in the carriage transaction. It releases the carrier from the delivery obligation under the contract of carriage if the carrier delivers the cargo in accordance with the shipper's or the documentary shipper's instructions, even without the surrender of the otherwise required negotiable transport document or electronic transport record.¹⁷⁷ The carrier only remains liable to the third party who became a bona fide holder of the negotiable transport document after delivery.¹⁷⁸ The reason is that since the holder in good faith acquires all the rights incorporated in the transport document or electronic transport record, including the right to claim delivery, it would have been unjust to deprive it of the rights it legitimately expects to gain by becoming holder of the negotiable transport document or electronic transport record.¹⁷⁹ But even in such cases the carrier is protected, as the Rotterdam Rules provide for the statutory indemnity of the carrier for any loss arising from it being held liable to the bona fide holder of the negotiable transport document or electronic transport record.¹⁸⁰ This indemnity is also reinforced through the right of the carrier to demand adequate security.¹⁸¹

The Rotterdam Rules also protect the consignees, since consignees with genuine reasons for not claiming delivery (e.g., because the transport document was delayed in the bank, but obtains the negotiable transport document or electronic transport record after delivery through "contractual or other arrangements"),¹⁸² are deprived only of the right to obtain delivery and not of

175. The express statement requirement was inserted in the course of the final negotiations of the Rotterdam Rules before the UNCITRAL Commission to address the concerns of the negative impact that delivery without the production of the negotiable transport document/electronic transport record may have on common trade and banking practices. See Report of the U.N. Comm'n on Int'l Trade Law on its Forty-First Session, *supra* note 62, at ¶ 154.

176. Rotterdam Rules, *supra* note 8, at art. 47.2(e). See also Gertjan van der Ziel, *Delivery of the Goods*, in Ziegler et al., *THE ROTTERDAM RULES 2008*, *supra* note 10, at 189, 209.

177. Rotterdam Rules, *supra* note 8, at art. 47.2(b).

178. See also *id.* at art. 47.2(e) (establishing the presumption that the holder, at the time that it became a holder, had or could reasonably have had knowledge of the delivery of the goods if the contract particularly states the expected time of arrival of the goods, or indicates how to obtain information as to whether the goods have been delivered.)

179. *Id.* at art. 47.2(e).

180. *Id.* at art. 47.2(c).

181. *Id.*

182. E.g., under the underlying contract of sale. See also U.N. Comm'n on Int'l Trade Law

any other right under the contract of carriage.¹⁸³ One example is that the arrival of damaged goods entitles a holder of the document or electronic record to claim for relief. Similarly, Article 47.2 maintains the interests of innocent third parties that obtain the bill of lading in good faith after delivery of the goods, since a bona fide acquirer of the negotiable transport document or electronic record acquires all the rights incorporated in the transport document or electronic transport record.¹⁸⁴

The solution provided in Article 47.2 resolves a real and practical problem for carriers without disturbing the status quo. On one hand, Article 47.2 merely provides an alternative for the letter of indemnity system without prohibiting the carrier from requesting one. On the other hand, the option to deliver without surrendering requisite documentation does not undermine the function of a negotiable transport document or electronic transport record as a document of title.¹⁸⁵ This is because delivery of goods only occurs if the negotiable transport document is surrendered or the holder of the electronic transport record demonstrates that it is the holder under the relevant Article 47.1 procedures. Thus, Article 47.2 comes into play only in cases where the cargo owners appeared at the place of destination without the requisite documentation, or failed to appear at all, provided that the aforementioned preconditions are met.

V.

ENHANCING EFFICIENCY

A. *Insurance Costs*

Supporters of the Rotterdam Rules argue that worldwide adoption of the Rules will enhance economic efficiency by decreasing total insurance costs. They argue that this follows from the provisions of the Rotterdam Rules that shift a great proportion of the risk to the carrier.¹⁸⁶ Decline in the risk of cargo interests should correspond to a remarkable decline in the premiums that cargo insurers seek under the Rotterdam regime. But it is also inevitable that the carriers' liability insurers—effectively protection and indemnity (“P & I”) clubs—will increase the cost of insurance because insurers would bear higher risks under the Rotterdam regime. Nevertheless, the general view is that the increase in the cost of P & I will be much less than the decrease in the premium

(UNCITRAL), Working Grp. on Transp. Law, Rep. of the Working Grp. on Transp. Law on the Work of its Eleventh Session, Mar. 24-Apr. 4, 2003, ¶ 87, U.N. Doc. A/CN.9/526 (May 9, 2003).

183. Rotterdam Rules, *supra* note 8, at art. 47.2(d).

184. *Id.* at art. 47.2(e).

185. See Report of the U.N. Comm'n on Int'l Trade Law on its Forty-First Session, *supra* note 62, at ¶ 146 (expressing concerns at the discussion of the final draft).

186. See, e.g., the discussion on the extension of the seaworthiness obligation and the alteration of the overall risk allocation between the carrier and cargo interests. UNCITRAL Working Group III, Report of Ninth Session, *supra* note 19, at ¶ 43; UNCITRAL Working Group III, Report of Twelfth Session, *supra* note 56, at ¶ 149.

for cargo insurance, primarily because P & I clubs operate on a mutual basis without any concern for generating profits for their shareholders.¹⁸⁷ If this theory holds true, the cumulative effect of these changes in the underwriting practice will be a reduction in the total cost involved in insuring cargos against marine risks.¹⁸⁸

The most obvious drawback to this argument is the absence of supportive empirical evidence. Such data does not exist in any useable form, nor has anyone publicly attempted to collate existing data. Insurance companies might have the information but they do not openly share the details of actuarial studies that form the foundations of their premium calculations. Alternately, insurance companies may have already decided that the value of such information is not worth the cost of gathering it.¹⁸⁹ Further, measuring the potential impact on the liability of the carrier arising from the Rotterdam Rules might not be straightforward. Apart from removing the navigational error defense, the Rules introduce several other fundamental changes in the liability regime, including extending the carrier's duties in terms of providing a seaworthy ship,¹⁹⁰ and also affording the carrier new defenses relating to FIOST clauses and environmental protection.¹⁹¹ Given the magnitude of the changes introduced in the liability system, it is indisputable that quantifying the precise impact of the changes on the carrier's liability will be a very difficult, if not impossible, task, regardless of any general consensus on the merits of such a study.

One might go even further to suggest that gathering such data *ex ante* in a way that will be useful for insurance companies in assessing their exposure would also be a very challenging task even if the Rotterdam Rules were to gain worldwide recognition. Fundamentally, this is because Article 80.1 of the Rotterdam Rules enables the parties to provide for greater or lesser rights, obligations and liabilities than those imposed by the Rules when they enter into a volume contract. It is estimated that about 90 percent of containerized cargo in the world moves under volume contracts, meaning that in those cases it is

187. Robert Hellawell, *Less-Developed Countries and Developed Country Law: Problems from the Law of Admiralty*, 7 COLUM. J. TRANSNAT'L L. 203, 212 (1968). Similar sentiments were echoed in *Cargo Liability Study*, U.S. Dep't of Transp. 1975 (YS-32004), at 65, where it was stated that P & I clubs utilize around 85-90 percent of their premium income for the payment of compensation, whilst this amount is a little more than half for the commercial insurers.

188. If taken to its natural conclusion, the carriers will pass on the increase in their liability insurance to the shippers, and ultimately consumers, in the form of an increase in freight rates. However, the cost to society as a whole for the carriage of cargoes will still be less, mainly because the increase in freight rates will be quite modest considering the reduction in the cost of cargo insurance.

189. A similar point was made by Professor Michael Sturley when discussing the insurance implications of moving from Hague-Visby to the Hamburg regime. Michael F. Sturley, *Changing Liability Rules and Marine Insurance: Conflicting Empirical Arguments about Hague, Visby and Hamburg in a Vacuum of Empirical Evidence*, 24 J. MAR. L. & COM. 119, 148 (1993).

190. See Rotterdam Rules, *supra* note 8, at art. 14.

191. See *id.* at arts. 17.3(i), (n).

conceivable that parties may contract out of most of the liability provisions of the Rotterdam Rules (except for the “super-mandatory” provisions).¹⁹² Assuming that most of the trade would be carried out under volume contracts that would essentially be subject to different liability regimes, trying to collate data to reveal the impact of the implementation of the Rotterdam Rules would be like searching for a needle in a haystack. Another factor that might cause serious difficulties in terms of gathering data to assess the impact of the Rotterdam Rules (even following their adoption) is the possibility that national courts might construe and apply the Rules differently.¹⁹³ Although this risk is inherent in any international convention,¹⁹⁴ the risk is aggravated with respect to the Rotterdam Rules because of the existence of several legal concepts that are novel to international regimes on carriage of goods by sea, such as the conflict of conventions rules¹⁹⁵ and the extensive delivery provisions.¹⁹⁶

Regardless, on a practical level it is doubtful whether the assumptions upon which the insurance argument is based will hold sway in the real world of shipping and insurance. Let us first turn to the proposition that adoption of the Rotterdam Rules will result in a decline in cargo insurance premiums. This bold statement perhaps over-simplifies the risk assessment and premium calculation processes. These processes are very complicated¹⁹⁷ and can be influenced by various external factors such as market conditions and competition for market share. The argument, however, is based simply on the premise that cargo insurers will have an increased prospect of recovery from the carrier because the extent of the carrier’s liability has been expanded under the Rules. Undoubtedly, the availability of recourse action against the carrier will be a relevant factor in determining the amount of the premium, but it is by no means certain that the prospect of recovery for cargo insurers will increase dramatically under the Rotterdam Rules. The reasons for this are considered below in turn.

First, as indicated before, the Rotterdam Rules enable the parties to a volume contract to create a different liability regime by contracting out of most of its provisions. Thus, it is conceivable that carriers might offer better freight rates to cargo interests who agree to accept a liability regime with terms more favorable to the carrier under a volume contract arrangement. In that case, the cargo interests will benefit from a freight discount but the position of their cargo insurer will not necessarily be enhanced in terms of recovery prospects against

192. See *id.* at art. 80.4 (referring to the rights and obligations provided in arts. 14(a)-(b), 29, 32).

193. See, e.g., *infra* Part II (discussing the interpretation of arts. 1.1, 12, 26, 82).

194. See generally Patrick Griggs, *Obstacles to Uniformity of Maritime Law*, 34 J. MAR. L. & COM. 191 (2003).

195. See *infra* Part II (discussing the Rotterdam Rules, *supra* note 8, at arts. 26, 82).

196. See Rotterdam Rules, *supra* note 8, at arts. 45(c), 46(b), 47.2(a).

197. For a recent study on the subject, see VITALIY DROZDENKO, PREMIUM CALCULATIONS IN INSURANCE ACTUARIAL APPROACH (VDM Verlag Dr. Muller Aktiengesellschaft & Co. KG 2008).

the carrier.

Second, uncertainties regarding the prospect of recovery from the carrier can arise from the complex conflict of other conventions' provisions with the Rotterdam Rules. This is best illustrated by the following hypothetical. Assume that the assured is a German exporter who purchases computer games from a factory in Mongolia to be delivered to its shop in Bonn, Germany. Also assume that the cargo is insured against all risks and that a multimodal transport operator ("MTO") has made all transport arrangements. Assume further that either China, the Netherlands or Germany have become contracting states to the Rotterdam Rules.¹⁹⁸ The goods are placed in a container and loaded onto a lorry in the factory in Mongolia. The goods are then brought to Shanghai where the lorry is loaded on a Ro-Ro (roll on-roll off) ship to Rotterdam. The lorry then continues by road to its destination in Bonn. Upon delivery, imagine that the cargo is damaged but it proves impossible to localize the damage. The cargo interest will possibly recover from its cargo insurer who will in turn try to recover this amount from the MTO.¹⁹⁹ At this juncture difficulties emerge, as both the CMR²⁰⁰ and the Rotterdam Rules²⁰¹ apply to this shipment. This unfortunate conflict between these international regimes would not be resolved by Article 82(b) because of the limited remit of this proviso, which serves to resolve only disputes arising out of cargo, loss, damage, or delay in delivery that occurred in the course of the sea carriage of the road cargo vehicle, on which the cargo remained loaded.²⁰² Thus, it will be left to the courts to decide whether the Rotterdam Rules or the CMR will apply. The solution adopted might vary from jurisdiction to jurisdiction, adding another complexity for the cargo insurer, who might wish to pursue the MTO in a recourse action.

Lastly, we should not lose sight of an inherent restriction that cargo insurers face when engaging in recourse actions of this nature. In the case of loss or damage to the goods, cargo insurers usually only manage to recover a proportion of the payment they make to their assureds from the carrier, simply because the insured value of the goods is higher than the limits that carriers enjoy under international carriage regimes. While the Rotterdam Rules increased the limits of the carrier's liability from what was previously allowed under the Hague-Visby Rules,²⁰³ this increase is minimal, since the Special Drawing

198. See Rotterdam Rules, *supra* note 8, at art. 5.1.

199. In such a scenario, the MTO might have a recourse action against subcontractors as well.

200. The CMR Convention will be relevant here because the overall carriage contact involves an international road transport to a contracting state (Germany), which also entails a ro-ro transport leg to which the CMR applies by virtue of CMR, art. 2 § 1. Within the context of the CMR Convention, the sea carriage may be viewed as incidental to the road carriage.

201. Rotterdam Rules, *supra* note 8, at arts. 1.1, 5.1.

202. See *infra* Part II.

203. Compared to the limits specified in the Hague-Visby Rules, the increase is in the region of 40 percent. See Rotterdam Rules, *supra* note 8, at art. 59.

Rights' (SDR) purchasing power is likely to erode over time.²⁰⁴ In fact, one study demonstrated that from 1976 until 1996, the purchase power of the SDR dropped on average, 58 percent in developed countries like Canada, Germany, Japan, the United Kingdom, and the United States.²⁰⁵ By extension, it is unlikely that worldwide implementation of the Rotterdam Rules would yield a significant advantage for the cargo insurers in financial terms through recourse actions.

The second part of the insurance argument presupposes that the increase in the cost of P & I cover will be less in comparison with the increase in the cost of cargo insurance. The nature of P & I cover and the practices adopted by the clubs, however, casts doubt on this hypothesis. A cursory glance at the claims profile of large P & I clubs reveals that cargo claims form a vast majority of the claims submitted to a club.²⁰⁶ If, as generally acknowledged, the implementation of the Rotterdam Rules increases the number of cargo claims coming to the clubs, the cost of P & I insurance inevitably will rise. The degree of increase will depend on the ability of the clubs to spread the risk of loss. Unlike cargo insurers, clubs will not be able to spread their loss by diversifying their insurance portfolios, or even by pursuing other types of businesses. Under the current pooling agreement, a club that is a member of the International Group will retain claims up to £8 million.²⁰⁷ That the majority of cargo claims will be below this figure limits the prospect for P & I clubs to spread the loss for cargo claims. Of course, in clubs where cargo ships form a smaller proportion of the entered tonnage, the prospect of risk spreading is greater; but this will not be the case for the vast majority of the clubs. In light of the limited prospect of risk spreading, it would not be fanciful to suggest that the increase in the cost of P & I cover might not be as modest as contended.

Another reason to doubt that the implementation of the Rotterdam Rules might result in a modest increase in P & I cover is that the settlement of cargo claims involves huge sums. Statistics suggest that fees constitute around 60 percent of the value of cargo claims submitted to the P & I clubs.²⁰⁸ A dramatic increase in the amount of cargo claims will increase the fees that clubs pay. This

204. See Baris Soyer, *Sundry Considerations on the Draft Protocol to the Athens Convention Relating to the Carriage of Passengers and Their Luggage at Sea 1974*, 33 J. MAR. L. & COM. 1, 2, n.6, 14 (Oct. 2002).

205. Baris Soyer, *1996 Protocol to the 1976 Limitation Convention: A More Satisfactory Global Limitation Regime for the Next Millennium?* 2000 J. BUS. L. 153, 155-56 (2000).

206. The reports published by the UK P & I Club, for example, suggest that 80 percent of the claims paid by the Club between 1998-2006 were cargo claims. See *Quality Shipping Co. Risk Profile*, UK P&I Club, Powerpoint (Feb. 2007) (containing relevant data), available at <http://www.ukpandi.com/fileadmin/uploads/uk-pi/LP%20Documents/Quality%20Shipping%20Co%20Profile.pdf> (last visited Mar. 9, 2012). Similar figures have been reported by other P & I clubs.

207. See Pooling Agreement, International Group of P&I Clubs (containing more information on the Pooling Agreement), available at <http://www.igpandi.org/Group+Agreements/The+Pooling+Agreement> (last visited Feb. 15, 2012).

208. See *Quality Shipping Co. Risk Profile*, *supra* note 206.

will impede settlement for a modest increase in the cost of cover

Yet another shortcoming of the insurance argument in relation to the cost of P & I cover is that it fails to take into account that the Rotterdam Rules will impact different types of cargo claims differently. For example, the common cause of claims for short delivery is theft or poor tallying or checking on the part of the carrier. Implementation of the Rotterdam Rules is not likely to enhance the legal position of the carrier in relation to such claims. Thus, in practice, the Rotterdam Rules may not affect the number of such claims.²⁰⁹ Alternately, the Rules may greatly affect routine damage and serious damage claims. Most routine claims are settled by applying a formula that might vary depending on the location and type of commodity in question. It is very likely that the cargo interest will attempt to replace any existing settlement agreements by others more favorable to them if the Rotterdam Rules are implemented, given that the liability of the carrier under the Rules will be extended. Similarly, the elimination of the “navigational error” defense might assist cargo interests by making it rather difficult for carriers to defend against large serious damage claims. Therefore, implementation of the Rules will apparently precipitate an increase in the amount for which the P & I clubs are responsible, especially in the case of routine and serious damage claims. Again, there is no available data enabling calculation of the amount of potential increase in the cost of P & I cover. Much will depend upon the impact of the elimination of the “navigational error” defense. Without this information, the insurance argument regarding the potential increase in the cost of P & I cover may not carry much force, as the increase could be quite modest.

The above analysis and the absence of statistical and empirical data undermines the argument that implementation of the Rotterdam Rules will enhance efficiency by reducing the cost of insuring carriage of goods by sea. Indeed, there are reasons to believe that implementation of the Rules might *increase* the potential liability of the third parties (parties other than the cargo interests, carriers, and their insurers). One response of such parties may be to purchase additional liability insurance, possibly even without a careful assessment of the need for such coverage. Of course, this is mere speculation, but if it were common practice the cost of insurance associated with international trade would undoubtedly rise. In these cases, three groups of parties would likely be affected by changes contained in the Rotterdam Rules. These are multimodal transport operators, subcontractors, and freight forwarders. The potential impact of the Rotterdam Rules on the liability of these parties and the respective insurance implications will be considered next.

209. Similar observations were made in the context of the Hamburg Rules. See Charles Goldie, *Effect of the Hamburg Rules on Shipowners' Liability Insurance*, 24 J. MAR. L. & COM. 111, 113 (1993).

i. Multimodal Transport Operators

Multimodal transport operators normally contract with the cargo interests by using standard multimodal bills of lading. Such documents set out the liability regime governing the relationship between the parties in the absence of any mandatory application of international convention or national law.²¹⁰ Therefore, if a multimodal transport operator issues a multimodal bill of lading to a German trader exporting computer games from Mongolia to Bonn for Lo-Lo transport (load on-load off carriage) via Rotterdam, the bill of lading will likely dictate that for damage—e.g., to the cargo caused during the road carriage from the Mongolian warehouse to the Shanghai port, by terminal handlers at the Shanghai port, or at the discharge port in Rotterdam—the liability regime applied to the multimodal transport operator will be the one set out in the bill. This would apply in the absence of any mandatory international or national law.

Most multimodal bills of lading, by making full use of freedom of contract, will afford a favorable liability regime for multimodal transport operators by listing a generous list of exclusions that vastly outnumber the exclusions in most international carriage regimes like the Hague-Visby Rules. For example, clause 9(3) of the COMBICONBILL 95 stipulates that:

The Carrier shall . . . be relieved of liability for any loss or damage if such loss or damage arose or resulted from:

- (a) The wrongful act neglect of the Merchant.
- (b) Compliance with the instructions of the person entitled to give them.
- (c) The lack of, or defective conditions of packaging in the case of goods which, by their nature, are liable to wastage or to be damaged when not packed or when not properly packed.
- (d) Handling, loading, stowage or unloading of the goods by or on behalf of the Merchant.
- (e) Inherent vice of goods.
- (f) Insufficiency or inadequacy of marks or numbers on the goods, covering, or unit loads.
- (g) Strikes or lock-outs or stoppages or restraints of labor from wherever cause whether partial or general.
- (h) Any cause or event which the Carrier could not avoid and the consequences whereof he could not prevent by the exercise of reasonable diligence.

The multimodal transport operator might also benefit from a presumption in terms of the burden of proof when seeking to rely on some of these defenses.²¹¹

210. Most multimodal transport contracts adopt a liability system whereby the liability of the carrier depends on the location of the loss or damage. They apply either the relevant international convention regulating that particular leg of transit (if it can be proven that the loss or damage occurred during such leg), or they apply more general contractual provisions of the contract of carriage. This system is commonly known as the “network liability system.” See, e.g., COMBICONBILL 95, cls. 9, 11 (1995), available at https://www.bimco.org/en/Chartering/Documents/Bills_of_Lading/COMBICONBILL.aspx (last visited Mar. 30, 2012).

211. See *id.* at cl. 9(6) (“When the carrier establishes that in the circumstances of the case, the loss or damage could be attributed to one or more of the causes or events, specified in (c) to (g) of

The underlying reason behind the introduction of a transport operator-friendly liability regime is to enable the operator to restrict its potential liability to the level of indemnity that it will be able to recover from its subcontractors (like the road carrier and terminal handlers at Shanghai and Rotterdam), in the event that it has to settle a claim brought by the cargo interests.

The implementation of the Rotterdam Rules might, however, affect the operations of the multimodal transport operators differently. Turning back to the hypothetical scenario, if the sea carriage is a Lo-Lo carriage operation, the Rotterdam Rules will apply to the entire voyage from Mongolia to Bonn, including the road carriage in China and terminal operations at both Shanghai and Rotterdam (assuming of course that China, the Netherlands, or Germany become party to the Rotterdam Rules).²¹² In that case, the Rotterdam Rules will form the basis of the recourse action that multimodal transport operators might use against maritime-performing parties,²¹³ like the terminal handlers, but the position in relation to non-maritime performing parties, like the road carrier, will be rather complex from the multimodal transport operator's perspective. While the multimodal transport operator's liability to the cargo interest will be determined on the basis of the Rotterdam Rules for loss of or damage to cargo suffered during this leg of the voyage,²¹⁴ the contractual relationship between the multimodal transport operator and the road carrier will be determined by Chinese standard road carriage terms or Chinese local law, which might afford greater protection to road haulers than the Rotterdam Rules.²¹⁵ Potentially, this might expose multimodal transport operators to greater liability than under the current regime, which would raise the cost of their liability insurance.

ii. Subcontractors

Subcontractors' operations will be affected by the implementation of the

sub-clause 9(3), it shall be presumed that it was so caused.”).

212. Rotterdam Rules, *supra* note 8, at arts. 1.1, 5.1, 26.

213. Article 19.1 of the Rotterdam Rules stipulates:

A maritime performing party is subject to the obligations and liabilities imposed on the carrier under this Convention and is entitled to the carrier's defenses and limits of liability as provided for in this Convention if:

The maritime performing party received the goods for carriage in a Contracting State, or delivered them in a Contracting State, or performed its activities with respect to the goods in a port in a Contracting State; and

The occurrence that caused the loss, damage or delay took place: (i) during the period between the arrival of the goods at the port of loading of the ship and their departure from the port of discharge from the ship; (ii) while the maritime performing party had custody of the goods; or (iii) at any other time to the extent that it was participating in the performance of any of the activities contemplated by the contract of carriage. Rotterdam Rules, *supra* note 8, at art 19.1.

214. Rotterdam Rules, *supra* note 8, at arts. 1.1, 5.1, 26.

215. The road carriers will also enjoy the protection of the circular indemnity clauses in the multimodal bill of lading, which will prevent cargo interests from bringing a claim directly against them.

Rotterdam Rules, particularly those who are classified as maritime performing parties.²¹⁶ In the hypothetical example in Section (i), above, the Rules treat Shanghai and Rotterdam terminal operators as maritime performing parties. Under present rules such parties operate under a terminal handling agreement, which determines the multimodal transport operator and their liability. The striking feature of this contract is that the parties have complete freedom to determine the scope of the liability regime. In practice, more often than not, the handling agreement replicates the liability provisions expressed in the multimodal transport operator's bill of lading. Such subcontractors are also usually protected against cargo claims that could be proven to have occurred during their stage of the transit by "circular indemnity clauses."²¹⁷

The implementation of the Rotterdam Rules will do away with the freedom of contract such subcontractors enjoy. As a maritime performing party under the Rotterdam regime, terminal operators will be jointly and severally liable to the cargo owner together with the carrier and to the same extent as the carrier for events occurring during the period between the arrival of the goods at the loading port and their departure at the discharge port if they performed their activities with respect to the goods in a port of a Contracting State.²¹⁸ Further, circular indemnity clauses or similar clauses designed to prevent cargo interests from bringing a claim against terminal operators will be void under Article 79(1) of the Rules.²¹⁹ It is apparent that being subject to the Rotterdam regime will not only potentially increase the amount of their liability, but will also present terminal operators as a more attractive target for the cargo interest. It is likely that liability insurers providing cover to such terminal operators²²⁰ will be wary

216. See definition of maritime performing party, *supra* note 42.

217. See *e.g.*, COMBICONBILL 95, cl. 14(3) (stating that "[t]he Merchant undertakes that no claim shall be made against any servant, agent or other persons whose services the Carrier has used in order to perform this Contract and if any claim should nevertheless be made, to indemnify the Carrier against all consequences thereof").

218. See Rotterdam Rules, *supra* note 8, at arts. 19-20.

219. This provision reads:

Unless otherwise provided in this Convention, any term in a contract of carriage is void to the extent that it:

- (a) Directly or indirectly excludes or limits the obligations of the carrier or a maritime performing party under this Convention;
- (b) Directly or indirectly excludes or limits the liability of the carrier or a maritime performing party for breach of an obligation under this Convention; or
- (c) Assigns a benefit of insurance of the goods in favor of the carrier or a person referred to in article 18.

Rotterdam Rules, *supra* note 8, at art. 79(1).

220. Liability insurance for terminal operators can be obtained directly from the commercial market or from the TT Club, which is a mutual association providing liability, property and equipment insurance coverage to marine terminal, stevedores, inland clearance depots, river terminals, container freight stations, container storage depots and airfreight handling terminals (this type of cover is also known as "cargo handling facility cover").

of the prospect of being targeted more often than they are at the moment—resulting in the increased cost of liability insurance.

iii. Freight Forwarders

Freight forwarders play a significant role in the context of multimodal transport operations. It is common for a shipper of goods to appoint a freight forwarder whose main function will be to appoint a carrier (usually a multimodal transport operator) who will make arrangements with subcontractors such as terminal operators, road carriers and ocean carriers for the carriage of the goods. In contemporary practice, freight forwarders appear in multimodal bills of lading as the “shipper” even though they enter into the contract with the carrier in question to the account of their customer,²²¹ thereby protecting themselves against actions that might be brought by carriers for breaches relating to the contract of carriage, such as failing to inform the carrier of the dangerous nature of the goods shipped.

However, under the Rotterdam Rules, the freight forwarders’ legal position will be radically different. If the current practice continues and freight forwarders continue to accept being named as “shipper” in the transport document or electronic record, as a documentary shipper²²² they will be subjected to the obligations and liabilities imposed on the shipper²²³ and will at the same time be entitled to the shipper’s rights and defenses.²²⁴ This will make freight forwarders directly responsible to the carrier. Most importantly, from an insurance perspective, the freight forwarders shall bear unlimited liability for incorrect information provided to the carriers.²²⁵ In theory, as documentary shippers freight forwarders might retain a recourse action against the real shipper. In practice, this right might well prove superficial for various reasons such as insolvency of the real shipper or judicial difficulties in pursuing the real shipper in certain jurisdictions.²²⁶ The logical inference is that insurers will increase liability premiums on freight forwarders as a result of the unlimited liability they would possess as documentary shippers under the Rules.

221. In its most straightforward form, the relationship between a freight forwarder and its customer is one of agency. *See also* David A. Glass, *FREIGHT FORWARDING AND MULTIMODAL TRANSPORT CONTRACTS*, at ch. 2 (LLP 2004).

222. Rotterdam Rules, *supra* note 8, at art. 1.9.

223. *See* Rotterdam Rules, *supra* note 8, at arts. 27-29.

224. Rotterdam Rules, *supra* note 8, at art. 33.

225. Any term in a contract of carriage that directly or indirectly excludes, limits or increases the liability of the documentary shipper for breach of any of its obligations under this Convention will be void by virtue of Article 79.2(b) of the Rotterdam Rules.

226. The real shipper can be the seller or buyer of the goods, depending on the type of the sale contract. In a Free-On-Board (“FOB”) sale, for example, the buyer, who is based in a foreign jurisdiction, will be the real shipper. Bringing a claim against that party might prove problematic under the regime that governs.

B. Other Transaction Costs

Undoubtedly, implementation of the Rotterdam Rules will induce major changes in the shipping industry, not only in legal terms but also financially. Parties will need to update the contracts of carriage, related documents, and underlying contracts (e.g., contracts of sale to conform to the Convention's terms. New transport documents or electronic transport records will need to reflect the requirements of the new Convention. These will specifically need to address, among others: (i) the pure maritime or the "maritime plus" scope of application of the Rotterdam Rules, (ii) the extended scope of the information to be included in the contract particulars (compared to the volume of information required by the Hague regimes),²²⁷ and (iii) the "delivery clause" requirement in Article 47.2. This is a one-off expense the shipping industry will incur, but it is absolutely necessary for the operation of the Convention.

Further, carriers and shippers wishing to derogate from the terms of the Rotterdam Rules under a volume contract cannot benefit from standardized contracts. They will bear the recurrent expenses of individually negotiating their volume contracts and terms that deviate from the Rotterdam Rules, as well as the costs of drafting tailor-made documents to meet the requirements of the Rotterdam Rules.²²⁸ If the contract is not individually negotiated, they will have to produce volume contracts containing a prominent statement that the contract opts-out of the Rotterdam Rules, and they will also have to prominently specify the sections of the volume contract that contain the derogations.²²⁹ Similarly, parties to a volume contract wishing to incorporate an exclusive choice-of-forum or arbitration agreement will incur the additional expenses of either individually negotiating such a clause or customizing the volume contract to include a prominent statement that there is an exclusive jurisdiction or arbitration clause. They will also need to specify the sections of the volume contract that contains that clause.²³⁰ An unfortunate difficulty with such derogations and clauses is that the Rotterdam Rules do not define the term "prominent," despite raising this issue during negotiations.²³¹ Litigation expenses may increase the aforementioned costs until the courts authoritatively resolve this issue.

Moreover, given that third parties, such as consignees or buyers, will only be bound by the derogations from the terms of the Rotterdam Rules included in

227. Compare Rotterdam Rules, *supra* note 8, at art. 36, with the minimal requirements set forth in Hague and Hague-Visby Rules, *supra* notes 2-3, at art. III, r.3.

228. Rotterdam Rules, *supra* note 8, at art. 80.2.

229. *Id.* at arts. 80.2(a)-(b).

230. *Id.* at arts. 67.1, 75.3.

231. UNCITRAL Working Group III, Report of Fifteenth Session, *supra* note 55, at ¶ 84. See also Honka, *Validity of Contractual Terms*, *supra* note 170, at 343 (interpreting the term as "particularly noticeable"); Sturley et al., THE ROTTERDAM RULES, *supra* note 10, at ¶ 13.054 (providing a similar interpretation, i.e., that a prominent statement must be written in a form that attracts the reader's attention, such as in bold or large, capitalized letters).

a volume contract meeting the strict preconditions of Article 80.5, the practices related to the underlying contracts, such as contracts of sale, will need to be revised in order to correlate with the Rotterdam Rules. For instance, a CIF seller or shipper may wish to enter into a volume contract that opts-out of the Rotterdam Rules while binding the buyer in the process. If so, it will bear the expense of ensuring that it or the carrier provides information to the CIF buyer prominently stating that the volume contract deviates from the Convention. It will also bear the expense of securing the buyer's express consent.²³²

The new regime will likely provoke increased transaction costs. Whether the recurrent transaction costs would be such that the efficiency expected of the introduction of the new rules will be eroded remains to be seen.

VI. CONCLUSION

The analysis carried out in this Article demonstrates that a number of significant benefits will emerge, especially in terms of modernizing the rules governing international contracts, should the Rotterdam Rules gain international recognition. It is also undeniable that the Rules would enhance certainty in international trade by establishing one regime that applies to "wet multimodal" contracts of carriage and defining rights and obligations of carriers, shippers and consignees in a clear fashion under a contract of carriage, and by making obscure doctrines such as "quasi-deviation" and "fair opportunity" redundant. Further, a more balanced liability regime, which extends the carrier's seaworthiness obligation and eliminates the "navigational error" defense, will assist in developing international trade in an equal manner by affording greater protection to cargo interests from developing countries.

This is not to suggest that the Rotterdam Rules will emerge unburdened by any difficulties. The Rules contain several provisions, particularly regarding the scope of application and some of the liability provisions, which are rather vague and likely to generate a certain degree of ambiguity, contrary to their stated objective of achieving legal certainty. In similar fashion, the conflict provisions of the Rotterdam Rules are flawed, failing to identify how potential conflicts between the Rules and other international conventions, such as CMR, should be resolved. It is also doubtful whether harmonization can be achieved given that provisions on jurisdiction and arbitration are not mandatory, allowing member states to opt-out of this section of the Rules. There are legitimate concerns in the sector that the carriers might exploit cargo interests by making use of volume contracts despite the safeguards that the Rules have attempted to establish.²³³ It

232. Rotterdam Rules, *supra* note 8, at arts. 80.5(a)-(b).

233. See, e.g., European Shippers' Council, *View of the European Shippers' Council on the Convention on Contracts for the International Carrying of Goods Wholly or Partly by Sea also known as the 'Rotterdam Rules'*, *supra* note 12 (discussing concerns).

is also a serious possibility that the introduction of the Rules will lead to an increase in transaction costs, while a corresponding reduction in the cost of insurance is more doubtful. This Article submits, however, that the implementation of the Rules might lead to an increase in the liability of maritime performing parties such as terminal handlers, multimodal transport operators and freight forwarders, and any such increase might lead to irrational purchase of liability insurance, thereby increasing the cost of international carriage of goods by sea.

Where does this leave states currently considering whether or not to ratify the Rules? Although the answer is not easy, ultimately, states will have to assess the advantages and disadvantages of acceding to this new international regime designed for international carriage of goods by sea in the new millennium, based on their national priorities. This Article takes the stance that some of the objectives identified in the Preamble of the Rules have been realized to an extent. Whether this will be deemed to be adequate by the majority of the international community remains to be seen. In the coming months, the position taken by the major shipping nations on the Rules will be critical in determining the future of the new regime. So far, only the United States has stated that it intends to ratify the Rules.²³⁴ Canada has openly declared its opposition.²³⁵ China has not issued any official statement. The United Kingdom has established a Consultative Committee, which, in consultation with the industry, is examining the possibility of acceding to the Convention. Thus far only Spain has ratified the Rules.

Thus, the Rotterdam Rules are unlikely to gain sufficient international recognition to replace the Hague-Visby regime in the immediate short-term. The nightmare scenario is that the Rules enter into force by attracting the minimum number of ratifications required (i.e., twenty) without securing the endorsement of major shipping nations. This would inevitably lead to further diffusion of the sea transport laws, adding another regime to the complex array of the international conventions that currently regulate sea carriage. While a distinct possibility, this outcome hopefully can be avoided.

234. See, e.g., Mary Helen Carlson, *U.S. Participation in Private International Law Negotiations: Why the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea is Important to the United States*, 44 *TEX. INT'L L.J.* 269, 272-73 (2009).

235. See Notice to Industry on the Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the "Rotterdam Rules") (Can.), available at http://www.mcgill.ca/files/maritimelaw/Notice_to_industry_Rotterdam_Rules.pdf (last visited Sept. 1, 2011).

2012

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Rivka Weill

Recommended Citation

Rivka Weill, *Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care*, 30 BERKELEY J. INT'L LAW. 349 (2012).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol30/iss2/3>

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Hybrid Constitutionalism: The Israeli Case for Judicial Review and Why We Should Care

By
Rivka Weill*

I. INTRODUCTION

Israel experienced a constitutional revolution in the 1990s.¹ In 1992, the Knesset, the Israeli Parliament, enacted two Basic Laws dealing with individual rights: Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation.² They were enacted with the sparse presence and slim support of

* Assistant Professor, Radzyner School of Law, IDC (Herzliya). J.S.D. Yale Law School. I thank Bruce Ackerman, Aharon Barak, Daphne Barak-Erez, Avihayi Dorfman, David Enoch, Alon Harel, Assaf Jacob, Arthur Jacobson, Roz Myers, Mike Seidman, Frederick Schauer, Yoram Shachar, Mark Tushnet, Adrian Vermeule and participants at the international conference on Judicial Review held at Hebrew University of Jerusalem in May 2009 and the Symposium on Constitutional Agendas held at IDC, Herzliya in December 2010 for their comments on earlier drafts of this Article. This Article is part of a larger project titled “Sui Generis? The Hybrid Israeli Constitutional Experience” available on: www.ssrn.com (May 2009). The first part of the project, which deals with Israel’s founding era (1948-1992/5), has been expanded in Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L. Q. 457 (2012) [hereinafter Weill, *Reconciling*]. The second part of the project, which deals with Israel’s second and current era of constitutionalism, has been expanded and deepened in this article. The author translated all Hebrew sources and citations unless noted otherwise.

1. Barak, more than any other speaker, is identified with coining the term “constitutional revolution” to describe the enactment of the 1992 Basic Laws. Aharon Barak, *The Constitutional Revolution: Protected Human Rights*, 1 L. & GOV’T 9, 9-13 (1992). Israel has enjoyed a substantive constitution since its founding, including protection for individual rights through common-law methods. It even had an *interpretive* constitution, under which the courts created, through common-law methods, a requirement that statutes would be interpreted to the extent possible in accordance with individual rights. This interpretive requirement meant that courts at times abandoned traditional methods of interpretation in order to protect individual rights. That is, even in its founding era, Israel serves as an example of weak-form constitutionalism. See Rivka Weill, *Reconciling Parliamentary Sovereignty and Judicial Review: On the Theoretical and Historical Origins of the Israeli Legislative Override Power*, 39 HASTINGS CONST. L. Q. 457 (2012) [hereinafter Weill, *Reconciling*].

2. Though Israel enacted Basic Laws since the 1950s, prior to 1992, Basic Laws dealt only

Members of the Knesset (MKs).³ But in the 1995 *United Mizrahi Bank* decision, the Israeli Supreme Court seized upon this opportunity to declare not only the existence of a *formal* Constitution in the form of Basic Laws, but also the resulting Court power of judicial review over primary legislation.⁴

Since then, there has been an ongoing vehement debate in Israel over the existence of a formal Israeli Constitution (including the question of whether a Constitution is even desirable).⁵ Thus, scholars and citizens have witnessed

with the structure of government and had at most a procedural entrenchment provision in them. The 1992 Basic Laws included provisions for substantive, not just procedural, entrenchment. That is, they included a “limitations” clause. It was also the first time that individual rights were provided for in the Basic Laws. Weill, *Reconciling*, *supra* note 1, 467-68. By substantive entrenchment, I mean that they set substantive criteria that infringing statutes must fulfill. The 1992 Basic Laws require any statute that infringes upon their provisions to pass muster under the following four-part cumulative substantive test: (1) The conflicting provision must be in a statute or authorized by a statute; (2) the infringement must be compatible with the values of a Jewish and democratic State; (3) it must be done for a proper purpose; and (4) it must be proportional. Basic Law: Human Dignity and Liberty, 5752, SH No. 1391 p. 150, § 8 (Isr.); Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 4 (Isr.) (Basic Law: Freedom of Occupation originally enacted in 1992, replaced in 1994). By procedural entrenchment, I mean that some Basic Laws set a special amendment process, usually requiring the affirmative consent of a specified supermajority of Members of the Knesset (MKs), to amend them.

3. Only a fraction of the 120 MKs actually voted for their enactment. Posner accordingly wrote that “only one-quarter of the Knesset’s members voted for those laws.” Richard A. Posner, *Enlightened Despot*, THE NEW REPUBLIC, Apr. 23, 2007, at 53; *cf.* RICHARD A. POSNER, HOW JUDGES THINK 362-68 (2008) (for a somewhat softer criticism). Basic Law: Freedom of Occupation passed first reading with the vote of 21 to 16, and the final reading with the support of 23 MKs and none against. Basic Law: Human Dignity and Liberty passed first reading with the vote of 40 to 12, and the final reading with the support of 32 MKs and 21 against. 2 AMNON RUBINSTEIN & BARAK MEDINA, CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 918 (5th ed. 1996) [hereinafter CONSTITUTIONAL LAW OF ISRAEL (5th ed.)]

4. CA 6821/93 *United Mizrahi Bank Ltd. v. Migdal Collective Vill.*, 49 (4) PD 221 [1995] (Isr.). It was partially translated in 31 ISR. L. REV. 764 (1997); *see also* full translation at 1995-2 ISR. L. REPORTS 1, *available at* http://elyon1.court.gov.il/files_eng/93/210/068/z01/93068210.z01.pdf. By formal Constitution, I mean a Constitution that enjoys the following three characteristics: identification, supremacy, and entrenchment. Identification means that it is relatively easy to identify the various parts of the Constitution. There is a commonly accepted document or set of documents that citizens and elites alike refer to as the country’s Constitution. Supremacy means that the legal system includes a hierarchy that defines the Constitution as supreme over regular law. Thus, a statute should not infringe on a constitutional provision, and, if it does, the courts in many countries are authorized to exercise judicial review to protect the supremacy of the Constitution. Entrenchment means that the constitutional amendment process is more arduous than is the process of amendment of regular law. Obviously, different countries offer a spectrum of these characteristics and the fulfillment of the requirements is often a matter of degree rather than of kind. *Cf.* Ruth Gavison, *The Constitutional Revolution--A Reality or a Self-Fulfilling Prophecy*, 28 MISHPATIM [LAWS] 21, 34-37 (1997). Constitution with capital C is used throughout this Article to describe a formal Constitution as distinguished from a material one.

5. *See e.g.*, ROBERT H. BORK, COERCING VIRTUE: THE WORLDWIDE RULE OF JUDGES 111-34 (2003); RAN HIRSCHL, TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM 50-74 (2004); Gavison, *The Constitutional Revolution*, *supra* note 4; Menachem Hofnung, *The Unintended Consequences of the Unplanned Legislative Reform – Constitutional Politics in Israel*, 44 AM. J. COMP. L. 585, 594, 601 (1996); Eli M. Salzberger, *The Constituent Assembly in Israel*, 3 L. & GOV’T 679 (1996); Moshe Landau, *The Supreme Court as*

bizarre events over the last sixteen years in which the President of the Supreme Court discussed the details of Israel's formal Constitution, while the Chair of the Knesset, the Minister of Justice, or the head of the Israeli Bar Association denied its very existence during the same discussion.⁶ This debate continues today.⁷

This Article argues that commentators and politicians focus on the wrong question. Rather than struggle with the existence—or lack thereof—of a formal Israeli Constitution, the polity should debate what type of formal Constitution Israel is developing. The either/or approach—influenced by US *Marbury*⁸ rhetoric, which established the foundations for the exercise of judicial review over primary legislation in the United States—is not compatible with Israel's historical, political, and societal conditions, as elaborated below. Yet Israeli constitutional discourse has been too affected by the American experience.

Among those who do believe that Israel enjoys a formal Constitution, the consensus view seems to be that its constitutional development is best explained⁹ by the Constituent Assembly (or Authority) theory, as articulated by

Constitution Maker for Israel, 3 L. & GOV'T 697 (1996); Joshua Segev, *Who Needs a Constitution? In Defense of the Non-Decision Constitution-Making Tactic in Israel*, 70 ALB. L. REV. 409 (2007); MENACHEM MAUTNER, *LAW & THE CULTURE OF ISRAEL* 175-80 (2011).

6. Thus, in various settings former President Barak spoke of the contents of the formal Constitution while Knesset Chairman Reuven Rivlin or Justice Ministers Yossi Beilin, Tzipi Livni and Daniel Friedmann or Israeli Bar Head Hotter-Yishai denied the very existence of a Constitution. See, e.g., *Justice Minister Bielin is not So Sure There is Democracy in Israel*, GLOBES (July 10, 1999), available at <http://www.globes.co.il/news/article.aspx?did=172483> (“Yesterday, in the grand opening of 2000 judicial year, it turned out that Israel is the only democracy in the world where the Justice Minister and the President of the Supreme Court are holding opposing opinions on the question whether there exists an Israeli Constitution.”). President's House Conference: Israel's Democracy in the Trial of the Hour (22/5/2003), available at http://www.idi.org.il/PublicationsCatalog/Documents/BOOK_7042/2003הדמוקרטיההישראליתבמבחןהשנההשנייה2003.pdf (The Israeli Democracy Institute) (documenting the dispute between Knesset Chairman Rivlin and President Barak). Even former President Shamgar expressed his opinion, in a conference held by the Israeli Association of Public Law in November 2008, that Israel has no formal Constitution. By that, he most likely meant to lament the fact that it is incomplete since he recognized the existence of an Israeli formal Constitution in *United Mizrahi Bank*. See *infra* Part II. In fact, to this very day, the Knesset's official website states that “unlike many other countries in the world, Israel has no Constitution.” *The Knesset as a Constitutive Authority: Constitution and Basic laws*, The Knesset, http://www.knesset.gov.il/description/heb/heb_mimshal_hoka.htm (last visited March 15, 2012).

7. See e.g. Caroline B. Glick, “Democracy Strikes Back” JERUSALEM POST, December 8, 2011, <http://www.jpost.com/Opinion/Columnists/Article.aspx?id=248747> (last visited March 15, 2012).

8. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Chief Justice Marshall wrote that between these alternatives there was no middle ground. Either the Constitution was supreme and thus no regular statute may contradict it, or a Constitution was a futile attempt on the part of the People to limit the legislature. *Id.* at 177.

9. By “best explained,” I mean in Dworkian terms. See RONALD DWORKIN, *LAW'S EMPIRE* 225-275 (1986); RONALD M. DWORKIN, *A BILL OF RIGHTS FOR BRITAIN* (1990).

President Barak in *United Mizrahi Bank*.¹⁰ Scholars adhere to this view because they believe that this theory is the one adopted by the Israeli Supreme Court.¹¹ In contrast, this Article suggests that Constituent Authority is only one of four possible theories that explain Israel's constitutional development, each with its own strengths and weaknesses, and each of which has some grounding in judicial decisions. This Article revives and expands the debate presented in *United Mizrahi Bank* regarding the theoretical foundations of the Israeli Constitution,¹² and it rejects the consensus of legal academia that the *United Mizrahi Bank* debate is already obsolete since the Constituent Authority theory has prevailed in the Court.

More importantly, this Article asserts that this debate is not merely theoretical, but rather has practical implications for Israel's present and future constitutional development. The theory one ascribes to Israel's formal Constitution determines how present and future constitutional debates will be resolved. For example, this Article explores the way the theories differ in how they will affect such fundamental matters such as the legitimacy of Israel's use of referenda to decide territorial concessions, the effectiveness of legislative self-entrenchment provisions found in regular statutes, the implications of using "notwithstanding" language to overcome Basic Laws,¹³ and the "unconstitutional constitutional amendment" quandary.¹⁴

Because of its unusual path to a formal Constitution, Israel's development presents a fascinating case study for comparative constitutional law. Israel is unique in that it adopted a formal Constitution, despite its tradition of parliamentary sovereignty, by utilizing an evolutionary process nurtured by, the

10. For discussion of the theory, see Part III below.

11. For the prevalence of the theory, see 1 AMNON RUBINSTEIN & BARAK MEDINA, THE CONSTITUTIONAL LAW OF THE STATE OF ISRAEL 60 (6th ed. 2005) [hereinafter CONSTITUTIONAL LAW OF ISRAEL (6th ed.)] (writing that the Constituent Authority theory is the law applicable today); Yoav Dotan, *Constitution to Israel?—The Constitutional Dialog After "The Constitutional Revolution"*, 28 MISHPATIM 149, 173 (1997) (writing that Barak's opinion enjoyed majority support in *United Mizrahi Bank*); Ruth Gavison, "A Constitutional Revolution?" in TOWARDS A NEW EUROPEAN IUS COMMUNE 517, 517 (A. Gambaro & A.M. Rabello eds., 1999) ("Naturally, [Barak's] analysis and interpretation are likely to become the law and the accepted approach to these matters.").

12. In *United Mizrahi Bank*, of a nine-member Court, three Justices (Dov Levin, Eliahu Matza, and Itzhak Zamir) concurred with Barak's constituent authority theory. Three Justices (Zvi Tal, Eliezer Goldberg, and Gabriel Bach) were undecided about which of the two theories, Shamgar's parliamentary sovereignty or Barak's constituent authority, was the correct one. Thus, there was no majority opinion in favor of either theory, only a plurality opinion in favor of the latter. Justice Cheshin dissented, writing that Israel lacks a formal Constitution. See *United Mizrahi Bank*, *supra* note 4.

13. The "notwithstanding" mechanism enables the legislature to override the Constitution (or the court's interpretation of it) for a defined period. See AHARON BARAK, PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS 215–21 (2010).

14. For definition and discussion of the "unconstitutional constitutional amendment" doctrine, see Parts III.C. and V below.

Israeli Supreme Court, an unelected body. The debates related to this process may resonate in other countries contemplating these same issues, including the “unconstitutional constitutional amendment” doctrine, the validity of legislative self-entrenchment, and the uses and misuses of “notwithstanding” language.

In the following Parts, this Article elaborates on the four possible theories to explain Israel’s constitutional development:

(1) The monistic theory of parliamentary sovereignty under which both constitutional and regular laws are enacted via the same legislative process. As sovereign, the legislature may decide to entrench some of its enactments, thus enabling the adoption of a formal Constitution.¹⁵

(2) The dualistic theory of popular sovereignty under which the adoption of a Constitution is the result of the enactment of a Constituent Assembly (or Authority) or other equivalent mechanisms that guarantee that the People express their broad, deep and decisive consent to the document and any amendment thereof. Under popular sovereignty, the People should decide the most important constitutional decisions in the life of the nation. In contrast, the People’s representatives should make regular daily government decisions.¹⁶

(3) The “manner and form” theory under which the sovereign legislature may define in legislation how to enact statutes. Once defined, the legislature must act according to the predefined process for its enactments to be considered

15. By “monist,” I mean a constitutional system that has only one-tier enactment. Both constitutional and regular laws are enacted via the same legislative process. I follow the terminology of Ackerman in this regard. See BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS*, 3-33 (1991) [hereinafter ACKERMAN, *FOUNDATIONS*]; ALBERT V. DICEY, *INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION* 39 (8th ed. 1915). For theoretical developments in the twentieth century relaxing these requirements, see Part II below. See also H.L.A. HART, *THE CONCEPT OF LAW* 74, 149 (2d ed. 1994). Parliamentary sovereignty has traditionally been understood to require three conditions: that parliament may enact any statute except one restricting its successors, that constitutional law is on par with regular law, and no judicial review power over primary legislation is granted to the courts.

16. By “dualist,” I mean a constitutional system that has a dual-tier enactment. It distinguishes between the enactment of regular law by the legislature and the enactment of constitutional law by the People. I use People with capital P to express the instances in which the People are involved in a dualist constitutional moment as further elaborated in Part III below. I follow Ackerman’s terminology in this regard. See ACKERMAN, *FOUNDATIONS*, *supra* note 15, at 3-33. For American perceptions of popular sovereignty, see BERNARD BAILYN, *THE IDEOLOGICAL ORIGINS OF THE AMERICAN REVOLUTION* 160-229 (1992); ACKERMAN, *FOUNDATIONS*, *supra* note 15; BRUCE ACKERMAN: *WE THE PEOPLE: TRANSFORMATIONS* (1998) [hereinafter ACKERMAN, *TRANSFORMATIONS*]; Akhil Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988). For a similar approach described in French constitutional theory, see Jeremy Waldron, *Judicial Power and Popular Sovereignty*, in *MARBURY VERSUS MADISON: DOCUMENTS AND COMMENTARY* 181-202 (Mark Graber & Michael Perhac, eds., 2002) (primarily discussing Sieyes’ theory). For a similar theory arising from British constitutional thinkers and political actors of the nineteenth and early twentieth century, see Rivka Weill, *Evolution vs. Revolution: Dueling Models of Dualism*, 54 AM. J. COMP. L. 429 (2006) [hereinafter Weill, *Evolution*]. For European attitudes, see REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY (David Butler & Austin Ranney, eds., 1994).

“law.”¹⁷

(4) The foundationalist theory under which certain values and rights are so fundamental in a given constitutional system as to be beyond the authority of the legislature or even of the body amending the Constitution to change. The Constitution defines these values and rights as fundamental or they become fundamental as a result of constitutional history.¹⁸

A different strand of this foundationalist theory is common-law constitutionalism, whereby certain values and rights become too fundamental for even the People or the original Constituent Assembly to alter. The courts guard these rights and values. In the absence of a formal Constitution, or even regardless of the Constitution, these rights can retain their special status.¹⁹

Thus, two of the theories that may explain the Israeli constitutional development derive from parliamentary sovereignty traditions (legislative self-entrenchment and “manner and form”); one is grounded in popular sovereignty traditions (Constituent Authority); and one is based on “common-law constitutionalism” (“foundationalism”).

Each Part of this Article focuses on one of these different theoretical frameworks and how it is applicable to the Israeli constitutional context. This Article presents each in turn, explaining its strengths, weaknesses, and implications for the present and future. Each theory is measured against the following criteria: (1) its suitability to the country’s legal and constitutional history; (2) its corresponding process of constitutional enactment; (3) the

17. See e.g. SIR W. IVOR JENNINGS, *THE LAW AND THE CONSTITUTION* 139-45 (3rd ed. 1943); GEOFFREY MARSHALL, *CONSTITUTIONAL THEORY* 41-53 (1971); Hamish R. Gray, *The Sovereignty of Parliament Today*, 10 U. TORONTO L.J. 54 (1953-54); Robin Elliot, *Rethinking Manner and Form: From Parliamentary Sovereignty to Constitutional Values*, 29 OSGOODE HALL L. J. 215 (1991). For further elaboration, see Part IV below.

18. See *Kesavananda Bharati v. State of Kerala*, A.I.R. 1973 S.C. 1461 (India); Article 1: Human Dignity [Basic Law], May 23, 1949 (Ger.); Article 20: Basic Institutional Principles; Defense of the Constitutional Order [Basic Law], May 23, 1949 (Ger.); Article 79(3): Amendment of the Basic Law [Basic Law], May 23, 1949 (Ger.); DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY*, 48, 542 (2nd ed. 1997); Gary J. Jacobsohn, *An Unconstitutional Constitution? A Comparative Perspective*, 4 INT’L J. CONST. L. 460 (2006). See also Sam Brooke, *Constitution-Making and Immutable Principles* 52-78 (2005) (M.A. in Law and Diplomacy Thesis, The Fletcher School, Tufts University), <http://fletcher.tufts.edu/research/2005/Brooke3.pdf> (last visited Jul. 13, 2009) (discussing various constitutional systems that have decided to treat certain provisions within the Constitution as not amendable by explicitly granting them absolute entrenchment. When done, such absolute entrenchment is granted to the democratic or republican nature of the State and to certain fundamental rights.) For support of such a theory in the US, see for example Walter F. Murphy, *Merlin’s Memory: The Past and Future Imperfect of the Once and Future Polity*, in *RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT* 163 (1995) [hereinafter *RESPONDING TO IMPERFECTION*].

19. See generally T.R.S. ALLAN, *CONSTITUTIONAL JUSTICE: A LIBERAL THEORY OF THE RULE OF LAW* (2001); Paul Craig, *Constitutional Foundations: The Rule of Law and Supremacy*, PUB. L. 92 (2003); David Jenkins, *Common Law Declarations of Unconstitutionality*, 7 INT’L J. CONST. L. 183 (2009). For further discussion see Part V below.

democratic legitimacy it offers; (4) the type of judicial review that stems from it; and (5) the appropriateness of the division of labor between the courts and the representatives that it fosters. The underlying assumption of the discussion is that the type of process used to adopt the formal Constitution determines the Constitution's character.

This Article concludes that Israel's Constitution is a hybrid Constitution of the Commonwealth model type, with mixed features from the various aforementioned theories. It is thus the "missing case" in international discussions of the Commonwealth model.²⁰ In addition, this Article also suggests that any of the various plausible theories explaining Israel's development may become weaker or stronger as a result of future legislative, judicial, or executive action. This adds import to this Article's attempt to highlight and understand the importance of these constitutional theories to each branch of government.²¹ This Article further argues that the potential for divergence in Israel's constitutional development reflects the inherently unstable nature of intermediate constitutional models, which lie along the spectrum between supreme Constitution and supreme legislature.

The Israeli case study has important implications for comparative constitutional law. Gardbaum, Hiebert, and Tushnet described "weak-form" or intermediate constitutionalism as dependent upon the specific constitutional provisions found in the various countries sharing the Commonwealth model.²²

20. This is not to argue that Israel belonged to the Commonwealth, only that its type of constitutionalism fits the Commonwealth model. See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008); Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (1996) [hereinafter Gardbaum, *The New Commonwealth Model*]; Janet L. Hiebert, *Parliamentary Bills of Rights: An Alternative Model?*, 69 MOD. L. REV. 7 (2006); Stephen Gardbaum, *Reassessing the New Commonwealth Model of Constitutionalism*, 8 INT'L J. CONST. L. 167 (2010) [hereinafter, Gardbaum, *Reassessing*]. The focus of this emerging area of study is the intermediate model between supreme Constitution and supreme legislature found in Commonwealth countries such as Canada, the U.K., New Zealand, and lately even to some extent Australia at the territorial and state levels. None of these writers mention the Israeli case. *But see* GIDEON SAPIR, *CONSTITUTIONAL REVOLUTION IN ISRAEL* (2010) (Hebrew), who discusses the commonwealth model in the Israeli context as a model for future Israeli development by repeating the discussions already offered by Gardbaum, Hiebert and Tushnet on Britain, New Zealand and Canada. In his book, Sapir offers three possible models—a Constitution as a gag rule, a Constitution as a dialogue, and a Constitution as a guardian of basic values—for Israel's future development. These models are distinguished from each other based on the underlying reason for the constitutional formation. In contrast, this article suggests that it is not the reason for constitutional formation, but rather it is the process of its adoption that determines the nature of the Constitution that results. But under all models discussed in my article there is a dialogue between courts and the other branches of government. It only takes a different nature depending on the model.

21. Kelsen and Hart have taught us that we may learn to identify the ultimate rule of recognition, or the "Grundnorm," by observing what courts, officials, and the People treat as the ultimate rule of recognition. HELEN KELSEN, *PURE THEORY OF LAW* 193-95 (Hans Knight trans., Univ. of Cal. Press 1967). HART, *supra* note 15, at 105-07. Thus, the practice of the various branches of government may affect and define the nature of the constitutional system.

22. See *supra* note 20.

These scholars suggest that Canada pioneered this model with its constitution, or Charter, which exemplifies an intermediate model because of, *inter alia*, its famous “notwithstanding clause,” which allows both the provincial and federal legislatures to legislate by regular majorities, notwithstanding the provisions of the Charter.²³ The UK offers another prominent example because, *inter alia*, only the superior courts may issue declarations of incompatibility, which the legislature may then disregard.²⁴ While these scholars deduce the nature of the Constitution in a given country from constitutional provisions, this Article argues that the nature of the Constitution and the strength or weakness of judicial review correlate strongly with the method used for constitution-making. Existing literature neglects this issue. But the Israeli case—thus far omitted from the international literature on the Commonwealth model—exemplifies how constitution-making methodology is relevant to determining the nature of a Constitution and its accompanying judicial review mechanism.

II.

LEGISLATIVE SELF-ENTRENCHMENT OR SELF-EMBRACING SOVEREIGNTY

One way to explain Israel’s constitutional development is through the legislative self-entrenchment theory (also titled self-embracing sovereignty). This theory best explains pre-*United Mizrahi Bank* constitutional development. It also aligns with British constitutional development since the 1970s, as well as that of some Eastern-European countries since the 1990s as elaborated below.²⁵ Though the theory has been neglected in Israeli academic writings and treated as obsolete, it has great explanatory force even today. But it may result in a weak form of constitutionalism.

A. Presenting the Theory

President Shamgar in *United Mizrahi Bank* articulated the legislative self-entrenchment theory of Israel’s constitutional development.²⁶ Under this theory, the Knesset as a sovereign body may entrench some of its own enactments, thereby creating a Constitution. Under this theory, entrenchment equals supremacy, which equals the creation of a formal Constitution.

This theory follows the influential legal philosopher H.L.A. Hart in arguing that two concepts of a sovereign body are possible: one that cannot restrict itself by entrenching enactments and one that can. But once restricted in this way, the

23. Section 33 of the Canadian Charter of Rights and Freedoms, Part I of the Constitution Act, 1982, *being* Schedule B to the Canada Act, 1982, c. 11 (U.K.).

24. Human Rights Act, 1998, c. 42 (U.K.). The superior courts that are empowered to issue declarations of incompatibility are enumerated in section 4 of the Human Rights Act, 1998.

25. *See infra* Part II.B.

26. *United Mizrahi Bank*, *supra* note 4, at 288-94 (Shamgar President).

body is no longer sovereign with respect to the entrenched issue.²⁷ Under the theory of legislative self-entrenchment, Israel chose this second concept of sovereignty.

The theory of legislative self-entrenchment does not provide special legitimacy to the Constitution beyond the legitimacy of the liminal decision of a body to entrench itself. Under this theory, the entrenching body is the body entrenched, and the decision to self-entrench is made in the same way as any other decision. That is, there are no preconditions to exercising entrenchment authority, such as requiring symmetry in the size of the majority entrenching and being entrenched. There are also no inherent limits to entrenchment power from within the theory. Rather, it is considered part of the sovereignty of the entrenching body to entrench itself. The entrenchment may be procedural (requiring a special process to amend the entrenched provision) or substantive (requiring a substantive limitations test).²⁸

Legislative self-entrenchment offers numerous unique advantages: entrenchment provisions may contribute to constitutional and legislative stability. They allow the legislature to pre-commit to a certain policy, avoiding *ex post* conflicts that might arise from individual political considerations. Such provisions allow the legislature to credibly signal its commitment to a certain policy, thus reducing *ex ante* the costs of legislation. They remove certain contested topics from the public agenda and thus enable the legislature to concentrate on other imperatives. They guarantee public deliberation before the entrenched provision is amended. They also provide a better decision-making rule than a simple majority for protecting minority rights from majority abuse.²⁹

This theory of legislative self-entrenchment has its roots in parliamentary sovereignty traditions. But it is a deviation from the classic Blackstonian and Diceyan views of sovereignty of the eighteenth and nineteenth centuries, under which the sovereign legislature can enact almost anything provided that its enactments do not bind its successors, who would then no longer be sovereign. Under the classic view of sovereignty, no judicial review over primary legislation is possible because no body, including the courts, may be superior to and declare invalid the acts of the sovereign legislature. Thus, no true distinction between constitutional and regular law is possible, and both are enacted via the same processes.³⁰ This classic monistic theory of sovereignty is one of the main reasons that Britain still lacks a formal supreme Constitution.³¹

27. HART, *supra* note 15, at 149.

28. For Israel's standard limitations test, *see supra* note 2.

29. Eric A. Posner & Adrian Vermeule, *Legislative Entrenchment: A Reappraisal*, 111 YALE L.J. 1665, 1670-1673 (2002) (elaborating these advantages with regard to legislative self-entrenchment in a constitutional system that enjoys a supreme Constitution).

30. DICEY, *supra* note 15; 1 W. BLACKSTONE COMMENTARIES 91.

31. In fact, in the U.K. Parliament's official site, parliamentary sovereignty is described as "the most important part of the UK constitution." *See Parliamentary sovereignty*, U.K.

B. Advantages of the Theory

Legislative self-entrenchment offers an attractive justification for the legitimacy of judicial review because when the courts exercise judicial review they may portray themselves as merely obeying the Knesset's will to entrench. Support for this theory can be found in Israel's constitutional history.³² It is also the theory that best explains pre-*United Mizrahi Bank* judicial review decisions. Prior to *United Mizrahi Bank*, in all four decisions in which the Court exercised judicial review, it did so to protect an entrenched provision.³³ This theory also aligns with Israel's partial historical roots in the British Mandate,³⁴ which led to linking Israel's nascent judiciary to the British legal system during the State's first decades.³⁵ As detailed in Part III below, it is also compatible with the process utilized to enact the Basic Laws in Israel. The Knesset enacted the Basic

PARLIAMENT, <http://www.parliament.uk/about/how/sovereignty/> (last visited on January 2, 2012).

32. Melville B. Nimmer, *The Uses of Judicial Review in Israel's Quest for a Constitution*, 70 COLUM. L. REV. 1217 (1970); Weill, *Reconciling*, *supra* note 1, at 476-86.

33. Prior to *United Mizrahi Bank*, judicial review over primary legislation occurred four times, each with regard to section 4 of Basic Law: the Knesset, which includes an entrenched provision. The section states: "The Knesset shall be elected by general, national, direct, equal, secret, and proportional elections, in accordance with the Knesset Election Law; this section shall not be varied save by a majority of Members of the Knesset." See *Basic Laws: The Knesset – 1958*, KNESSET, http://www.knesset.gov.il/laws/special/eng/basic2_eng.htm (last visited March 17, 2012); H CJ 98/69 Bergman v. Minister of Finance and State Comptroller, 23 (1) PD 693 [1969] (Isr.) (an English translation is available in 4 ISR. L.REV. 559 (1969)); H CJ 246/81 Agudat Derech Eretz v. Broadcasting Authority 35(4) PD 1 [1981] (Isr.); H CJ 141/82 Rubinstein MK v. Chairman of the Knesset 37(3) PD 141 [1983] (Isr.); H CJ 172, 142/89 Laor Movement v. Speaker of the Knesset 44(3) PD 529 [1990] (Isr.) [hereinafter *Laor Movement*]. For a comprehensive discussion of Israel's founding era of constitutionalism, see Weill, *Reconciling*, *supra* note 1, especially at 476-501.

34. To avoid legal chaos, the new State adopted (by statute) the law as it existed at the time of the State's founding but with the necessary implied alterations resulting from its establishment. That law included British judicial decisions that served as precedents for the new State. Law and Administration Ordinance, 5708-1948, OG No. 2 p. 9, § 11 (Isr.). See Daniel Friedmann, *Infusion of the Common Law into the Legal System of Israel*, 10 ISR. L. REV. 324 (1975); Aharon Barak, *The Israeli Legal System—Tradition and Culture*, 40 HAPRAKLIT 197, 202-05 (1992); MAUTNER, *supra* note 5, at 35-38. Furthermore, Mapai, the political party that led the Israeli government from 1948 to 1977 almost exclusively, and its leader David Ben-Gurion, were strong advocates of the British legal tradition. Shlomo Aronson, *David Ben-Gurion and the British Constitutional Model*, 3 ISR. STUDIES 193-214 (1998); Michael Mandel, *Democracy and the New Constitutionalism in Israel*, 33 ISR. L. REV. 259, 266-67 (1999). Because of Israel's parliamentary system, Mapai was also the party in control of the majority in the Knesset. Thus, all three branches of government (legislative, executive, and judicial) treated the British legal tradition with veneration and looked to it for guidance during Israel's founding era.

35. In 1956, the primacy of British references reached a peak with 40% of references in Israeli Supreme Court decisions being of British origin. This percentage declined gradually and consistently, with no particular identifiable reason according to Y. Shachar, R. Harris & M. Gross, *Citation Practices of the Supreme Court, Quantitative Analyses*, 27 MISHPATIM 119, 152, 157-59 (1996). Of the Supreme Court Justices serving from 1948-80, 20% were educated in England, 20% were educated in Israel and 32% were educated in Germany. See ELYAKIM RUBINSTEIN, JUDGES OF THE LAND 142 (1980). For the ramifications of these demographics, see Fania Oz-Salzberger & Eli Salzberger, *The Secret German Sources of the Israeli Supreme Court*, 3 ISR. STUD. 159, 185 (1998) (arguing that Israel's "German" Supreme Court judges were "Anglophilians").

Laws via the same process as regular laws. The identical process for enacting constitutional and regular laws is a hallmark of parliamentary sovereignty, as discussed above.³⁶

This theory is also compatible with the experience of some European countries. After the fall of the Soviet Union, many Eastern-European countries' legislatures adopted formal supreme constitutions that can be amended via legislative supermajorities. These countries show that legislative self-entrenchment can serve as the vehicle for the creation of formal constitutions.³⁷ The theory is also compatible with British constitutional development since the 1970s. Ever since Britain joined the European Union, British judges have not applied statutes that conflict with the superiority of European law. By Parliament's own enactment via the European Communities Act, parliamentary sovereignty became subject to the higher law of the European Union.³⁸

C. Difficulties with the Self-Entrenchment Theory

The self-entrenchment theory, however, suffers from at least five important conceptual difficulties. Chief among these is the question of whether legislative self-entrenchment can create a supreme formal Constitution.

1. The Self-Entrenchment Theory Equates Entrenchment with Supremacy

The theory erroneously equates entrenchment with supremacy—two very separate mechanisms. An enactment may be entrenched without being supreme and vice versa. It is true that a supreme Constitution is often characterized by amendment provisions that outline a more arduous track for achieving constitutional (as opposed to legislative) change. In that sense, a supreme Constitution may enjoy some degree of entrenchment. However, entrenchment

36. DICEY, *supra* note 15, at 39. *See also supra* note 15. The Israeli legislative process consists of three readings for each bill: The first reading is the one in which the statute is introduced to the Knesset, and a vote takes place on whether to refer the bill to the committee stage. The second reading takes place after the bill emerges from committee stage and, during this reading, a vote takes place on each section separately to allow a vote on objections to particular provisions. The last reading is on the bill as a whole as the content has been defined in the second reading. If it is a bill that has been proposed by a private MK, there is an additional preliminary vote to the three regular readings. 2 CONSTITUTIONAL LAW OF ISRAEL (6th ed.), *supra* note 11, at 733-743.

37. Stephen Holmes & Cass R. Sunstein, *The Politics of Constitutional Revision in Eastern Europe*, in *RESPONDING TO IMPERFECTION*, *supra* note 18, at 275, 280-94; Jon Elster, *Constitution-Making in Eastern Europe: Rebuilding the Boat in the Open Sea*, 71 *PUB. ADMIN.* 169, 187-95 (1993). These Eastern-European constitutions are not exemplary of the popular sovereignty model, since even a requirement for supermajority in the legislature is not enough to guarantee that the populace has consented to constitutional change, as further elaborated in Part III below.

38. *Regina v. Sec'y of State for Transp., ex parte Factortame* (No. 2), [1991] 1 AC 603. Anthony Bradley, *The Sovereignty of Parliament--Form or Substance?*, in *THE CHANGING CONSTITUTION* 26 (Jeffrey Jowell & Dawn Oliver, eds., 6th ed. 2007). The Human Rights Act of 1998 is less relevant for this theory because even the superior courts must apply incompatible statutes. *See* Human Rights Act, 1998, c. 42 (U.K.).

provisions may appear in regular enactments as well, which in fact has happened in Israel,³⁹ the United States,⁴⁰ and elsewhere. Yet no one seriously claims that entrenched *regular* statutes are part of the Israeli formal Constitution. Not only may entrenched provisions appear in regular law, but legal supremacy also may exist even without entrenchment provisions. Thus, supreme constitutions enjoy wide-ranging amendment mechanisms that vary from the requirement of a mere simple legislative majority to the complete inability to amend certain provisions. Moreover, the same Constitution may employ different amendment procedures for different provisions.⁴¹ In fact, most of the provisions in Israel's Basic Laws lack entrenchment protection.⁴² Supremacy deals with the relationship between the Constitution and regular law. It curtails the regular legislature. Entrenchment deals with the relationship between the Constitution and amendments thereof. It curtails the body in charge of amending the Constitution.

2. *This Theory Does Not Easily Align with post-United Mizrahi Bank Constitutional Development*

The theory does not easily align with post-*United Mizrahi Bank* constitutional development, under which the Court also treats un-entrenched Basic Laws as supreme,⁴³ unless one construes the very title "Basic Law" to imply some form of entrenchment. The Knesset cannot infringe upon un-entrenched Basic Laws' provisions dealing with individual rights unless the infringing statute fulfills the four-part cumulative test of constitutional scrutiny (i.e., a limitations clause). While the Basic Laws enacted in 1992 explicitly included these limitations for the first time, the judiciary subsequently read these

39. Thus, for example, the Protection of the Israeli Public Investment in Financial Assets Act, 5744-1984, SH No. 1121 p. 178, § 3 (Isr.), requires an absolute majority of MKs for its amendment to signal to the public that the government would not unilaterally alter the conditions of financial instruments such as state bonds.

40. See Bruce Ackerman et al., *An Open Letter to Congressman Gingrich*, 104 YALE L. J. 1539 (1995); Jed Rubenfeld, *Rights of Passage: Majority Rule in Congress*, 46 DUKE L. J. 73 (1996). For critique, see John O. McGinnis & Michael B. Rappaport, *The Constitutionality of Legislative Supermajority Requirements: A Defense*, 105 YALE L.J. 483 (1995). This controversy arose in the context of *Skaggs v. Carle*, 898 F. Supp. 1 (D.D.C. 1995) *aff'd*, 324 U.S. App. D.C. 87 (1997).

41. See Donald S. Lutz, *Toward a Theory of Constitutional Amendment* in RESPONDING TO IMPERFECTION, *supra* note 18, at 237.

42. In fact, Shamgar was not consistent regarding his own theory. In some places, he asserted that, when there is no entrenchment provision in place, then the Basic Laws are only potentially and not *de facto* supreme. *United Mizrahi Bank*, *supra* note 4, at 271. In other places, he seemed to suggest that after *United Mizrahi Bank*, all Basic Laws should be treated as supreme and be amended by "Basic Laws" alone, regardless of whether they enjoy entrenchment provisions. *Id.* at 299.

43. See e.g., HCJ 212/03 Herut-The National Movement v. Chairman of the Central Elections Commission to the Sixteenth Knesset, 57(1) PD 750 [2003] (Isr.) (treating Basic Law: the Judiciary, which was enacted before the constitutional revolution, as supreme); EA 92/03 Mofaz v. Chairman of the Central Elections Commission to the Sixteenth Knesset, 57(3) PD 793 [2003] (Isr.) (reading a limitations clause into Basic Law: the Knesset, though it lacks an explicit clause to that effect).

limitations into previous Basic Laws as well.⁴⁴

3. *The Theory Creates a Democratic Deficit*

Aside from the well-known logical difficulty of self-reference,⁴⁵ self-entrenchment of the legislature is questionable on democratic grounds. It allows one legislature to bind another without providing democratic legitimacy: Why should the entrenching legislature enjoy more power than its successors by restricting the latter through entrenched provisions? Moreover, entrenchment that results from a supermajority requirement is essentially a grant of veto power to the minority over the majority of legislators. In theory, people choose the legislature to legislate, not to delegate its authority to yesterday's majority or tomorrow's minority, as occurs under common entrenchment.⁴⁶

Further, entrenchment provisions that can only be undone by a supermajority are especially problematic when established by a simple coincidental majority, as is the case with the entrenched provisions of Israel's Basic Laws.⁴⁷ Thus, for example, under the theory of legislative self-entrenchment, by a majority of 2 to 1 or 20 to 18 (a simple coincidental majority), the Knesset may prevent the amendment of certain Basic Laws unless 80 MKs agree to the change. This way, a large majority of 61 to 5 cannot amend the Basic Law. This is true although a supermajority of 80 MKs—the prerequisite for amending the law—may never have existed, not even to enact and entrench the Basic Law.

Entrenchment as described in the previous paragraph thus amounts to an abuse of legislative power by a small coincidental majority seizing the opportunity to prevent its policy from being changed. It thus subverts true

44. *Id.* It is unclear whether the Court will read entrenchment into unentrenched Basic Laws' provisions dealing with the structure of the government. For the four part cumulative test, see *supra* note 2.

45. The logical difficulty with self-reference is that the rule itself serves as the basis for its own legitimacy. In the context of constitutional amendment, it is part of the broader paradox whether omnipotent power can truly limit itself. On the logical difficulty of self-reference, see Alf Ross, *On Self-Reference and a Puzzle in Constitutional Law*, 78 MIND 1 (1969). See also PETER SUBER, *THE PARADOX OF SELF-AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE AND CHANGE* (1990). When the legislature itself, rather than a higher external hierarchy, is the source of the Constitution it is unclear why we should grant more authority to the Constitution than any other later statute enacted by the legislature. While we may claim that self-entrenchment reflects the legislature's will to grant the Constitution special status, we may at the same time assert that the legislature's later breach of the entrenchment shows that it does not want to grant the Constitution special status.

46. "The Legislative cannot transfer the Power of Making Laws to any other hands. For it being but a delegated Power from the People, they, who have it, cannot pass it over to others." JOHN LOCKE, *The Second Treatise, in TWO TREATISES OF GOVERNMENT* § 141 (Peter Laslett ed., 1988). See also Bruce Ackerman et al., *supra* note 40; Julian N. Eule, *Temporal Limits on the Legislative Mandate: Entrenchment and Retroactivity*, 1987 AM. B. FOUND. RES. J. 379. Democracy seems to require that the last will of the legislature prevail over its predecessors' will. Thus, later statutes usually prevail over earlier ones in case of conflict between the two.

47. Weill, *Reconciling*, *supra* note 1, at 475 and note 86.

majority rule.⁴⁸ This kind of legislative self-entrenchment suffers from a serious democratic deficit.⁴⁹ This cautions against majority power abuses that discriminate against minority groups and also against the manipulation of legislative processes to restrain the majority. However, if legislative self-entrenchment occurs in the context of a legislative supermajority—reflecting broad, deep, and decisive support—then its entrenching nature may instead be dualist as elaborated in Part II below. In sum, the legislative self-entrenchment theory creates a democratic deficit by placing no inherent limits on entrenchment power.

4. *This Theory Creates Weak Constitutionalism*

As a practical matter, legislative self-entrenchment may create a weak form of constitutionalism because there is no guarantee that the courts will act in a counter-majoritarian way by granting preference to the past will of the legislature (as manifested in entrenched provisions) over the current legislature's will (as expressed by current legislative breaches of past entrenchment).⁵⁰ Thus, this Article specifically argues that legislative self-entrenchment is a model of weak constitutionalism for reasons that are detailed below.

First, this claim is supported by comparative historical experience. There is a long tradition in the common law world that parliament is sovereign and may enact as it pleases except to bind its successors.⁵¹ Even Hart, who wrote of the theoretical possibility of self-embracing sovereignty, admitted that this sovereignty concept was *de facto* rejected.⁵² This does not mean that parliaments did not try to limit their successors but courts did not enforce those limits on breaching parliaments.⁵³

48. See John O. McGinnis & Michael B. Rappaport, *Symmetric Entrenchment: A Constitutional and Normative Theory*, 89 VA. L. REV. 385 (2003) (arguing for the need to be symmetric in the size of majority adopting and amending entrenched statutes).

49. "A democratic deficit occurs when ostensibly democratic organizations or institutions in fact fall short of fulfilling what are believed to be the principles of democracy." Sanford Levinson, *How the United States Constitution Contributes to the Democratic Deficit in America*, 55 DRAKE L. REV. 859, 860 (2007).

50. See *infra* note 53. For the counter-majoritarian difficulty, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* (2nd ed., 1986).

51. DICEY, *supra* note 15, at 39. See *supra* note 15.

52. HART, *supra* note 15, at 149.

53. See DICEY, *supra* note 15, at 21-25 ("That Parliaments have more than once intended and endeavoured to pass Acts which should tie the hands of their successors is certain, but the endeavour has always ended in failure."); Mark Elliott, *Embracing "Constitutional" Legislation: Towards Fundamental Law?*, 54 N. IR. LEGAL Q. 25 (2003) (explaining the central role courts play in deciding whether to respect entrenchment); Anupam Chander, *Sovereignty, Referenda, and the Entrenchment of a United Kingdom Bill of Rights*, 101 YALE L. J. 457 (1991) (suggesting the use of a referendum to entrench a U.K. bill of rights and explaining why a statutory bill of rights would be inferior); Posner & Vermeule, *supra* note 29, at 1667-68; John C. Roberts & Erwin Chemerinsky, *Entrenchment of Ordinary Legislation: A Reply to Professors Posner and Vermeule*, 91 CALIF. L.

Thus, even recent changes in British constitutional law, such as adherence to the law of the European Union or the Human Rights Act [HRA], are not treated in Britain as beyond Parliament's legislative power to undo by deciding to leave the Union or amend the HRA. Thus, Parliament is able to breach its self-imposed limitations.⁵⁴

Second, the reason why a court may choose not to enforce legislative self-entrenchment provisions on breaching parliaments is that this theory does not sufficiently answer the democratic challenges raised above. On the contrary, the tradition of parliamentary sovereignty grants legitimacy to the judge to rule that the last will of the legislature prevails, even against entrenched past provisions.

Further, this monistic legislative self-entrenchment model leaves the court to battle the breaching legislature instead of involving other governmental bodies in the process of adoption and amendment of constitutions, as is done under the dualist model. Thus, it is difficult for the court to withstand the pressure of the legislature that decides to breach self-entrenched provisions.

Third, even in Israel, where the Court seems to impose self-entrenched provisions on the Knesset, no case has arisen in which the Knesset has decided openly and explicitly to "notwithstanding" entrenched Basic Laws, except with regard to the prohibition on importation of non-kosher meat to Israel.⁵⁵ In that case, the Knesset enacted a statute with a notwithstanding provision and it was done in accordance with Basic Law: Freedom of Occupation, which is the only Basic Law in Israel that explicitly allows for notwithstanding practice.⁵⁶

So far, the Court has enforced the Basic Laws on breaching Knessets. But in all those cases the Knesset believed it was acting according to the demands of the Basic Laws, while the Court ruled otherwise. We thus cannot yet be certain how the Court will treat a Knesset's decision to explicitly breach or notwithstanding the entrenched provisions of the Basic Laws.

To conclude, legislative self-entrenchment may create a weak form of constitutionalism that will not withstand the test of time. This model might collapse again into full parliamentary sovereignty. In fact, this is what happened in Canada with regard to its Bill of Rights Act of 1960. This Act was based on substantive entrenchment of the legislature but failed to achieve strong protection for individual rights.⁵⁷ Only the Canadian Charter, which was

REV. 1773, 1789-95 (2003) (suggesting that US courts will treat the breach of legislative self-entrenchment as non-justiciable).

54. See John Laws, *Law and Democracy*, 1995 PUB. L. 72. Cf. Bradley, *supra* note 38; Gardbaum, *The New Commonwealth Model supra* note 20, at 732-39.

55. For the story of the enactment of this statute, see *infra* Part III.C.

56. Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 8 (Isr.).

57. The Canadian Bill of Rights Act of 1960 was enacted via the same legislative process as any regular federal legislation and included no procedural entrenchment. Ten years after its adoption, the Canadian Supreme Court interpreted the Bill of Rights Act as authorizing it to exercise judicial review and even abolish statutes that cannot be interpreted in accord with the Charter and include no explicit notwithstanding language in them. *Regina v. Drybones*, [1970] 3 S.C.R. 282

adopted as a result of a dualist process, led to strong constitutionalism.⁵⁸

5. *Who is the Sovereign?*

So far, we have examined the possibility that legislative self-entrenchment would be ineffective in the face of a determined breaching legislative body. But if it is effective, then this legislative self-entrenchment theory poses additional challenges. When Hart wrote of the two possible concepts of sovereignty, he also wrote that once the legislature entrenches itself, the legislature is no longer sovereign with regard to the matter entrenched.⁵⁹ This is so, because sovereignty implies supremacy: the lack of a body (such as a Court) that may tell the sovereign legislature that its enactments are not law.⁶⁰

Thus, while legislative self-entrenchment theory assumes that legislative sovereignty and valid entrenchment are not mutually exclusive, if we take this theory to its logical end, then a legislature that successfully establishes a Constitution through self-entrenchment by definition diffuses its sovereignty and unavoidably curtails its own powers. This theory thus illustrates how parliamentary sovereignty destroys itself without defining a clear successor: what new sovereign replaces the legislature? Ultimately, where does responsibility lie when the Constitution is unalterable according to existing rules, but there is broad agreement in the legislative body or the People that it should be changed?⁶¹ The legislative self-entrenchment theory does not provide answers to these challenges.

D. *Relevance to Current Israeli Debates*

While the prevailing assumption in Israeli academia is that the Court has rejected the legislative self-entrenchment theory in favor of the dualist theory,⁶² it is difficult to deny this theory's explanatory force with regard to judicial decisions given before *United Mizrahi Bank*.⁶³ It further aligns with the process

(Can.). But even after this decision there is general agreement among commentators that this Act did not sufficiently succeed in protecting individual rights. See e.g. Gardbaum, *New Commonwealth Model*, *supra* note 20, at 719-21.

58. The Charter was enacted via a special dualist track that received the consent of both the federal and all provincial legislative bodies except for Quebec. 2 PETER W. HOGG, *CONSTITUTIONAL LAW OF CANADA* 15-16, 28-29 (5th ed. 2007). The Charter amendment process requires dualist consent as well. Canada Act, 1982, c.11 (U.K.), containing Constitution Act, 1982, 38, annex B.

59. HART, *supra* note 15, at 149.

60. DICEY, *supra* note 15, at 39. See also *supra* note 15.

61. Thus, for example, a Basic Law may require a supermajority of 80 MKs to amend it and despite repeated majorities of 70 MKs in consecutive elected legislative bodies, there is no mechanism from within the monistic theory that will allow the overcoming of the entrenched provision unless the supermajority of 80 MKs is met. Even a referendum will not serve to break the deadlock under the monistic theory.

62. See *supra* note 11.

63. See *supra* note 33.

through which Basic Laws were enacted in Israel, as discussed in Part III below. It was also the theory offered by President Shamgar in *United Mizrahi Bank* as the best explanation for Israel's constitutional development, and three additional Justices in *United Mizrahi Bank* remained undecided regarding this theory.⁶⁴ Since *United Mizrahi Bank*, the theory has not been explicitly discussed anew by the Court.

Interestingly, this theory not only explains past judicial decisions or current legislative processes but also current judicial decisions. The *Yekutieli* decision, given in 2010,⁶⁵ shows that the Court implicitly treats legislative self-entrenchment theory as a valid thesis upon which to base judicial review. This decision, which incited supportive public demonstrations on equality between the Ultra-Orthodox and secular segments of society,⁶⁶ a very hot topic in Israel, struck down a section in a budget statute.⁶⁷

In the *Yekutieli* decision, the Court struck down a provision that provided money to Ultra-Orthodox Yeshiva students who needed financial support,⁶⁸ primarily because no similar stipend had been granted to students in the higher education system. Why did the Court treat the two populations as requiring equal treatment? The Court learned of the legislature's intent to treat the two as equal from a 1980 statute, which guaranteed income and excluded both Yeshiva and higher-education students from entitlement for support.⁶⁹ Had this been the exclusive basis for the decision, the Court would have probably applied the regular maxim of interpretation and required that the later regular budget statute of 2010 prevail over the previous regular statute of 1980. But the Court found that the duty to treat the two equally also arises from the Budget Principles Statute of 1985, which requires money to be allocated to similar institutions equally.⁷⁰

64. See *supra* note 12.

65. HCJ 4124/00 *Yekutieli v. Minister of Religious Affairs* (Jun. 14, 2010), Nevo Legal Database (by subscription) (Isr.).

66. Isabel Kershner, *Some Israelis Question Benefits for Ultra-Religious*, N.Y. TIMES, Dec. 29, 2010, at A1.

67. Though the Court declared the provision in the budget statute invalid (¶ 51 in President Beinish opinion), it delayed the operation of its decision to the next budget year to allow the elected branches and the Ultra-Orthodox community to prepare for the change.

68. The case dealt with financial support of about 1,000 NIS for families with at least five members. There were about 10,000 families in the Ultra-Orthodox community who qualified for this stipend. See *Yekutieli*, *supra* note 65, at ¶¶ 1, 4 to President Beinish opinion.

69. In fact, the statute itself only provided that the minister will define which students shall not be entitled for support. Guaranteeing Income Statute, 5740-1980, SH No. 991 p. 30, § 3(4) (Isr.). In the regulations that implemented the statute, both Yeshiva and higher education students were exempted from entitlement for support. Regulations Guaranteeing Income, 5742-1982, KT No. 4316 p. 590, § 6(a) (Isr.).

70. The Budget Principles Law, 5745-1985, SH No. 1139 p. 60, § 3a (Isr.). This Budget Principles Statute did not require treating the students equally but it did require equal treatment for the institutions in which they learn. But this did not prevent the Court from deducing the equality norm from the statute and applying it also with regard to the students themselves. *Yekutieli*, *supra*

However, the Budget Principles Statute is a regular statute and not part of the Basic Laws. How can the Court rely on it to strike down a provision in the budget statute of 2010, which is later in time? The Court's answer is that section 3(a) of the Budget Principles Statute, which requires equality in monetary distributions under budget statutes, should be treated as embodying a substantive entrenchment norm of equality.⁷¹ Moreover, the entire Budget Principles Statute should be treated as a framework statute for regular annual budget statutes.⁷² Based on the substantive entrenchment of either the entire Budget Principles Statute or solely its section 3(a), the Court may strike down a later conflicting regular budget provision. This decision shows that the legislative self-entrenchment theory has force even now, and the Court may strike down statutes because they conflict with entrenched provisions, even if the entrenchment appears in regular statutes and not in Basic Laws.⁷³

Still one may argue that we should understand the *Yekutieli* decision as based not on the substantive entrenchment nature of the Budget Principles Statute but on the unique legal status of budget statutes in Israeli law. There are judicial precedents for the assertion that the budget statute should be considered as inferior to regular statutes because its content is not truly normative, and it is more similar to an executive order than a statute.⁷⁴ Thus, it is easier for the Court to intervene in budgetary statutes, rather than regular statutes.

The difficulty with this explanation is that the Knesset enacts budget statutes via the same legislative process as any other statute. There is no constitutional theory that recognizes a hierarchy that distinguishes among *regular* laws.⁷⁵ Further, such attitude towards budget statutes does not align with modern democratic principles, which developed in tandem with the legislative authority to approve national budgets.⁷⁶ Budgetary matters in other

note 65, at ¶¶ 30-34 to President Beinish opinion.

71. *Id.* at ¶¶ 19, 21, 50 of President Beinish opinion.

72. *Id.* at ¶¶ 19-21 of President Beinish opinion.

73. The Court towards the end of its decision applies the substantive limitations test of the Basic Laws. *Id.* at ¶¶ 42-51 of President Beinish opinion. This limitations test is relevant only in the context of the Basic Laws and to protect their supremacy. BARAK, PROPORTIONALITY, *supra* note 13, at 173-186. Thus, it seems that the Court was undecided regarding the source of the duty to treat equally Ultra-orthodox Yeshiva and higher-education students: Did it derive from the basic right to human dignity provided for in Basic Law: Human Dignity and Freedom or from the Budget Principles Statute? If the former, there was no need to rely on the substantive entrenchment nature of the Budget Principles Statute. If the latter, there was no need to apply the Basic Laws' substantive limitations test.

74. See H CJ 1438/98 Conservative Movement v. Minister of Religions 53(5) PD 337, 385-88 [1999] (Isr.). The budget statute is also temporary in nature, applying to a particular fiscal year.

75. See Suzie Navot, *The Normative Status of Budget Laws*, 6 HAMISHPAT 123 (2001).

76. Thus, for example, even before the British Parliament became a legislative body, it first enjoyed the authority to approve the King's budget. This way Parliament supervised the King with regard to the imposition of taxes, the spending of expenditures and the initiation of wars. See CARL J. FRIEDRICH, *CONSTITUTIONAL GOVERNMENT AND DEMOCRACY: THEORY AND PRACTICE IN EUROPE AND AMERICA* 271 (rev. ed. 1949).

common law jurisdictions have usually been treated as the sole prerogative of the elected branches, as a tool to translate their mandate into operation.⁷⁷ In parliamentary systems (as distinguished from presidential ones), it is also one of the main mechanisms through which the parliament may express its confidence, or lack thereof, in the executive branch.⁷⁸ Thus, the Court's intervention in the budget is actually more problematic than its intervention in other regular statutes. This is especially true in parliamentary systems, where such an intervention may lead to a crisis between the legislative and executive branches, which in turn can spur elections.⁷⁹

In conclusion, legislative self-entrenchment, while not an appealing theory, remains a possible explanation for Israel's constitutional development, as seen in the *Yekutieli* decision. The theory's greatest weakness is the danger that it may create a feeble form of constitutionalism, which would permit the legislature to overcome constitutional restrictions on its actions. Such a system might ultimately fall into complete legislative sovereignty.

III. CONSTITUENT AUTHORITY (OR ASSEMBLY) THEORY

The second theory that may explain Israel's constitutional development is the Constituent Authority (or Assembly) theory, as articulated by President Barak in *United Mizrahi Bank*.⁸⁰ The Israeli legal academia largely contends that the Israeli Supreme Court adopted this theory and thus that it best explains post-*United Mizrahi Bank* constitutional development.⁸¹ However, although the Constituent Authority theory is the more desirable theory on which to base the Israeli formal Constitution, it lacks historical and social support. The difficulty is not that the Knesset enacted the Basic Laws, but that the Basic Laws' process of enactment did not reflect broad, deep, and decisive dualist support of the People for constitutional change. Further, this theory has implications for

77. THE FEDERALIST PAPERS 334 (Jacob E. Cooke, ed., 1961) (Federalist 48) (Madison).

78. See COLIN TURPIN & ADAM TOMKINS, *BRITISH GOVERNMENT AND THE CONSTITUTION: TEXT, CASES, AND MATERIALS* 567 (6th ed. 2007) ("the requirement that the government must retain the confidence of the House of Commons is still a fundamental principle of the constitution. In the last resort it is sustained by the government's dependence on the House of Commons for 'supply' (finance) and the passing of legislation."); A.W. BRADLEY & K.D. EWING, *CONSTITUTIONAL AND ADMINISTRATIVE LAW* 218 (12th ed. 1997) ("A government which failed to ensure supply would have to resign or to seek a general election.").

79. In fact, the House of Lords' rejection of the budget act of 1909 in Britain has led to a severe constitutional crisis and the enactment of the Parliament Act 1911, which curtailed the Lords' veto power with regard to the budget. The other branches of government could not accept that an unelected body, such as the Upper House, intervenes in the budget. Rivka Weill, *We the British People*, PUB. L. 380 (2004).

80. *United Mizrahi Bank*, *supra* note 4, at 352-427 (Barak President). President Barak relied on Claude Klein, *The Constitutional Power in Israel*, 2 MISHPATIM 51 (1970).

81. See *supra* note 11.

holding referenda on territorial matters.

A. Presenting the Theory

Under the Constituent Authority theory, the Knesset enjoys a dual authority—operating alternately as a Constituent Assembly and as a regular legislative body.⁸² Only in its capacity as a Constituent Assembly may the Knesset entrench its enactments or create a more arduous process for the amendment of Basic Laws than for regular laws. Any attempt on the part of the Knesset as a regular legislative body to entrench its enactments is questionable on democratic grounds and may not survive judicial scrutiny.⁸³ Thus, the *Yekutieli* decision, where the Court applied a theory of legislative self-entrenchment to a statute that was enacted as a regular statute, does not easily align with this theory.⁸⁴ Further, only in its capacity as a Constituent Assembly may the Knesset enact a supreme Constitution that binds the Knesset in its capacity as a regular legislative body. Thus, this theory can be seen as a variant of *popular sovereignty* theories. Under such theories, the legislature gains an additional layer of legitimacy by acting as a constituent authority and not merely as a regular legislative body.⁸⁵

The Constituent Assembly theory asserts that Members of the Knesset (MKs) are aware when enacting Basic Laws of fulfilling their task of a Constituent Assembly, although the Knesset does not use a separate legislative track for the enactment of constitutional law.⁸⁶ The theory suggests that the Knesset purposely uses the combination of the title “Basic Law” and omits a year mark—essentially a “technical title test”—to distinguish chapters of the Constitution from that of regular legislation.⁸⁷ Under the theory, this differentiation is sufficient to validate entrenched constitutional enactments but not entrenched regular ones.

This theory attributes the Knesset’s power of constituent authority (continuing since 1949) to “constitutional continuity.”⁸⁸ Had the First Knesset, elected in 1949, chosen to adopt a Constitution, no one seriously doubts that it would have enjoyed the authority to do so.⁸⁹ This First Knesset was elected primarily as a constituent rather than a legislative body.⁹⁰ Even voters’

82. *United Mizrahi Bank*, *supra* note 4, at 355-56 (Barak President).

83. *Id.* at 410-11 (Barak President).

84. *Yekutieli*, *supra* note 65. See discussion *supra* Part II.D.

85. See discussion *infra* Parts III.B. & III.C.

86. *United Mizrahi Bank*, *supra* note 4, at 369-83 (Barak President).

87. *Id.* at 403-06 (Barak President).

88. *Id.* at 359-69 (Barak President).

89. *Id.* at 392-93 (Barak President).

90. Yechiam Weitz, *General Elections and Governmental Crises*, 9 ISRAEL AT THE FIRST DECADE 10 (2001). Its election campaigns focused on various proposals to a Constitution advocated by the political parties. “The fact that the Constituent Assembly was elected for the purpose of

participation in the election to the Constituent Assembly was the highest ever achieved in Israel (86.9%).⁹¹ Although the First Knesset did not adopt a Constitution, it passed the *Harrari Resolution* charging future Knessets with the task of drafting the Constitution in the form of “Basic Laws.” The *Harrari Resolution* specifically assigned the task of preparing a draft Constitution in the form of “Basic Laws” to the Committee on Constitution, Legislation, and Justice of the Knesset.⁹² The First Knesset further enacted the Transition to the Second Knesset Act of 1951, which stated that any authority enjoyed by it would also be available to its successors.⁹³ The Constituent Authority theory thus concludes that when future Knessets enacted “Basic Laws,” they assumed they were enjoying the same authority of Constituent Assembly as the First Knesset.⁹⁴

This theory accepts one key difference between the First Knesset and all subsequent Knessets: that the First Knesset’s elections focused on the constitutional agenda whereas all subsequent Knessets’ elections dealt with a variety of issues. Nevertheless, this theory posits regular general elections as sufficient to anchor the legitimacy of the formal Israeli Constitution. That is, the theory relies on the relatively amorphous mandate that the People grant the Knesset through regular general elections as sufficient for constitutional legitimacy.⁹⁵

The Constituent Authority theory asserts that all relevant political actors in Israel—the Knesset, the executive, the Court, the people, and academia—shared a common expectation that the Knesset would draft a Constitution. The Knesset fulfilled these expectations when enacting the “Basic Laws.” Since all relevant constitutional actors recognize the Basic Laws as Israel’s Constitution, it forms part of the Hartian rule of recognition or the Kelsian Grundnorm of Israel’s legal system.⁹⁶ Further, this cumulative recognition grants popular legitimacy to the

enacting a constitution would seem to vest that body with such authority by direct mandate from the people.” Nimmer, *supra* note 32, at 1239, n. 92 (1970). “Only in this election was the constitutional issue brought to the voter decision as a matter of legal requirement.” *United Mizrahi Bank, supra* note 4, at 486 (Cheshin J.). See also DK (1950) 739-49 (Isr.); DK (1950) 804 (Isr.); DK (1950) 826 (Isr.) (for MKs’ discussion of the campaigns’ promise to draft a Constitution).

91. AVRAHAM DISKIN, THE ELECTIONS TO THE 12TH KNESSET 7 (1990).

92. According to the Resolution, the task of proposing a Constitution was entrusted to a Knesset committee that would draft chapters of the Constitution that the Knesset would enact as Basic Laws. When the task was complete, all Basic Laws would be unified in one document to serve as Israel’s Constitution. As expected of a compromise, everyone understood this resolution differently. The status of the Basic Laws enacted prior to the completion of the Constitution was unclear. These ambiguities were intentionally left for future Knessets to address, since the First Knesset failed even to reach a consensus on the most fundamental question: Whether a Constitution was at all desired. Benyamin Neuberger, *The Constitution Debate in Israel*, in GOVERNMENT AND POLITICS IN ISRAEL unit 3, 38-40 (1990).

93. The Transition to the Second Knesset Act, 5711-1951, S.H. No. 73 p. 104, §§ 5 and 10 (Isr.).

94. *United Mizrahi Bank, supra* note 4, at 365-83 (Barak President).

95. *Id.* at 400 (Barak President).

96. *Id.* at 356-58. See also HART, *supra* note 15, at 79-99; KELSEN, *supra* note 21, at 193-95.

Constitution. Put differently, the assumption behind the Constituent Authority theory is that the different political branches, in a cumulative capacity, express the will of the People.

B. Advantages of Constituent Assembly Theory

The Constituent Assembly theory has obvious advantages over its rival, the legislative self-entrenchment theory. In fact, any country would be wise to prefer the constituent assembly model, unless it intentionally seeks a weak constitutional model. The reasons for this are enumerated below.

1. The Theory Establishes a Clear Hierarchy of Norms and Authorities: It Distinguishes between the People and its Representatives, between Constitution and Statute

Popular sovereignty theory distinguishes between the People and their representatives. It does not assume that the will of the representatives necessarily aligns with the will of the People, as is assumed under parliamentary sovereignty.⁹⁷ Thus, for example, the constitutions of the American colonies were first adopted by the legislatures (like parliamentary sovereignty). Later, the States recognized the inferiority of such constitutions and replaced them with constitutions enacted by the People (like popular sovereignty).⁹⁸ Bernard Bailyn explains:

In order to confine the ordinary actions of government, the constitution must be grounded in some fundamental source of authority, some “higher authority than the giving out [of] temporary laws.” This special authority could be gained if the constitution were created by “an act of all,” and it would acquire permanence if it were embodied “in some written charter.”⁹⁹

The American Revolution teaches us that if a state desires to subject its legislature to a Constitution, then an authority superior to the legislature—the People—must adopt such a document.

We should not equate the will of the legislature with the will of the People for numerous reasons. Usually, it is nearly impossible to derive from election results the People’s will with respect to a particular issue,¹⁰⁰ since people vote for representatives based on a mixture of issues. The People also do not

97. ACKERMAN, FOUNDATIONS, *supra* note 15, at 3-10, 230-322; ACKERMAN, TRANSFORMATIONS, *supra* note 16, at 3-31; Amar, *supra* note 16.

98. Lutz, *supra* note 41, at 237.

99. BAILYN, *supra* note 16, at 182-83.

100. Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1223, 1284 (1995); David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V*, 76 IOWA L. REV. 1, 47 (1990) (suggesting that “reading electoral politics is only slightly less fatuous than reading tea leaves.”); Terrance Sandalow, *Abstract Democracy: A Review of Ackerman’s We the People*, 9 CONST. COMM. 309, 319-22 (1992).

seriously deliberate on any particular topic before voting at regular elections because they usually are preoccupied with their private lives.¹⁰¹ There is ample empirical evidence suggesting that legislation supported, even by an overwhelming majority of the representatives, does not always enjoy similarly enthusiastic support of the People.¹⁰² Also, representatives frequently deviate from their pre-election campaign commitments. This is the nature of representative democracy. Thus, a citizen's electoral vote is usually too far removed from a representative's vote on a constitutional matter to suggest that the will of the representative expresses the will of the citizenry.

For a legal system to be based on popular sovereignty, it is not enough that the legislature consents to the Constitution or an amendment. In fact, even in the eighteenth century, the French philosopher Emmanuel Joseph Sièyes, who is considered the architect of the Constitution of the French revolution, wrote that popular sovereignty requires that no constituted body, *acting on its own*, may assert that its will represents the People's will in constitutional matters.¹⁰³ Rather popular sovereignty requires that a nation's most important constitutional decisions are supported by the broad, deep, and decisive consent of the People, not just that of their representatives.¹⁰⁴ In essence, popular sovereignty requires a dual lawmaking track: The first track is for the enactment of regular laws by the legislature as representatives of the people. The other more arduous track is for the enactment of constitutional law by the People.¹⁰⁵

101. ACKERMAN, FOUNDATIONS, *supra* note 15, at 3-10, 230-322.

102. See, e.g., Vernon Bogdanor, *Western Europe*, in REFERENDUMS AROUND THE WORLD, *supra* note 16, at 24, 65-68 (on the Italian experience), 96 (with regard to the European Community, the author wrote: "The unwillingness of electors to endorse Maastricht when contrasted with the large majorities for it in the legislatures of the member states showed that the European Community was beginning to give rise to that deepest and most intractable of all political conflicts - that between the electorate and the political class. The referendum is an instrument peculiarly well equipped to expose such a conflict"); Kris W. Kobach, *Switzerland*, in REFERENDUMS AROUND THE WORLD, *supra* note 16, at 98, 132 (on the Swiss experience).

103. See Waldron, *supra* note 16, at 181-202.

104. Ackerman, for example, writes that proponents of constitutional change must gain "extraordinary support for their initiative in the country at large." ACKERMAN, FOUNDATIONS, *supra* note 15, at 272. The depth and breadth of popular support should be extraordinary: "Numbers count." *Id.* at 274. Needless to say, the support of a majority is required. *Id.* at 274-75. The quality of public consideration and deliberation should be comparable to that of individuals making major life-decisions. The decisiveness of the popular support should be extraordinary, defeating "all the plausible alternatives . . . it should be a Condorcet-winner." *Id.* at 277. The aim of this phase is "to penetrate the barriers of ignorance, apathy, and selfishness [typical of normal politics] in an extraordinary way." *Id.* at 279. Ackerman suggests these three criteria—depth, breadth and decisiveness—to assess the legitimacy of both the signaling and eventual ratification of the constitutional transformation. The hurdle, however, for meeting these criteria is higher as the transformation process proceeds. For similar criteria in British constitutional thought, see Weill, *Evolution*, *supra* note 16.

105. ACKERMAN, FOUNDATIONS, *supra* note 15, at 3-10, 230-322; ACKERMAN, TRANSFORMATIONS, *supra* note 16, at 3-31, 383-420. For similar theory arising from British constitutional thinkers and political actors of the nineteenth and early twentieth centuries, see Weill, *Evolution*, *supra* note 16; Weill, *We the British People*, *supra* note 79; Rivka Weill, *Dacey was not*

Inherent in this theory is the requirement that decisions on constitutional matters result from procedures that better express the will of the People than can be accomplished by legislative vote. It requires a dialogue and interaction between elected bodies and the populace. The People in this context “is not the name of some superhuman being . . . but the name of an extended process of interaction between political elites [especially the various branches of government] and ordinary citizens.”¹⁰⁶ It necessitates a dispersion of authority to adopt and amend the Constitution between various independently elected branches of government so that their cumulative consent to the constitutional change will attest to the popular consent.

Thus, elections held during constitutional times may signify the People’s consent if constitutional change is the main, if not sole, issue of the election.¹⁰⁷ In fact, dualist systems typically require a series of elections before popular consent to constitutional change may be attributed to the elections’ results.¹⁰⁸ Therefore, dualist constitutional change demands broad and repeated majority support for the change in *consecutive* elected bodies.

There may be better political tools to ascertain the People’s will on constitutional issues than repeated elections. For example, referenda (or a series of referendums) focusing exclusively on the constitutional change can unambiguously reflect public views, if mechanisms allow the People an opportunity for deep public deliberation and broad participation. An election to a Constituent Assembly that is charged with the sole mission of drafting constitutional change and bringing it to the People’s decision is another possible mechanism. While these mechanisms are not free of challenges, they are at least better approximations of the popular will than that which can be achieved by the legislative body acting alone.

To conclude, Constituent Assembly theory rests the supremacy of the Constitution over regular law on the supremacy of those adopting the constitutional change—the People—over their legislature.

2. *This Theory Distinguishes between Supremacy and Entrenchment*

Under this theory, the supremacy of the Basic Laws is not based on self-entrenchment (as in the monist theory), but rather on the superior authority of a Constituent Assembly over the regular assembly. All Basic Laws are then treated as supreme, regardless of whether or not they are protected by an arduous amendment process. This is especially important in the Israeli context,

Diceyan, 62 CAMBRIDGE L.J. 474 (2003).

106. ACKERMAN, TRANSFORMATIONS, *supra* note 16, at 187; *see also id.* at 162.

107. *See* Amar, *supra* note 16, at 1094. On the use of elections as *semi* referenda, *see* Weill, *Evolution*, *supra* note 16, at 450-53, 466-68. It is not sufficient for the constitutional issue to be only one of the issues at election such that election’s results are used to suggest the consent of the People.

108. ACKERMAN, TRANSFORMATIONS, *supra* note 16; Weill, *Evolution*, *supra* note 16, at 466-69. Bruce Ackerman, *The New Separation of Powers*, 113 HARV. L. REV. 633, 667 (2000).

since most Basic Laws are not entrenched.¹⁰⁹

Further, ascribing constituent power to the Knesset, which also serves as a regular legislative assembly, is a potent device. This is so, since it is likely to be more difficult to persuade legislators to entrench individual rights and constitutional values than to merely enact them.¹¹⁰

In contradistinction to the monist theory, the Constituent Authority theory also enjoys the advantage of setting inherent limits to entrenchment power from within the theory, by which regular statutes, even if entrenched, will not enjoy supreme status. Indeed, the validity of entrenched regular statutes might be democratically problematic. Using a Constituent Authority theory avoids democratic compromises by aligning supreme (entrenched) constitutional law with the supreme authority to enact it. Put differently, only constitutional and not regular matters may be entrenched.¹¹¹

3. *This Theory Deals with the Democratic Deficit: It Grants Popular Legitimacy to the Constitution*

This theory suggests that the Constitution enjoys the legitimacy of popular consent. The legislature is limited not by its own self-entrenchment power, but by the higher authority of the People. If grave democratic doubts arise as to the power of one legislature to bind its successors without a special mandate from the People, there is little remedy under legislative self-entrenchment theory. In contrast, under the Constituent Assembly theory, it is the *demos* that binds its representatives.

A pure popular sovereignty theory assumes that the entrenching power is not endowed to the one entrenched. The People limit the authority of their representatives by the Constitution, but they are free to amend the document if the amendment process guarantees that their broad, deep and decisive consent is expressed.¹¹² How do we prevent tyranny of the majority under this theory? The dualist theory assumes that, because it is so difficult to garner the People's consent for constitutional change, the Constitution will most likely reflect the deep and permanent will of the People, rather than its passing passions. Dualism

109. Weill, *Reconciling*, *supra* note 1, at 475-78 and accompanying footnotes that detail which Basic Laws are entrenched.

110. In fact, MKs enacted Basic Law: Human Dignity and Freedom after being assured by the Chair of the Constitution, Legislation and Law committee, Uriel Lin, that the Basic Law does not grant the power of judicial review to the Court. See Judith Karp, *Basic Law: Human Dignity and Liberty: A Biography of Power Struggles*, 1 L. & GOV'T 323, 365-66 (1993). MKs probably assumed that judicial review was possible only in the context of entrenched Basic Laws since this was the theory prevalent before *United Mizrahi Bank*. See *supra* Part II.B.

111. See *supra* note 83 and accompanying text.

112. Under this interpretation, Article V of the US Constitution does not codify an exclusive track for amending the Constitution. See e.g. ACKERMAN, FOUNDATIONS, *supra* note 15; ACKERMAN, TRANSFORMATIONS, *supra* note 16; Amar, *supra* note 16; Weill, *Evolution*, *supra* note 16, at 458-61. See also *infra* Part III.C.2.

is intended to codify history, not hysteria.¹¹³

4. *This Theory Establishes Marburian Legitimacy for Judicial Review*

Constituent Authority theory allows courts to assert their power of judicial review. Under this theory, there is no substantial counter-majoritarian difficulty when the judiciary exercises judicial review, because the judiciary frustrates the will of the legislature (expressed in statutes) to enable the will of the People (expressed in the Constitution or the Basic Laws) to prevail. Only the People, not its representatives, may amend the Constitution. If the judiciary is wrong in its interpretation of the People's will, the People may amend the Constitution to clarify their will, which has happened four times in American history.¹¹⁴ This is, indeed, the rationale for judicial review in *Marbury v. Madison*:

That the people have an original right to establish, for their future government, such principles, as, in their opinion, shall most conduce to their own happiness is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent. . . . Between these alternatives there is no middle ground. The constitution is either a superior paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it. If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power in its own nature illimitable.¹¹⁵

The Israeli Supreme Court relied explicitly on *Marbury* in its own claims to the power of judicial review in *United Mizrahi Bank*.¹¹⁶

5. *The Theory Creates a Strong Model of Constitution*

The Constituent Assembly theory offers a strong version of a Constitution. This ensures vigorous protection of individual rights and societal values, since it is based on a superior, external entrenchment mechanism imposed by the People, rather than on legislative self-entrenchment power. It also eases the work of the Court when exercising judicial review, because the Court does not stand alone in a power struggle with the legislature as occurs under monism. Rather additional political actors are involved in the constitutional dialogue. This is one of the main advantages of a superior external binding authority over legislative self-entrenchment.

113. See AHARON BARAK, *THE JUDGE IN A DEMOCRACY* 108 (2006).

114. Walter Dellinger, *The Legitimacy of Constitutional Change: Rethinking the Amendment Process*, 97 HARV. L. REV. 386, 414-15 (1983); Laurence H. Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433, 435-36 (1983).

115. *Marbury*, *supra* note 8, at 176-77.

116. *United Mizrahi Bank*, *supra* note 4, at 416-17 (Barak President).

It is therefore unsurprising that the Constituent Assembly theory has prevailed in Israeli academia as the best theory to explain the supreme status of Basic Laws among those who believe that Israel has a formal Constitution following the *United Mizrahi Bank* decision.

C. *Lack of Fitness between Theory and Practice*

The only challenge with Constituent Assembly theory is that it does not easily align with Israel's constitutional history and development. Constitutional legitimacy based on Constituent Assembly theory requires the broad, deep, and decisive consent of the People, not just that of their representatives as previously discussed.¹¹⁷ In Israel, however, the enactment of Basic Laws reflects a more haphazard decision-making process than by the People's broad, deep, and decisive consent. *First*, Basic Laws were enacted in Israel using the same procedures that are applicable to regular law. *Second*, the test to identify Israel's constitutional provisions (as separate from regular law) is typical of monist, not dualist, constitutional systems. *Third*, the way that the Basic Laws were recognized as comprising Israel's Constitution manifested a fear of losing the opportunity to do so. The dynamics exhibited in the Court's *United Mizrahi Bank* decision revealed an impulse to turn the desired dream of a Constitution into actual law.

1. *Process of Enactment Does Not Manifest Dualist Consent*

The process of enactment for Basic Laws was typical of monist systems. Even Barak himself conceded that, excluding the elections to the First Knesset, elections never focused on the constitutional issue. In subsequent elections, the constitutional agenda was rather one of many issues competing for electorate attention and not even a central issue among them.¹¹⁸ Elections in Israel were usually a battleground regarding security, politicians' personalities, and socioeconomic matters, not constitutional topics. This was also true of the elections preceding the 1992 revolutionary Basic Laws' enactment.¹¹⁹ Under dualism, such regular elections grant a mandate for the enactment of regular, not constitutional, law.

117. See *supra* Part III.B. For sources see *supra* note 16.

118. See *supra* note 95 and accompanying text.

119. There was the activity of the "Constitution for Israel" movement prior to the elections to the 12th Knesset and during the time it was in session. But the 1988 elections to the Knesset dealt primarily with the explosion of the Intifada by the Palestinians, and voters were not thinking about the Constitution. DISKIN, *supra* note 91, at 47. Further, the "Constitution for Israel" movement focused its struggle on electoral change, advocating direct elections to the office of Prime Minister. The movement's proposed Bill of Rights was entirely different than that enacted by the Knesset. The movement also sought to have its proposed Constitution ratified by the support of both two-thirds of the entire Knesset and a referendum. Neither of these ratification requirements was ever followed. GUY BECHOR, CONSTITUTION FOR ISRAEL 55-58, 62-63, 68, 128, 133 (1996).

While the theory of continuity assumes that it is sufficient for later Knessets to enact constitutional law based on the special popular mandate granted to the First Knesset, dualism in the sense of popular sovereignty requires that the assembly, which actually adopts constitutional change, directly enjoy such authority. It cannot rely on its predecessors' authority, but must itself earn a special popular mandate for a defined constitutional agenda. Certainly, the Knesset cannot enjoy constituent authority through its own legislation in the Transition Act. It cannot simply grant itself supreme legal authority. Under dualism, such authority belongs to the People. Moreover, it is not at all clear that the Transition Act meant to transfer constitutional authority to later Knessets. Some interpret it to declare that every Knesset is Israel's legislature—that is, every Knesset enjoys the same scope of legislative, not constitutional authority.¹²⁰ Further, if, under dualism, legislation cannot grant constitutional authority to adopt constitutional change, the same limitation applies to a mere decision of the Knesset in the form of the *Harrari Resolution*. It should also be noted that, contrary to the *Harrari Resolution*, most Basic Laws were not actually initiated by the Constitution, Legislation, and Justice Committee.¹²¹

The Knesset enacted Basic Laws and regular laws via the same legislative process consisting of three readings,¹²² as is typical of a monist, not a dualist, constitutional system. Basic Laws were also often enacted and amended by a small number of MKs, as is typical of monist systems.¹²³ For most Basic Laws, there is not even an official record of the number of MKs supporting their enactment, and for the twelve extant Basic Laws, only partial data exists of MKs' votes with regard to just six of them.¹²⁴ Although some academics assert that most Basic Laws enjoyed wide support during their enactment,¹²⁵ it seems that no one thought that the breadth and depth of MK support for Basic Laws' enactment mattered enough to record it. While some MKs may have understood that they were fulfilling a constitutional role when passing Basic Laws, many more were utterly unaware of their task as a Constituent Assembly.¹²⁶ Barak

120. *United Mizrahi Bank*, *supra* note 4, at 484 (Cheshin J.).

121. 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 3, at 731.

122. For explanation of the three readings process, see *supra* note 36.

123. See *supra* note 47 and accompanying text.

124. There is no record on MKs' votes on Basic Law: Israel Lands, 5720, SH No. 312 p. 56 (Isr.); Basic Law: The President of the State, 5724, SH No. 428 p. 118 (Isr.); Basic Law: The Government, 5728, SH No. 540 p. 226 (Isr.), except for the vote on first reading of fifty-one to twenty-three MKs (DK (1966) 2533 (Isr.)); Basic Law: The State Economy, 5735, SH No. 777 p. 206 (Isr.); Basic Law: The Army, 5736, SH No. 806 p. 154 (Isr.); Basic Law: The Judiciary, 5744, SH No. 110 p. 78 (Isr.); and Basic Law: The State Comptroller, 5748, SH No. 1237 p. 30 (Isr.).

125. See e.g. Barak Medina, *Four Myths of Judicial Review: A Response to Richard Posner's Critique of Aharon Barak's Judicial Activism*, 49 HARV. INT'L L.J. ONLINE 1, 2 (2007), http://www.harvardilj.org/2007/08/online_49_medina/ (asserting that "the bulk of the Basic Laws passed by a decisive majority.") (last visited March 17, 2012).

126. See *United Mizrahi Bank*, *supra* note 4, at 495-501 (Cheshin's dissenting opinion quoting MKs' speeches at the Knesset). Judith Karp, who accompanied the enactment process in 1992 of

himself wrote in his scholarly work that two watershed Basic Laws passed in 1992 without the public or media attention to their significance. In an interview, he feared “the crisis of legitimacy originated by the way in which the Basic Laws were enacted. They were not preceded by enough preparation of the public. The constitutional revolution occurred in quiet, almost in secrecy.”¹²⁷

The final content of the Basic Laws was also a matter of sheer luck or lack thereof. The draft of Basic Law: Human Dignity and Liberty originally included a procedural entrenchment requiring the support of an absolute majority of MKs to amend it. However, at the last moment, one MK changed his opinion and this entrenchment fell through.¹²⁸ A day after the Knesset’s vote on the final reading of Basic Law: Human Dignity and Liberty, Professor and MK Amnon Rubinstein lamented in the Knesset that there was no precedent anywhere in the world for that turn of events, in which such important constitutional provisions were enacted “by the way.” He asserted that the importance of the Basic Law stands in sharp contrast to the absent of interest in it by the media and MKs.¹²⁹ This is not the kind of broad, deep, and decisive popular consent required to satisfy the requirements of the dualist model.

Further, Basic Laws have frequently been enacted or amended to suit whatever political need arises.¹³⁰ The politics involving their enactment has been characteristic of regular, not constitutional, politics. Thus, for example, in 1994, the Knesset revised Basic Law: Freedom of Occupation to ensure that a statute prohibiting the importation of non-kosher meat would survive constitutional scrutiny,¹³¹ and enable the return of the Ultra-Orthodox political party Shas to the coalition. But, both Prime Minister Rabin and Shas later “discovered” that the Basic Law they had voted for included reference to the

Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation as representative of the Minister of Justice, believes that a constitutional revolution has occurred with their enactment. Nonetheless, she attested “that it is doubtful whether the opinions raised in the Knesset during the discussion of the law show that Knesset Members were aware of their part and participation in the process of a Constitutional Revolution.” Karp, *supra* note 110, at 326.

127. Aharon Barak, *The Knesset Was Never Sovereign, The People Are The Sovereign*, 24 HALISHKAH 8, 14 (1995). See also Karp, *supra* note 110, at 325 (quoting Barak’s speech at Haifa U. of May 18, 1992 speaking of the fact that “not everyone is aware of it, but recently a revolution has occurred.”).

128. Section 13 of the proposed Basic Law required an absolute majority of MKs for its amendment. On second reading, however, the religious political parties proposed to omit the entrenchment and the vote was 27 to 27 in favor of their proposal, thus, the original draft should have remained intact. However, MK Charlie Biton announced that he had mistakenly voted against the proposed change and in a recount of the vote there was a majority of one in favor of the change. The entrenchment was rejected by a vote of 27 to 26. See DK (1992) 3793 (Isr.); 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 3, at 921-22 and n. 40.

129. See DK (1992) 3852 (Isr.) (March 18, 1992).

130. Ariel Bendor, *Defects in the Enactment of Basic Laws*, 2 L. & GOV’T 443, 445-46 (1994).

131. This replacement was done according to the advice of the Israeli Supreme Court. See H CJ 3872/93 Meatrael v. Prime Minister and Minister of Religions 47 (5) PD 485, 505 [1993] (Isr.) (The decision was given on October 22, 1993).

Declaration of the Establishment of the State of Israel and felt “cheated.”¹³² Shas and Rabin never intended to enact the reference to the Declaration or so they claimed. Because of the reference to the Declaration in the amended Basic Law, Shas never returned to the coalition despite the fact that the Basic Law was amended only to enable its return.¹³³ Because of the claims against the way the 1994 Basic Law was enacted, it is also difficult to accept the “redemption story” promoted by some members of legal academia, under which the broad majority supporting the 1994 Basic Laws’ enactment cured the lack of adequate majority supporting the enactment of the 1992 Basic Laws.¹³⁴

One recent example of the inappropriate process used in Israel for the passing of Basic Laws is found in the way Israel’s Parliament introduced the innovation of a dual-year budget. Just after elections and two days before Passover, while the public was busy preparing for the holiday in April 2009, the Knesset passed within the same day, a *temporary* Basic Law providing for a dual-year budget,¹³⁵ without either the benefit of committee review or the support of anyone outside the coalition.¹³⁶ Its very title—“provisional”—negates the essence of the Constitution as providing for long-term arrangements. Creating a two-year budget deprived the public and the Knesset of their unique annual constructive check on whether the executive body still enjoyed Parliament’s confidence.¹³⁷ This example is typical of the politically driven way

132. They had learned, after their vote, of the Basic Law’s declaration that the rights enumerated in it and in Basic Law: Human Dignity and Liberty would be respected in the spirit of the principles embodied in the Declaration of the Establishment of the State of Israel. Basic Law: Freedom of Occupation, 1994, § 1 and the amended new § 1 of Basic Law: Human Dignity and Liberty.

133. 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 3, at 924.

134. In 1994, the Knesset replaced Basic Law: Freedom of Occupation with a new one, this time with the presence and support of sixty-seven to nine MKs on third reading. *See* DK (1994) 5439 (Isr.). With this replacement, the Knesset also amended some sections of Basic Law: Human Dignity and Liberty. Thus, the “redemption story” is that the broader support of MKs in 1994 remedied the slim support granted to these Basic Laws in 1992. For the redemption story, see Dan Meridor, *Court Rulings in Light of the Basic Laws*, in CONSTITUTIONAL REFORM IN ISRAEL AND ITS IMPLICATIONS - CONFERENCE PROCEEDINGS, JUNE 1994 69, at 70-71 (1995). *See also* 2 CONSTITUTIONAL LAW OF ISRAEL (5th ed.), *supra* note 3, at 915.

135. Basic Law: The State’s Budget for the Years 2009 and 2010 (Special Provisions) (Provisional Enactment), 5760, SH No. 2245 p. 550 (Isr.). This Basic Law was later amended: Basic Law: The State’s Budget for the Years 2009 to 2012 (Special Provisions) (Provisional Enactment), 2009. The Basic Law also includes the year of its enactment. This stands against the general practice not to include the year of enactment in the title of the Basic Laws. *See supra* note 87 and accompanying text.

136. For the Knesset’s discussions on this Basic Law, see DK (2009) 657-97, 723-845 (Isr.). It is also available at http://www.knesset.gov.il/plenum/heb/plenum_search.aspx (April 6, 2009).

137. With non-confidence motions, the Opposition needs to master at least a majority of the legislature to topple the government. In contrast, the government needs to master a majority to pass the budget and avoid the need to step down. On the importance of the budget in parliamentary systems, *see* TURPIN & TOMKINS, *supra* note 78, at 567; BRADLEY & EWING, *supra* note 78, at 218-19. A petition against the enactment of this Basic Law was rejected in HCJ 4908/10 MK Roni Bar-On v. The Israeli Knesset (July 4, 2011), Nevo Legal Database (by subscription) (Isr.).

Basic Laws—which comprise the nation’s Constitution—are enacted in Israel.

The Knesset has also amended provisions in Basic Laws via enactment of later regular statutes and the Court has approved of this practice before *United Mizrahi Bank*.¹³⁸ Thus, there was no true distinction between constitutional and regular law, as is typical of monist systems. In fact, the Justices acknowledged this constitutional reality in *United Mizrahi Bank*. In response, Barak stated that the past cannot be undone but, going forward after *United Mizrahi Bank*, the Knesset should amend Basic Laws only in other Basic Laws.¹³⁹

2. *Conflicting Criteria for Identifying Constitutional Norms*

Only in *United Mizrahi Bank* do the Justices come up with a test for identifying what is part of the formal Israeli Constitution. Barak suggested that, if the enactment is entitled “Basic Law” without a year mark, then it will be construed as part of the formal Constitution in accordance with the *Harrari Resolution*.¹⁴⁰ The very need to define the elements of the Constitution arose because, prior to *United Mizrahi Bank*, the Knesset did not treat constitutional law differently than regular law, as is typical of monist systems.¹⁴¹

Barak’s “technical title” test could have worked, but Barak was not satisfied with this single factor. In *dicta*,¹⁴² he qualified this “technical title” test twice. He first suggested that some of the enactments of the First Knesset might be part of the formal Constitution, although they lack the title “Basic Law.” Barak had in mind mainly two statutes, the Law of Return enacted in July 1950 and the Statute of Equal Rights for a Woman, enacted in 1951.¹⁴³ Although

138. See e.g. HCJ 60/77 Ressler v. Chairman of the Central Elections to the Knesset Commission, 31 (2) PD 556, 560 [1977] (Isr.). HCJ 148/73 Kniel v. Minister of Justice, 27 (1) PD 794, 795 [1973] (Isr.). See also Weill, *Reconciling*, *supra* note 1, at 487-98.

139. *United Mizrahi Bank*, *supra* note 4, at 406-07.

140. *Id.* at 294 (Shamgar), 406 (Barak).

141. In the *Bar-On* decision, given in 2011, the Court has left open the question whether to “apply a substantive test for identifying Basic Laws,” in addition to the technical test. *Bar-On*, *supra* note 137, at ¶ 35 to President Beinisch opinion.

142. Since the Court did not strike down any statute or provision thereof in *United Mizrahi Bank*, some have argued that the entire decision recognizing both Israel’s Basic Laws as its formal Constitution and the resulting power of judicial review was all *dicta*. Salzberger, *supra* note 5, at 679-86. It may however be argued that the Court needed to discuss the status of the Basic Laws and its power of judicial review to reach a conclusion that the disputed statute at stake was valid.

143. Shamgar specifically referred to these two Acts and explained in *dicta* that, because the First Knesset was primarily a Constituent Assembly, its enactments may be classified based on their content, not their titles. If their content is constitutional, they may be part of the formal Constitution. *Id.* at 294 (Shamgar). In contrast, Barak raised this issue of the status of the First Knesset’s enactments without referring explicitly to these two Acts. *Id.* at 406 (Barak). But, in his book, which laid the theoretical basis for *United Mizrahi Bank*, Barak mentioned these two Acts as the main candidates to be included in the Constitution despite the lack of the title “Basic Law.” See AHARON BARAK, *INTERPRETATION IN LAW: CONSTITUTIONAL INTERPRETATIONS* 46 (1994). Both Shamgar and Barak, however, chose in *United Mizrahi Bank* to leave this issue open for future Court decisions.

Barak's dualism rests on the notion that later Knessets enjoy the same authority as the First Knesset, he himself treated the First Knesset differently.

Second, Barak qualified his "title test" by suggesting that there may be an unconstitutional constitutional amendment or an abuse of the Knesset's constituent authority.¹⁴⁴ If the first qualification broadened what may be included in the formal Constitution, the latter qualification attempted to narrow those options. With this second qualification, Barak laid the theoretical groundwork for the courts to decide the content of the formal Israeli Constitution.

Yet, his reasoning is inconsistent with dualism for two reasons. *First*, it leaves to the Court, rather than the People, the determination of what provisions comprise the Constitution. *Second*, under a dualist approach based on popular sovereignty, the People reserve the power to alter the Constitution and may even do so by procedures that violate the amendment process defined in the constitutional text as long as the process satisfies the substantive requirements of dualism—primarily, it must manifest broad, deep, and decisive popular consent for change. Further, constitutional theorists have long recognized that many constitutional changes *de facto* occur outside the regular mechanisms prescribed in the Constitution for change. Thus, for example, Ackerman has shown that the adoption of the American Civil War constitutional amendments (13th-15th) violated Article V, but these are nonetheless valid because they received the People's dualist consent.¹⁴⁵

Under dualism, the People's power to alter the Constitution is treated on par with their original power to create a Constitution.¹⁴⁶ Under Barak's approach, the power to amend is necessarily inferior to the power to create the

144. *United Mizrahi Bank*, *supra* note 4, at 406, 408 (Barak).

145. See, e.g., ACKERMAN, FOUNDATIONS, *supra* note 15; ACKERMAN, TRANSFORMATIONS, *supra* note 16; Sanford Levinson, *How Many Times Has the United States Constitution Been Amended? (A) <26; (B) 26; (C) 27; (D) >27: Accounting for Constitutional Change*, in RESPONDING TO IMPERFECTION, *supra* note 18, at 13; David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457 (2001); Peter H. Russell, *Can the Canadians Be a Sovereign People? The Question Revisited*, in CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES 9, 9-34 (Stephen L. Newman ed., 2004); Ian Greene, *Constitutional Amendment in Canada and the United States*, in CONSTITUTIONAL POLITICS IN CANADA AND THE UNITED STATES, 249, 249-71 (Stephen L. Newman ed., 2004).

146. That the People included in the Constitution explicit provisions governing its amendment only restricts their representatives (constituted power) when amending the document. But the People themselves may alter it by other means as well. In this way Ackerman legitimizes the fact that during constitutional transformations, the reformers often break the rules governing the official constitutional amendment process. Ackerman argues that constitutional transformations usually consist of innovations in both the constitutional content and constitutional amendment process. See, e.g., ACKERMAN, FOUNDATIONS, *supra* note 15; ACKERMAN, TRANSFORMATIONS, *supra* note 16; Waldron, *supra* note 16, at 185 (quoting Sieyes: "It would be ridiculous to suppose that the nation itself could be constricted by the procedures of the constitution to which it has subjected its mandatories."). Others have vehemently debated the proposition that constitutional amendment may legitimately occur in violation of the Constitution's provisions governing its amendment. See, e.g., Tribe, *Taking Text*, *supra* note 100, at 1284.

Constitution.¹⁴⁷ This is why the doctrine of the “unconstitutional constitutional amendment” is possible under Barak’s approach but not under pure dualist theory.¹⁴⁸ Barak’s approach suggests in final analysis that Barak is more foundationalist than dualist, as further illustrated in Part V below. It should be noted that, in the 2011 *Bar-On* decision—which rejected a constitutional challenge against the validity of the Basic Law: The State’s Budget for the Years 2009 to 2012 (Special Provisions) (Provisional Enactment) 2009—the Israeli Supreme Court left open the question whether the doctrine of the “unconstitutional constitutional amendment” is applicable in Israel, but it nevertheless expressed its inclination to adopt it.¹⁴⁹

3. *Dynamics of Seizing the Moment and Preventing a Lost Opportunity*

It seems that the *United Mizrahi Bank* decision was partly driven by the Justices’ belief that the 1992 Basic Laws dealing with individual rights was a constitutional opportunity that should be seized. The young Israeli State could not afford to squander that opportunity.¹⁵⁰ The Declaration of the Establishment of the State of Israel, with its enumeration of rights, could have served as a Constitution, but instead the Court treated it as legally non-binding during Israel’s founding era.¹⁵¹ The First Knesset could have enacted—but did not—a Constitution under the *Harrari Resolution*.¹⁵² The 1969 *Bergman* decision, the first case in which the Israeli Supreme Court exercised judicial review over primary legislation, could have laid a solid ground for constitutionalism and judicial review, but it was instead laconic.¹⁵³ It led to the application of judicial review in the limited context of protecting equal elections under Section 4 of

147. Barak relied on Klein, *supra* note 80, at 51 (1970) (Klein discusses the distinction between original and derivative constitutional power).

148. Ackerman provides the following example: if the American Constitution were amended such that it included that “Christianity is established as the state religion of the American people, and the public worship of other gods is hereby forbidden,” this amendment would be valid. Although this amendment negates the most basic principles of the current American Constitution, it would be valid because of America’s ultimate commitment to dualism. ACKERMAN, FOUNDATIONS, *supra* note 15, at 10-16.

149. *Bar-On*, *supra* note 137, at ¶ 35 to President Beinisch opinion.

150. Bruce Ackerman, *The Lost Opportunity?*, 10 TEL AVIV U. STUD. IN LAW 53, 66-69 (1990) (discussing the fact that, although Israel had all the features of a “fresh start” constitutional scenario, its founders risked missing the window of opportunity entirely).

151. See, e.g., HCJ 7/48 Elkabotly v. Minister of Defense, 2(1) PD 5 [1949] (Isr.). See also M. Ben-Porat, *A Constitution for the State of Israel: Whether Desirable and Feasible?*, 11 TEL AVIV. U. L. REV. 17, 19 (1985) (writing of the lost opportunity to recognize the Declaration as part of the Israeli Constitution). The Declaration was also signed by representatives of all the Jewish fractions in the Israeli society. Ben Gurion doubted whether any further consensus could be reached than that achieved in the Declaration. See DK (1950) 820 (Isr.).

152. See *supra* note 92 and accompanying text. See also Segev, *supra* note 5 (describing Israel’s entire constitutional history as a decision not to decide with regard to a formal Constitution).

153. *Bergman*, *supra* note 33.

Basic Law: the Knesset.¹⁵⁴ If this opportunity, too, went by, Barak portrayed a very bleak constitutional horizon for Israel. He expressed grave doubts about the ability of Israel ever, in the future, to adopt a Constitution.¹⁵⁵

This pessimism, however, warrants close examination. Comparative constitutional experience does suggest that it is more difficult to adopt a Constitution after the founding period.¹⁵⁶ It further shows that often the adoption of a dualistic Constitution is accompanied by violence, turmoil, and a break from the regular legal rules of the system. It does not suggest, however, that dualistic constitutions cannot be adopted in stages, in an evolutionary fashion. It does not imply that a monistic constitutional system cannot transform into a dualistic one gradually or by the use of referenda. There is nothing irreversible about the non-use of referenda in the past in Israel.¹⁵⁷ Barak's great worry regarding Israel's constitutional future ultimately reflected his own heart's desire that Israel would have a formal dualistic Constitution. But, the "ought" does not necessarily reflect the "is," however desired it might be.

To conclude, though a desirable end, there was no adoption of an Israeli Constitution through a dualist process. Further, in the absence of a dualist process, the entrenched provisions of the Basic Laws suffer from all the legitimacy difficulties associated with the legislative self-entrenchment theory.

D. Implications of the Constituent Assembly Theory

There are a few interesting implications of the Constituent Assembly theory to current Israeli constitutional issues. *First*, the *Yekutieli* decision does not easily align with this dualist theory. *Yekutieli* is based on the validity of entrenchment provisions appearing in regular statutes while, under the Constituent Assembly theory, it is probably undemocratic for the regular legislature to bind its successors through entrenchment provisions.¹⁵⁸ Only a Constituent Assembly may entrench its enactments. Put differently, under the

154. Between *Bergman* and *United Mizrahi Bank*, the Israeli Supreme Court applied judicial review over primary legislation in the following cases: *Agudat Derech Eretz*, *supra* note 33; *Rubinstein MK*, *supra* note 33; *Laor Movement*, *supra* note 33. See also Weill, *Reconciling*, *supra* note 1, at 483-84.

155. Barak warned that such an interpretation by the Court would have dire implications, since it is not at all clear how Israel can adopt a Constitution today from scratch. Usually, a country adopts a Constitution at its founding. But Israel does not want to begin again. Israelis do not want the fire, turmoil, and violence typical of a nation's founding and constitutional birth. Moreover, Barak asserted that referring a Constitution for the people's decision via referendum is not simple, since Israel has no tradition of such referrals to the populous. *United Mizrahi Bank*, *supra* note 4, at 392.

156. See, e.g., Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771 (1997); BRUCE ACKERMAN, *THE FUTURE OF LIBERAL REVOLUTION* 3, 46 (1992); K.C. WHEARE, *MODERN CONSTITUTIONS* 8-9 (1951).

157. See the writings of Gardbaum, Tushnet and Hiebert with regard to the Commonwealth model discussed *supra* note 20; see also Weill, *Evolution*, *supra* note 16.

158. See discussions *supra* Part II.A. See also *Yekutieli*, *supra* note 65 and discussion of the case *supra* Part II.D.

Constituent Assembly theory entrenchment provisions are valid only if they appear in Basic Laws, not regular law.

Second, Israel is now debating the adoption of the referendum as a tool to decide territorial concessions. The referendum, endorsed by the Knesset through regular legislation as a tool to bind elected bodies to territorial decision,¹⁵⁹ may be relevant to East Jerusalem and the Golan Heights.¹⁶⁰ Because it requires the consent of the majority of all votes actually cast in addition to Knesset's consent, the referendum has the potential to veto a decision by the elected branch to cede territory. Eighty MKs would need to agree to territorial concessions to forgo the need for a referendum. The underlying assumption is that, in a system of proportional representation, such broad legislative support reflects the People's support.

In December 2010, Dr. Mohammed S. Wattad filed a petition with the Israeli Supreme Court challenging the constitutionality of the referendum process on the grounds that, *inter alia*, the process undermines the constitutional authority of the elected bodies, as provided for in the Basic Laws. As such, the referendum process should have been introduced in a Basic Law rather than in a regular statute.¹⁶¹

The claimant's arguments are contrary to the concept of popular sovereignty, which would demand that the People be allowed to express their opinion on fundamental constitutional issues. Under true commitment to popular sovereignty as discussed above, formalism about the question whether the introduction of the referendum into the Israeli constitutional system was done in a Basic Law or in a regular law is unimportant. More significant is the enabling of a deep, stable, and lasting will of the People to express itself.¹⁶² This presents a dilemma for those who support the Constituent Assembly theory on the one hand but desire a peace agreement on the other hand. Either the Constituent Assembly theory, with its underlying notion that the People's will should prevail, must be upheld, or that theory must be abandoned so that the requirement to hold referenda can be abolished, which, in turn, would strengthen the peace process. Put differently: embrace popular sovereignty at the expense of the peace process, or embrace the peace process at the cost of appearing

159. The Law and Administration (Relinquishment of the Applicability of Law, Jurisdiction and Administration) (Amendment) Act, 5771-2010, SH No. 2263 p. 58 (Isr.) (adopted Nov. 22, 2010). See also Isabel Kershner, *Israel Enacts Bill to Force Referendum on a Treaty*, N.Y. TIMES, Nov. 23, 2010, at A4, available at <http://www.nytimes.com/2010/11/23/world/middleeast/23mideast.html>.

160. It does not apply to Judaia and Samaria, which were never officially and legally annexed to Israel according to the Court. See, e.g., HCJ 1661/05 Hamoeza Haezurit Hof Aza v. Israeli Knesset 59(2) PD 481, 514 [2005] (Isr.).

161. The content of the petition (number 9149/10) is available at <http://humanrights.org.il/main.asp?Search=7872%2025>.

162. See *supra* Part III.B.1. & 3. C.2 and especially *supra* note 104.

autocratic.¹⁶³

The Constituent Assembly theory could have provided greater constitutional legitimacy because it derives the higher authority of the Constitution from the People's adoption of the Constitution. But the way in which Israel has historically implemented Constituent Assembly theory has been formalistic. The Knesset merely uses the word "Basic" to impute constitutional legitimacy without using a special process for the enactment of Basic Laws. Therefore, the Knesset can easily meet the current requirement that a "Basic Law" can only be amended by another "Basic Law" and not by regular statutes by merely calling the new statute "Basic." If we truly want to establish the Israeli Constitution on this theory, it is time to involve the People in the adoption of the Constitution through one of the various possible mechanisms discussed above. Until then, Israel will have a Constitution that is predominantly monistic.

IV.

"MANNER AND FORM" THEORY

The "manner and form" theory enables judicial review of primary legislation even without a formal supreme Constitution upon which to expound. This Part presents the theory and explains why it is still relevant in the Israeli context. It further explains the ramifications of this theory to Israel's constitutional future when compared to the implications of the other theories discussed thus far.

A. Presenting the Theory

The third theory that may explain Israel's constitutional development is another variant of parliamentary sovereignty: "manner and form" theory. It is different from the self-entrenchment theory in that it does not restrain the sovereignty of the legislature with a supreme formal Constitution. Instead, under this theory, Parliament retains its sovereignty. As part of its sovereignty, however, Parliament may use *legislation* to define the process—in other words, the "manner and form"—for enacting statutes. This theory argues that, since the legislature is an artificial body composed of numerous members, the rules governing legislative processes, as well as the legislature's composition and

163. It is interesting to note that an opposite dilemma arose in Britain towards the end of the nineteenth century. Dicey, Britain's great constitutional scholar of the nineteenth century, is identified more than anyone else with characterizing the British constitutional system as monistic (i.e., based on parliamentary sovereignty.) Nonetheless, Dicey repeatedly offered the referendum as a tool to decide the contested issue of Home Rule for Ireland. His biographer, Richard Cosgrove, explained that Dicey was so against Home Rule that he embraced a tool of popular sovereignty, thus negating his own theory. See RICHARD A. COSGROVE, *THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST* 105-110, 247 (1980). For a different interpretation, see Weill, *Dicey, supra* note 105.

membership, cannot logically be subject to parliamentary sovereignty. Thus, parliamentary sovereignty applies to the content of its statutory enactments but not to the process of enactment. Put differently, Parliament is sovereign when it enacts for others, but may be restricted with regard to the rules governing its own conduct. Thus, Parliament may *de facto* restrict itself procedurally by setting a more arduous or a different track for legislation. Once it has done so, if Parliament later tries to violate the *pre-defined* procedure, the Court may exercise judicial review to strike down the enactment on the grounds that because it was not enacted under those procedures, it is not truly a “statute.”¹⁶⁴ In British literature, this theory is still considered new and is distinguished from the classic Diceyan approach, which did not recognize the possibility of binding the legislature or enabling judicial review.¹⁶⁵ In reality, however, the theory is rather old and dates back to at least the 1930s, when Sir Ivor Jennings first articulated it. In his minority opinion in *United Mizrahi Bank*, Justice Cheshin articulated the “manner and form” theory.¹⁶⁶

It should be emphasized that Justice Cheshin agreed both in *United Mizrahi Bank* and in later decisions, to the very exercise of judicial review, despite his belief that Israel lacks a formal supreme Constitution. He could do so, because under “manner and form,” judicial review is possible even in the absence of a formal Constitution. This interpretation deviates from the conventional scholarly view that Cheshin abandoned his support for the “manner and form” theory after *United Mizrahi Bank* and joined Barak’s approach after *United Mizrahi Bank*.¹⁶⁷ In fact, Cheshin himself has recently testified that he still adheres to his *United Mizrahi Bank* minority opinion.¹⁶⁸ It was possible for Cheshin to remain faithful to “manner and form” even after *United Mizrahi Bank* because later judicial decisions did not renew the theoretical discussion about the three major explanatory theories for Israel’s constitutional development: legislative self-entrenchment, Constituent Assembly, and “manner and form.” In *United Mizrahi Bank* the debate was not resolved either. Instead, there was only a plurality opinion in favor of Barak’s Constituent Assembly theory.¹⁶⁹

The “manner and form” theory tries to distinguish itself from the legislative self-entrenchment theory by allowing only procedural, and not substantive, limitations on future legislation. Further, each of these procedural limitations is

164. See *supra* note 17.

165. DICEY, *supra* note 15 and accompanying text. See also *supra* Part II.A. For comparison between the two theories, see also Rivka Weill, *Centennial to the Parliament Act 1911: The Manner and Form Fallacy*, PUB. L. 105, 107-08 (2012).

166. *United Mizrahi Bank*, *supra* note 4, at 530-35 (Cheshin J.).

167. For the conventional approach, see SAPIR, *supra* note 20, at 97-107.

168. “My opinion did not change, not even a bit.” Mishael Cheshin, *Responses*, 6 NETANYA ACAD. C. L. REV. 503, 503 (2007). Similar views were expressed on the eve of his retirement: HCJ 7052/03 Adalah v. Minister of Interior Affairs 61(2) PD 202, para 39-40 [2006] (Isr.) (Cheshin Deputy President).

169. See *supra* note 12.

subject to majority rule, and thus arguably does not enable true legislative self-entrenchment.¹⁷⁰ This theory explains that procedural limitations align with parliamentary sovereignty, because Parliament is a multi-member body that must set its own rules for the enactment of legislation. Parliament may change these rules, however, as long as it acts according to the predefined process for enacting statutes.¹⁷¹

What kinds of procedural limitations are possible? The legislature might entrench statutes (regular or “Basic”), as long as this entrenchment does not violate the democratic principle of majority rule. This way the legislature remains sovereign and arguably does not truly bind its successors. In other words, rather than create true entrenchment, the legislature may set attendance or quorum requirements. The legislature may, for example, require the support of an absolute majority before an enactment is changed, or mandate explicit repeal or override of statutes. Statutory repeal requiring a supermajority of members of Parliament would accordingly be interpreted to require an absolute majority. In this way, the legislature’s intent to tighten the requirements for repeal would be respected without defying majority rule.¹⁷² For these reasons, the “manner and form” theory might be treated not as a variant of the legislative self-entrenchment theory but rather as a separate, independent approach.

Arguably this theory is no longer plausible in the Israeli context (assuming it ever was). The Israeli Supreme Court has time and again struck down statutes based on the limitations clause found in Basic Law: Human Dignity and Liberty (a substantive entrenchment clause).¹⁷³ A theory that allows only procedural limits on the legislature and prohibits content-based limitations, treating the latter as negating the legislature’s sovereignty, should not have potential explanatory force.

The answer to this challenge is that under “manner and form,” the legislature may also substantively entrench statutes; however, substantive entrenchment has a different meaning under this theory than under the others discussed above. Under “manner and form” theory, substantive entrenchment presents the legislature with a choice: either abide by the substantive entrenchment or explicitly violate it (by explicit repeal or override), taking public responsibility for those actions. Every substantive entrenchment would thus be translated to a procedural “manner and form” requirement by preventing the legislature from absent-mindedly or implicitly repealing or overriding entrenched statutes. Only a self-conscious public act, with Parliament held

170. *United Mizrahi Bank*, *supra* note 4, at 537-43 (Cheshin J.).

171. It should be noted that judicial review that stems from “manner and form” is distinguished from judicial review over internal parliamentary proceedings because the former imposes a process defined in primary legislation, while the latter deals with a process that is defined in secondary sources, such as the internal rules of the legislative body.

172. *United Mizrahi Bank*, *supra* note 4, at 529-47, especially 542-43 (Cheshin J.).

173. Basic Law: Human Dignity and Liberty, 5752, SH No. 1391 p. 150, § 8 (Isr.).

publicly accountable for its actions, would suffice.¹⁷⁴ But were Parliament to explicitly override the substantive entrenchment, its statute would be valid, since previous statutes cannot bind a sovereign body.¹⁷⁵

So far, Israel's Parliament has not attempted to explicitly "notwithstanding" Basic Law: Human Dignity and Freedom. Israel has not yet seen the *Occam's razor* case that would demonstrate whether this "manner and form" theory is still plausible in the Israeli context. There is, however, support for such a theory in the Court's treatment of substantive entrenchment in regular statutes.¹⁷⁶

B. *Advantages of the Theory*

On its face, "manner and form" theory—which would limit the legislature's self-entrenchment power to majority rule and construe substantive entrenchment as merely requiring explicit repeal or override of prior legislation—is attractive. Majority rule comports with democracy. Explicit repeal or override guarantees that the breach of entrenchment is done self-consciously and in the public eye. It necessitates public deliberation and extracts a political price from the breaching parliament. It is thus a form of accountability and a shaming mechanism.¹⁷⁷ At the same time, it respects the ultimate democratic authority of the legislature to repeal or override its predecessors' legislation by majority vote, thus raising no substantial counter-majoritarian difficulty.

Under "manner and form" theory, one can enjoy the power of judicial review over primary legislation, which is usually associated with the existence of a formal Constitution, *and* use judicial review merely to respect Parliament's predefined process. The theory has the potential to enable weak constitutionalism that may be overcome by majority rule and explicit legislative language. The 2005 *Jackson* decision by the House of Lords in the United Kingdom reveals traces of such an approach.¹⁷⁸

174. *United Mizrahi Bank*, *supra* note 4, at 551-63 (Cheshin J.).

175. DICEY, *supra* note 15, at 39. See BLACKSTONE, *supra* note 30.

176. Substantive entrenchment provisions appear, for example, in the following regular statutes: The Women's Equal Rights Law, 5711-1951, SH No. 82 p 248, § 1a (Isr.); The Budget Principles Law, 5745-1985, SH No. 1139 p. 60, § 3(a) (Isr.); Commodities and Services Control Law, 5718-1957, SH No. 240 p. 24, § 46(b) (Isr.). For decisions interpreting these substantive entrenchment provisions to require explicit repeal, see, e.g., HCJ 104/87 Nevo v. Nat'l Labor Ct. 44(4) PD 749, 764 [1990] (Isr.); HCJ 256/88 Medinvest Herzliya Med. Ctr. v. CEO of Minister of Health 44(1) PD 19, 42-46 [1989] (Isr.); Conservative Movement, *supra* note 74, at 385-88.

177. Scholars usually discuss shaming of individuals. *But see* Berthold Rittberger and Frank Schimmelfennig, *Explaining the Constitutionalization of the European Union*, 13 J. EUR. PUB. POL. 1148 (2006) (suggesting that shaming of community enabled European constitutionalism).

178. R (on the application of Jackson) v. Attorney Gen., [2005] UKHL 56. The *Jackson* case dealt with the question whether the Hunting Act 2004 was valid, given that it had been enacted without the consent of the Upper House using the procedure defined in the Parliament Act 1949. The judicial decision declared the Hunting Act was valid, as the Parliament Act 1949 set new "manner and form" for the passage of statutes without the consent of the Upper House. *See* Weill, *Centennial*, *supra* note 165, at 110-12.

C. Difficulties with the Theory

The difficulties with “manner and form” theory are numerous. Four of the most troubling difficulties are discussed below.

1. Historical Origins and Current Use of the Theory are Incompatible

The “manner and form” theory originated historically with the *Colonial Laws Validity Act* of 1865, under which the British imperial superior parliament set restrictions on inferior dominion-colonial bodies.¹⁷⁹ The very origins of this theory define it as a manifestation of dualism, in that it reflects a structure in which a higher authority can instruct an inferior governmental body, rather than a parliamentary structure in which procedures are predefined.¹⁸⁰

2. The Theory Allows De Facto Content Restrictions

To be faithful to the theory, the predefined process for enactment of statutes must be applicable to all legislation, not just a subcategory of statutes. But, as the theory is actually employed in Israel, Britain, and elsewhere, it enables distinctions between different kinds of legislation, establishing different processes for their enactment.¹⁸¹ In doing so, it negates the “manner and form” theory’s prohibition on placing content restrictions on legislatures in order to preserve a parliamentary sovereignty model.¹⁸²

3. The Theory Creates a Democratic Deficit

This theory does not fully escape the democratic deficit problem, a difficulty that is currently debated in Britain and New Zealand. This debate hinges on whether demands for explicit repeal negate parliamentary sovereignty.¹⁸³ The difficulty arises because courts would interpret a later

179. JENNINGS, *supra* note 17, at 143-44.

180. See Chander, *supra* note 53; see also M.H. Tse, *The Canadian Bill of Rights as an Effective Manner and Form Device: An Analysis of the Supreme Court of Canada Decision in Authorson v. Canada (Attorney General)*, 18 NAT’L J. CONST. L. 71 (2005).

181. Thus, for example, in Israel, “manner and form” restrictions apply mainly with regard to amending or overcoming some Basic Laws. For elaboration, see Weill, *Reconciling*, *supra* note 1, at 473-76. In Britain, some judicial decisions interpret statutes creatively, and even against what would otherwise be legislative intent, to align the statutes with the Human Rights Act. See J.W.F. ALLISON, *ENGLISH HISTORICAL CONSTITUTION: CONTINUITY, CHANGE AND EUROPEAN EFFECTS* 221-36 (2007); Gardbaum, *Reassessing*, *supra* note 20, at 188-98. These decisions thus require explicit repeal, which is a type of “manner and form,” to interpret statutes as incompatible with the Human Rights Act. See also *Thoburn v. Sunderland City Council*, [2003] Q.B. 151, 185-89 (Laws LJ discussing “constitutional statutes” that should enjoy special status so that if Parliament were to repeal them it should do so explicitly).

182. DICEY, *supra* note 15, at 39. See discussion *supra* Part IV.A.

183. See, e.g., *Thoburn*, *supra* note 181, at 151 (Laws LJ requiring explicit repeal of statutes he characterized as fundamental); Rebecca Prebble, *Constitutional Statutes and Implied Repeal: The*

statute to imply the repeal of an earlier statute only when the two could not be reconciled through interpretation, because the assumption is that if the legislature desired to abolish the earlier statute it would have done so directly. Implied repeal is considered a “last resort” tool in common law. If such circumstances arise where implied repeal should be recognized, then should not the last will of the sovereign legislature govern despite its predecessor’s requirement for explicit repeal?

4. *The Theory Offers a Weak Model of Constitutionalism*

In light of the above difficulties, it seems wise to recognize that “manner and form” restrictions should be allowed only in limited contexts—mainly to protect individual rights and constitutional values. The theory should be recognized as providing a weak form of constitutionalism within a parliamentary sovereignty system. This form of constitutionalism is weak insofar as Anglo-American courts occasionally have refused to impose such requirements on noncompliant parliaments, as discussed above.¹⁸⁴ It is also weak in that it enables the legislature to ultimately prevail by explicitly taking responsibility for the breach of predefined substantive constitutional limits. In other words, explicit legislative language overcomes the limitations clause. While some Israeli academic circles characterize as courageous Cheshin’s opinion in *United Mizrahi Bank* (stating that Israel lacks a formal constitution),¹⁸⁵ interpretation of “manner and form” presented here suggests that Cheshin actually *did* express a commitment to constitutionalism, although weak in form.

D. *The Implications of “Manner and Form” Theory*

The implications of “manner and form” theory to Israel’s current development are numerous. *First*, this theory allows for potential expansion of the “notwithstanding” clause to all Basic Laws, not just to Basic Law: Freedom of Occupation, which contains an explicit clause to this effect.¹⁸⁶ This occurs because any limitations clause (i.e., substantive entrenchment clause) may be translated into a procedural clause if Parliament is permitted to explicitly deviate from the limitations clause.

Thoburn Decision and the Consequences for New Zealand, 36 VICT. U. WELLINGTON L. REV. 291 (2009); Elliott, *supra* note 53; Andrew Butler, *Implied Repeal, Parliamentary Sovereignty, and Human Rights in New Zealand*, PUB. L. 586 (2001).

184. See *supra* Part II.C.

185. *United Mizrahi Bank*, *supra* note 4, at 471-526; Joshua Segev, *Was it a Dream or Reality: Justice Cheshin on the Knesset’s Constituent Authority*, 6 NETANYA ACAD. C. L. REV. 461 (2007).

186. Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 8 (Isr.). In the 1994 Basic Law: Freedom of Occupation, the Knesset adopted an override clause to the effect that the Knesset could enact, with the support of an absolute majority of MKs (61 out of 120), an infringing statute explicitly proclaiming its validity despite its conflict with the Basic Law. This override would be valid for four years, unless a shorter period was provided for in the infringing statute.

By contrast, under the Constituent Assembly theory, an explicit override in breach of substantive entrenchment provisions would only assist the Court in deciding the unconstitutionality of the breaching statute. If the Knesset itself declared that it did not fulfill the requirements of substantive entrenchment, why should the Court hold otherwise?¹⁸⁷

Second, adopting the referendum as a binding tool, as has now occurred in Israel, may infringe upon “manner and form” theory’s commitment to parliamentary sovereignty. In Britain, the referendum was used as a consultative, non-binding tool.¹⁸⁸ Under a Constituent Assembly theory, however, to strike down a requirement for referenda on constitutional change would negate the theory’s ultimate commitment to popular sovereignty, as discussed above.¹⁸⁹ So far, the statute requiring the State to hold referenda on territorial concessions is itself un-entrenched and may be amended via a simple majority.¹⁹⁰ If the Knesset decides to hold a referendum and its results negate the Knesset’s decision, then we will have a case study as to whether our constitutional system is dualist or monist.

Third, under “manner and form,” a procedural entrenchment (whether in a “Basic” or regular law) that exceeds the requirements of an absolute majority would merely be interpreted as a requirement for an absolute majority.¹⁹¹

However, under the Constituent Authority theory, the entrenchment may very well be valid if it appears in a “Basic Law.” The purpose of a Constitution is to restrict majority rule. However, if the entrenchment appears in a regular statute, a requirement for an absolute majority may not even be valid. If members of Parliament have a right to abstain, then a requirement of absolute majority may infringe upon MKs’ right to be undecided.¹⁹² Certainly, if the entrenchment in a regular statute exceeds absolute majority, the entrenchment would most likely be undemocratic and thus invalid. The Knesset, in its role as a legislative assembly, enjoys no superior authority over its successors.

Fourth, under “manner and form,” even a regular statute may amend a Basic Law unless that Basic Law explicitly requires that it must, in turn, be

187. *United Mizrahi Bank*, *supra* note 4, at 409 (Barak President).

188. Chander, *supra* note 53, at 476-79; DAVID DENVER ET AL., SCOTLAND DECIDES: THE DEVOLUTION ISSUE AND THE SCOTTISH REFERENDUM (2000); LEIGHTON ANDREWS, WALES SAYS YES (1999). Though the referenda held in Britain were consultative, the British government treated their results as binding *de facto*. See Weill, *Centennial*, *supra* note 165, at 121-23.

189. See *supra* Part III.D.

190. See HCJ 1169/07 Rabes v. Israel’s Knesset (unpublished, 2007), available at <http://elyon1.court.gov.il/files/07/690/011/B02/07011690.b02.pdf>. (Isr.) (the Court held that even if a statute includes a provision requiring a more arduous track for deciding on an issue, if the provision itself is not entrenched, the Knesset may overcome it by simply amending the statute by a simple majority).

191. See discussion *supra* Part IV.A.

192. *United Mizrahi Bank*, *supra* note 4, at 411 (Barak President) (Barak left the issue open for future Court decisions).

amended via another Basic Law, in which case such a requirement would be treated as a process requirement. This is so since under “manner and form,” Basic Laws are not fundamentally different than any other law. This interpretation of “manner and form” actually aligns with pre-*United Mizrahi Bank* judicial decisions.¹⁹³

Each of the other two theories stipulates that a Basic Law can only be amended via another Basic Law. One does so because it treats Basic Laws as the product of Constituent Authority theory (dualism), while the other does so by treating the title “Basic Law” as a form of entrenchment (monism).

Fifth, under “manner and form,” we may enjoy judicial review within a full parliamentary sovereignty system and without a formal Constitution to expound.

In conclusion the “manner and form” approach provides another plausible theory to explain Israel’s development. Further, only when the Court confronts Parliament’s attempt to explicitly overcome or “notwithstanding” Basic Law: Human Dignity and Freedom, or when the Knesset tries to act contrary to referenda results, will there be a test case as to the explanatory value of this theory. Such a test case may help us better define the hybrid intermediate nature of Israel’s Constitution by demonstrating whether it is leading to a strong model of dualism or to a weaker model of monism. It is therefore particularly important to understand the hybrid nature of Israel’s Constitution and the debate over its predominant characteristics. This way, when the case study arises, the political actors will be informed about the possible routes available to them and their respective implications.

V.

COMMON-LAW CONSTITUTIONALISM OR FOUNDATIONALISM

The desire to imitate the US Constitution is so great in Commonwealth countries that certain jurists who had given up on the prospect of adopting a complete formal American-style Constitution are referring to “common-law constitutionalism” or “fundamental unwritten values” as a mechanism to impose higher law on legislatures.¹⁹⁴ Although this jurisprudence is considered innovative in these nations, its roots may be found in their early common law foundations.¹⁹⁵ In the United Kingdom, for example, the Law Lords’ *dicta* in *Jackson* indicated that if the legislature were either to abolish judicial review

193. See *supra* Part II.B.

194. See, e.g., ALLAN, *supra* note 19; Craig, *supra* note 19; Jenkins, *supra* note 19.

195. See Dr. Bonham’s Case, (1610) 77 Eng. Rep. 646, 652 (C.P.) (“in many cases, the common law will controul Acts of Parliament, and sometimes adjudge them to be utterly void.”). For discussion of the case as possibly laying foundations for judicial review power, see, generally, Theodore F.T. Plucknett, *Bonham’s Case and Judicial Review*, 40 HARV. L. REV. 30 (1926); Edward S. Corwin, *The ‘Higher Law’ Background of American Constitutional Law*, 42 HARV. L. REV. 149 (1928); Raoul Berger, *Doctor Bonham’s Case: Statutory Construction or Constitutional Theory?*, 117 U. PA. L. REV. 521, 521-45 (1969).

over governmental acts in a way that greatly infringed upon human rights or to abolish the House of Lords without its consent, the Court might find such enactments to be invalid.¹⁹⁶

This Part argues that the same motivation may explain the Israeli constitutional development. It explores two variants of this foundationalist approach. It also explains why common-law constitutionalism, also known as foundationalism, may be an inferior justification for Israeli judicial review.

A. Presenting the Theory

The last theory that may plausibly explain Israel's constitutional development is foundationalism, although this theory was not explicitly offered in *United Mizrahi Bank*.¹⁹⁷ Under the foundationalism theory, some values and rights are so fundamental that they exist beyond the authority of either the legislature or the body amending the Constitution to violate them or take them away. The courts serve as guardians of these rights.¹⁹⁸ These rights and values represent the most important and defining values of a given legal system. Because this theory relies on foundational values of a given constitutional system rather than attempting to derive such values and rights in the abstract, it is distinguished from pure natural law theories.¹⁹⁹

This theory has two variants. Under the first foundationalist approach, those fundamental values are derived from the written Constitution and are inviolable because of their constitutional history or because of express constitutional language to that effect. This is the approach of the German constitutional system, which also relies on text, and the Indian system, which relies solely on history.²⁰⁰ Under a common-law constitutionalism approach, these unwritten fundamental values derive from the history of the given legal system, even in the absence of a formal Constitution or regardless of the existing Constitution. Instead, the courts are charged with identifying these fundamental

196. *Jackson*, *supra* note 178. Lord Stein [101-102] and Lord Hope [104-107] made the most explicit comments in this direction. Lord Carswell at [178] and Lord Brown at [194] inclined towards this direction but left it open for future decisions. Lord Bingham in dissent upheld unrestricted parliamentary sovereignty at [9, 32]. *See also* Weill, *Centennial*, *supra* note 165, at 111, 125-26.

197. *United Mizrahi Bank*, *supra* note 4.

198. For support see *supra* note 18.

199. *See* Dotan, *Constitutional Dialog*, *supra* note 11 (discussing the possibility of basing judicial review in Israel on meta-textual considerations); Yoseph M. Edrey, *The Israeli Constitutional Revolution/Evolution, Models of Constitutions, and a Lesson From Mistakes and Achievements*, 53 AM. J. COMP. L. 77 (2005) (arguing that Israel's Basic Laws may not be treated as a Constitution but the Court has nonetheless the power of judicial review to protect core democratic values; he discusses various models of rights); *Cf.* 1 CONSTITUTIONAL LAW OF ISRAEL (6th ed.), *supra* note 11, at 86-92 (arguing that the Court based the Knesset's Constituent Power, *inter alia*, on a justification that it is desirable to recognize such authority).

200. For sources see *supra* note 18.

common law constitutional values.²⁰¹ Such values and rights may even restrain the People or the original Constituent Assembly adopting the Constitution, because they are not derived from the Constitution itself. Their power is not subject to the boundaries of the constitutional document.

In Israel, we find traces of both variants of foundationalism. Traces of common-law constitutionalism and foundationalism are evidenced in various Israeli Supreme Court decisions, including *Laor Movement*,²⁰² *United Mizrahi Bank*,²⁰³ *Movement for Quality Government (MQG)*,²⁰⁴ as well as several others.²⁰⁵ Further, it seems that foundationalism unites the different opinions of the Justices in *United Mizrahi Bank* as all implicitly expressed commitment to this theory.

1. *Foundationalism in Barak's Constitutional Theory*

Before *United Mizrahi Bank*, Barak tried to develop common-law constitutionalism in the *Laor Movement* decision. Barak, in *dicta*, raised the possibility that the Court in the future may strike down a statute if it does not align with fundamental unwritten principles of the legal system.²⁰⁶ Although he relied on German post-World War II sources to justify his position,²⁰⁷ Barak also referred to British common-law precedents. At the time *Laor Movement* was decided, there was no formal Constitution recognized by the Court and thus

201. For sources see *supra* note 19.

202. *Laor Movement*, *supra* note 33, at 551-54. The *Laor Movement* case dealt with the following difficulty: Two weeks after the elections for the twelfth Knesset—the same Knesset that enacted Basic Law: Human Dignity and Liberty and Basic Law: Freedom of Occupation—the Knesset's finance committee decided, and later ratified by statute, to retroactively increase the public funding granted to the political parties that had competed in the previous election. This was done to cover huge deficits that the parties suffered as a result of the preceding electoral campaign.

The statute, if valid, would have permitted political parties to spend more money than their economic fortunes allowed for campaigning if they could safely assume they would be part of the majority in the forthcoming legislature and could then enact a statute with retroactive funding increase. This would have heavily distorted election results, since small parties that were insecure about their electoral success would be unable to spend equally with large political parties whose future place in the Knesset was guaranteed. The retroactive funding would have meant unequal elections in real time. For the full story, see Weill, *Reconciling*, *supra* note 1, at 493-95.

203. See, e.g., *United Mizrahi Bank*, *supra* note 4, at 394, 406, 408 (President Barak). For full discussion, see *infra* Part V.A.

204. HCJ 6427/02 *Movement for Quality Gov't v. Knesset* 61(1) PD 619 [2006] (Isr.) [hereinafter *MQG*].

205. See, e.g., HCJ 2605/05 *Human Rights Dep't v. Minister of Fin.* (Nov. 19, 2009) Nevo Legal Database (by subscription) (Isr.) (invalidating privatization of prisons); see *infra* note 238 for discussion of common-law constitutionalism in the Human Rights Dep't decision; see also *Bar-On*, *supra* note 137.

206. *Laor Movement*, *supra* note 33, at 551-554 (Barak, J., dissenting).

207. Barak cited H. REICHEL, *GESETZ UND RICHTERSPRUCH* (1915); K. ENGISCH, *EINFÜHRUNG IN DAS JURISTISCHE DENKEN STUTTGART-BERLIN-KÖLN*, 173 (7th ed. 1977); G. RADBRUCH, *RECHTSPHILOSOPHIE* 4 (Stuttgart, 1954); *Article 117 Case* (3 BVerfGE 225).

it seems that Barak was advancing common-law constitutionalism. Although Barak asserted that such authority might theoretically be attributed to the Court, he qualified his opinion by suggesting that the time has not yet come to utilize it in Israel.²⁰⁸

In *United Mizrahi Bank*, President Barak referred again to foundationalist theories without labeling or characterizing his views as such. He suggested in *dicta* that a future case may arise in which the Court finds that certain constitutional amendments are unconstitutional. That is, they are beyond the authority of the body amending the Constitution (the “unconstitutional constitutional amendment” doctrine).²⁰⁹ The Court is therefore authorized to review the content of constitutional amendments and decide whether they are valid. Thus, in the very decision that recognized the Court’s judicial review power, he began laying the groundwork to review the content of the Basic Laws.

He also suggested in *dicta* that some retrofitting might later be necessary, if the Knesset were to misuse the title “Basic Law.” Should misuse occur, a “Basic Law” that did not “deserve” to be treated as constitutional might be treated as regular law.²¹⁰ Barak relied on both Indian and German constitutional jurisprudence to justify his position.²¹¹ Both constitutional systems are famous for embodying a foundationalist approach. With both propositions—the unconstitutional constitutional amendment and misuse of the title “Basic Law”—Barak hinted that the basis of Israeli constitutionalism may be foundationalist after all, rather than dualist. Both propositions also try to employ existing Basic Laws to restrict the power of constitutional amendment.

208. Scholars have described the *Yardor* decision, given in 1964, as the first decision to rely on foundationalism in reaching a result contrary to the explicit language of a statute. EA 1/65 *Yardor v. Chairman of Cent. Elections Comm. to the Sixth Knesset*, 19(3) PD 365 [1965] (Isr.). In a majority opinion, the Court validated the Central Election Commission’s decision to disqualify the political party, *El Ard*, from competing in elections to the sixth Knesset. The statute did not authorize the Commission to exclude a political party based on the content of its platform and ideology. To the contrary, Basic Law: The Knesset explicitly granted equal rights to all parties to compete at elections. §§ 4 and 6. Nonetheless, the Court ruled that Israel was not required to permit campaigning by political parties that aimed to abuse the democratic laws to destroy the State from within the Knesset. The majority opinion relied on fundamental unwritten principles, but it did not use explicit language of striking down a statute. On one hand, the Court implicitly overruled both election statutes and Basic Law: The Knesset with regard to the most basic norm of a democracy: equal elections. On the other hand, it is possible to read the majority decision as a robust interpretation of existing statutes to embody principles of self-defense that were not explicitly stated but seem self-evident. See Ruth Gavison, *Twenty Years to the Yardor Decision--The Right to be Elected and Historical Lessons*, in *ESSAYS IN HONOUR OF SHIMON AGRANAT* 145, 181 (R. Gavison & M. Kremnitzer eds., 1986); Barak Medina, *Forty Years to Yeredor: The Rule of Law, Natural Law and Restrictions on Political Parties in a Jewish and Democratic State*, 22 *BAR-ILAN L. STUD.* 327 (2006).

209. *United Mizrahi Bank*, *supra* note 4, at 394, 406, 408.

210. *Id.* at 406 (Barak President) (though Barak left it an open question to be decided in the future).

211. *Id.* at 394 (Barak President) (citing *Kesavananda*, *supra* note 18 (India) and 6 BverfGE 32 (1957) (Germany)).

But Barak is not decisive in *United Mizrahi Bank* regarding the origins of his foundationalist commitments. Common-law constitutionalism might better explain Barak's assertions that judicial review is justified by the very nature of the rule of law. Further, Barak contends that judicial review is necessary to protect basic rights in a democracy that is substantive, not formal.²¹² Barak thus reveals a philosophy that embraces judicial review regardless of whether a specific formal Constitution exists to expound such principles. This is why Barak declared that anyone challenging judicial review as undemocratic effectively also asserts that the protection of individual rights is undemocratic.²¹³ Thus, in *United Mizrahi Bank*, Barak promotes dualism and foundationalism simultaneously—and within foundationalism he advances two variants, opening the way for the Court's broad judicial review power.

In the decisions after the *United Mizrahi Bank* revolution, President Barak seemed to advance the foundationalist theory, as shown for example in his *Meatrael* decision.²¹⁴ Barak suggested in *dicta* that, if a statute were to severely infringe on the most basic values of a Jewish and democratic State—even if it were to include a “notwithstanding provision”—the Court could nonetheless find it unconstitutional. In such a case, the Court may narrowly read the notwithstanding provision in the Basic Law: Freedom of Occupation to prevent a statute from undermining Israel's most basic societal values, which are protected by the “purpose and basic principles” clauses of the Basic Laws. This is a foundationalist approach, because the notwithstanding clause, according to its language and purpose, was intended to enable the legislature to override the entire Basic Law: Freedom of Occupation and not just some provisions of it.²¹⁵ In the *Meatrael* decision, Barak attempted to anchor his foundationalist approach in the Basic Laws themselves, following the German and Indian style, to legitimize the approach: It is not based on the Court alone as in common-law constitutionalism but is rather based on the Basic Laws.

To conclude, Barak moved from common-law constitutionalism in *Laor Movement* to an uncertain variant of foundationalism in *United Mizrahi Bank*, to finally embracing its Indian and German version in *Meatrael*. It appears that, having accomplished the constitutional revolution, Barak felt comfortable basing foundationalism on a creative interpretation of the Basic Laws.

After Barak's retirement, he continued to express his commitment to foundationalist theory in his scholarly work, although without explicit acknowledgement of such. In his article on the “unconstitutional constitutional amendment,”²¹⁶ Barak recognizes that the unconstitutional constitutional

212. *United Mizrahi Bank*, *supra* note 4, at 419-27 (Barak President).

213. *Id.* at 424 (Barak President).

214. H CJ 4676/94 *Meatrael Ltd. v. Knesset*, 50 (5) PD 15 [1996] (Isr.).

215. *See* Basic Law: Freedom of Occupation, 5754, SH No. 1454 p. 90, § 8 (Isr.).

216. Aharon Barak, *Unconstitutional Constitutional Amendment*, in GABRIEL BACH BOOK 361 (David Hahn et al. eds., 2011).

amendment doctrine developed in Germany, Turkey, and Brazil to protect explicit “eternity clauses,” which prohibit amending certain constitutional provisions. Nonetheless, he asserts that this doctrine was also adopted in countries lacking eternity clauses such as India. The Indian Court adopted this doctrine to protect the basic structure of the Constitution. Thus, Barak suggests that, although Israel lacks explicit eternity clauses in the Basic Laws, it may nonetheless adopt the doctrine to protect its most basic character as a Jewish and democratic country. This manifests a commitment to foundationalism, but it may be anchored in the Basic Laws.

But Barak advances his reasoning even further. He suggests that the very adoption of the Constitution—an issue that is relevant in Israel since the enactment of Basic Laws has not been completed—may be subject to the unconstitutional constitutional amendment doctrine. With this further proposition, Barak reveals the essence of his approach: Even the original constituent power is restricted by common-law constitutionalism, not just the power to amend an existing Constitution. That is, a Constitution may be adopted, but its content must satisfy the Court’s criteria. Barak’s approach goes beyond the unconstitutional constitutional amendment doctrine. In other countries the doctrine was intended to restrict the amending power, not the original power to adopt a Constitution. Also, in his new book, *Proportionality in Law*, he implicitly reaffirms his commitment to common-law constitutionalism.²¹⁷

2. Foundationalism in Shamgar’s Constitutional Theory

Foundationalism also explains Shamgar’s *dicta* in *United Mizrahi Bank*, which states that there were limits to the Knesset’s self-entrenchment power. Not every subject may be entrenched, and not every form of entrenchment would be accepted. Shamgar mentioned that he treated Israel’s “Jewish and democratic” nature as setting limits on the self-entrenchment power.²¹⁸ In other words, the limits on self-entrenchment power were not inherent in the legislative self-entrenchment theory itself but were imposed by Shamgar’s foundationalist commitments.

3. Foundationalism in Cheshin’s Constitutional Theory

Surprisingly, for a theory that was not explicitly discussed, foundationalism unites not only Barak’s and Shamgar’s approaches, but also Cheshin’s. In a dissenting opinion in *MQG*, Cheshin found a statute deferring and even exempting Ultra-Orthodox students’ duty to serve in the army (the Tal statute) to be repugnant to the most fundamental unwritten constitutional values of the

217. For discussion of his work on proportionality in this light, see Rivka Weill, *Did the Lawmaker Use a Canon to Shoot a Flea? On Proportionality in Law*, L. & BUS. J. (forthcoming).

218. *United Mizrahi Bank*, *supra* note 4, at 293 (Shamgar President).

Israeli legal system and thus invalid.²¹⁹ He found that the statute violated the fundamental value of equality. This conclusion was not, however, derived from the Basic Laws' protection of human dignity. For Cheshin, serving in the Israeli army was an honor, not an infringement of dignity. Rather, Cheshin was willing to invalidate the statute as contrary to equality as a fundamental common-law value, and as contrary to the nature of the Israeli State both in its Jewish aspects (implicating the need for an army to protect the State) and democratic aspects (implicating the imperative to not discriminate against seculars). This was the first and only instance that an Israeli Supreme Court Justice was willing to explicitly utilize common-law constitutionalism to invalidate a statute.²²⁰ This decision surprised some Israeli legal academics that perceived Cheshin to be expressing a conservative opinion regarding judicial review in *United Mizrahi Bank* because he did not recognize Israel's Basic Laws as its formal Constitution. In *MQG*, he suddenly expressed a contrasting expansive approach regarding the power of judicial review.²²¹

However, Cheshin's opinion in *MQG* should not have surprised Israeli academia because it aligns with his *United Mizrahi Bank* opinion. In *United Mizrahi Bank*, Cheshin treats democracy as a fundamental unwritten value protected by common-law constitutionalism such that no legislative procedure may require more than the support of an absolute majority of MKs to enact or amend statutes.²²² He holds that Israel's Parliament is sovereign when "legislating to others," as opposed to its more limited authority in the regulation of its own conduct.²²³ Thus, the Knesset may even legally declare that a man is a woman or vice versa.²²⁴ With regard to its own authority, however, the Knesset is restricted by the most fundamental unwritten value: democracy.²²⁵ In 2006 *MQG* decision, Cheshin extended common-law constitutionalism, so that it applied not just to the internal proceedings of the Knesset ("legislating for itself"), but also to enactments for the public at large ("legislating for others").

Barak, however, wrote that the Tal statute could have been invalidated as unjustly unequal because existing Basic Laws prohibited unjustified infringement on human dignity. Thus, Barak's argument did not need to rely on common-law constitutionalism.²²⁶ Barak did not dispute the potential of relying

219. Deferral of Service to Yeshiva Students That Torah Is Their Work Act, 5762-2002, SH No. 1862 p. 521 (Isr.).

220. *MQG*, *supra* note 204, at 722-78.

221. *SAPIR*, *supra* note 20, at 97-107.

222. *See supra* notes 170, 172, 174 and accompanying text.

223. *United Mizrahi Bank*, *supra* note 4, at 545-46 (Cheshin, J.); *see supra* Part IV.A.

224. *United Mizrahi Bank*, *supra* note 4, at 527 (Cheshin J.); *cf.* DICEY, *supra* note 15, at 5 ("It is a fundamental principle with English lawyers, that Parliament can do everything but make a woman a man, and a man a woman.").

225. *United Mizrahi Bank*, *supra* note 4, at 544-46 (Cheshin J.); *see also* discussion *supra* Part IV.A.

226. *MQG*, *supra* note 204, at 714-17. Barak also did not want to declare the statute

on common-law constitutionalism but rather the need to refer to it in this specific case of *MQG*. He wanted to preserve common-law constitutionalism for those extreme situations of gross infringement of constitutional rights and values, where no other route is available except common-law constitutionalism.

4. *The Influence of Carolene Products*²²⁷

While Cheshin tried to expand the basis for judicial review power in *MQG*, Justice Grunis, the new President of the Supreme Court (since February 2012), tried to constrain it to situations where judicial review enhances the democratic process, thus mitigating the counter-majoritarian difficulty. Grunis explicitly relied on John Hart Ely's democratic process enhancing theory.²²⁸ In Grunis' words:

The central justification for judicial review over legislation is the need to protect the minority and the individuals from majoritarian tyranny. The Court is the last barrier that can prevent the majority from injuring the individuals and minority groups.²²⁹

Grunis found that the Tal statute was valid because it granted a privilege to the minority group of Ultra-Orthodox men. The majority of secular people do not need the Court's protection, as they were responsible for the statute's enactment. There is no danger of the majority discriminating against itself.²³⁰

Why restrain judicial review in this Eliyan way? Grunis' approach expresses a foundationalist perspective, though its content differs sharply from that in Cheshin's and Barak's theories. With Cheshin and Barak, foundationalist perspectives complement their other main theories, while with Grunis it is the only one.

The Israeli literature has suggested that Grunis' theory should be applied to identify when there is any "infringement" of constitutional rights: If the statute does not target individuals or minorities, there is no infringement of constitutional rights.²³¹ Grunis' approach is understood as an interpretation of the scope of existing constitutional rights, but it does not replace constituent

unconstitutional but rather suspected of unconstitutionality. He thought there was not enough experience with the Tal statute to know whether it actually succeeds in drafting the Ultra-Orthodox community to the army or not. *Id.* at 714. In the *Ressler* decision, handed in February 2012, the Court finally struck down the Tal statute based on Barak's opinion in *MQG*. H.CJ 6298/07 *Ressler v. The Knesset* (February 21, 2012) (unpublished) available at: <http://elyon1.court.gov.il/verdictssearch/HebrewVerdictsSearch.aspx>.

227. *United States v. Carolene Prod. Co.*, 304 U.S. 144, 152 n.4 (1938).

228. *MQG*, *supra* note 204, at 802-804 (Grunis J.); *see generally* J.H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Ely's book theorizes *Carolene Prod. Co.*, 304 U.S. at 152 n.4 (1938).

229. *MQG*, *supra* note 204, at 809-10 (Grunis J.).

230. *Id.* at 798-810 (Grunis J.).

231. *See, e.g.*, Moshe Cohen-Eliya, *Towards a Procedural Limitation Clause*, 10 L. & GOV'T 521 (2007).

authority or self-entrenchment theories in *United Mizrahi Bank*. Further, Grunis is thought to hold a very conservative approach to judicial review, incompatible with foundationalist theory.

But a different reading of Grunis' opinion is possible. Grunis interprets *United Mizrahi Bank* to state that the Israeli Supreme Court has judicial review power over primary legislation. But he does not view the decision as deciding in favor of monism or dualism.²³² Why does the Court enjoy judicial review? Grunis suggests that it exists to protect the democratic process, as well as individual and minority rights. Who gave this guardian role to the Court? Grunis does not rely on the Basic Laws but on a foundationalist view of the Court's role in a democracy. This is also why he relies on Ely and not on the language of the Basic Laws.²³³

Further, Grunis emphasizes that his view extends beyond the question of whether there exists an infringement of constitutional rights or whether the infringement is proportional. Rather, it is an *a priori* approach and deals with the question of when judicial review is ever justified.²³⁴

It seems that Barak in *MQG* understood Grunis' thesis as foundationalist. He wrote that both Cheshin's and Grunis' opinions in *MQG* attempt to anchor judicial review on doctrines external to the Basic Laws, regardless of their limitations clauses.²³⁵

So far, Grunis' approach is a lone voice in Israeli judicial decisions, though this may possibly change now that he became the President of the Court. He offers the most constrained approach to the power of judicial review, and it contains internal contradictions. His approach purports to limit judicial review to cases in which the legislature infringes the democratic processes or minority groups. But he also states that judicial review is always justified to protect the rights of the individual. This last statement undermines his initial conservative limitations on judicial review power. Every statute that infringes constitutional rights also infringes the rights of individuals.²³⁶ In fact, one could also make this argument with regard to the Tal statute, as Barak has done.

Grunis' answer is that, in the Tal statute case, it cannot be shown that exempting Yeshiva students from the army leads to infringement of individual rights. There is no proof that, were Yeshiva students to serve, the toll on the individuals already serving would be lessened.²³⁷ But Grunis' opinion would

232. *MQG*, *supra* note 204, at 808-809 (Grunis J.).

233. In fact, all the examples he brings in which the Court should intervene—disenfranchisement of minority groups, double vote to part of the electorate/MKs, extension of parliament's life—do not rely on the language of the Basic Laws or refers to them at all. *Id.* at 802-804.

234. *MQG*, *supra* note 204, at 807-808 (Grunis J.).

235. *Id.* at 721 (Barak President).

236. See Cohen-Eliya, *supra* note 231, at 530-531 n.27.

237. *MQG*, *supra* note 204, at 809-810 (Grunis J.).

lead the Court to abstain from intervening when equal allocation of State resources is challenged, and these are the prime examples of failure in democratic processes, even according to Ely's thesis. Grunis does not adequately deal with this internal conflict in his own approach.

To conclude, the various judicial opinions regarding the scope of judicial review power in Israel post-constitutional revolution share a commitment to foundationalism, whether as a sole source for judicial review (Grunis) or as a complementary source (the other approaches). The Court has reaffirmed its commitment to foundationalism in the *Human Rights Department*²³⁸ and *Bar-On* decisions.²³⁹

B. Difficulties with the Foundationalist Theory

This theory is the most problematic when articulating the rationale and justifications for judicial review. The challenges it poses include the following:

1. Should the Validity of Constitutional Amendment be Justiciable?

At first glance, the concept of an unconstitutional constitutional amendment seems self-contradictory. How can part of the Constitution be deemed unconstitutional? Against what content should the text of the amendment be measured? The amendment contradicts the text of the existing Constitution; otherwise no amendment would have been necessary. If the amendment were passed according to the applicable procedural rules set in the Constitution, why shouldn't the constitutional amendment be valid? Indeed, some constitutional systems—chief among them the US system—rejected the idea of judicial review over the constitutionality of constitutional amendments. The US Supreme Court treats this issue as non-justiciable. That is, on prudential grounds the Court prefers to leave the judgment as to the validity of constitutional amendments to the political branches.²⁴⁰

2. Intensifying the Counter-majoritarian Difficulty

If judicial review over primary legislation suffers from counter-majoritarian

238. *Human Rights Dep't*, *supra* note 205. President Beinisch, who wrote the main opinion, relied on the social contract idea to conclude that privatization of prisons infringe upon the rights to liberty and human dignity (¶¶ 23-39). Deputy President Rivlin *in dicta* suggested that maybe the privatization statute could have been abolished based on common-law constitutionalism because it negates the fundamental social contract principles of the State. He did not rely on the Basic Laws to reach this conclusion. In contrast, Justices Chayut, Naor and Levi wrote that the infringement was not so severe as to justify such a move on the part of the Court (¶¶ 3-4 of Chayut's opinion, ¶ 29 of Naor's opinion, ¶¶ 18-19 of Levi's opinion).

239. *Bar On*, *supra* note 137; *see discussion supra* Part III.C.

240. *See Coleman v. Miller*, 307 U.S. 433, 454 (1939) (though this was not always the attitude of the US Supreme Court). For discussion *see* Edward S. Corwin & Mary Louise Ramsey, *The Constitutional Law of Constitutional Amendment*, 26 NOTRE DAME L. REV. 185 (1951).

difficulties, although grounded in a supreme Constitution, then judicial review of the very content of the Constitution itself is even more contentious on democratic grounds. When the Court's exercise of judicial review is based on foundationalism, it will be difficult for the Court to assert that it only guarantees that the People's will prevail over the legislative will, because the People have already expressed their opinion in favor of constitutional change. Judicial intervention in the content of the Constitution grants it the last word in constitutional matters, while the "regular" judicial review power may be overcome by constitutional amendment.

3. *Incompatibility with the Other Justifications for Judicial Review*

It should be clarified that while the Justices in Israel have tried to assert foundationalism as a complementary theory, foundationalism is a deviation from the other theories in that it does not easily align with their major premises. In a system of parliamentary sovereignty, parliament should ultimately be able to act without constraints. Similarly, in a system of popular sovereignty, many scholars believe that the amending power should be treated on par with the original constitutive power and that constitutional amendments may occur outside the process prescribed for amendment in the constitutional text. As long as the constitutional amendment satisfies the dualistic requirements of expressing the People's deep, deliberate, and sustained judgment, it should be treated as the new higher law governing the nation.²⁴¹ Acceptance of an "unconstitutional constitutional amendment" doctrine thwarts this profound commitment to popular sovereignty. The Justices' reliance on common-law constitutionalism or foundationalism reflects their commitment to the superiority of some constitutional values and rights over democratic or participatory processes. In this sense, the foundationalist or common-law constitutionalism theory has the potential to *supplant* rather than *supplement* the other theories.

4. *Importance of Textual and Historical Support for the Unconstitutional Constitutional Amendment Doctrine*

Germany and India, whose constitutional jurisprudence Barak relied on to promote the application of the unconstitutional constitutional amendment in Israel, have expressed textual and/or historical support for foundationalism. It is doubtful that Israel has similar support in its Basic Laws' language or history.

i. *Comparative Experience*

Many constitutional systems have decided to treat certain provisions within the Constitution as not amendable by explicitly granting them absolute entrenchment (eternity clauses). Usually, such absolute entrenchment is granted

241. See *supra* note 146 and accompanying text.

to the democratic or republican nature of the State, as well as to certain fundamental rights.²⁴² To protect these eternity clauses, some states developed the doctrine of the unconstitutional constitutional amendment.

The German Basic Law is famous for its foundationalist character. The Basic Law's drafters, working in 1949, had the horrors of Nazism firmly in mind. They therefore made some provisions, especially those regarding the basic value of human dignity and the democratic character of the State, inviolable.²⁴³ This textual and historical background also explains why the German Federal Constitutional Court, in its first major constitutional decision, introduced the notion of the unconstitutional constitutional amendment into the system.²⁴⁴ However, since the Court has never yet acted on this doctrine, it remains a *dictum*.²⁴⁵

Even the absence of textual support such as an eternity clause may not be an obstacle for adopting the doctrine of the unconstitutional constitutional amendment. This happened in India because of its unique constitutional history.

The Indian Supreme Court, by a majority of seven to six in *Kesavananda*, decided that its Constitution has some "essential features" and a "basic structure" that could not be violated, even by a constitutional amendment.²⁴⁶ This decision was given in April 1973, and the Court relied on the history of the drafting of the Indian Constitution. It suggested that the Constituent Assembly that drafted the Constitution represented the various minority groups within the Indian society and reached its decisions consensually. Thus, it was inappropriate for a coincidental transitory supermajority of Parliament to amend the essential features of the constitutional document.²⁴⁷ That is to say, the Court wanted to protect the results of the dualist process that led to the adoption of the Indian

242. See BROOKE, *supra* note 18.

243. Article 79(3) of the German Basic Law states: "Amendments to this Basic Law affecting the division of the Federation into *Länder*, their participation in the legislative process, or the principles laid down in Articles 1 and 20 shall be prohibited." Article 1 provides that "Human dignity shall be inviolable," and Article 20 defines that "Germany is a democratic and social federal state." KOMMERS, *supra* note 18, Appendix A.

244. *Southwest State Case*, 1 BVerfGE 14 (1951) (Ger.). For partial English translation of the case, see KOMMERS, *supra* note 18, at 62-69. See also *id.* at 542 n.90. In fact, there is some ambiguity in the decision as to whether the German Federal Constitutional Court derives the foundationalist commitments from the Basic Law or even from some higher principles that bind the Basic Law itself. *Id.* at 63. For discussion of the case, see also Gerhard Leibholz, *The Federal Constitutional Court in Germany and the "Southwest Case"*, 46 AM. POL. SCI. REV. 723, 725-26 (1952). The doctrine was further embraced in the *Article 117 case*, 3 BVerfGE 225, 234 (1953) (Ger.). KOMMERS, *supra* note 18, at 48.

245. See Jacobsohn, *supra* note 18, at 477. It is important to note, that in the *Klass case*, 30 BVerfGE 1, 33-47 (1970), there was a dissenting opinion of three justices that found a constitutional amendment unconstitutional. See KOMMERS, *supra* note 18, at 48, 228-29 and especially 563 note 98.

246. See *Kesavananda*, *supra* note 18.

247. See David G. Morgan, *The Indian "Essential Features" Case*, 30 INT'L COMP. L. Q. 307 (1981).

Constitution (constituent assembly) from being fundamentally altered through a monist process (of supermajority legislative support).

Further, the decision should be seen as part of a power struggle between the legislative and judicial branches. This struggle began in the 1960s, with Parliament adopting statutes that fundamentally infringed on constitutional rights, which were thus invalidated by the Court. This led Parliament to implement its policy through constitutional amendments. In the 1967 *Golk Nath* decision, the Court declared that there are limits to Parliament's constitutional amendment power, but that these limits would only be imposed in the future.²⁴⁸ This constitutional decision became the prominent issue of the 1971 elections and brought victory to Indira Gandhi. Parliament amended the Constitution to abolish the doctrine of the unconstitutional constitutional amendment. In *Kesavananda*, decided in 1973, the Court abolished the *Golak Nath* decision, authorizing Parliament to amend the Constitution in a way that greatly curtails rights. But the Court preserved its power to apply judicial review over a constitutional amendment, if the amendment violates the essential features of the Constitution. The power struggle between the two branches peaked in almost two years of "emergency rule" in India during the years 1975-1976, when Parliament suspended some of India's most important constitutional provisions with regard to fundamental rights and imposed a dictatorial regime. It also amended the Constitution to abolish yet again the judicial power to review constitutional amendments.²⁴⁹ The Court abolished some of these constitutional amendments in the 1980 *Minerva Mills* case based on the "essential features of the Constitution" doctrine.²⁵⁰ These extreme historical and political circumstances, in which all political actors realized after the fact that Parliament had abused its constitutional amendment power, lend credence and retroactive legitimacy to the innovative decision of the Court to adopt the unconstitutional constitutional amendment doctrine.

ii. Israel's Experience

Barak relied on the German and Indian experiences in offering foundationalism to Israel, but it is questionable whether this reliance is justified. Unlike Germany, Israel has no inviolable language or eternity clauses in its Basic Laws. It is also as difficult to speak of the "essential features" of the Israeli Basic Laws as it is with Indian jurisprudence, since Israel has not completed the process of adopting a Constitution of which the essential features can be readily identified. Nor was the process of adopting the Basic Laws typified by consensual support as has happened with regard to the Indian

248. See *L.C. Golak Nath and Others v. State of Punjab*, A.I.R. 1967 S.C. 1643 (India).

249. Brooke, *supra* note 18, at 63-65; Morgan, *supra* note 247, at 326-37; Jacobsohn, *supra* note 18, at 470-76.

250. See *Minerva Mills Ltd. V. Union of India*, A.I.R. 1980 S.C. 1789 (India).

Constitution.

5. *Should Common-law Constitutionalism Serve as the Theoretical Basis for Constitutionalism?*

Even if the Knesset does not adopt eternity clauses, there is still support for the view that certain constitutional values are so fundamental that the Knesset may not substantially violate them, thus advancing common-law constitutionalism. But the circumstances that would justify such judicial decisions should be quite extreme. In the two decisions where the Justices seriously considered applying common-law constitutionalism in Israel—the *Laor Movement* (dealing with unequal allocation of funding for elections) and *MQG* (dealing with inequality in the draft duty)—the circumstances were not extreme enough to justify implementing common-law constitutionalism.

Why should common-law constitutionalism be treated as the last resort rather than the tool for constructing Israel's constitutional regime? Simply because, in the absence of explicit foundationalist provisions in the Constitution, it is not really known what common-law constitutionalism requires. We do not know the origins of its principles. There is no agreed-upon document that can serve as its basis. It is a form of secular religion, but religion nonetheless. Thus, for example, in the *MQG* case, both sides could have invoked common-law constitutionalism on behalf of their cause. The Ultra-Orthodox population could have claimed that their common-law constitutionalism required respect for Jewish tradition and Torah learning, necessitating the exemption of Yeshiva students from army service. Those serving in the army, on the other hand, could have invoked equality and protection of life as requiring no exemption for the Ultra-Orthodox community. History is full of examples of the use of common-law constitutionalism to advance not-so-liberal goals, such as slavery, racial segregation, or degradation of women.²⁵¹

Further, common-law constitutionalism raises critical epistemic concerns of the kind discussed in Adrian Vermeule's *Law and the Limits of Reason*.²⁵² It is not at all clear why we should prefer the decisions of the courts to those of the elected branches, when the latter enjoy the following advantages over the courts: (1) greater numbers; (2) diversity of background and professional experience; (3) tools for gathering information; and (4) the ability to respond rapidly to changing circumstances. When the courts exercise judicial review in the name of the Constitution, it is arguable that they are joining the political branches in a

251. Thus, for example, before the Civil War, it was argued by both sides of the slavery debate that God's law either required or forbade that black people should be slaves. See ELY, *supra* note 228, at 50-51. During the nineteenth century, it was argued that women could not be attorneys since, by the law of nature, they were destined to fulfill the role of mothers and wives. *Bradwell v. Illinois*, (16 Wall.) 130, 141 (1872) (Bradley, J., concurring). In *Plessy v. Ferguson*, 163 U.S. 537, 544 (1896), "the nature of things" required social segregation of blacks and whites on railroad trains.

252. ADRIAN VERMEULE, *LAW AND THE LIMITS OF REASON* 1-122 (2009).

cumulative enterprise. But, when the courts use common-law constitutionalism to decide the content of the Constitution, overriding the political branches' amendments, it is harder to defend judicial decisions as part of a cumulative enterprise. Such judicial review amounts to a naked superiority of the judges over the other branches of governments. In the words of Thomas Poole in *Questioning Common-law constitutionalism*: “[T]o allow the ultimate decision on the prioritisation of values to rest with the judges smacks of abandoning a democratic system in favour of one layered with aristocracy.”²⁵³

It should be noted that theories of common-law constitutionalism or foundationalism cannot prevent constitutional change from occurring when the popular will overwhelmingly and passionately favors it. The commitment to these theories only raises the stakes for constitutional change by requiring a new Constitution or even the use of force to bring about change. It is thus only advisable to rely on these theories in extreme cases.

Probably because of these challenges, the Israeli judiciary in *United Mizrahi Bank* did not rely exclusively on foundationalism or common-law constitutionalism to base its power of judicial review. Commitment to foundationalism may have inspired the Justices to recognize Israel's Basic Laws as its Constitution, but they were careful to treat foundationalism as supplementary to the other theories already discussed in this Article, rather than as a substitute for them. The margins of the different opinions contain a common commitment to foundationalism or common-law constitutionalism. All the Justices seem willing to refer to common-law constitutionalism or foundationalism in the extreme, but they differ in what they consider “extreme.”²⁵⁴

C. *Implications of the Theory*

What are the implications of this theory to present constitutional development? It is often asserted that Israel's legislature has accepted the constitutional revolution as legitimate. Commentators point to the fact that Basic Law: Human Dignity and Liberty is not procedurally entrenched and is thus exposed to amendment by a simple majority; nevertheless, the legislature does not amend that Basic Law.²⁵⁵ But this assertion must be qualified: The very fact that foundationalism or common-law constitutionalism was raised in judicial decisions means that the legislature operates in the *shadow* of this theory.²⁵⁶ In

253. Thomas Poole, *Questioning Common Law Constitutionalism*, 25 *LEGAL STUD.* 142, 162 (2005).

254. See discussion *supra* Part V.A.

255. See, e.g., Rivka Weill, *Shouldn't We Seek the People Consent? On the Nexus between the Procedures of Adoption and Amendment of Israel's Constitution*, 10 *L. & GOV'T* 449, 467-68 (2007).

256. “Since [1992] the Knesset stopped enacting Basic Laws and refuses to continue enacting them. The main reason is the pressure of the religious political parties. Arie Deri, former leader of

other words, the reason why the Israeli legislature does not amend the Basic Laws dealing with individual rights is unclear. The legislature may refrain from doing so because it accepts the legitimacy of Israel's constitutional revolution. But it also may refrain because of concern that the Court would use its authority to declare a constitutional amendment unconstitutional. In light of foundationalism or common-law constitutionalism, it is difficult to explain Parliament's inaction regarding the constitutional revolution or some of its parts.

Barak's latest article on the unconstitutional constitutional amendment intensifies these difficulties. He expands the application of the unconstitutional constitutional amendment doctrine to situations in which the constitutional adoption process was not completed, making it difficult to differentiate between adoption and amendment. He also suggests that, were the Constitution to exclude judicial review over constitutional amendment, this may be treated as an unconstitutional constitutional amendment.²⁵⁷ And, were the Knesset to entirely abolish judicial review over primary legislation, this would also be considered an unconstitutional constitutional amendment. The arguments set forth in this Article suggest that Barak believes the Knesset cannot abolish the constitutional revolution of the 1990s. Barak further suggests in *his* article that it may be the time to treat Israel's current Basic Laws as its complete Constitution, even if the Knesset did not decide to end the constitutional project.²⁵⁸ If the Court made this declaration, any attempt by the Knesset to undo *United Mizrahi Bank* would require it to initiate the replacement rather than the amendment of the Constitution.

VI.

AN INTERMEDIATE CONCLUSION

Israel is the only country in the world where a law professor asking her students, during their first constitutional law lecture, whether the nation has a formal Constitution will receive no answer in the affirmative. This position stands in sharp contrast to the fact that the Israeli Supreme Court currently exercises judicial review to protect the country's Constitution.

This Article contends that Israel's formal Constitution is a hybrid. It is based on a parliamentary sovereignty process of enactment. Yet, it achieved a semi-dualist outcome insofar as only other "Basic Laws" may amend the Basic Laws. Further, foundationalist motives have created judicial recognition of the existence of a formal Constitution. Although omitted from the international

Shas, said that even were the Knesset to enact the Ten Commandments as Basic Laws, he will oppose it. This is so, because of the interpretation of the Supreme Court, and especially that of Barak." Moshe Gorali, "Only Three Statutes were Invalidated" HAARETZ, March 27, 2002, <http://www.haaretz.co.il/hasite/pages/ShArt.jhtml?itemNo=146225> (last visited on January 2, 2012).

257. Barak, *Unconstitutional*, *supra* note 216, at 373.

258. *Id.* at 381 (Barak leaves this issue undecided but it is his way to examine ideas before endorsing them in full).

literature on commonwealth constitutionalism, as mentioned above, Israel, like Commonwealth countries (notably Canada, the United Kingdom and New Zealand), has thus succeeded in creating a middle ground between the sovereignty of the legislature and the supremacy of the Constitution (or, some would say, of the Justices). After *United Mizrahi Bank*, Israel enjoys a formal supreme Constitution in the form of the Basic Laws that are protected via judicial review. This Constitution, however, is vulnerable to the light entrenchment requirements provided for in the Basic Laws.

Every country has its unique history of constitutional development. The process of constitution-making worldwide has always required compromises. It has often involved calls for coercion against dissenters. It sometimes also required a resort to illegality in order to bring about change.²⁵⁹ This Article has attempted to portray Israel's compromises in its constitutional adoption process. Since *United Mizrahi Bank*, the Knesset has accepted the Court's judicial review "trumping" power, at least to the extent of being willing to repeatedly amend regular statutes found by the Court to be unconstitutional.²⁶⁰ This may legitimize Israel's formal Constitution over time, based on *ex post facto* acquiescence.²⁶¹

But the impetus behind this Article has been deeper. It has elaborated that, depending on one's views of the theoretical bases of Israel's formal Constitution, present and future constitutional debates may be resolved differently. Each theoretical framework leads to a different conclusion, and these conclusions should affect Israel's constitutional present and future—whether toward a weak or strong form of constitutionalism. Because of the hybrid nature of Israel's Constitution, Israel may develop in either direction as a result. Therefore, it is now appropriate to debate the kind of a Constitution that is forming in Israel rather than the question of whether an Israeli Constitution exists.

VII.

ON THE NEXUS BETWEEN FORMS OF CONSTITUTION-MAKING AND TYPES OF JUDICIAL REVIEW

This Article uses a comparative analysis to better understand Israel's constitutional development. At the same time, one may deduce the relevant lessons for a comparative study from Israel's unique experience. Politicians and

259. See e.g., ACKERMAN, FOUNDATIONS, *supra* note 15; ACKERMAN, TRANSFORMATIONS, *supra* note 16 (American experience); Jon Elster, *Arguing and Bargaining in Two Constituent Assemblies*, 2 U. PA. J. CONST. L. 345 (2000) (American and French experience); Weill, *Evolution*, *supra* note 16, at 453-79 (American and British experience).

260. Weill, *Reconciling*, *supra* note 1, at 500, 504 and note 190.

261. See also Or Bassok, *A Decade to the "Constitutional Revolution": Israel's Constitutional Process From a Historical-Comparative Perspective*, 6 L. & GOV'T 451 (2003) (discussing the potential that Israel's Constitution would acquire legitimacy in an evolutionary manner).

scholars alike show growing interest in various forms of judicial review, especially alternatives to the prevalent “strong-form” judicial review exercised in the United States.²⁶² The interest in weak forms of judicial review arises out of a desire to see a better balance between the protection of individual rights and democratic self-governance, on one hand, and the redistribution of power from the courts to elected representatives in constitution-making and interpretation, on the other. The focus of this emerging area of study is on the intermediate model found in Commonwealth countries such as Canada, the United Kingdom, New Zealand, and to some extent in Australia at the territorial and state levels.²⁶³ This intermediate model lies along a continuum between the supremacy of the Constitution (or judges), as in the United States, and the supremacy of the legislature, as in the classic Diceyan tradition of the United Kingdom. The intermediate model allows for better protection of rights than that found in traditional forms of parliamentary sovereignty. But, in contrast to the US “strong-form” model, this weaker intermediate model recognizes that different branches of government—primarily the legislature and the judiciary—can legitimately and reasonably disagree about the interpretation of the Constitution; and when this occurs, the elected bodies should retain the final word on the subject.²⁶⁴

Leading scholars of this Commonwealth model have asserted that the features of a given constitutional document determine the nature of intermediate or hybrid constitutionalism.²⁶⁵ In contrast, the underlying theme of this Article is that there is a strong connection between the process of constitution-making and the resulting democratic legitimacy of the Constitution. Consequently, this legitimacy, or lack thereof, affects the nature of judicial review that may be utilized by the courts. That is to say, intermediate constitutionalism is the result of the political processes that accompany the adoption (and amendment) of the Constitution, rather than the result of the language of the constitutional provisions.

A dualist, popular sovereignty Constitution offers the strongest democratic legitimacy, since it is based on the deliberative, deep, sustained decisions of the People. This, in turn, allows for strong-form judicial review, under which courts may argue that they are protecting the will of the People from incursions by the legislature at times of normal politics. Courts guarantee that the People, rather

262. Tushnet argued that some weaker forms of judicial review exist and should even be used within the US to examine certain constitutional issues. Thus, for example, the non-justiciability doctrine is already employed in the United States as a mechanism to ensure that decision-making responsibility rests with the elected bodies. Also, the social rights of citizens may in the future be recognized as particularly suitable for weaker forms of judicial review. TUSHNET, *supra* note 20, at 37, 227-64.

263. See *supra* note 20 and accompanying text; see, e.g., TUSHNET, *supra* note 20, at xi, 23. Gardbaum, *The New Commonwealth Model*, *supra* note 20, at 707-11, 739-48.

264. See e.g. HOGG, *supra* note 58, at 172-74; TUSHNET, *supra* note 20, at xi, 23.

265. For literature, see *supra* note 20.

than their representatives, are the only ones entitled to alter the Constitution through special constitutive processes. This in fact is the justification in *Marbury* for judicial review developed in the United States.²⁶⁶ This model also allows political dissent from judicial decisions; but this dissent must gather the support of the People in order to override judicial decisions.²⁶⁷

The legislative self-entrenchment model suffers from a democratic deficit in the case of the “monist” constitutions that rely on constitution-making by regular legislative assemblies in regular legislative processes. The problem is that this model does not explain why one legislature should enjoy more power than its successors, so as to bind them to constitutional arrangements. The model’s application is thus totally dependent on how both the courts and the representative bodies *de facto* treat the Constitution. As long as subsequent legislatures adhere to legislative self-entrenchment, semi-constitutional arrangements may protect individual rights and constitutional values. But when legislatures choose to violate legislative self-entrenchment provisions, it will be up to the courts to decide whether to force them to abide by those provisions. Both theory and history suggest that this will not necessarily happen. Dicey and more recent British commentators provide various examples of this phenomenon within British history.²⁶⁸ This model thus offers inherent instability and is a weak form of constitutionalism.²⁶⁹

The “manner and form” model, which is also rooted in monist traditions, enjoys better democratic legitimacy than legislative self-entrenchment does. That model does not entrench rights or values but merely sets a shaming mechanism against their infringement. The courts may exercise judicial review to respect the legislature’s own predefined process of enactment, but this judicial power gives way once the legislature openly declares its will to violate or override constitutional rights and values.²⁷⁰ This may account for New Zealand’s current constitutional regime, which some argue is not actually a constitutional democracy.²⁷¹ This “manner and form” idea may also be the impetus behind the “notwithstanding” clause in Canada, which allows the legislature to explicitly contradict provisions of the Canadian Charter with a simple majority.²⁷² “Manner and form” restrictions have also been advocated lately in Commonwealth countries—notably New Zealand, Britain, and

266. *Marbury*, *supra* note 8.

267. For elaboration, see *supra* Part III.

268. See *supra* note 53 and accompanying text.

269. For elaboration see *supra* Part II. C.

270. See *supra* Part IV.

271. The New Zealand Bill of Rights Act of 1990 grants courts the power to interpret statutes as far as possible in accordance with protected rights contained in the Bill. But the courts lack the power to invalidate statutes. The legislature may overcome any interpretation by explicitly declaring its intention to violate rights. See Gardbaum, *Reassessing*, *supra* note 20, at 183-88 (describing New Zealand’s intermediate model of constitutionalism).

272. See Weill, *Reconciling*, *supra* note 1, at 506-10.

Canada—as an intermediate model between parliamentary sovereignty and supreme constitutions.²⁷³ While the model may thus be attractive in parliamentary systems, it is at the price of creating very weak protection for rights as shown above.

Lastly, foundationalism or common-law constitutionalism is the most problematic theory on which to exercise judicial review. Since the courts primarily develop foundationalism, it suffers from the most severe democratic legitimacy problem. It serves mainly as a threat against the legislature rather than a potent weapon. Even in the countries from which the foundationalist model emerged—initially Germany and subsequently India—it is rarely used. Nonetheless, this model is not without consequences. The knowledge of the elected bodies that their courts might potentially use foundationalism to strike down statutes may affect legislation in ways that cannot be easily measured.²⁷⁴

This Article rejects the assertion, sometimes found in the literature, that the instability of intermediate hybrid models results only or mainly from the political culture in which they operate.²⁷⁵ Instead, the inherent instability of intermediate models of constitutionalism stems from their hybrid nature. This hybrid nature enables these models to become either weak—or strong—form constitutionalism through evolution and “experimentalism,” without revolutions or other grand constitutional beginnings.²⁷⁶ Rather, their evolution is dependent on the behavior and interaction between the various constitutional actors—primarily courts, executives, legislatures, and the People.

Further, although the literature suggests that hybrid models tend to develop into “strong-form” judicial review,²⁷⁷ this is not supported by history.²⁷⁸ Rather, hybrid models may develop in either direction. The method of constitutional adoption may be a strong indicator of the direction in which they will evolve. This leads to the last point: emphasis on the connection between the method of constitutional adoption and the resulting type of judicial review leads one to

273. See e.g., Prebble, *supra* note 183 (citing British authorities); Tse, *supra* note 180, at 83 (citing Canadian authorities).

274. For elaboration see *supra* Part V.C.

275. TUSHNET, *supra* note 20, at 43-76; Gardbaum, *Reassessing*, *supra* note 20, at 177, 183; Hiebert, *supra* note 20, at 12, 14, 19, 25, 27.

276. The term experimentalism is taken from Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998).

277. See, e.g., TUSHNET, *supra* note 20, at 43, 47; Gardbaum, *Reassessing*, *supra* note 20, at 175, 178-79, 183, 188, 191, 198-99 (writing that commentators’ major criticism against the Commonwealth model is that it tends to strong-form judicial review like the US instead of being an intermediate model. He however does not share this criticism particularly with regard to New Zealand that seems to have successfully created an intermediate model).

278. See, e.g., DICEY, *supra* note 15, at 21-25 (attesting that parliaments’ attempt at self-entrenchment has often failed in practice); Weill, *Centennial*, *supra* note 165 (suggesting that the *Jackson* decision may weaken the dualist commitments of Britain); Gardbaum, *New Commonwealth Model*, *supra* note 20, at 719-21 (describing Canada’s Bill of Rights of 1960 as a failed attempt to achieve strong constitutionalism).

question the classifications of some countries as belonging to the intermediate model. The literature suggests that judicial review in both Canada and the United Kingdom is evolving toward *de facto* “strong-form” judicial review,²⁷⁹ and this is not surprising in light of the process of adoption of their constitutional documents. The Charter’s adoption occurred through a dualist popular sovereignty process, not by legislative enactment.²⁸⁰ Thus the relatively strong democratic legitimacy of the Charter lends legitimacy to strong-form judicial review. Similarly, the UK Human Rights Act 1998—though of domestic origins—is the result of higher European structures in the form of the European Convention of Human Rights that is binding upon Britain through the Strasbourg Court. The operation of judicial review in both Canada and the United Kingdom should thus resemble strong-form judicial review as in other dualist countries, including the United States. Perhaps they should have been classified as belonging to strong-form constitutionalism to begin with. In contrast, Israel—as shown in this Article—and maybe some Eastern European countries may fit the intermediate model, though they are omitted from the international literature on Commonwealth constitutionalism.²⁸¹

VIII. CONCLUSION

This Article in its entirety may be treated as a theoretical exercise in how to transform from parliamentary sovereignty to constitutional democracy, and vice versa, through evolutionary processes with the involvement of regular political actors, rather than through a special Constituent Assembly or another explicit constitution-making process. It is also a theoretical exercise in how various modes of constitutional adoption lead to different mechanisms of judicial review. As such, it challenges conventional accounts of how intermediate models come about and what systems should be classified as belonging to this intermediate model. This Article may be of special relevance to the United Kingdom, which still struggles with the question of how to adopt a formal Constitution within a monist framework, and the United States, which frequently deals with fundamental questions of informal constitutional amendments, possible mechanisms of judicial review, and the validity of legislative self-entrenchment.

279. See *supra* note 278.

280. See *supra* note 58 and accompanying text.

281. See *supra* Part II.B.

2012

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Seema Mohapatra

Recommended Citation

Seema Mohapatra, *Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy*, 30 BERKELEY J. INT'L LAW. 412 (2012).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol30/iss2/4>

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Stateless Babies & Adoption Scams: A Bioethical Analysis of International Commercial Surrogacy

By
Seema Mohapatra*

I. INTRODUCTION

Truth is often stranger than fiction, and nowhere is this more evident than when examining real stories from international commercial surrogacy that have occurred in the last few years. This Article uses these cases¹ to analyze this industry through a bioethical lens. Bioethicists use stories to demonstrate how theory and normative ideals apply to real-world situations.² By detailing examples of the unique scenarios that have arisen in cities in India, the United States, and Ukraine, this Article highlights some of the ethical and legal dilemmas such stories raise. Additionally, this Article examines these stories using a classic bioethics framework³ to demonstrate the need for clarification of

* Assistant Professor of Law, Barry University School of Law, Orlando, Florida. B.A., Johns Hopkins University, M.P.H., Yale University, J.D., Northwestern University School of Law. I would like to thank Judith Daar, Paul Lombardo, and the participants of the Fourth Annual Applied Feminism Workshop at the University of Baltimore School of Law and the Junior Faculty Workshop at the 2011 American Society of Law and Medicine Health Law Professors Conference at the Loyola University School of Law for their helpful insight in developing my surrogacy research for this Article. I would like to also express my appreciation to Patrick Burton for his research assistance and to the Barry University School of Law for supporting this research with a Summer Research Grant. This Article is part of a series of Articles in which I explore legal and ethical issues related to international surrogacy. See Seema Mohapatra, *Achieving Reproductive Justice in International Surrogacy*, 22 ANNALS HEALTH L. (forthcoming 2012).

1. The term “stories” is often used interchangeably with “cases” in bioethical analyses. See Sidney Dean Watson, *In Search of the Story: Physicians and Charity Care*, 15 ST. LOUIS U. PUB. L. REV. 353, 355 (1996) (stating that “bioethics attempts to define ethical behavior in the context of concrete, often complex, real life stories.”)

2. *Id.* (noting that storytelling has long been a tool by bioethicists.)

3. See TOM L. BEAUCHAMP & JAMES F. CHILDRESS, PRINCIPLES OF BIOMEDICAL ETHICS 15-16, 166 (5th ed. 2001) (defining the classic principles of bioethics as beneficence, nonmaleficence, autonomy, and justice.)

the regulations related to international surrogacy, and to suggest the form that these regulations might take.⁴

Global surrogacy has achieved unprecedented popularity due to advances in technology that allow for gestational surrogacy and greater acceptance in public opinion. In a traditional non-gestational surrogacy arrangement, a surrogate becomes pregnant via artificial insemination by sperm from the intended father or a sperm donor.⁵ Because her own egg contributes to the embryo, a traditional surrogate carries her own genetically related child and agrees to give it up upon the baby's birth.⁶ In contrast, gestational surrogacy refers to the process whereby scientists create an embryo with an egg and sperm from the intended parents (or from donor eggs and sperm) through an in vitro fertilization (IVF) procedure and then transfer it into the uterus of a genetically unrelated surrogate.⁷ After a combination of well-publicized cases where traditional surrogates decided they wished to raise the infant that they carried, and the public sympathy these surrogates received due to their genetic tie to the infant, the absence of a genetic tie has made gestational surrogacy vastly more popular than traditional surrogacy.⁸ Consequently, medical tourism, whereby consumers of health care travel around the world to receive cheaper medical care,⁹ now includes reproductive tourism.

International, or global, surrogacy is a booming business. Despite many countries' prohibitions or restrictions on surrogacy arrangements, the market for international surrogacy has grown to an estimated size of six billion dollars annually worldwide.¹⁰ Some countries, such as India and Ukraine, wish to build a reputation as international surrogacy meccas by providing quality medical care at a low cost and by attempting to provide the most comprehensive legal protections for intended parents.¹¹ In the United States and some European countries, the stigma associated with using a surrogate that existed a few decades ago appears to have dissipated as these arrangements become more common.¹² Additionally, intended parents who were previously unable to consider a surrogacy arrangement due to financial constraints have become

4. See Binny Miller, *Telling Stories About Cases and Clients: The Ethics of Narrative*, 14 GEO.J. LEGAL ETHICS 1, 10 (2000) (arguing that stories may be preferable to traditional methods of legal analysis to understand legal issues in context).

5. Usha Regachary Smerdon, *Crossing Bodies, Crossing Borders: International Surrogacy Between the United States and India*, 39 CUMB. L. REV. 15, 17 (2008-09).

6. *Id.*

7. *Id.*

8. *Id.*

9. See Nathan Cortez, *Patients Without Borders: The Emerging Global Market for Patients and the Evolution of Modern Health Care*, 83 IND. L.J. 71, 79 (2008).

10. Smerdon, *supra* note 5, at 24.

11. See generally *id.*

12. See generally Lorraine Ali & Raina Kelly, *The Curious Lives of Surrogates*, NEWSWEEK, Apr. 7, 2008, <http://www.newsweek.com/2008/03/29/the-curious-lives-of-surrogates.html>.

viable fertility tourists as the competitive global marketplace drives costs down and enhances access to information about foreign countries. Although some have written with concern about the potentially exploitative nature of international surrogacy,¹³ the Western press has generated mostly positive reports about success stories in international surrogacy.¹⁴

This Article uses surrogacy cases in Ukraine, India, and the United States to highlight similarities and differences in the surrogacy experience in countries active in the international surrogacy market. Although international surrogacy is a relatively new market in which participant countries compete to establish their reputations as leaders, Ukraine, India and the United States have been at the forefront of the booming international surrogacy industry. Within the United States, California has a long history with surrogacy. Due to its developed surrogacy system, it is perceived as an attractive international surrogacy option for those who can afford the high cost of surrogacy in the United States.¹⁵ India also has emerged as a global leader in surrogacy in the developing world. Ukraine is quickly gaining traction as a destination of choice.

This Article first describes the story of a baby-selling ring that exploited the mismatch between surrogacy and adoption law between the United States—California specifically—and Ukraine. Then, this Article explores stories in India and Ukraine involving babies “lost” in legal limbo due to the inconsistencies between the surrogacy laws of different countries. Next, this Article discusses the gestational surrogacy landscape in the United States, India, and Ukraine and examines the laws and regulations related to surrogacy that exist in each country. Finally, this Article discusses bioethical concerns raised by the stories as they relate to intended parents and the surrogates. I use this bioethical framework to analyze the stories of commercial surrogacy and identify areas where better regulations could improve the current global surrogacy market.

13. See generally DEBORA L. SPAR, *THE BABY BUSINESS: HOW MONEY, SCIENCE AND POLITICS DRIVE THE COMMERCE OF CONCEPTION* 83 (2006) (noting that surrogacy has been thought of as baby selling, prostitution, and rape).

14. See, e.g., *Oprah Winfrey Show* (CBS television broadcast Jan. 1, 2006), <http://www.oprah.com/world/Wombs-for-Rent/6>. (Lisa Ling, who as an investigative reporter on the Oprah Winfrey Show featured the Akanksha Infertility Clinic, stated, “So many people from Europe and other countries come to the United States, but it’s so expensive. No one says that American women are being exploited when they become surrogates . . . Now this baby and this couple will have this bond with this country. And in a way, become these sorts of ambassadors, these cultural ambassadors. It is confirmation of how close our countries can really be.”).

15. See Alex Barnum, *For Infertile Couples, It’s California or Bust*, *SAN FRANCISCO CHRONICLE*, Aug. 15, 2005, <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2005/08/15/MNG0NE81BB1.DTL&ao=all>.

A. *Accounts of International Commercial Surrogacy Gone Awry:
Baby Selling Enabled by Different Legal Regimes for
Adoption and Surrogacy in California*

In what has been described as a “baby-selling ring,” Theresa Erickson¹⁶ and Hillary Neiman,¹⁷ two well-known surrogacy law attorneys, and Carla Chambers,¹⁸ a six-time surrogate, recruited American and Canadian women between the years 2005 and 2011 to purportedly serve as surrogates.¹⁹ According to Erickson, Chambers, and Neiman’s admissions in plea agreements with federal prosecutors,²⁰ the three women arranged for the surrogates to fly to Ukraine to be implanted with embryos from donor eggs and donor sperm.²¹ Erickson, Chambers, and Neiman also promised these recruits between \$38,000 and \$45,000 for their services,²² which is a much higher rate than is typical for

16. Erickson was extremely well known and well regarded in the surrogacy community. She had appeared on national television and authored a book entitled “Assisted Reproduction: The Complete Guide to Having a Baby with the Help of a Third Party.” See Alyssa Newcomb, *Baby-Selling Enterprise Busted, Three Plead Guilty*, (ABC News broadcast Aug. 10, 2011), <http://abcnews.go.com/US/attorney-pleads-guilty-baby-selling-ring/story?id=14274193>. She was the host of her own radio show, *The Surrogacy Lawyer: Your Guide to IVF & Third Party Family Building Surrogacy Law* Radio on Voice America. Erickson served as an executive board member and a member of the Legal Council of the American Fertility Association, Board Member and the Legal Director of Parents via Egg Donation. Ironically, Erickson often gave talks about “how prospective parents can best protect themselves and their families legally, financially and emotionally” in international “family building” arrangements. She was set to speak on this topic at the 2012 Exotic Medical Tourism Congress & Expo. See <http://www.fertility-tourism.com/agenda/> (last visited Aug. 29, 2011).

17. Neiman founded The National Adoption and Surrogacy Center in Rockville, Maryland and joined the baby-selling operation in 2008, according to federal court filings. Danielle E. Gaines, *Former Attorney from Chevy Chase Sentenced to Prison for Baby-Selling Conspiracy*, GAZETTE (Dec. 2, 2011), <http://www.gazette.net/article/20111202/NEWS/712029586/former-attorney-from-chevy-chase-sentenced-to-prison-for-baby-selling&template=gazette>.

18. See Kate Sheehy, *Black-market babies may have had same mom and dad*, NEW YORK POST, Aug. 18, 2011, http://www.nypost.com/p/news/local/ma_and_pa_operation_5T6oMVXk5I15kVt6buVI6H?CMP=O TC-rss&FEEDNAME=.

19. See Alan Zarembo, *Women deceived in surrogacy scam*, LOS ANGELES TIMES, Aug. 13, 2011, <http://articles.latimes.com/2011/aug/13/local/la-me-baby-ring-20110814>. The term “surrogate” means “to take the place of another” and in the context of gestational surrogacy arrangements, the surrogate is meant to carry a baby for another person or couple. In this case, however, there was no one for whom the “surrogates” were actually carrying these fetuses.

20. FED. BUREAU OF INVESTIGATION, *BABY-SELLING RING BUSTED*, Aug. 9, 2011 <http://www.fbi.gov/sandiego/press-releases/2011/baby-selling-ring-busted> [hereinafter FBI].

Under their plea deals, Erickson and Neiman were charged with one count of conspiracy to commit wire fraud each. Under her plea deal, Chambers was charged with “monetary transactions in property derived from illegal activity.” Each woman faces a maximum sentence of five years in federal prison and a fine of up to \$250,000. Erickson has agreed to pay \$10,000 restitution to each family who received a baby under their scheme.

21. *Id.*

22. See Zarembo, *supra* note 19.

surrogates in the United States. Erickson, Chambers, and Neiman likely picked Ukraine as a destination because of its lax regulations,²³ the availability of white egg and sperm donors,²⁴ and willingness of local clinics to implant women with embryos without proof of a surrogacy agreement.²⁵ At the time these embryos were implanted and for months afterward, these “surrogates” carried fetuses for which there were no intended parents or surrogacy agreements.²⁶ Instead, Erickson, Chambers, and Neiman waited until the women were in their second trimester of pregnancy, when the chance of miscarriage was smaller, and advertised to potential adoptive parents that a “Caucasian” infant was available, with “high expenses” due to a surrogacy arrangement that “fell through.”²⁷ The women told the same story—that the intended parents no longer wanted the baby—to numerous potential adoptive parents over six years.²⁸ Additionally, they informed prospective parents that the parents would be able to choose their not-yet-born child’s gender.²⁹ This arrangement led to the placement of at least a dozen babies, and potential adoptive parents paid from \$100,000 to \$150,000

23. *Id.*; See also Emily Smith, *How Socialite Brought Down Black-Market Baby Brokers*, NEW YORK POST, Aug. 16, 2011. According to press reports, the Intersono Clinic in Lviv, Ukraine was the location where the imported surrogates had their IVF treatments and became impregnated. In a recent newspaper article, the manager of the Intersono Reproductive Clinic in Lviv, Ukraine, where the surrogates were implanted, reported that there “a lower demand for surrogacy.” This may be a reason why the Clinic chose to impregnate American and Canadian women who did not have proof of surrogacy arrangements. These arrangements break Ukrainian family law but, to date, no charges have been brought against the clinic or its affiliates.

24. See Sheehy, *supra* note 18. (stating that all of the “designer babies” were white and the most marketable with fair hair and light eyes); See also Bonnie Rochman, *Baby-Selling Scam Focuses Attention on Surrogacy*, TIME HEALTHLAND, Aug. 19, 2011, <http://healthland.time.com/2011/08/19/baby-selling-scam-focuses-attention-on-surrogacy/>. (noting that white babies are sought after and hard to come by in the adoption market); Smith, *supra* note 23. Each of the advertisements related to these arrangements emphasized that the babies were Caucasian. For example, one Internet advertisement posted by Chambers stated “Lawyer currently has a adoption situation available...originally a surrogacy situation, baby conceived via IVF and donor embryos...Caucasian Infant...This situation has high expenses.” See Carla Chambers, Hilary Neiman, Theresa Erickson, *Baby for sale ads, IVF Land at Surrogacy Land on Surrogacy World*, <http://ivflandonsurrogacyworld.blogspot.com/2011/08/carla-chambers-hilary-neiman-theresa.html> (last visited Aug. 28, 2011) (providing excerpts of advertisements for adoptive parents placed by Chambers and Nieman to popular adoption websites). See also Anthony Barnett & Helena Smith, *Cruel Cost of the Human Egg Trade*, OBSERVER, Apr. 30, 2006, at 6, <http://www.guardian.co.uk/uk/2006/apr/30/health.healthandwellbeing> (stating that, because of their light complexion, Eastern European women egg donors are sought after in Ukraine and are even imported to other countries).

25. See Zarembo, *supra* note 19.

26. *Id.*

27. See CHAMBERS ET AL., *supra* note 24.

28. See Zarembo, *supra* note 19.

29. Bonnie Rochman, *Baby-Selling Scam Focuses Attention on Surrogacy*, TIME HEALTHLAND, Aug. 19, 2011, <http://healthland.time.com/2011/08/19/baby-selling-scam-focuses-attention-on-surrogacy/>. See also Smith, *supra* note 23.

to assume the supposedly failed surrogacy arrangements.³⁰

Under California law, it is legal to pay a surrogate to carry a child as long as a surrogacy agreement is in place prior to conception.³¹ However, if a woman is carrying a child and wishes to give it up for adoption, it is illegal to pay her beyond her medical expenses.³² The reason for the distinction is that it is considered human trafficking to seek to adopt a baby for a price after its conception. To avoid these regulations, the women flew the “surrogates” to Ukraine for their implantation. Erickson then pre-dated the surrogacy agreements and falsely represented to the San Diego Superior Court that the infants were the result of surrogacy arrangements in place at the time of conception.³³ Although California has a very sophisticated legal system relating to family building via surrogacy and adoption, the women picked California as the place where the surrogates would give birth because of one particularly permissive requirement. Unlike in most US states, in California intended parents of a biologically unrelated baby carried by a surrogate may be listed on a birth certificate without going through a legal adoption.³⁴

These attorneys capitalized on their knowledge of inconsistencies between adoption and surrogacy laws in two countries to profit from baby-selling transactions. The lack of oversight in Ukraine allowed the implantation to take place. Despite California’s very sophisticated legal system relating to family building via surrogacy and adoption, the permissive birth certificate requirements nevertheless allowed Erickson to defraud the system. While there are many disturbing aspects of this case, this Article will focus on the way inconsistencies between adoption and surrogacy laws in California and the lack of oversight in Ukraine enabled this scheme.

B. *The Case of Baby Manji: A Legal Limbo Causes Great Delay*

The story of Baby Manji further demonstrates the kinds of bioethical dilemmas that commercial surrogacy raises. Baby Manji’s birth to a surrogate sparked a controversy about how to best determine the legal parentage of a baby

30. Rochman, *supra* note 29.

31. According to prosecutors, the attorneys also misrepresented that they knew the identities of the anonymous sperm and egg donors and “fraudulently obtained more than \$20,000 in state insurance coverage for the surrogates, who were ineligible to receive the benefits.” There is also some concern that at least some of the babies involved in the scheme may be “full brothers and sisters” because they may be from the same egg and sperm donors. See Kate Sheehy, ‘Ma And Pa’ Operation - Black-Market Siblings, NEW YORK POST, Aug. 18, 2011. See also, FBI, *supra* note 20 (stating that California law permits surrogacy arrangements if the women who will carry the babies “enter into an agreement prior to the embryonic transfer”).

32. See CAL. PENAL CODE § 273 (2012).

33. See Kate Sheehy, ‘Ma And Pa’ Operation - Black-Market Siblings, NEW YORK POST, Aug. 18, 2011.

34. *Id.*

born to a surrogate and whether it was wise to allow the commercial surrogacy market to grow unfettered by regulations. Born in 2008 to a surrogate mother in India, the media regularly referred to her as “Baby M.”³⁵ (The Baby M. case from India discussed here should not be confused with the Baby M. case that occurred three decades ago in New Jersey.³⁶)

The Baby Manji case was controversial, bringing up novel issues and demonstrating gaps in the current surrogacy laws and regulations. In 2007, Baby Manji’s intended parents, Ikufumi and Yuki Yamada, traveled from their home in Japan to the Akanksha Infertility Clinic in Anand, Gujarat,³⁷ to arrange for a gestational surrogacy with an Indian surrogate. Akanksha Infertility Clinic paired the Yamadas with an Indian woman, Pritiben Mehta, who agreed to serve as their surrogate.³⁸ Pritiben Mehta was from Ahmadabad, Gujarat, and had two children of her own.³⁹ Under the Yamadas’ agreement with the Akanksha Infertility Clinic, Pritiben Mehta would be implanted with an anonymous donor egg fertilized by Ikufumi’s sperm.⁴⁰ Under the contract that the Yamadas and the gestational surrogate signed, Pritiben Mehta would carry the baby to term and then relinquish all rights and responsibilities for the baby to the Yamadas.⁴¹

However, the Yamadas divorced one month prior to Baby Manji’s birth, which complicated the legal determination of her rightful parents.⁴² The intended father, Ikufumi Yamada, still wished to raise Baby Manji, but the intended mother Yuki Yamada did not.⁴³ First, Ikufumi Yamada petitioned the

35. See Dhananjay Mahapatra, *Baby Manji’s Case Throws Up Need For Law On Surrogacy*, *TIMES OF INDIA*, Aug. 25, 2008, http://articles.timesofindia.indiatimes.com/2008-08-25/india/27946185_1_surrogacy-agreements-surrogate-mother-surrogate-contract.

36. *In re Baby M*, 537 A.2d 1227, 1237 (N.J. 1988); see generally J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M*, 39 *CAP. U. L. REV.* 345, 346 (2011). The Baby M case involved a traditional surrogate, Mary Beth Whitehead, who was artificially inseminated with the sperm of William Stern, the intended father. Mary Beth Whitehead was supposed to give up all rights to the baby she was carrying upon delivery in exchange for \$10,000. However, she had a change of heart and wanted to raise the child. This decision began a drawn-out battle in both the courts and media that raised questions of class and privilege. Many scholars saw the surrogacy contract between the college-educated and wealthy Sterns (a biochemist and pediatrician), and the high school dropout Whitehead (who was married to a sanitation worker), as unseemly, and even exploitative. Volumes have been written about this famous case, and it highlighted some of the problems that may arise with commercial surrogacy. Additionally, as discussed later, as a result of controversy over the Baby M case, states developed various laws related to surrogacy, ranging from banning it outright to being very permissive. See discussion *infra* Part II.A.

37. See discussion, *infra* Part II.C.2

38. See Kari Points, *Commercial Surrogacy and Fertility Tourism in India: The Case of Baby Manji*, *KENAN INST. FOR ETHICS AT DUKE UNIV.*, (2009), <http://www.duke.edu/web/kenanethics/CaseStudies/BabyManji.pdf>.

39. *Id.* at 10.

40. *Id.* at 4.

41. *Id.*

42. See *id.* at 5.

43. Additionally, Yuki Yamada refused to accompany Ikufumi Yamada to India to claim her.

Japanese embassy in India for a Japanese passport for Baby Manji, but the embassy would not issue the baby a Japanese passport because of Japan's requirement of birth citizenship.⁴⁴ Then Ikufumi Yamada approached the Indian embassy for an Indian passport for Baby Manji in order to take the baby back to Japan. However, Indian law did not recognize Ikufumi Yamada's status as a single adoptive father.⁴⁵ Thus, the Indian embassy was unable to issue a passport for the baby because, in India, a child is issued a passport based upon the child's mother's citizenship.⁴⁶ None of the potential mothers—the surrogate, the intended mother, or the egg donor—would claim Baby Manji as her own.⁴⁷ While the city of Anand issued a *birth certificate* for Baby Manji, indicating that Ikufumi Yamada was her father,⁴⁸ the slot for the name of Baby Manji's mother remained blank.⁴⁹ Although Ikufumi Yamada was the biological father of Baby Manji, he now confronted the potential need to legally adopt her because of the unique legal situation he and the baby faced. Again, Indian law presented a barrier: India's adoption laws prevent a single male from adopting a female child.⁵⁰

While Ikufumi Yamada worked to resolve this legal disarray, political turmoil and bombings in Baby Manji's birthplace required that she be moved to another hospital shortly after her birth.⁵¹ Simultaneously, doctors treated her for a variety of hospital-borne illnesses, including septicemia.⁵² Adding yet another "mother" to her life, Ikufumi Yamada's friend's wife temporarily housed and breastfed Baby Manji.⁵³

Eventually, Ikufumi Yamada prevailed in taking Baby Manji home to Japan, but not before his Indian tourist visa expired. Instead, he returned to Japan and left the care of Baby Manji to his mother, Emiko Yamada.⁵⁴ Emiko

The surrogacy contract that the Yamadas had entered into at the Akanksha Infertility Clinic in Anand, Gujarat did not directly address this issue, but it did state that the intended father would raise the child if the intended mother did not wish to. This contractual provision did not prevent the legal turmoil that resulted from this unique situation, which neither Indian nor Japanese law was equipped to handle. *See id.* at 4–6.

44. *See* Rohit Parihar, *Identity Crisis*, INDIA TODAY, Aug. 9, 2008, <http://indiatoday.intoday.in/site/story/Identity+crisis/1/12831.html>; *India-Japan Baby in Legal Wrangle*, BBC NEWS, Aug. 6, 2008, <http://news.bbc.co.uk/2/hi/7544430.stm>.

45. Points, *supra* note 38, at 5.

46. The Japanese embassy insisted that Baby Manji needed travel documents from India, her birthplace. Parihar, *supra* note 45.

47. Points, *supra* note 38.

48. *Id.*

49. *See id.*

50. The Hindu Adoptions and Maintenance Act, No. 78 of 1956 (1956), vol. 7, [http://punjabrevenue.nic.in/hadoptact\(1\).htm#_ftnref1](http://punjabrevenue.nic.in/hadoptact(1).htm#_ftnref1).

51. Points, *supra* note 38, at 5.

52. *See id.*

53. *Id.* at 4.

54. *Id.* at 6.

Yamada petitioned to adopt Baby Manji, and the case went up to the Supreme Court, the highest court in India.⁵⁵ The court referred Emiko Yamada to the National Commission for Protection of Child Rights.⁵⁶ After much legal wrangling, the state finally issued Baby Manji a certificate of identity, a legal document given to those who are stateless or cannot get a passport from their home country.⁵⁷ With this certificate, Ikufumi Yamada was able to obtain a Japanese visa to bring Baby Manji home to Japan.⁵⁸

The Baby Manji case demonstrates the complexity of international surrogacy. Laws and regulations concerning adoption, surrogacy, and citizenship have not been able to accommodate international arrangements borne out of the rapidly emerging technology used to create babies such as Baby Manji. Although the Indian Courts finally allowed Baby Manji to leave India with her biological father, the case exposed the lack of clear guidelines and laws related to international surrogacy in India.

C. *A Stateless Baby, Criminal Charges and Exile in Ukraine*

Patrice and Aurelia Le Roch, citizens of France, traveled to Ukraine to hire a gestational surrogate in 2010.⁵⁹ Surrogacy is illegal in France and the country does not grant French citizenship to surrogate-born babies.⁶⁰ However, the Le Roches desired to have a biologically related baby through surrogacy. Since Ukrainian law allows intended parents of surrogate-born babies to be listed as birth parents, Patrice and Aurelia travelled to Kyiv, Ukraine to arrange for a gestational surrogate through an agency.⁶¹ The Ukrainian surrogate then delivered twins for the couple.⁶² After, the Le Roches followed the agency's suggestion to hide the details of the surrogacy from the French embassy in Ukraine so as to obtain French passports for the babies.⁶³ The couple then filed for French passports at the French Embassy and apparently claimed that the

55. In the meantime, Satya, a non-governmental organization based in Jaipur, attempted unsuccessfully to petition a lower court, the Rajasthan High Court, claiming that Emiko Yamada's custody of Baby Manji was illegal due the lack of laws on surrogacy in India and Japan. *See Japan Gate-Pass For Baby Manji*, THE TELEGRAPH, October, 17, 2008, http://www.telegraphindia.com/1081018/jsp/nation/story_9984517.jsp.

56. *See Yamada v. Union of India*, 2008 S.C.A.L.E. 76, 13 (India), <http://judis.nic.in/supremecourt/helddis.aspx>.

57. *Id.*

58. Karen Bushy & Delaney Vun, *Revisiting the Handmaid's Tale: Feminist Theory Meets Empirical Research on Surrogate Mothers*, 26 CAN. J. FAM. L. 13, 84 (2010).

59. *See* Kateryna Grushenko, *French Couple's Desire for Child Brings Trouble*, KYIV POST, April 15, 2011, <http://www.kyivpost.com/news/nation/detail/102433/#ixzz1WM80ko3W>.

60. *See id.*

61. *Id.*

62. *Id.*

63. *Id.*

babies were naturally born to the mother.⁶⁴ The French embassy suspected surrogacy and requested medical records and supporting documentation.⁶⁵ When the Le Roches could not produce these, the French Embassy rejected the passport applications and the babies were refused entry to France.⁶⁶

Ukrainian law recognizes married couples that hire surrogates as the only lawful parents of a surrogate-born child.⁶⁷ But conversely, Ukraine does not recognize such children as enjoying birth citizenship through the surrogate mother. Thus, the twins also could not obtain Ukrainian passports. Under Ukrainian law, the twins were French because their legal parents were French.⁶⁸ Since France would not recognize the twins, the babies were effectively stateless. It is worth mention that, at the time, the French Embassy in Kyiv, Ukraine warned French citizens on its website against engaging in local surrogacy to prevent exactly this type of scenario.⁶⁹

Facing this legal limbo, Patrice Le Roch, and his father Bernard Le Roch, hid the twins under a mattress in their Mercedes and attempted to cross into Hungary at the Ukrainian border without proper documentation.⁷⁰ Upon discovery, Ukrainian authorities charged both men with attempting to illegally transport children without proper documentation under Ukrainian child trafficking laws.⁷¹ Initially, the babies were taken away from the Le Roches but have since been returned to them.⁷² Ukraine fined both men \$2,130 for the smuggling attempt.⁷³ Patrice and Aurelia Le Roch have tried to petition other European countries to give their twins a passport and remain in Kyiv with their twins waiting for French authorities to rule on their daughters' status.⁷⁴

64. *Id.*

65. *Id.*

66. *See id.* Apparently, this situation is not unique and occurs to an estimated 400 French couples each year. *See* Richard F. Storrow, *Travel into the Future of Reproductive Technology*, 79 UMKC L. REV. 295, 305 (2010).

67. *See The baby smugglers: French family arrested trying to sneak two-month-old surrogate twins out of Ukraine in a chest*, DAILY MAIL, March 24, 2011, <http://www.dailymail.co.uk/news/article-1369561/French-family-arrested-trying-smuggle-month-old-surrogate-twins-Ukraine.html#ixzz1WM0sAKqe>.

68. *Id.*

69. *Id.*

70. *Id.*

71. *See Frenchman Faces Fine In Ukraine For Baby Smuggling*, KYIV POST, May 5, 2011, <http://www.kyivpost.com/news/nation/detail/103727/#ixzz1WON0LZ0>.

72. *Id.*

73. *Id.*

74. *Id.*

*D. A Case of Successful International Commercial
Surrogacy Despite Ambiguities About Payment*

In the recent documentary film *Made in India*, the filmmakers followed an American couple, Lisa and Brian Switzer, who sold their house and spent their savings to go through a surrogacy process in India.⁷⁵ The Switzers could not afford the cost of surrogacy in the United States and decided to enter into an international surrogacy arrangement facilitated by Planet Hospital, a California based surrogacy broker. The surrogate, Aasia Khan, a 27-year-old Muslim woman living in the Mumbai slums, became a surrogate to provide for her three children and thereby offset the financial instability of her husband's mechanic business. She signed the agreement with the surrogacy clinic Rotunda without informing her husband. She did not appear to understand the IVF procedure and thought it was comical that a baby could be created "without a man." Intermediaries told the Switzers that Aasia was paid \$7,000, although she was actually promised around \$2,000.⁷⁶ Aasia carried twins for the Switzers successfully, yet she felt it was unfair that she was not paid more for carrying two babies instead of one.⁷⁷ Aasia met with the Switzers to solicit their goodwill in providing additional compensation, despite a contract prohibiting her from such action.⁷⁸ The Switzers promised Aasia additional compensation.⁷⁹

II.

THE INTERNATIONAL SURROGACY LANDSCAPE

This Section examines how international surrogacy differs in various countries and centers on the laws related to surrogacy, the surrogacy process, and the surrogates themselves. This analysis will focus on three leaders in this area—the United States, India, and Ukraine.

A. The United States

When one thinks about international surrogacy, the typically scenario involves a couple from a more developed country, such as the United States, traveling to a less developed country, such as India, to have a surrogate bear a child on their behalf. Although that scenario is common in the rapidly growing surrogacy market, the United States has also emerged as an international surrogacy destination.⁸⁰ Sir Elton John and his partner, arguably the most

75. *MADE IN INDIA* (Rebecca Haimowitz & Vaishali Sinha 2011) at minute 12:16.

76. *Id.* at minute 31:15.

77. *Id.* at minute 1:22:19.

78. *Id.* at minute 1:25:14.

79. *Id.* at minute 1:14:30.

80. Spar, *supra* note 13, at 84-86 (noting that California is a surrogacy destination spot within the United States and internationally). The United States has also long been an international

famous reproductive tourists, recently made international headlines by traveling from their native England to California to commission a child using a gestational surrogate.⁸¹ Elton John chose California as his surrogacy destination because England does not allow commercial surrogacy. Despite the high costs for commercial surrogacy in California, many regard the state as “the nation’s hub for surrogate pregnancies” because of “its well-established network of sperm banks, fertility clinics and social workers” and regulations favoring intended parents.⁸²

Unlike many countries, the United States has not banned surrogacy on a national level.⁸³ Each state has its own policy on surrogacy. This regulatory environment reflects mixed public sentiment regarding whether it is realistic for a mother to relinquish rights to a biological baby that she has carried to term as a surrogate, regardless of earlier contractual and monetary agreements. This mixed sentiment arose in connection with a prominent, controversial case from 1985, the New Jersey Baby M case.⁸⁴ The Baby M case involved a traditional surrogacy arrangement in which the surrogate mother, Mary Beth Whitehead, refused to give up the baby.⁸⁵ Experts predicted that the case was the beginning of the end of surrogacy; but although the Baby M case caused an uproar among the public and may have led to two failed federal attempts to prohibit or restrict surrogacy arrangements, surrogacy regulations continue to be governed at the state level.⁸⁶

The advent of gestational surrogacy technology has diminished some of the concern surrounding a surrogate’s possible refusal to give up the baby that

destination for high quality health care, with wealthy medical tourists seeking out renowned facilities such as the Cleveland Clinic and Massachusetts General Hospital for certain procedures. See Leigh Turner, ‘First World Health Care at Third World Prices’: *Globalization, Bioethics and Medical Tourism*, 2 *BIOsocieties* 303, 307 (2007).

81. See Laura Roberts & Nick Allen, *Elton John Uses a Surrogate to Become a Father for the First Time*, *THE TELEGRAPH*, Dec. 29, 2010, <http://www.telegraph.co.uk/news/celebritynews/8228152/Elton-John-uses-a-surrogate-to-become-a-father-for-the-first-time.html> (noting that the couple may have spent paid the California based surrogacy agency more than £100,000 for the transaction).

82. See Julie Watson, *Surrogacy Scandal Raises Questions On Regulation Woman Used Flawed System To Broker Babies, Dupe Couples*, *HOUSTON CHRONICLE*, August 12, 2011.

83. Many countries including Germany, Sweden, Norway, and Italy have banned all forms of surrogacy. Australia, Greece, Denmark and the Netherlands ban all commercial surrogacy. J. Brad Reich & Dawn Swink, *Outsourcing Human Reproduction: Embryos & Surrogacy Services in the Cyberprocreation Era*, 14 *J. HEALTH CARE L. & POL’Y* 241, nn.117–18 (2011).

84. *In re Baby M*, 537 A.2d 1227 (N.J. 1988).

85. *Id.*

86. Todd M. Krim, *Comparative Health Law: Beyond Baby M: International Perspectives on Gestational Surrogacy and the Demise of the Unitary Biological Mother*, 5 *ANNALS HEALTH L.* 193, 213 (1996). The “Surrogacy Arrangements Act of 1989” proposed imposing criminal penalties on anyone who knowingly engaged in commercial surrogacy. *Id.* at 214. The “Anti-Surrogate-Mother-Act of 1989,” sought to criminalize “all activities relating to surrogacy” *Id.* Neither bill received much support. See *id.*

existed at the time of the Baby M case.⁸⁷ In the last half-decade, gestational surrogacy rates in the United States have risen almost 400%.⁸⁸ Estimates compiled in 2010 suggest that 1,400 babies are now born via surrogacy in the United States each year.⁸⁹ Not only do a large number of Americans decide that surrogacy is the right option for them, but a sizeable number of international couples choose to utilize American surrogate mothers to give birth to their children as well.

Currently, no regulatory body tracks exactly how many international parents commission surrogate babies in the United States. Recent accounts suggest that this practice represents a growing portion of the surrogacy market in the United States. One large surrogacy agency, the Center for Surrogate Parenting in Encino, California, reports that approximately half of its 104 births in 2010 were for international parents.⁹⁰

1. *The Legal Landscape of Surrogacy in the United States*

This section provides an overview of the regulations and laws related to surrogacy in different states. There is no federal law that regulates surrogacy in the United States.⁹¹ Instead, states determine how and whether to allow surrogacy, creating a patchwork of laws regulating surrogacy throughout the United States.⁹² Some states specifically prohibit gestational surrogacy.⁹³ Other states only recognize surrogacy that is noncommercial⁹⁴ or “altruistic.”⁹⁵ Some states allow commercial surrogacy, i.e., where surrogates may be paid

87. See *supra* notes 7-8 and accompanying text (describing gestational surrogacy arrangements).

88. In 2006, the Society for Assisted Reproductive Technology estimated that the total number of surrogate mothers in the United States was 260. Ali, *supra* note 12. In 2008 SART estimated this number to be 1000. *Id.* However, the number is certainly higher than that because at least 15 percent of clinics do not report their numbers to SART and because private agreements made outside of an agency are not counted. Additionally, SART figures do not factor in pregnancies in which one of the intended parents does not provide the egg – for example, where a male couple will raise the baby. *Id.*

89. Nara Schoenberg, *Growing Number of Surrogates Carry Babies for Foreign Clients*, THE TIMES, April 19, 2011, available at 2011 WLNR 7629757.

90. *Id.*

91. Austin Caster, Comment, *Don't Split the Baby: How the U.S. Could Avoid Uncertainty and Unnecessary Litigation and Promote Equality by Emulating the British Surrogacy Law Regime*, 10 CONN. PUB. INT. L.J. 477, 505 (2011).

92. See SUSAN MARKENS, SURROGATE MOTHERHOOD AND THE POLITICS OF REPRODUCTION, 28-29 (2007).

93. *Id.* at 46.

94. Jennifer Rimm, Comment, *Booming Baby Business: Regulating Commercial Surrogacy in India*, 30 U. PA. J. INT'L L. 1429, 1435 (2009). In these noncommercial agreements, the intended parents may pay for the expenses that occurred as a result of the pregnancy but no additional compensation is provided to the surrogate. *Id.*

95. *Id.*

compensation over and above medical expenses.⁹⁶ Finally, numerous states have yet to address surrogacy agreements in either case law or by statute.⁹⁷ In these states it is unclear precisely how surrogacy contracts would be handled in a legal dispute.⁹⁸

Although commercial surrogacy is accepted in many states, some states still hold the practice to be illegal.⁹⁹ Among those states, some impose criminal sanctions,¹⁰⁰ while others merely refuse to enforce commercial surrogacy arrangements.¹⁰¹ For example, New York has ruled all surrogacy agreements void, unenforceable, and contrary to the public policy of the state regardless of their commercial or altruistic nature.¹⁰² Nevertheless, the New York Supreme Court recently held that a genetic mother who used a gestational carrier could place her own name on her child's birth certificate.¹⁰³ This could be a sign that New York is beginning to soften its prohibition against surrogacy. All types of surrogacy remain illegal in Delaware, Indiana, Louisiana, Michigan, Nebraska, North Dakota, and Washington DC.¹⁰⁴

Other states differentiate between commercial and altruistic gestational surrogacy contracts. In Nevada, "it is unlawful to pay or offer to pay . . . the surrogate except for the medical and necessary living expenses related to the birth of the child as specified in the contract."¹⁰⁵ Likewise, in Florida, a surrogate mother can only receive the "reasonable living, legal, medical, psychological, and psychiatric expenses of the gestational surrogate that are directly related to prenatal, intra-partum, and postpartum periods."¹⁰⁶

96. *Id.* at 1436.

97. Caster, *supra* note 91, at 489.

98. *Id.*

99. Brock A. Patton, Comment, *Buying a Newborn: Globalization and the Lack of Federal Regulation of Commercial Surrogacy Contracts*, 79 UMKC L. REV. 507, 514 (2010). For example, Kentucky has taken this stance by enacting a statute that carries a fine of \$2000 and/or up to 6 months in prison for any party who contracts to "compensate a woman for her artificial insemination and subsequent termination of parental rights." KY. REV. STAT. ANN. § 199.590(4) (West 2011).

100. *Id.*

101. Margaret Ryznar, *International Commercial Surrogacy and Its Parties*, 43 J. MARSHALL L. REV. 1009, 1014 (2010) (citing the Baby M case). In the Baby M case, New Jersey determined that "the payment of money to a 'surrogate' mother [is] illegal, perhaps criminal, and potentially degrading to women." *In re Baby M*, 537 A.2d 1227, 1234. To date, New Jersey forbids commercial surrogacy. *New Jersey Surrogacy Law*, HRC.ORG, <http://www.hrc.org/laws-and-legislation/entry/new-jersey-surrogacy-law> (last visited Jan. 18, 2012).

102. See N.Y. DOM. REL. LAW § 122 (Gould 2011). Indiana has taken this same approach. See IND. CODE ANN. § 31-20-1-1 (West 2011).

103. See *T.V. (Anonymous), v. New York State Dep't of Health*, 88 A.D. 3d 290 (N.Y. App. Div. 2011).

104. See Joseph F. Morrissey, *Lochner, Lawrence, and Liberty*, 27 GA. ST. U. L. REV. 609, 671-672 (2011).

105. See NEV. REV. STAT. § 126.045(3) (2011).

106. FLA. STAT. § 742.15(4) (2011).

Although some states see a clear line between commercial and altruistic surrogacy, others do not differentiate between the two and consider both types to be legal and contractually enforceable. For example, Arkansas state law specifically mandates that when a surrogacy agreement is in place, the intended parents, not the surrogate, are the legal parents of the child.¹⁰⁷ Arkansas law enforces surrogacy contracts and provides no indication that surrogate mothers may not be paid for their role.¹⁰⁸ Arkansas thus has “some of the most liberal laws in the country with regard to surrogacy agreements”¹⁰⁹ Illinois similarly permits commercial surrogacy agreements. In 2004, the Illinois state legislature passed the Gestational Surrogacy Act,¹¹⁰ which allows the surrogate mother to receive reasonable compensation.¹¹¹

Some states, such as Massachusetts, do not have a specific statute that legalizes commercial gestational surrogacy.¹¹² However, Massachusetts’ courts look favorably on commercial surrogacy agreements.¹¹³ In at least one case, the court recognized a paid surrogacy agreement as legally enforceable.¹¹⁴

California is the capital of commercial surrogacy in the United States, and many California courts have upheld surrogacy agreements.¹¹⁵ In one of the most notable cases, *Johnson v. Calvert*, 851 P.2d 776, 782 (1993), the Supreme Court of California ruled that commercial surrogacy agreements were enforceable.¹¹⁶ In *Johnson*, the court determined that in cases of gestational surrogacy agreements, the conflict of rights to the child between the egg donor and the surrogate must be resolved by looking to the intent of the parties at the time of

107. ARK. CODE ANN. § 9-10-201(b)(1)-(3) (2011).

108. *See Id.*

109. *Arkansas Surrogacy Law*, HRC.ORG, <http://www.hrc.org/laws-and-legislation/entry/arkansas-surrogacy-law> (last visited Sept. 21, 2011).

110. *See* 750 ILL. COMP. STAT. ANN. 47/1 (2005).

111. *See* 750 ILL. COMP. STAT. ANN. 47/25 (2011). Compensation is defined in the Act as payment of any valuable consideration for services in excess of reasonable medical and ancillary costs. *Id.*

112. *Massachusetts Surrogacy Law*, HRC.ORG., <http://www.hrc.org/laws-and-legislation/entry/massachusetts-surrogacy-law> (last visited Sept. 21, 2011).

113. *Id.*

114. *Culliton v. Beth Israel Deaconess Med. Ctr.*, 756 N.E.2d 1133 (2001). However, in writing this decision, the court did not allow all surrogacy agreements to be enforceable. The court instead set forth criteria under which lower courts may review requests for atypical birth-certificate assignments in surrogacy cases. *Id.* These criteria are, whether “(a) the plaintiffs are the sole genetic sources of the twins; (b) the gestational carrier agrees with the order sought; (c) no one, including the hospital, has contested the complaint or petition; and (d) by filing the complaint and stipulation for judgment the plaintiffs agree that they have waived any contradictory provisions in the contract” *Id.* at 1138.

115. *California Surrogacy Law*, HRC.ORG., <http://preview.hrc.org/laws-and-legislation/entry/california-surrogacy-law> (last visited Sept. 21, 2011).

116. *See* Elizabeth S. Scott, *Surrogacy and the Politics of Commodification*, 72 LAW & CONTEMP. PROBS. 109, 121-23 (2009) (noting that *Johnson v. Calvert*, 851 P.2d 776 (Cal. 1993), helped increase California’s appeal as a surrogacy- friendly state).

the surrogacy arrangement.¹¹⁷ California statutory law also accepts parenthood as determined by a surrogacy agreement.¹¹⁸ Therefore, the names of unrelated intended parents may be placed on a birth certificate without an adoption procedure. Additionally, California law provides a variety of procedures prior to the finalization of a surrogacy arrangement. For example, a surrogacy facilitator¹¹⁹ directs the intended parents to place funds in either an independent, bonded escrow depository or a trust account maintained by an attorney.¹²⁰

Some states require that an applicable court approve surrogacy contracts in advance to ensure that all contingencies are considered prior to the finalization of an arrangement.¹²¹ Additionally, some states both allow gestational surrogacy agreements and provide legal protections for the surrogate mothers.¹²²

117. *Johnson v. Calvert*, 851 P.2d 776, 782 (Cal. 1993).

118. See CAL. FAM. CODE § 7648.9 (West 2004); *In re Marriage of Buzzanca*, 72 Cal. Rptr. 2d 280, 282 (Cal. Ct. App. 1998) (which held that the California statute, which makes a husband the lawful father of a child unrelated to him if he causes it to be created by artificial insemination, also applies to intended parents).

119. California statute defines a surrogacy facilitator as “a person or organization that engages in either “[a]dvertising for the purpose of soliciting parties to an assisted reproduction agreement or acting as an intermediary between the parties to an assisted reproduction agreement, or charging a fee or other valuable consideration for services rendered relating to an assisted reproduction agreement.” See CAL. FAM. CODE § 7960(a)(1), (2) (West 2011).

120. CAL. FAM. CODE § 7961(a) (West 2011). California law also makes clear that the surrogacy facilitator may not have a financial interest in the escrow company, and that the funds may only be disbursed in accordance with the reproduction agreement. CAL. FAM. CODE § 7961(b) (West 2011). In addition to this funds regulation, legislation has been introduced in California that would further regulate surrogacy agreements. See An Act to Amend Section 7613 of, and to Add Section 7613.5 and 7962 to, the Family Code, Related to Assisted Reproduction, H.R. 1217, 2011-12 Sess. (Cal. 2011), http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_1201-1250/ab_1217_bill_20110620_amended_sen_v95.pdf. If approved, this bill would enact a new section to the California Family Code that would forbid any medical or legal professional from medically evaluating or legally representing an intended parent or surrogate while acting as a surrogacy facilitator. This legislation seeks to prevent the conflict of interest that occurs when a surrogacy agency recruits, legally represents, and medically evaluates a surrogate. Although these protections are admirable, the Erickson admission suggests that someone intent on conducting unethical activity will actively sidestep such protections. See *infra* Part 1.A (discussing the Erickson baby-selling scheme).

121. Caster, *supra* note 91, at 487-88. For example in Virginia, “[p]rior to the performance of assisted conception, the intended parents, the surrogate, and her husband shall join in a petition to the circuit court” for the court to approve the contract. VA. CODE ANN. § 20-160(a) (2011). At this time the court appoints “a guardian ad litem to represent the interests of any resulting child” and also appoints counsel to represent the surrogate. *Id.* In order to approve the contract, the court must find that the pregnancy does not impose an unreasonable risk of mental or physical harm to the surrogate. *Id.* at § 20-160(b)(6). Additionally, a home study must be conducted of the intended parents, the surrogate and, if she is married, the surrogate’s husband. *Id.* at § 20-160(b)(1). Virginia law also mandates that if the surrogate is married, the surrogate’s husband must be a party to the contract. *Id.* at § 20-160(b)(10).

122. For example in New Hampshire, a state statute seeks to protect the health of the surrogate by specifically stating the prerequisites to becoming a surrogate in that state. According to the statute, “[n]o woman shall be a surrogate, unless the woman has been medically evaluated and the results, documented in accordance with rules adopted by the department of health and human

Of those states that allow surrogacy, many require that the intended parents be married. That leaves many single women and men, along with lesbian and gay couples, unable to utilize surrogacy in numerous states, such as Florida, Nevada, New Hampshire, Oklahoma, Texas, Utah, and Virginia.¹²³ Other states, such as California and Illinois, have surrogacy statutes that do not require an intended parent to be married.¹²⁴ This is another reason why California has been a leader in commercial surrogacy in the United States.

A final approach that states have taken to gestational surrogacy agreements is not to address the practice.¹²⁵ Many states lack statutes that explicitly address the validity or legality of surrogacy agreements, nor is their case law that indicates how their courts will handle the issue.¹²⁶ For example, Wisconsin is one state that has yet to speak on the issue of surrogacy,¹²⁷ leaving the issue of whether surrogacy agreements will be enforced in the event of a conflict an open question. However, this uncertainty has not deterred hopeful parents and potential surrogates from contracting with one another for the purposes of creating a child.¹²⁸

services, demonstrate the medical acceptability of the woman to be a surrogate.” See N.H. REV. STAT. § 168-B:16(III) (2011). Illinois also provides legal protections for surrogates. See 750 ILL. COMP. STAT. ANN. 47/20(a) (2011). Within the states’ Gestational Surrogacy Act, Illinois has set requirements for a surrogate to be eligible to enter a surrogacy agreement. These requirements include that the surrogate must be at least 21 years of age, she must have given birth to at least one child and she must have completed a medical as well as a mental health evaluation. See 750 ILL. COMP. STAT. ANN. 47/20(a) (2011). Additionally, she must also have “undergone [a] legal consultation with independent legal counsel regarding the terms of the gestational surrogacy contract and the potential legal consequences of the gestational surrogacy.” *Id.* Finally, the surrogate must have a health insurance policy that covers major medical treatments and hospitalization. *Id.* This policy must “extend throughout the duration of the expected pregnancy and for 8 weeks after the birth of the child.” *Id.* However, Illinois’ Gestational Surrogacy Act allows this policy to be purchased for the surrogate by the intended parents pursuant to the gestational surrogacy contract. *Id.*

123. See Morrissey, *supra* note 104, at 671.

124. *Id.* Other states that have surrogacy statutes without a marriage requirement are: Connecticut, Kentucky, Massachusetts, New Jersey, New Mexico, North Carolina, Oregon, Washington, and West Virginia. *Id.*

125. Caster, *supra* note 91, at 486.

126. In the following states, the legal status of surrogacy is unclear: Alabama, Alaska, Arizona, Arkansas, Colorado, Georgia, Hawaii, Idaho, Iowa, Kansas, Maine, Maryland, Minnesota, Mississippi, Missouri, Montana, Ohio, Pennsylvania, Rhode Island, South Carolina, South Dakota, Tennessee, Vermont, Wisconsin, and Wyoming. Morrissey, *supra* note 105 at 672.672 (2011); See also Magdalena Gugucheva, *Surrogacy in America*, COUNCIL FOR RESPONSIBLE GENETICS (2010), <http://www.councilforresponsiblegenetics.org/pageDocuments/KAEVEJ0A1M.pdf>.

127. *Wisconsin Surrogacy Law*, HRC.ORG, <http://preview.hrc.org/laws-and-legislation/entry/wisconsin-surrogacy-law> (last visited Sept. 21, 2011).

128. Many surrogacy agencies operate in Wisconsin. See e.g., Pink & Blue Surrogacy and Fertility, LLC, http://www.pinkandbluesurro.com/Pink_and_Blue_Surro/Welcome.html (last visited Mar. 4, 2012); New Hope Surrogacy Center, <http://www.newhopesurrogacy.com>; The Surrogacy Center, LLC, <http://www.surrogacycenter.com> (last visited Mar. 4, 2012).

2. Surrogates in the United States

The surrogacy industry in the United States consists of different private clinics, usually located in the states with the most developed, permissive surrogacy laws. Agencies work independently, leading to a wide variety of practices, but agencies typically require a screening process to ensure that the surrogate mother is physically and emotionally suitable for the position.¹²⁹

Most women decide to become a gestational surrogate for the income.¹³⁰ Estimates vary, but the typical cost for a surrogacy arrangement in the United States ranges from \$80,000 and \$120,000, of which the surrogate receives between \$14,000 and \$18,000.¹³¹

Although a diverse group of women in the United States become surrogate mothers, many are “military wives,” i.e., women who are married to someone in the armed services.¹³² In fact, many surrogacy agencies actively attempt to recruit these women,¹³³ who often live on or near army bases where employment is scarce. Military wives can often make more as a surrogate mother than their husbands’ income from serving in the armed forces.¹³⁴ Additionally, the armed forces’ very comprehensive insurance provider, Tri-Care, which pays for most pregnancy related expenses, including in vitro

129. See Ali, *supra* note 12. The screening process differs for each agency but, typically, before any progress is made, a woman who wants to be a surrogate must complete an application provided by the agency with whom she would like to work. These applications ask basic questions concerning the pregnancy history, lifestyle and medical and work history of the surrogate. If the answers are satisfactory, an employee visits the applicant to evaluate her. Upon the approval of the employee, the surrogate is accepted into the agency’s program. Once a member of the program, the surrogate and the intended parents select who they would like to work with, and a meeting is arranged. If the agency, the surrogate and the intended parents are satisfied that each of their goals for the endeavor will be met, then they sign the appropriate documentation and the procedure begins. See e.g., CSP Registration Page, https://www.creatingfamilies.com/SM/SM_app_request.aspx (last visited Aug. 9, 2011); West Coast Surrogacy Inc., <http://www.westcoastsurrogacy.com/surrogates.php> (last visited Aug. 9, 2011); Become a Surrogate Mother with Conceiveabilities, http://www.conceiveabilities.com/surrogate_application.htm (last visited Aug. 9, 2011); SSA Surrogate Application, <http://www.ssa-agency.com/showhtml.aspx?html=surrogatebriefapplication.htm> (last visited Aug. 9, 2011); Creating Families Surrogate Mother Process, http://www.creatingfamilies.com/SM/SM_Info.aspx?Type=117 (last visited Aug. 9, 2011); Conceiveabilities Surrogate Mother Process, http://www.conceiveabilities.com/surrogate_process.htm (last visited Aug. 9, 2011).

130. See Ryznar, *supra* note 101, at 1028.

131. See also Smerdon, *supra* note 5 (noting a lower estimate).

132. Ali, *supra* note 12.

133. Habiba Nosheen & Hilke Schellmann, *The Most Wanted Surrogates in the World*, GLAMOUR, Oct. 2010, <http://www.glamour.com/magazine/2010/10/the-most-wanted-surrogates-in-the-world/> (surrogate agencies often market to military wives when seeking surrogates due to their desire to help other couples and their financial situations); See also Caster, *supra* note 91, at 505.

134. See Ali, *supra* note 12. In addition to compensation, some women indicate that, by becoming a surrogate, they hope to help another family have a child. Others admit to choosing surrogacy to afford luxuries that they otherwise could not, such as a big screen television or a Disney vacation.

fertilization, covers these women.¹³⁵ As a result, military spouses reportedly comprise half of the surrogate mothers population for certain surrogate agencies and fertility clinics in Texas and California.¹³⁶

Accounts differ concerning the proper amount of interaction between an American surrogate mother and the intended parents of the child. Some surrogates and intended couples agree that the main purpose of their relationship is to create a baby, not to bond with one another.¹³⁷ Couples and surrogates that adopt this attitude keep their interactions brief.¹³⁸ However, some agencies encourage or even require that bonds be formed between the parties, sometimes creating lasting relationships long after the child has been given to the intended parents.¹³⁹

B. Ukraine

Ukraine's liberal surrogate laws have helped the country emerge as an important destination for international surrogacy in recent years. Numerous surrogacy clinics operate in Ukraine and advertise the lax regulations and favorable policies toward intended parent as selling points.¹⁴⁰ It is nevertheless difficult to determine how many surrogacy arrangements take place annually

135. *Id.* (noting an increase of surrogates who are military wives after the Iraq war).

136. *Id.*

137. Ali, *supra* note 12.

138. *Id.*

139. For example, the Center for Surrogate Parenting, Inc. requires that the intended parents at a minimum send a note and photo of the baby at three, six and twelve months of age to the surrogate. In fact, many surrogacy agencies encourage interaction between the surrogate and the intended parents. See e.g., http://www.conceiveabilities.com/surrogate_process.htm ("This pregnancy is shared with the loving intended parents, and therefore there needs to be ongoing communication about the developing fetus, your health status, needs for support, or other matters."); http://www.creatingfamilies.com/IP/IP_Info.aspx?Type=20#8 ("[Y]ou will be overwhelmed at times by having a newborn at home, it is important to take time to contact your surrogate mother at least once every five days for the first month. It is also very important that you send her pictures of the baby as agreed upon in your contract.") It appears that Elton John is maintaining a relationship with his surrogate. According to an interview, the surrogate is mailing her breast milk via FedEx so that John and his partner can use it to feed the baby she carried. See Stephen M. Silverman, *Elton's John's Son's Breast Milk Comes via Fedex*, PEOPLE, April 25, 2011, <http://www.people.com/people/article/0,,20484504,00.html>.

140. Numerous surrogacy agencies and brokers have websites that tout the advantages of pursuing surrogacy in Ukraine. See e.g., *Advantages*, NEW LIFE UKRAINE.COM, <http://www.ukraine-surrogacy.com/advantages> (noting some of the advantages of surrogacy in Ukraine including "[1]gestational surrogate mothers cannot legally keep the baby after delivery," "[2]only the names of the intended parents are written on the birth certificate," "[3]the cost of surrogacy and embryo adoption/egg donation is 60-70% less . . . than the cost of the same programs in the United States," "[4]the availability of young, healthy egg donors and surrogate mothers," and "[5]no waiting time for our clients."). Also, the site notes that "gender selection is legal in Ukraine." http://www.ukraine-surrogacy.com/Sex_selection.

because there is no regulatory body to track surrogacy in Ukraine.¹⁴¹ One news source recently reported 120 successful surrogate pregnancies in Ukraine in 2011.¹⁴² The true number is likely much higher as surrogacy agencies do not have to report surrogacy arrangements.¹⁴³ Approximately half of the surrogacy arrangements in Ukraine are for foreign couples.¹⁴⁴

In Ukraine, a surrogacy arrangement costs approximately “\$30,000 and \$45,000 for foreign parents . . . with \$10,000 to \$15,000 going to the surrogate mother.”¹⁴⁵ But the costs of surrogacy in Ukraine will likely decrease because there is a surplus of women who desire to be surrogates.¹⁴⁶ That would make Ukraine an even more attractive fertility tourism destination.

1. *The Legal Landscape of Surrogacy in Ukraine*

In Ukraine, only infertile, legally married couples are able to participate in a surrogacy arrangement.¹⁴⁷ Nevertheless, otherwise liberal surrogacy laws attract many surrogate tourists. Only the intended parents receive recognized rights: the Family Code sanctions surrogacy and allows married couples that hire a surrogate to be legal parents of the resulting offspring.¹⁴⁸ According to Ukrainian law, the intended parents are registered as the legal parents of the child upon the notarized written consent of the surrogate.¹⁴⁹ The Ministry of Health requires that only accredited healthcare establishments engage in assisted

141. See Ohla Zhyla, *More Women in Ukraine Want To Be Surrogate Mothers*, THE DAY WEEKLY DIGEST, Dec. 15, 2009, <http://www.day.kiev.ua/289226>. In this newspaper article, a representative of the Association of Reproductive Medicine of Ukraine estimated that there were around sixty couples utilizing surrogate mothers in 2009, and theorized that the numbers went down from an estimated 90 couples in 2007 due to hassles with several European couples not being granted passports for their babies to return to their home country. *See id.*

142. Claire Biggs & Courtney Brooks, *Ukraine Surrogacy Boom Not Risk-Free*, RADIO FREE EUROPE, June 4, 2011, http://www.rferl.org/content/womb_for_hire_ukraine_surrogacy_boom_is_not_risk_free/24215336.html [hereinafter *Biggs*].

143. Zhyla, *supra* note 141. He estimates that the number is likely thirty percent higher and predicts that the number will be forty percent higher in 2011 due to the opening of several large surrogacy clinics.

144. *Id.*

145. Biggs, *supra* note 142.

146. *See* Zhyla, *supra* note 141.

147. *Id.*

148. *See* Family Code of Ukraine, Dec. 26, 2002, http://www.mfa.gov.ua/data/upload/publication/usa/en/7148/family_kideks_engl.pdf (The Family Code of Ukraine, Article 123.2, states “If an ovum conceived by the spouses is implanted to another woman, the spouses shall be the parents of the child.”).

149. *See* Order #140/5 dated November 18th, 2003, Ukrainian Legislation, European Society of Human Reproduction and Embryology, <http://www.eshre.eu/ESHRE/English/Guidelines-Legal/Legal-documentation/Ukraine/Embryo-research/page.aspx/578>.

reproduction, but it does not specify what type of accreditation is required.¹⁵⁰ This permits a larger number of surrogacy providers to enter the market.

Ukrainian law does not mention any rights that the surrogate mother may have.¹⁵¹ Its focus is to “protect[] the family and the child, but not the surrogate mother.”¹⁵² Although a surrogate may technically insist on a surrogacy contract to protect her interests prior to conception, the enforceability of such agreements remains unclear. Also, the surrogate would require an attorney to execute such an agreement, which may not be financially feasible for most surrogates. Although surrogacy bills have been drafted to protect surrogate mothers, they have received no government support.¹⁵³

Ukraine’s liberal surrogacy laws have attracted many fertility tourists, but the lack of clear national and international guidelines has left some children in legal flux, as the aforementioned Le Roche story illustrates. Nevertheless, Ukraine has emerged as a popular surrogacy destination due to its low costs, European location, Caucasian population, and laws favoring intended parents.

2. *Surrogates in Ukraine*

To summarize, surrogates typically earn between \$10,000 and \$15,000.¹⁵⁴ In addition, Ukraine does not appear to have the same social stigma associated with surrogacy that exists in countries such as India.¹⁵⁵ Although Ukraine has a booming surrogacy business, there has not been as much written about the backgrounds and experiences of surrogates in Ukraine, as compared with India and the United States.

C. *India*

India actively pursues fertility tourists to hire Indian surrogates. In 2002, India became the first country to explicitly legalize commercial surrogacy, and

150. See Order # 771 dated December 23rd, 2008 issued by the Ministry of Health of Ukraine and titled “About approval of instruction of the order to apply assisted reproductive technologies” regulates the order of usage of reproductive techniques and surrogacy. Ukrainian Legislation, European Society of Human Reproduction and Embryology, <http://www.eshre.eu/ESHRE/English/Guidelines-Legal/Legal-documentation/Ukraine/Embryo-research/page.aspx/578>.

151. See *id.* (identifying no such rights).

152. Zhyla, *supra* note 141.

153. *Id.* Some aspects of a recent bill proposed by a member of Parliament include: “paying tax-free honorariums to surrogate mothers,” conferring the status “heroic mother,” paid maternity leave, and training courses for government employees and law enforcement agencies (about surrogacy). The estimated cost of the proposed bill totaled 200 million hryvnias (about twenty five million US dollars per year).

154. See Biggs, *supra* note 142. Note that elsewhere it has been reported that some surrogates only earn \$6,000. See Zhyla *supra* note 141.

155. *Id.*

the floodgates opened.¹⁵⁶ The Indian government encourages surrogacy by granting tax breaks to hospitals that treat international patients,¹⁵⁷ including those that provide surrogacy related services, such as egg removal and IVF techniques used in gestational surrogacy.¹⁵⁸ Although “there are no firm statistics on how many surrogacies have been arranged in India,”¹⁵⁹ surrogacy cases appear to have more than doubled in recent years.¹⁶⁰ One Indian physician claims to have delivered over 3,000 surrogate babies in the last ten years.¹⁶¹ This increase corresponds to an increase in customers from outside of India.¹⁶² Such fertility tourists benefit from India’s world-class medical facilities and technical capabilities, combined with the lower costs of surrogacy than are available in their home country.¹⁶³ The Indian Council of Medical Research estimates that surrogacy is almost a \$450 million a year industry in India.¹⁶⁴

As of 2009, India had 350 facilities that offered surrogacy as a part of a broader array of infertility-treatment services, triple the number in 2005.¹⁶⁵ Also in 2009, approximately 1,500 pregnancy attempts using surrogates were made at these clinics.¹⁶⁶ A third of those were made on behalf of foreign parents who hired surrogates.

1. *The Legal Landscape of Surrogacy in India*

India currently does not regulate the fertility industry, although the Indian Council of Medical Research made efforts to suggest guidelines and propose legislation. In 2005, The Indian Council of Medical Research suggested voluntary guidelines for surrogacy clinics.¹⁶⁷ These guidelines are designed to

156. See Audrey Gentleman, *India Nurtures Business of Surrogate Motherhood*, N.Y. TIMES, Mar. 10, 2008, at A9, <http://www.nytimes.com/2008/03/10/world/asia/10surrogate.html>.

157. *Id.*

158. *Id.*

159. Rimm, *supra* note 95, at 1432.

160. *Id.*

161. Patton, *supra* note 99, at 525.

162. Smerdon, *supra* note 5, at 45.

163. *Id.* at 32.

164. *Id.*

165. These numbers are estimates, which are difficult to substantiate because there is no registry or any licensure required to operate a clinic that offers surrogacy services. See Shilpa Kannan, *BBC News, Regulators eye India’s surrogacy sector*, BBC NEWS, March 19, 2009, <http://news.bbc.co.uk/2/hi/business/7935768.stm>. See also

Sarmishta Subramanian, *Wombs for rent: Is paying the poor to have children wrong when both sides reap such benefits?*, MACLEAN’S, July 2, 2007, http://www.macleans.ca/article.jsp?content=20070702_107062_107062&page=2 (estimating that there were 600 IVF clinics in India in 2007 with over 200 offering surrogacy).

166. *Id.*

167. See Indian Council of Medical Research, National Guidelines for Accreditation, Supervision and Regulation of ART Clinics in India (2005), http://icmr.nic.in/art/art_clinics.htm. See

protect the interest of the intended parents. Critics have attacked these guidelines as vague with respect to the rights of Indian surrogate mothers.¹⁶⁸ For example, the guidelines fail to specify a maximum number of embryos with which a surrogate mother may be implanted at one time.¹⁶⁹

The Indian Council of Medical Research also has urged the government to enact legislation to protect the rights of all parties in a surrogacy arrangement.¹⁷⁰ However, the Indian surrogacy industry significantly influenced the drafting of the Assisted Reproductive Technology Regulation Bill-2010.¹⁷¹ Thus, the bill only addresses gestational surrogacy, and it makes clear that such surrogacy is available to both single parents and married couples.¹⁷² The legislation also states that the intended parents shall pay all expenses incurred during pregnancy and after delivery as per medical advice.¹⁷³ The legislation allows the surrogate to receive compensation but does not specify a minimum amount or percentage. Under the draft bill, the surrogate relinquishes all parental rights.¹⁷⁴ In addition, the bill gap-fills the situation illustrated as the Baby Manji case by allowing the issuance of birth certificates in the names of the intended parents, who then automatically become the child's legal parents.¹⁷⁵ Moreover, the legislation requires that the surrogacy clinic and intended parents obtain a certificate of approval from the intended parent or parents' corresponding embassy in India prior to initiation of the surrogacy procedure.¹⁷⁶

While the proposed legislation seeks to address many issues in the surrogacy process, it falls short in several ways. Although reproductive clinics with different standards have proliferated throughout India,¹⁷⁷ the proposed legislation does not address this heterogeneity, nor does it enact a meaningful screening process when searching for surrogate mothers.¹⁷⁸

also Points, *supra* note 38.

168. Points, *supra* note 38.

169. Diana Farrell, *IVF in India - Why You Should Look Into This*, EZINE ARTICLES, <http://ezinearticles.com/?IVF-in-India---Why-You-Should-Look-Into-This&id=3586089>.

170. See Indian Council of Medical Research, *The Assisted Reproduction Technologies Bill (2010)* [herein after Draft Bill], <http://icmr.nic.in/guide/ART%20REGULATION%20Draft%20Bill1.pdf>.

171. *Id.*

172. *Id.* at 17–18 (stating “[i]n India, the non-binding guidelines and proposed legislation covering commercial surrogacy arrangements define only gestational surrogacy.”); Draft Bill *supra* note 170, at §32(1) (stating “ART shall be available to all persons including single persons, married couples and unmarried couples.”).

173. Draft Bill, *supra* note 170, at §34(2).

174. *Id.* at § 34(4).

175. See *id.* at § 34(10).

176. See *id.* at § 34(19).

177. See Smerdon, *supra* note 5, at 44–45.

178. Patton, *supra* note 99, at 526.

2. Surrogates in India

The typical surrogacy in India costs \$12,000, which is a fraction of the cost in the United States.¹⁷⁹ Of that amount, the surrogate is paid \$2,500 to \$7000.¹⁸⁰ There are over 200 clinics and agencies offering gestational surrogacy services in India.¹⁸¹ Often, intermediaries recruit women to serve as surrogates; the fertility clinics or surrogates pay these intermediaries.¹⁸² Recruiters include “former surrogates, women who could not become surrogates for medical reasons, and midwives.”¹⁸³ Such brokers recruited over half of the women interviewed in at least one investigation.¹⁸⁴

The media attention and sociological studies on Akanksha Infertility Clinic, located in Anand, Gujarat, enable a more detailed description of the surrogacy process in India than that available for Ukraine. Akanksha Infertility Clinic appeared on both the Oprah Winfrey Show and Good Morning America.¹⁸⁵ It became home to India’s first international gestational surrogacy arrangement, when an Indian woman decided to be the gestational carrier for her daughter, who resided in England.

Dr. Nayna Patel, the director and obstetrician at the clinic, arranges and delivers surrogate babies for approximately 130 couples a year.¹⁸⁶ According to Dr. Patel, her clinic only accepts potential surrogates who are between 18 and 45 years of age, in good health, and already have children.¹⁸⁷ Akanksha Infertility Clinic requires a signed contract between parties in which intended parents pay for medical care and surrogate mothers renounce any rights to the baby or babies.¹⁸⁸

Surrogates live in dormitory-like group homes for the entirety of their

179. Abigail Halworth, *Surrogate Mothers: Womb for Rent*, MARIE CLAIRE, Jul. 29, 2007, <http://www.marieclaire.com/world-reports/news/international/surrogate-mothers-india>

180. Smerdon, *supra* note 5, at 32.

181. Subramanian, *supra* note 165.

182. Ruby L. Lee, Note, *New Trends in Global Outsourcing of Commercial Surrogacy: A Call for Regulation*, 20 HASTINGS WOMEN’S L.J. 275, 282 (2009).

183. See Amrita Pande, *Commercial Surrogacy in India: Manufacturing a Perfect Mother-Worker*, 35 SIGNS: J. OF WOMEN IN CULTURE AND SOCIETY 969, 975 (2010) [hereinafter Pande Manufacturing].

184. *Id.* (noting that one of the recruiters she met charged the surrogates around \$200 for driving them to the clinic and driving them back after the medical tests.)

185. *Id.* at 278. For example, in the *Made in India* documentary, the fertility clinic in Mumbai hired an older woman who lived in the slums to help identify and convince young women in the slums to consider becoming a surrogate. MADE IN INDIA *supra* note 75.

186. Cynthia Vukets, *Single Man Wanted A Child, Hired A Surrogate, Had A Baby*, THE STAR, August 12, 2011, <http://www.thestar.com/iphone/Living/article/1038283>.

187. Scott Carney, *Inside India’s Rent-A-Womb Business*, MOTHER JONES, March/April 2010, <http://motherjones.com/politics/2010/02/surrogacy-tourism-india-nayna-patel> [hereinafter Carney Rent-A-Womb].

188. *Id.*

pregnancy at Akanksha, as they do in many of the clinics in India.¹⁸⁹ Because women are often the last to eat in traditional Indian households and might have limited access to food,¹⁹⁰ these residential arrangements ensure that surrogates enjoy proper meals and nutrition. In addition, the clinic restricts the surrogates' daily activities.¹⁹¹ For example, unless the surrogate has a doctor's appointment or permission to visit family, she spends most of her time in the group home.¹⁹²

Sociologist Amrita Pande interviewed 42 gestational surrogates, their husbands, and their in-laws from Akanksha, and clinic director Dr. Patel.¹⁹³ According to Pande's report, although relatives are free to visit surrogates, the prohibitive cost of travel ensures that many surrogates do not see their families while pregnant.¹⁹⁴ Some surrogates reported missing their children.¹⁹⁵ Others reported enjoying the respite from caring for their household or other work.¹⁹⁶

The payments that surrogates receive for carrying a baby often equals four or five times their annual household income.¹⁹⁷ Although payments in India are much less than in other countries, such as the United States, the sum is significant in the lives of these surrogates. Surrogates state that this income allows them to provide an education for their children or to purchase a home.¹⁹⁸ Akanksha Infertility Clinic facilitates this possibility for surrogates by placing her payments in a separate bank account under the surrogate's name or those of children, thereby reducing the possibility that the surrogate's husband or in-laws obtain control of her earnings.¹⁹⁹ Alternatively, the Clinic will buy a house in the woman's name.²⁰⁰ As a part of the surrogacy agreement, intended parents also cover the cost of the surrogates' room and board, which is approximately \$100 per month.²⁰¹

189. Marcy Darnovsky, "Moral Questions of an Altogether Different Kind:" *Progressive Politics in the Biotech Age*, 4 *Harv. L. & Pol'y Rev.* 99, 111-12 (2010).

190. Lauren Birchfield & Jessica Corsi, *Between Starvation and Globalization: Realizing the Right to Food in India*, 31 *MICH. J. INT'L L.* 691, 738 at FN219 (2010) (citing a UNICEF report noting that women and girls in India are often amongst the last to eat).

191. See SCOTT CARNEY, *THE RED MARKET*, 135-138 (2011) (noting that, while the surrogates at the Akanksha Infertility clinic are not prisoners, they cannot leave either) [hereinafter Scott Carney].

192. According to Scott Carney's experience, the surrogates were in the group home almost all day, without the opportunity to go outside unless they had doctors' appointments. Scott Carney, *supra* note 191.

193. See Pande Manufacturing, *supra* note 183, at 974.

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

In India, the interaction between the intended parents and the surrogate is usually limited.²⁰² Before the surrogate is implanted with embryos, the foreign couple may only meet the surrogate briefly during a short session with the fertility doctor.²⁰³ However, some intended parents do stay in touch with the Indian surrogate and even plan to bring the baby back to India to visit her.²⁰⁴

III.

A BIOETHICAL ANALYSIS OF INTERNATIONAL SURROGACY

Scholarly responses to international surrogacy vary widely. Some commentators espouse a laissez-faire attitude regarding the surrogacy market.²⁰⁵ These scholars advocate for minimal governmental regulation because they fear paternalistic limitations on a competent woman's choice to become a surrogate. They also believe that prohibitions on surrogacy would adversely affect certain already disadvantaged groups, e.g., infertile individuals or gay and lesbian couples who want to be parents.²⁰⁶ Some also believe that surrogacy is not inherently exploitative and that proper regulation could minimize potential exploitation.²⁰⁷ Others advocate against an outright ban on international surrogacy—which some commentators compare to slavery or prostitution²⁰⁸—because of the potential of creating a black market in surrogacy with even fewer protections for the parties involved.²⁰⁹

Rather than advocate for any one of these perspectives, this Article attempts to locate the problems in international surrogacy as a starting point for policymakers.²¹⁰ These stories serve as a vehicle through which to explore the

202. CHRISTINE WILLIAMS, GENDER AND SEXUALITY IN THE WORKPLACE 273 (2010).

203. See Halworth, *supra* note 179.

204. *Id.*

205. Patton, *supra* note 99, at 514 (noting the existence of various approaches to international surrogacy).

206. For example, there may be concerns that such restrictions may disadvantage the infertile, the potential single parents, or gay or lesbian intended parents. Many regulatory schemes that are currently in place restrict surrogacy to those in a married, heterosexual relationship.

207. Patton, *supra* note 99, at 514 (noting the existence of various approaches to international surrogacy).

208. See generally Rosalie Ber, *Ethical Issues in Gestational Surrogacy*, 21 THEORETICAL MED. & BIOETHICS 153 (2000) (comparing gestational surrogacy to slavery and prostitution). See also DEBORAH L. SPAR, *THE BABY BUSINESS* 85-86 (Harvard Business School Press 2005) (noting that the bans on surrogacy in some countries may have spurred the international surrogacy market). Many countries, such as France and Japan, have banned surrogacy or commercial surrogacy. However, as seen in the Ukrainian and American examples I described, that has not stopped those interested in having a child through a surrogate from seeking a surrogate from another country.

209. See generally Lisa Ikemoto, *Reproductive Tourism: Equality Concerns in the Global Market for Fertility*, 27 LAW & INEQ. 277, 295-08 (2009) (arguing that the international reproductive tourism industry promotes inequality due to the lax regulations in developing countries).

210. I offer a more detailed discussion of a need for consistency in international regulations related to commercial surrogacy in my forthcoming article, *A Race To The Bottom? The Need For*

bioethical ramifications of the international surrogacy market. Although there are numerous ways to conduct a bioethical analysis,²¹¹ this Article does so via the baby stories of global surrogacy through the lenses of beneficence, nonmaleficence, justice, and autonomy.²¹² These principles are set forth in *Principles of Biomedical Ethics* by Tom L. Beauchamp and James F. Childress and are intended to aid clinical decision making. But these principles also provide an analytical framework for a wide variety of social issues related to health care, such as adoption and assisted reproduction.²¹³ This Article pushes this framework further by applying these principles to the stories of international gestational surrogacy, while considering race, gender, and culture as part of the analysis. Through examining these stories in this framework, this Article achieves a richer, more nuanced look into global surrogacy. This type of theoretical bioethical examination is absent from the legal literature related to international surrogacy. Since bioethical analyses impact the formation of health policy and law, this Article begins to correct the oversight in legal literature concerning international surrogacy.

A. Beneficence: Does International Surrogacy Promote Well Being?

Beneficence refers to the concept of promoting well-being.²¹⁴ In the context of surrogacy, the question is whether international surrogacy serves the best interests of intended parents, surrogates, and the babies born out of the surrogacy arrangement.

1. Benefits to Intended Parents

Sociological literature suggests that intended parents fare well in the current system of international surrogacy, as parents are able to have their child and can sometimes escape the legal and financial constraints of national surrogacy programs.²¹⁵ In the case of surrogacy in the Global South, parents obtain the services of surrogates at a significantly lower cost, as illustrated by both the Switzers and the Yamadas experiences in India. The international,

International Regulation Of The Rapidly Growing Global Surrogacy Market? (work in progress, on file with author) (advocating for consistency through additions to the Hague Convention on Private International Law).

211. See Susan M. Wolf, *Shifting Paradigms in Bioethics and Health Law: The Rise of a New Pragmatism*, 20 AM. J.L. & MED. 395, 401 (1994) (noting modern approaches to bioethics that incorporate race, feminist theory, empiricism, and narratives).

212. See *id.* at 400.

213. *Id.* at n.1 (stating that bioethics is “the study of ethical problems in health care and the biological sciences”).

214. BARRY R. FURROW ET AL., *BIOETHICS: HEALTH CARE LAW AND ETHICS* 4 (6th ed. 2008) (noting that beneficence requires acting in the benefit of others).

215. Casey Humbyrd, *Fair Trade International Surrogacy*, 9 DEVELOPING WORLD BIOETHICS, 112, 2009: no.3 p. 113.

commercial surrogacy market also enabled the Le Roches to have a biological child, thereby avoiding the French prohibition on surrogacy. Although it is difficult to determine the value that intended parents place on having a child by surrogacy, the prices that these parents paid, as well as those charged by the baby-selling ring in California serve as a benchmark of the value that potential parents place on adopting Caucasian children at birth.

2. Benefits to Surrogates

International surrogacy promotes the well-being of surrogates by generating income, spurring a reevaluation of the worth of pregnancy, and sometimes offering fringe benefits. Compared to the limited economic opportunities available, surrogates usually earn a comparatively high income.²¹⁶ In the United States, Ukraine, and India, many women's decision to become gestational surrogates stems primarily from the corresponding financial benefits. The surrogate relationship could be framed as a job, whereby the surrogate mother is an employee of the surrogacy agency and, by extension, the intended parents. Intended parents can also be cast as customers of the business operated by the surrogacy agency. Sociologist Amrita Pande takes the former approach and stresses that surrogacy should be compared to these women's other job prospects.²¹⁷ Pande observes that the ethical critiques of surrogacy ignore the reality that surrogate mothers live,²¹⁸ namely that women who serve as surrogates may not have comparable job or income opportunities.²¹⁹

The aforementioned documentary, *Made in India*, illustrates the importance of financial incentives to surrogate mothers by relating the story of Aasia.²²⁰ Aasia clearly states that the financial benefits are the only reason she chose to become a surrogate.²²¹ The fee she received of \$2,000 is much higher than the average Indian family income of \$60 per month.²²² Surrogacy enables women like Aasia to provide for their families and save for their children by earning almost five years of total family income in less than one year.²²³

Not only does the international surrogacy market greatly value

216. See *infra* notes 222–24.

217. See Pande Manufacturing, *supra* note 183, at 971–72.

218. *Id.*

219. The most common reason why men and women work outside the home is financial necessity. PEW RESEARCH CTR., AMERICA'S CHANGING WORKFORCE: RECESSION TURNS A GRAYING OFFICE GRAYER 25 (2009), <http://pewsocialtrends.org/files/2010/10/americas-changing-workforce.pdf> (stating that “the single biggest reason [men and women] work is to support themselves and their families.”)

220. See *supra* PART 1.D.

221. MADE IN INDIA, *supra* note 75.

222. See Pande Manufacturing, *supra* note 183, at 974.

223. See *id.*

pregnancy,²²⁴ only women can be surrogates. This may be one of the few jobs where women face no competition from men. Unlike other jobs that are devalued and underpaid as “female” jobs, such as teaching and nursing, surrogacy fetches a relatively large sum. Although a lack of data exists as to broad cultural trends in framing pregnancy, international commercial surrogacy could conceivably spur cultural recognition in the developing world in particular of the tremendous value of the labor involved in pregnancy. If society in these countries were to value pregnancy more highly because of its potential for income-generation, this could lead to general, incremental improvement of women’s lives and status.

Finally, it seems that this practice can generate real benefits for surrogates. For example, the Akanksha Infertility Clinic educates surrogates who are living in the surrogate group home. Surrogates receive English and computer lessons,²²⁵ thereby developing skills transferable to non-surrogacy employment.

B. Nonmaleficence: Does International Surrogacy cause harm?

The principle of nonmaleficence stipulates that the set of actors who make international surrogacy possible have a duty to do no harm.²²⁶ But international commercial surrogacy potentially causes harm on multiple levels. Harm may occur to intended parents, surrogates, and the babies born from these arrangements.

1. Harm to Intended Parents

The stories in this Article demonstrate that the laws addressing surrogacy in different nations differ to “the point of mutual contradiction”²²⁷ and can cause harms ranging from substantial emotional turmoil to criminal sanctions on intended parents.

In the California baby-selling scandal, the intended parents thought they were adoptive parents.²²⁸ They did not realize that the babies they adopted were conceived for the sole purpose of adoption. These intended parents became the unintended victims of an illegal scheme, and thus suffered harm.

Dr. Yamada, the biological father of Baby Manji, suffered emotional turmoil and an administrative burden because both Indian and Japanese law

224. *See id.*

225. *Id.* at 970.

226. According to Beauchamp and Childress, one “ought not to inflict evil or harm.” Beauchamp, *supra* note 3, at 151. They apply this principle in the clinical decision making context. However, I use it here as an analytical framework to highlight the legal problems the stories described in this Article.

227. *In re X & Y*, [2008] EWHC 3030 (Fam.) (U.K.), <http://www.bailii.org/ew/cases/EWHC/Fam/2008/3030.html> (United Kingdom).

228. *See supra* Part I.A.

temporarily deprived him of his parental rights to his biologically related child.²²⁹ As a result of Indian and Japanese laws related to citizenship, he spent time and money appealing to the Indian courts to allow him to take Baby Manji back to Japan.

The Le Roches clearly suffered harm because the Ukrainian surrogacy agency with which they dealt misled them as to the ease of returning with their surrogate babies.²³⁰ The agency reassured them that they would be able to take their babies to France with legal papers as long as they hid the facts of their conception and birth. When the Le Roches were unable to return to France with their twins, they attempted to smuggle their babies out of Ukraine. When caught they faced monetary penalties and criminal charges under child trafficking laws. They continue to live in Ukraine because their babies do not have legal paperwork to return to their home in France.²³¹

In *Made in India*, the Switzers seemed to have a mostly positive experience but even they encountered financial and administrative obstacles that caused them harm. They paid more than they initially intended to intermediaries, the surrogacy mother, and as a result of the failure to contract for certain possibilities.²³² Some of the additional payment was voluntary, arising from their false belief that Aasia had been paid \$7,000 rather than \$2,000²³³ and the fact that Aasia believed that the Switzers should pay her more because she bore them twins.²³⁴ The Switzers faced administrative burdens associated with ensuring that the twins' birth certificates bore their names and in obtaining US passports for their babies. Such burdens were minor compared to those of the Le Roches and Ikufumi Yamada.

2. Harm to Surrogates

International commercial surrogacy might cause harm to surrogate mothers with respect to the commodification of their bodies, physical health, and even mortality. India, for instance, has the highest number of maternal deaths in the world and a very high incidence of maternal mortality.²³⁵ The Indian surrogates therefore face greater risks from childbirth compared with the risks experienced by mothers elsewhere in the world.

Additionally, in each of the stories, the surrogates are gestational surrogates, meaning that they are implanted with the embryo via in vitro

229. See *supra* Part I.B.

230. See *supra* Part I.C.

231. See *supra* text accompanying note 74.

232. *MADE IN INDIA supra* note 75.

233. See *supra* text accompanying note 76.

234. See *supra* text accompanying note 77.

235. Transcript, *What to Expect: Legal Developments and Challenges in Reproductive Justice*, 15 CARDOZO J.L. GENDER, 585 (2009).

fertilization. There are health risks inherent to the in vitro implantation procedure, especially the common practice of implanting a single surrogate with multiple embryos.²³⁶ Most surrogacy clinics in Ukraine and India implant the surrogates with multiple embryos to boost their success rate.²³⁷ However, pregnancy with multiple embryos exposes surrogates to increased risks, such as “hypertension, gestational diabetes, and excessive bleeding in labor and delivery.”²³⁸ Additionally, studies have shown that women who become pregnant via IVF have twice the risk of an ectopic pregnancy, which can require surgery or cause death.²³⁹

Further, it is not clear what recourse surrogates have in India or Ukraine should they be harmed in the course of their surrogacy arrangement. *Made in India* reveals that Aasia was not fully informed about what surrogacy entailed. She did not understand the science of IVF, the increased risk of multiple fetuses, or the lack of payment in the event that she bore twins.²⁴⁰ In Sociologist Amrita Pande’s interviews of surrogates from Akanksha Infertility Clinic, which is where the Yamadas contracted with their surrogate, a surrogate reported that “we were told that if anything happens to the child, it’s not our responsibility but if anything happens to me, we can’t hold anyone responsible.”²⁴¹ There appears to be no protection for surrogates in this regard. The power dynamic favors surrogacy agencies over surrogates, who could potentially be misled or coerced into giving up rights and remedies in the case of harm to health.

There is further concern over the potential commodification of surrogates, where a surrogate’s womb is essentially available for a rental fee.²⁴² Some argue that these arrangements reduce a surrogate to a reproductive vessel.²⁴³ In countries where high paying jobs for women are scarce, as in India, surrogate

236. See Jaime King, *Predicting Probability: Regulating the Future of Preimplantation Genetic Screening*, 8 YALE J. HEALTH POL’Y L. & ETHICS 283, 290-91 (2008).

237. See Carney Rent-A-Womb, *supra* note 187 (noting that Akanksha Clinic “routinely uses five or more embryos at a time”). Some agencies even offer two surrogates per client to increase the chance of a successful implantation. If both surrogates successfully become pregnant, doctors perform selective reduction or abortion on the less desirable embryo(s). See Tamar Audi & Arlene Chang, *Assembling a Global Baby*, Wall St. J., (Dec. 11, 2010), <http://online.wsj.com/article/SB10001424052748703493504576007774155273928.html>.

238. King, *supra* note 236, at n.115 (stating that “the risk of pregnancy-induced hypertension doubles from just under 4% in women pregnant with one fetus to just under 8% in those carrying twins and over 11% in those carrying triplets”).

239. *Id.* at 308.

240. MADE IN INDIA, *supra* note 75.

241. Pande Manufacturing, *supra* note 183, at 977.

242. Casey Humbyrd, *Fair Trade International Surrogacy*, 9 DEVELOPING WORLD BIOETHICS 112, 2009: no.3 at 112.

243. See Ailis L. Burpee, Note, *Momma Drama: A Study of How Canada’s National Regulation of Surrogacy Compares to Australia’s Independent State Regulation of Surrogacy*, 37 GA. J. INT’L & COMP. L. 305 at 324–25 (2009); see also Bushy & Von, *supra* note 59, at 59-60 (noting concern that commercial surrogacy reduces women to reproductive vessels).

agencies wield substantial power over surrogates, which may force surrogates to accept lower pay and fewer protections. Some feminists worry about racial and class discrimination if minority women are sought “to serve as ‘mother machines’ for embryos of middle and upper-class clients.”²⁴⁴ Additionally, there is concern that the science fiction notion of a “breeder class” of women who bear babies for richer, often white women, may actually come to fruition as the popularity of international surrogacy builds.²⁴⁵ Critics of international surrogacy, such as Barbara Katz Rothman, predicted even before international surrogacy’s rise in popularity that “[p]oor, uneducated third world women and women of color from the United States and elsewhere, with fewer economic alternatives, can be hired more cheaply.”²⁴⁶ Rothman’s hypothesis appears to be correct, especially in the case of Indian surrogates like Aasia.

3. Harm to Children Born From the Surrogacy Arrangement

Children born of surrogacy face potential health risks as a result of the IVF techniques used for gestational surrogacy.²⁴⁷ Studies have showed that babies born via IVF have “higher incidences of perinatal problems, congenital malformations and problems of the genitourinary system than naturally conceived children.”²⁴⁸ These babies also experience higher rates of mortality, low birth weight, and more frequent preterm delivery than naturally conceived children. These issues arise in part due to their increased likelihood of being a multiple birth pregnancy.²⁴⁹

Babies born of surrogacy also experience potential non-physical harm, as illustrated by the Le Roches’ twin babies and Ikufumi Yamada’s Baby Manji. These babies face the legal harm of lack of citizenship as a result of inconsistencies in the laws among Ukraine, France, India, and Japan. In particular, Baby Manji did not have a legal mother because of Indian laws regarding parental rights.

C. Autonomy in the International Surrogacy Relationship

With respect to international surrogacy, autonomy ought to refer to the idea that intended parents should be able to freely choose to participate in surrogacy arrangements and that a competent woman should be able to make her own

244. Bushy & Von, *supra* note 58 at 41.

245. *Id.* at 41–42.

246. *Id.* Rothman compares advertisements for Purdue chickens to advertisements to babies in a tongue-in-cheek fashion.

247. King, *supra* note 236 at 305.

248. *Id.* at n.14 (citing to Reija Klemetti ET AL., *Health of Children Born as a Result of In Vitro Fertilization*, 118 PEDIATRICS 1819 (2006)).

249. *Id.* at 305.

decision to become a surrogate.²⁵⁰

1. *Autonomy for Intended Parents*

The actors that enable and regulate international commercial surrogacy encroach on the autonomy of the intended parents in two important ways. First, the accounts above demonstrate that intended parents are sometimes unclear about the terms of their surrogacy contracts.²⁵¹ Second, the different norms and laws around surrogacy in each country (or state in the case of the United States, which does not regulate surrogacy at the federal level) often subvert the surrogacy arrangements made by intended parents.²⁵² For example, the Switzers did not know that their surrogate, Aasia, was underpaid.²⁵³ The agency misled them into believing that Aasia received a larger share of the fees that they paid the surrogacy agency.²⁵⁴

Intended parents also may lack autonomy vis-à-vis surrogacy companies, as in the California baby-selling scam.²⁵⁵ The reproductive law attorneys lied to the intended parents by mischaracterizing the situation as one where the original intended parents had “dropped out.”²⁵⁶ Thus, the intended parents lacked meaningful autonomy because they lacked the necessary facts with which to make an informed decision.²⁵⁷

In addition, the accounts of surrogacy presented in this Article demonstrate that the patchwork of different or even contradictory laws on surrogacy, adoption, and citizenship may potentially unravel many international surrogacy arrangements. The Yamadas and the Le Roches initially exercised autonomy by deciding to seek a gestational surrogacy arrangement outside their home countries. But the laws curtailed their decisions because of the legal uncertainty or illegality of such arrangements in Japan and France, respectively, and the laws in Ukraine and India about parental rights and citizenship. In these cases,

250. I do not analyze autonomy in the context of babies born from surrogacy arrangements because babies do not have autonomy to make decisions. Rather, their lives are dictated by the decisions of their intended parents and surrogate mother.

251. See *supra* text accompanying notes 76.

252. See *supra* text accompanying notes 44–58 (describing the legal predicament involved in the Baby Manji case); and notes 68–70 (describing the legal problems the Le Roches faced).

253. See *supra* text accompanying note 76.

254. MADE IN INDIA, *supra* note 75.

255. See *infra* Part I.A.

256. Greg Moran, *Woman Gets Prison In Baby-Selling Fraud*, San Diego Union-Tribune, December 2, 2011 (hereinafter *Baby-Selling Fraud*); see also *Unborn babies sold to highest bidder*, CNN, October 21, 2011, <http://www.cnn.com/video/#/video/crime/2011/10/21/pkg-endo-black-market-babies.cnn>; see also KTLA Special Report: *Made to Order Babies* (KTLA-TV television broadcast Feb. 14, 2012) (noting that the surrogates were told that intended parents were already in place and intended parents were told that the baby was to be adopted, not part of a surrogacy arrangement).

257. See *infra* Part I.A.

although the parents attempted to make decisions to control their reproductive destinies by ignoring their respective country's prohibitions against surrogacy, they found themselves in compromising situations with stateless babies.

2. *Autonomy for Surrogates*

Although international commercial surrogacy enables surrogates to gain some financial independence, thereby enhancing one aspect of these women's autonomy, the outsized economic rewards of serving as a surrogate might also result in coercion and prevent surrogates from meaningfully negotiating the terms of their surrogacy.

One of the most important indicators of autonomy is voluntariness. In the Baby Manji case and the documentary *Made in India*, it is not clear whether the women may be characterized as truly having made a voluntary choice to serve as surrogates. Similarly, sociologist Amrita Pande reports that the majority of surrogates in her study were recruited.²⁵⁸ In an interview, one recruiter shared a strategy of targeting women "who have very young children and ones . . . in desperate need of money."²⁵⁹ The recruiter admitted to making women feel badly about being "unable to provide for their children."²⁶⁰ For example, some surrogates felt pressure about being "unable to get their daughters married" because of a lack of income.²⁶¹ This assertion seems to ring true in *Made in India* where recruiters visit slums to find women in desperate financial need.²⁶² The movie detailed, for example, that Aasia was able to earn \$2,000 in less than a year, while typical wages for a family are around \$60 a month in poor Indian communities like hers.²⁶³

Additionally, in India, many surrogate mothers are unable to read the contract,²⁶⁴ let alone bargain over the terms.²⁶⁵ Surrogates sometimes authorize

258. Pande Manufacturing, *supra* note 183, at 975.

259. *Id.*

260. *Id.*

261. *Id.* at 975–76.

262. MADE IN INDIA, *supra* note 75.

263. See *supra* note 221 and accompanying text. Because of the competitive nature of the surrogacy market, stakeholders in competing countries such as the United States are often the loudest critics of international surrogacy in less developed countries. For example, John Weltman, the President of Circle Surrogacy, a surrogacy broker that matches intended parents from countries around the world to surrogates in the United States, has been quoted stating, "Surrogate mothers in India are 'milk-fed veal, kept apart from their families and communities' while being kept under close monitoring. They're saying 'I want my woman in a closet,' but wait a minute, that's slavery." Surrogacy Abroad Inc., *More Seek Surrogacy in India as an Available Destiny for International Surrogate Mothers*, SURROGACY ABROAD BLOG, May 9, 2011, <http://egg-donors.blogspot.com>.

264. Pande Manufacturing, *supra* note 183 at 976–77 (noting that the essential points of the contract are translated for the surrogates and quoting an Indian surrogate who says that "[t]he only thing they told me was that this thing is not immoral, I will not have to sleep with anyone, and that the seed will be transferred into me with an injection").

contracts with a thumbprint because they are illiterate.²⁶⁶ Also, some women become surrogates with a limited general education, and are thus uninformed as to what the IVF procedure entails.²⁶⁷ For example, Aasia is not familiar with the IVF procedure and does not seem to be able to foresee the higher risk of bearing twins, although multiple gestations are more common with the IVF procedure.²⁶⁸ Had she been fully informed about the increased risks, she may have been able to negotiate additional payment in the contract for that possibility. Instead she agreed to the contract without the full information required to make a truly autonomous decision. Thus, it is unlikely that surrogates in places like India may freely negotiate the terms of their surrogacy arrangements because of the financial need of the surrogates and their relative lack of legal sophistication.

Just as Indian surrogates are drawn into surrogacy by the relatively high compensation, attorneys Erickson and Neiman enticed the American and Canadian surrogates involved in the baby selling scandal with higher than typical surrogate compensation. One surrogate involved in the scheme was paid \$38,000 to travel to Ukraine to serve as a surrogate, which was nearly double what she had made the previous time she had been a surrogate.²⁶⁹ The surrogate seemed to have some initial doubts about this unusual arrangement, which involved traveling to Ukraine to be implanted.²⁷⁰ However, her fears were quelled after speaking to the lawyer Neiman, who assured her that the arrangement was legal.²⁷¹ Some of these surrogates believed that there were intended parents in place prior to their implantation.²⁷² Others knew that there were no intended parents yet but did not know that the arrangement was illegal.²⁷³ Presumably, all of these women were drawn into the surrogacy arrangement by the promise of high compensation. In one interview, one surrogate states “how “desperate [she] was” to become a surrogate.²⁷⁴ This statement seems to demonstrate that even surrogates in the United States are drawn in by the compensation. In the baby-selling example, although the surrogates were tempted by the high compensation, most of them ended up receiving no or very little payment after the court found the arrangements illegal.²⁷⁵

265. See Pande Manufacturing, *supra* note 183, at 971.

266. Gentleman *supra* note 156.

267. See generally *id.* at 976-77.

268. MADE IN INDIA, *supra* note 75.

269. Zarembo Scam, *supra* note 19.

270. *Id.*

271. *Id.*

272. Baby-Selling Fraud, *supra* note 256.

273. Zarembo Scam, *supra* note 19.

274. *Id.*

275. See *id.*

D. Does International Surrogacy Promote Justice?

Although justice is a broad and complex concept, in bioethics literature, justice refers to the goal of achieving equal access to health care services by various subpopulations.²⁷⁶ In the case of surrogacy, instead of health care services, the issue is access to services that allow one to have a child via a surrogate. This Section contends that intended parents who choose to use surrogacy rather than adoption are treated inequitably by the varying legal schemes for adoption and surrogacy. In addition, there is another broad justice concern that the above stories reveal—the way international surrogacy might reinforce particular racial hierarchies.

In the baby-selling scam, the intended parents were actually adoptive parents who were misled into believing that they were adopting a baby because the intended parents in a surrogacy arrangement withdrew from the arrangement. This story reveals that intended parents who decide to seek surrogacy services and intended parents who adopt are similarly situated. Both sets of parents desire to have a baby, often due to infertility.²⁷⁷ Most cases of surrogacy now involve gestational surrogacy,²⁷⁸ so the baby is genetically related to one or both intended parents in a surrogacy arrangement. However, it is not clear that this minor difference is enough to justify such different legal regimes between adoption and surrogacy. The baby-selling scam demonstrates the similarity of the two scenarios and how unscrupulous agents might take advantage of the different laws governing each practice despite this similarity.

Through scams like this, and as a result of the developed/developing world power dynamic, international surrogacy might play a harmful role in reinforcing certain racial hierarchies.²⁷⁹ The majority of couples who use surrogacy and other assisted reproductive technologies to achieve fertility are white.²⁸⁰ Such use of assisted reproductive technologies “has become a racially-specific, class-based method of family formation.”²⁸¹ Consequently, the surrogacy market

276. See generally Beauchamp & Childress, *supra* note 3, at 326-87 (discussing justice concept); Judith C. Ahronheim et al., ETHICS IN CLINICAL PRACTICE 34-37 (1994) (noting the importance of justice considerations in determining how to allocate medical resources).

277. See Patton, *supra* note 99, at 512 (noting that the difficulty of the adoption process has led more couples to commercial gestational surrogacy).

278. Diane S. Hinson & Maureen McBrien *Surrogacy Across America*, FAM. ADVOC. 32, 34 (noting that 95% of surrogacies in the United States are gestational surrogacies).

279. Some have suggested that, as the “supply of adoptable children, especially healthy white infants, diminished,” more white families have sought treatment for infertility. See J. Herbie DiFonzo & Ruth C. Stern, *The Children of Baby M.*, 39 CAP. U. L. REV. 345, 350-351 (2011) (noting that, in the United States, “by the end of the twentieth century, the combined annual birth rate from donor insemination, IVF, and surrogacy arrangements was 76,000 while only 30,000 healthy children were available for adoption”).

280. Lisa C. Ikemoto, *The In/Fertile, the Too Fertile, and the Dysfertile*, 47 HASTINGS L.J. 1007, 1030 (1996).

281. *Id.*

appears to be geared toward white customers and values white egg donors, white sperm, and white babies.²⁸² Planet Hospital, the surrogacy agency featured in *Made in India*, reported a “growing demand from clients for [donor] eggs from Caucasian women.”²⁸³ In response to this demand, the agency transports eggs from white donors from the former Soviet Republic of Georgia to India and charges intended parents an extra \$5,000 for a Caucasian egg donor.²⁸⁴ The baby-selling case similarly showed that some intended parents were willing to pay the higher than usual price for a white surrogate child.²⁸⁵ This concrete signaling that non-white lives are less valuable may be serious unintended consequence of the international surrogacy marketplace. This reinforcement of racial hierarchies is especially acute and immediate when poorer, non-white surrogates carry fetuses for white intended parents.

IV. CONCLUSION

This bioethical analysis based on Beauchamp and Childress’ principles reveals certain problems created by the lack of international regulations related to surrogacy. Although the stories demonstrate that surrogates, intended parents, and children born from surrogacy arrangements do receive some benefit, these benefits seem to be diminished by the harms these parties face and ways in which the system undercuts the autonomy of parties and broader distributive justice.

As the discussion of the laws related to surrogacy in the United States, India, and Ukraine demonstrates, domestic law regarding surrogacy varies greatly and encourages forum shopping in the jurisdiction that is most favorable to intended parents. The best way to avoid such forum shopping and to adequately address the ethical problems, which surround international surrogacy practices, is by developing a set of international guidelines and regulations regarding international surrogacy. The Hague Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption (“Hague

282. Although rates of infertility are similar between all races, the majority of those who seek assisted reproductive technologies are white. See Dorothy Roberts, *Racial Disparity in Reproductive Technologies*, Chi Trib., Jan. 29, 1998, at 19N. Although beyond the scope of this article, it is worth exploring the reasons for this disparity. Is access to the surrogacy and assisted reproductive technology market in general limited to only middle and upper class white men and women? See also John A. Robertson, CHILDREN OF CHOICE: FREEDOM AND THE NEW REPRODUCTIVE TECHNOLOGIES at 97 (1994) (“Black and poorer women have higher rates of infertility than white, middle-class women . . .”).

283. Margot Cohen, *A Search for a Surrogate Leads to India*, Wall St. J., Oct. 9, 2009, <http://online.wsj.com/article/SB10001424052748704252004574459003279407832.html>.

284. *Id.*

285. *Unborn babies sold to highest bidder through unknown surrogates*, CNN, Oct. 21, 2011, <http://www.cnn.com/video/#/video/crime/2011/10/21/pkg-endo-black-market-babies.cnn>.

Adoption Convention”) raised and addressed similar ethical concerns in the context of international adoption decades ago.²⁸⁶ The Hague Adoption Convention represented a “dramatic step forward in at least symbolic support for international adoption . . .”²⁸⁷ Sixty-six countries, including most of those who exported and imported babies in international adoption, approved it.²⁸⁸

A similar surrogacy convention could be negotiated and adopted by the countries active in international surrogacy. The details of such a convention appear in another article, *A Race To The Bottom? The Need For International Regulation Of The Rapidly Growing Global Surrogacy Market?*,²⁸⁹ but in conclusion this Article summarizes the key points of this proposal. Just as the Hague Adoption Convention set forth standards and safeguards to protect intercountry adoptions,²⁹⁰ the surrogacy convention should set forth safeguards and minimum standards for international surrogacy.²⁹¹

One of the primary benefits of such a convention would be to give intended parents notice that surrogacies occurring in countries that have signed the convention would be recognized and given effect in other party countries. That would help avoid the situation of stateless babies, like the Le Roches’ twins or Baby Manji. Of course, the creation of such a convention could not require countries that outlaw surrogacy to recognize it. However, intended parents will be on notice that participating in international surrogacy in countries not party to such a convention would subject them to uncertainty and risk. Additionally, the mere existence of such a convention would reduce the influence of surrogacy agencies that may falsely assure intended parents of the legality of certain arrangements.

An international surrogacy convention must require that accredited surrogacy agencies itemize and disclose in writing the fees and estimated expenses associated with the surrogacy ahead of time. This disclosure should include the fees paid to the surrogates. Such transparency would help intended parents and surrogates make autonomous choices. The surrogacy convention should ensure that payments to surrogates not vary based on their race, nor

286. Convention on Protection of Children and Co-operation in Respect of Intercountry Adoption, May 29, 1993, 1870 U.N.T.S. 167 (entered into force May 1, 1995), http://www.hcch.net/index_en.php?act=conventions.text&cid=69.

287. Elizabeth Bartholet, *International Adoption: Thoughts on the Human Rights Issues*, 13 BUFF. HUM. RTS. L. REV. 151, 172 (2007).

288. *Id.*

289. Seema Mohapatra, *A Race To The Bottom? The Need For International Regulation Of The Rapidly Growing Global Surrogacy Market?* (work in progress, on file with author).

290. *Id.* The United States signed the Convention in 1994, and the Convention entered into force for the United States in April 2008. See U.S. Dept. of State, *Understanding the Hague Convention*, http://adoption.state.gov/hague_convention/overview.php.

291. See Katarina Trimmings & Paul Beaumont, *International Surrogacy Arrangements: An Urgent Need for Legal Regulation at the International Level*, 7 J. INT. PRIV. LAW 1, 10 (2011) (suggesting a sample framework for such a convention).

should charges to surrogates vary based on the race of the baby the surrogate is carrying. That would help address some of the racial justice concerns discussed earlier.

An international surrogacy convention also must set forth minimum standards for surrogate contracts and intended parent contracts. All payments should be negotiated in advance of the arrangement. Additionally, there need to be safeguards to ensure that the surrogates have an understanding of what is in their contract in their mother tongue.

A surrogacy convention must also ensure that every baby created through surrogacy in a convention country receives some sort of certification or declaration, similar to the Hague Adoption Certificate or a Hague Custody Declaration delineated by the Hague Adoption Convention. Such a procedure would help prevent the citizenship and birth certificate issues that frequently arise in international surrogacy cases. Such certificate would ensure that the surrogacy agency has already contacted and pre-arranged with the home country consulate and embassy, and ensure that the child born from the surrogacy arrangement will have the necessary passport, birth certificate, and visas. That would allow the intended parents to know ahead of time whether the child appears to be eligible to enter their home countries.

From Baby Manji to the baby-selling scandal in California, we are reminded that tremendous ethical concerns surround international commercial surrogacy. The international surrogacy industry will continue to grow, and regulators and scholars will need to be prepared with thoughtful, nuanced responses. The bioethical framework of beneficence, nonmaleficence, autonomy, and justice enables us to begin to think about the form that an international response to surrogacy arrangements might take.

2012

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Sabine Michalowski

Recommended Citation

Sabine Michalowski, *No Complicity Liability for Funding Gross Human Rights Violations?*, 30 BERKELEY J. INT'L LAW. 451 (2012).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol30/iss2/5>

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No Complicity Liability for Funding Gross Human Rights Violations?

By
Sabine Michalowski*

I. INTRODUCTION

Many corporations operate in countries with poor human rights records and at times are accused of being complicit in the violations carried out by the governments of these states. International bodies have been working on guidelines to define the responsibilities of corporations in order to avoid such complicity.¹ During his mandate as Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises, Professor John Ruggie developed a human rights framework and due diligence standards to determine the responsibilities of corporations.² While these developments demonstrate concern for the dangers of

* Professor of Law, University of Essex, UK. I would like to express my gratitude to Juan Pablo Bohoslavsky, Geoff Gilbert, Jim Gobert, Karen Hulme, Jeff King, Sheldon Leader and Nigel Rodley for their helpful comments on earlier drafts of this paper. Thanks go also to the participants of talks on issues around this paper at the University of Essex, City University London, New York Law School and NYU Law School for their comments and suggestions.

1. See, e.g., Organization for Econ. Co-Operation and Dev. [OECD], *OECD Guidelines for Multinational Enterprises* (2008); U.N. Global Compact, The Ten Principles, available at <http://www.unglobalcompact.org/AboutTheGC/TheTenPrinciples/index.html>; Draft Norms on the Responsibilities of Transnational Corp. and Other Bus. Enters. with Regard to Human Rights, Comm'n on Human Rights, U.N. Doc. E/CN.4/Sub.2/2003/12 (2003). See also Int'l Comm'n of Jurists, *Report of the Expert Legal Panel on Corporate Complicity in International Crimes, Vol. 3: Civil Remedies* (2008), available at http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&id=22851.

2. U.N. Special Representative of the Secretary General on the Issue of Human Rights and Transnational Corp. and Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, Human Rights Council, A/HRC/17/31* (Mar. 21, 2011) (by John Ruggie). The guiding principles were adopted by the UN Human Rights Council in June 2011. See also Press Release, U.N. Human Rights Council, New Guiding Principles on Business and Human Rights Endorsed by the UN Human Rights Council (June 16, 2011) available at <http://www.business-humanrights.org/media/documents/ruggie/ruggie-guiding-principles-endorsed-16-jun-2011.pdf>.

corporate complicity, these guidelines do not give rise to legally enforceable obligations.

In an attempt to achieve legal accountability, concerned parties and organizations are increasingly suing corporations for their role in human rights violations committed by regimes.³ The main difficulty for courts in deciding complicity liability is where to draw the line between acceptable business interactions with regimes that clearly commit gross human rights violations, and activities that make the corporation complicit in these violations. As is, it is difficult to answer these questions with regard to corporate activities. But the issue becomes even more complicated in the context of liability for doing business with, and thus making funds available to, regimes that carry out gross human rights violations. Unlike commodities such as weapons, money is never the direct means by which gross human rights violations are perpetrated. Moreover, money is difficult to connect to a particular human rights violation because of its fungibility. For example, it is easier to link a specific weapon or even weapons sold by a particular manufacturer to an extrajudicial killing, whereas it would be difficult to link any particular loan to the same killing. Does this fungibility mean that money is always too removed for complicity liability? If not, how can a sufficiently close link between a loan and a gross human rights violation be established to avoid holding lenders responsible for every violation a borrowing regime carries out?

The expanding corporate complicity debate has largely excluded the question of responsibility for financial complicity.⁴ Instead, to the extent that loans to regimes that committed gross human rights violations are in the legal and political spotlight, the discussion has centered primarily on the legality or legitimacy of the resulting debt.⁵ Although the legal validity of loans and complicity liability undoubtedly share factual issues, the two legal issues hold very different consequences. To the extent that funding gross human rights violations voids a loan, the consequence of a violation would be to relieve the

3. Litigation under the Alien Torts Act is increasing in US Courts. *See, e.g., In re "Agent Orange" Product Liability Litigation*, 373 F. Supp. 2d 7 (E.D.N.Y. 2005); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003); *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002); *Doe v. Unocal Corp.*, 395 F.3d 932 (9th Cir. 2002); *Doe v. Unocal Corp.*, 395 F.3d 978 (9th Cir. 2003).

4. Some notable exceptions are Anita Ramasastry, *Secrets and Lies? Swiss Banks and International Human Rights*, 31 VAND. J. TRANSNAT'L L. 325 (1998); Shaw W. Scott, Note, *Taking Riggs Seriously: The ATCA Case Against a Corporate Abettor of Pinochet Atrocities*, 89 MINN. L. REV. 1497 (2005); Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *The Past and Present of Corporate Complicity: Financing the Argentinean Dictatorship*, 23 HARV. HUM. RTS. J. 157 (2010); Juan Pablo Bohoslavsky & Mariana Rulli, *Corporate Complicity and Finance as a "Killing Agent"*, 8 J. INT. CRIMINAL JUSTICE 829 (2010).

5. SABINE MICHALOWSKI, UNCONSTITUTIONAL REGIMES AND THE VALIDITY OF SOVEREIGN DEBT: A LEGAL PERSPECTIVE 69-96, (2007); Sabine Michalowski & Juan Pablo Bohoslavsky, *Ius Cogens, Transitional Justice and Other Trends of the Debate on Odious Debts: A Response to the World Bank Discussion Paper on Odious Debts*, 48 COLUM. J. TRANSNAT'L L. 59 (2009).

debtor state from its repayment obligation. If the same loan gave rise to complicity liability, the corporation could be found liable to the victims of these violations and provide them with a remedy. Victims of gross human rights violations may therefore be without a remedy unless the discussion extends beyond debt repayment and into the context of corporate complicity.⁶

The question of corporate complicity liability in gross human rights violations has arisen mainly in litigation before US courts under the Alien Tort Claims Act (ATCA). Recent US case law defines the *mens rea* standard of such liability,⁷ and debates the existence of corporate complicity liability under the ATCA.⁸ However, the decision in *South African Apartheid Litigation*⁹ demonstrates that in the context of financing, there is a need for in-depth analysis of the *actus reus* and causation elements of complicity liability. In that case, the Court dismissed aiding and abetting claims against banking defendants for their complicity in the human rights violations committed by the South African apartheid. It based its decision on the grounds that commercial loans are too far removed from human rights violations carried out by their recipients for a legally relevant link to exist between the two.¹⁰ This holding creates a sweeping exemption for commercial lenders from complicity liability, without the requirement of a case-by-case analysis or an examination of the lender's *mens rea*.

Other courts adjudicating under the ATCA have since adopted the reasoning in *South African Apartheid Litigation*.¹¹ Given the scarcity of legal analysis and authority on the problem of complicity for financing gross human

6. Sabine Michalowski, *Trazando Paralelos entre la Responsabilidad de Bancos por Complicidad y las Deudas Odiosas*, REVISTA JURÍDICA DE LA UNIVERSIDAD DE PALERMO, Aug. 2009, at 279, 286-87.

7. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (suggesting a move from a *mens rea* standard of knowledge to one of primary purpose, which would considerably reduce the possibility of successful litigation against corporations); *But see Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) (holding that *Talisman* was wrongly decided and that the *mens rea* standard in international law is that of knowledge).

8. See *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1088-91 (C.D. Cal. 2010) (rejecting the existence of such liability). In favour of such liability, see *Exxon Mobil*, 654 F.3d 11; *Flomo v. Firestone Natural Rubber Co.*, 643 F. 2d 1013 (7th Cir. 2011); *Sarei v. Rio Tinto, PLC*, Nos. 02-56256, 02-56390, 09-56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011); *Kiobel*, 621 F.3d at 149-188 (Leval, J., concurring only in the judgment). For further discussion, see *Volker Nerlich, Core Crimes and International Business Corporations*, 8 JICJ 895 (2010); Julian G. Ku, *The Curious Case of Corporate Liability Under the Alien Tort Statute: a Flawed System of Judicial Lawmaking*, 51 VA. J. INT'L L. 353 (2011); Michael Ramsey, *International Law Limits on Investor Liability in Human Rights Litigation*, 50 HARV. INT'L L.J. 271 (2009); Lucien J. Dhooze, *Accessorial Liability of Transnational Corporations Pursuant to the Alien Tort Statute: The South African Apartheid Litigation and the Lessons of Central Bank*, 18 TRANSNAT'L L. & CONTEMP. PROBS. 247, 280-81 (2009).

9. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

10. *Id.* at 269.

11. *Nestle*, 748 F. Supp. 2d at 1096.

rights violations committed by regimes, it is likely that these arguments will prove influential far beyond litigation against banks under the ATCA. *South African Apartheid Litigation* is thus significant not only for future complicity cases under the ATCA, but also for advancing the debate on lender liability for complicity in gross human rights violations more generally.

This Article provides a detailed critique of the arguments that led the Court to exempt commercial lenders from complicity liability. This includes a critical analysis of the Court's interpretation of the *Ministries* case (*Accord United States v. Von Weizsacker*)¹² as an indication that Nuremberg case law declines all liability with regard to commercial loans. Courts tend to rely on Nuremberg cases as the main, if not the sole authority, that supports their rejection of complicity liability for commercial loans.¹³ However, the relevant Nuremberg cases, as well as developments in international law, do not justify such a far-reaching conclusion, making a strong case for reconsidering complicity liability of lenders in gross human rights violations.

This Article contrasts the view of the Court in *South African Apartheid Litigation* that money is inherently neutral and loans are always too far removed from the violations carried out by their recipients with US case law on funding terrorism, which adopts the opposite view by regarding money as particularly dangerous and casts a wide net for complicity liability. Finally, this Article discusses whether the policy considerations and liability standards applied in the terrorism context are transferrable to complicity liability for funding regimes that commit gross human rights violations.

II.

SOUTH AFRICAN APARTHEID LITIGATION

A. *Litigation for Corporate Complicity under the ATCA*

Victims of the apartheid regime filed a lawsuit in the United States under the ATCA, which provides that “[t]he 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.”¹⁴ It was enacted as part of the Judiciary Act of 1789 to deal with cases such as piracy.¹⁵ For about 200 years, the statute lay forgotten until it was rediscovered by human rights lawyers and tested in *Filartiga v. Pena-Irala*, where the Court determined that the ATCA

12. *United States v. Von Weizsacker* (“The Ministries Case”), 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 478 (Nuernberg Military Tribs. 1950).

13. The most important examples are *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 293 (2d Cir. 2007); *In re South African Apartheid*, 617 F. Supp. 2d at 258-59; *Nestle*, 748 F. Supp. 2d at 1088-91, 1094-97, 1099-1100.

14. Alien Tort Claims Act (ATCA), 28 U.S.C. § 1350 (2006).

15. *Sosa v. Alvarez-Machain*, 542 U.S. 692, 724 (2004).

allowed victims to sue in US courts for serious violations of international human rights law.¹⁶ A string of lawsuits for gross human rights violations followed *Filartiga*, not only against individuals, but also against multinational corporations.¹⁷

The main litigation issues for corporate complicity under the ATCA are: (i) how to define what falls under the law of nations;¹⁸ (ii) whether cases can be brought against corporations;¹⁹ (iii) whether the ATCA encompasses liability for aiding and abetting;²⁰ and (iv) if so, what standards courts should apply to determine the *actus reus* and *mens rea* of such liability.

B. Corporate Complicity in the South African Context and the Khulumani Complaint

When Nelson Mandela became the first black president of South Africa in 1994, the government established the Truth and Reconciliation Commission (TRC) to investigate and document human rights violations committed under apartheid between March 1960 and May 1994. Perpetrators who came forward and admitted their guilt received amnesty against prosecution.²¹ The TRC had the authority to investigate the role of corporations in apartheid South Africa,²²

16. *Filartiga v. Pena-Irala*, 630 F.2d 876, 880 (2d Cir. 1980).

17. See, e.g., *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009) (Plaintiff sued Talisman Energy for aiding and abetting genocide and other gross human rights violations committed by the Sudanese government in the context of the development of oil concessions in Southern Sudan); See also *Wiwa v. Royal Dutch Petroleum Co.*, No. 96 CIV. 8386 (KMW), 2002 WL 319887 (S.D.N.Y. Feb. 28, 2002) (plaintiffs sued Shell Oil Company for complicity in the repression of Ogoni protests against the environmental damages caused by oil platforms and in the execution of Ken Saro-Wiwa). In June 2009, Shell settled out of court for \$15.5 million. Ed Pilkington, *Shell Pays Out \$15.5m Over Saro-Wiwa Killing*, THE GUARDIAN (Jun. 8, 2009, 19:07), <http://www.guardian.co.uk/world/2009/jun/08/nigeria-usa>. Plaintiffs sued UNOCAL for complicity in forced labor, rape, and a murder carried out by soldiers along a natural gas pipeline route in Myanmar. *Doe v. Unocal*, 395 F.3d 932 (9th Cir. 2002). A settlement was reached in 2005 whose terms were not made public. Duncan Campbell, *Energy Giant Agrees Settlement with Burmese Villagers*, THE GUARDIAN (Dec. 14, 2004, 19:04), <http://www.guardian.co.uk/world/2004/dec/15/burma.duncancampbell>.

18. Some U.S. courts have held that grave human rights violations such as forced labour, genocide, forced disappearances, extra-judicial killings and torture as well as the violation of other norms of *ius cogens* status are violations of the law of nations. See *Siderman de Blake v. Republic of Arg.*, 965 F.2d 699, 715-16 (9th Cir. 1992).

19. Decided in the affirmative for the first time in *Unocal*, 395 F.3d 932 but recently put into doubt by *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010), and *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1124-28 (C.D. Cal. 2010).

20. Accepted for the first time in the first *Talisman* decision, *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289 (S.D.N.Y. 2003).

21. See The Promotion of National Unity and Reconciliation Act 34 of 1995 § 3 (S. Afr.).

22. For a critical discussion see, e.g., Jaco Barnard-Naudé, *For Justice and Reconciliation to Come: The TRC Archive, Big Business, and the Demand for Material Reparations*, in JUSTICE AND RECONCILIATION IN POST-APARTHEID SOUTH AFRICA 172 (François du Bois, Antje du Bois-Pedain eds., 2008).

but few corporations decided to come forward and take part in the process. Nevertheless, the TRC concluded that “business was central to the economy that sustained the South African state during the apartheid years”²³ and that:

[T]he degree to which business maintained the status quo varied from direct involvement in shaping government policies or engaging in activities directly associated with repressive functions to simply benefiting from operating in a racially structured society in which wages were low and workers were denied basic democratic rights.²⁴

With regard to the responsibility of banks, the TRC Report suggested that there was a strong case for reparations, as “[t]he banks played an instrumental role in prolonging apartheid from the time of the debt crisis in 1985 onwards.”²⁵

Many victims were unsatisfied with the TRC process, the government’s implementation of TRC findings, the reparations program, and the lack of redress for gross human rights violations.²⁶ In 2002, several South African victims’ organizations, including the Khulumani Support Group, filed a lawsuit in the Southern District of New York against a variety of multinational corporations, including banks, for aiding and abetting or otherwise participating in the international law violations committed by the apartheid regime. The *Khulumani* case needs to be understood as “a logical continuation of the outcome of the TRC.”²⁷

The original complaint, submitted in 2002 by the *Khulumani* plaintiffs, alleged that:

[T]he participation of the defendants, companies in the key industries of oil, armaments, banking, transportation, technology, and mining, was instrumental in encouraging and furthering the abuses. Defendants’ conduct was so integrally connected to the abuses that apartheid would not have occurred in the same way without their participation.²⁸

But the *Khulumani* plaintiffs took a step beyond the structural approach, i.e., the generalized role of business in apartheid-related crimes, to present specific claims against the defendants, both individually and as a group. With regard to the banking defendants, the original complaint stressed the importance of foreign financing for the apartheid regime and specifically identified the

23. Truth and Reconciliation Commission of South Africa Final Report, Vol. 6, Section 2, 58 (2003), available at <http://www.justice.gov.za/trc/report/index.htm>.

24. *Id.* at 140.

25. *Id.* at 146.

26. See, e.g., Erin Daly, *Reparations in South Africa: A Cautionary Tale*, 33 U. MEM. L. REV. 367, 383-87 (2003).

27. Charles Abrahams, *The TRC’s Unfinished Business: Reparations*, in TRUTH & RECONCILIATION IN SOUTH AFRICA: 10 YEARS ON 34, 36 (Charles Villa-Vicencio & Fanie du Toit eds., 2006).

28. Complaint at 4, *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) available at www.khulumani.net/attachments/259_Khulumani%20Complaint.pdf. The decision *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) addresses the complaints of both the Khulumani and the Ntsebeza plaintiffs.

individual contributions of the various banking defendants.²⁹

In November 2004, Judge Sprizzo of the Southern District of New York dismissed the complaint, primarily on the grounds that plaintiffs could not invoke liability for aiding and abetting under the ATCA.³⁰ On appeal, the United States Court of Appeals for the Second Circuit decided that aiding and abetting violations of the law of nations cannot give rise to liability under the ATCA and allowed the plaintiffs to amend and specify their complaints.³¹

The *Khulumani* plaintiffs submitted an amended complaint in October 2008, which reduced the number of defendants from more than twenty corporations to eight, including two banks. They identified banking as one of four strategic sectors—along with armaments, technology, and transportation—that had been critical in assisting “the regime to perpetuate apartheid and commit systematic acts of violence and terror . . . including extrajudicial killing; torture; prolonged unlawful detention; and cruel, inhuman, and degrading treatment.”³²

The complaint alleged that the two remaining banking defendants, Barclays and UBS, had made funds available to the apartheid regime on a large scale,³³ and that “without the funding provided by Barclays and UBS, the apartheid regime could not have maintained control over the civilian population to the same degree, nor could it have maintained and expanded its security forces to the same degree.”³⁴ Specifically, the complaint alleged that defendant banks “directly financed the South African security forces that carried out the most brutal aspects of apartheid.”³⁵ According to the complaint, the borrowed funds were necessary to underwrite the growing costs of policing the apartheid state.³⁶

The complaint also alleged that inclusion of these costs in non-security related budgets obscured their true nature. For example, the education budget contained costs for troops occupying black schools, while “loans to railway and harbor systems assisted in the mobilization of the armed forces and trade financing provided the computers and telecommunications equipment necessary

29. *Khulumani* Complaint, *supra* note 28, at 407-408, 414-415, 422, 431, 440-441, 471, 480, and 491.

30. *In re* South African Apartheid Litigation, 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 320-24 (S.D.N.Y. 2003) (taking this contradictory view one and a half years earlier).

31. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) (Korman, J., concurring in part, dissenting in part).

32. First Amended Complaint at 145, *In re* South African Apartheid Litigation, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) (No. 03 Civ. 4524).

33. *Id.* at 150.

34. *Id.* at 151.

35. *Id.* at 152.

36. *Id.* at 169.

to the efficient functioning of a modern army.”³⁷ The complaint makes evident how difficult it is to distinguish between “innocent” and “harmful” loans in the context of a regime that violates international law so pervasively. Most of the plaintiffs’ allegations do not refer to financing for particular crimes, but instead try to show that some of the loans went to the security forces that perpetrated crimes, demonstrating how the loans generally facilitated widespread violations.

C. *The Decision of April 2009*³⁸

When the case came before Judge Scheindlin in the Southern District of New York, the plaintiffs consisted of two groups: the *Khulumani* and the *Ntsebeza* plaintiffs. The plaintiffs presented their claims based on both direct and complicity liability theories. However, the Court excluded all legal bases other than liability for aiding and abetting, which was the focus of the Court’s discussion.

1. *General Actus Reus and Causation Considerations*

Judge Scheindlin looked to international criminal law,³⁹ Second Circuit precedent,⁴⁰ and academic commentary⁴¹ in holding that “the *actus reus* of aiding and abetting in international criminal law requires practical assistance, encouragement, or moral support which has a *substantial effect* on the perpetration of the crime.”⁴² This definition seems to combine *actus reus* and causation, as the effect of the assistance on the crime is a question of causation, rather than of the *actus reus* itself.

Though neither party disputed this standard, they argued according to different interpretations, making it necessary for the Court to address what sort of action amounts to having a substantial effect on the commission of gross

37. *Id.* at 170.

38. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009).

39. *Id.* at 257-58. The court relied, in particular, on *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 235 (Dec. 10, 1998); *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 688 (May 7, 1997); *Prosecutor v. Blagojević and Jokić*, Case No. IT-02-60-A, Appeal Judgment, ¶¶ 127, 134 (May 9, 2007); *Accord United States v. Von Weizsacker* (“The Ministries Case”), 14 T.W.C., at 478 (1950).

40. *See, e.g., Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 277 (2d Cir. 2007) (Katzmann, J., concurring) (cited in *In re South African Apartheid*, 617 F. Supp. 2d at 257-58).

41. Doug Cassel, *Corporate Aiding and Abetting of Human Rights Violations: Confusion in the Courts*, 6 NW. J. INT’L HUM. RTS. 304, 308 (2008); Tarek F. Maassarani, *Four Counts of Corporate Complicity: Alternative Forms of Accomplice Liability Under the Alien Tort Claims Act*, 38 N.Y.U. J. INT’L L. & POL. 39, 43-44, 55 (2005-2006); Shaw W. Scott, *supra* note 4 at 1531; Paul Hoffman & Daniel Zaheer, *The Rules of the Road: Federal Common Law and Aiding and Abetting under the Alien Tort Claims Act*, 26 LOY. L.A. INT’L & COMP. L. REV. 47, 71-72 (2003).

42. *In re South African Apartheid*, 617 F. Supp. 2d at 257; *See also Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 374 F. Supp. 2d 331, 337-38, 340 (S.D.N.Y. 2005); *Doe v. Unocal*, 395 F.3d 932, 951 (9th Cir. 2002).

human rights violations. The Court explained:

[I]t is (or should be) undisputed that simply doing business with a state or individual who violates the law of nations is insufficient to create liability under customary international law. International law does not impose liability for declining to boycott a pariah state or to shun a war criminal. Aiding a criminal “is not the same thing as aiding and abetting [his or her] alleged human rights abuses.”⁴³

The Court continued, stating that the plaintiffs’ case was not based merely on the allegation that “the defendants engaged in commerce with a pariah state.”⁴⁴ They had rather argued that the defendant corporations provided essential assistance to the apartheid state, which had a substantial effect on the crimes that victimized the plaintiffs.⁴⁵ Judge Scheindlin thus opposed the views of various individuals, including Judge Sprizzo when he dismissed the case in 2004,⁴⁶ of Judge Korman (who was a dissenting judge when the case came before the Second Circuit in 2007),⁴⁷ and of some commentators,⁴⁸ who characterized the apartheid litigation as being about nothing other than accusing the defendants of having done business with the apartheid regime. Instead, the relevant issue for Judge Scheindlin was whether “doing business” with a regime has a substantial effect on its commission of crimes. If plaintiffs can demonstrate a substantial effect, liability does not follow from merely doing business with the regime, or from aiding and abetting the regime as such, but rather from aiding and abetting the regime’s violations.⁴⁹

Next, the Court queried how to determine whether a commercial activity has a substantial effect on gross human rights violations. The Court approached this question by citing with approval the statement of the ICTY:

[A]ssistance having a substantial effect “need not constitute an indispensable element, that is, a *conditio sine qua non* for the acts of the principal.” An accessory may be found liable even if the crimes could have been carried out through different means or with the assistance of another.⁵⁰

The Court defined “substantial effect” by comparing two Nuremberg cases, the *Ministries Case* and the *Zyklon B Case*⁵¹. In the *Ministries Case*, the

43. *In re South African Apartheid*, 617 F. Supp. 2d at 257.

44. *Id.* at 263.

45. *Id.* (with regard to the Ntsebeza plaintiffs); *Id.* at 266 (with regard to the Khulumani plaintiffs).

46. *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 551 (S.D.N.Y. 2004).

47. *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 293-94 (2d Cir. 2007).

48. See Michael Ramsey, *supra* note 8, at 280.

49. See also, *Khulumani*, 504 F.3d at 289 (Hall, J., concurring).

50. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257-58 (S.D.N.Y. 2009) (citing Prosecutor v. Furundžija, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 209 (Dec. 10, 1998)).

51. U.N. War Crimes Comm’n, LAW REP. OF TRIALS OF WAR CRIMINALS (Vol. 1), Case. No. 9, The Zyklon B Case, The Trial of Bruno Tesch and Two Others, at 93-103 (1947).

Nuremberg Tribunal had acquitted Karl Rasche, a member of the board of managers of Dresdner Bank during the Nazi period, because the Tribunal did not regard the bank's activities as criminal:

[T]o make a loan, knowing or having good reason to believe that the borrower will use [sic] the funds in financing enterprises which are employed in using labor in violation of either national or international law . . . A bank sells money or credit in the same manner as the merchandiser of any other commodity . . . Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime.⁵²

In the *Zyklon B Case*, on the other hand, Bruno Tesch, whose factory had manufactured and sold the lethal gas used in the concentration camps, was found guilty of aiding and abetting crimes against humanity for supplying the gas used to execute allied nationals.⁵³ Judge Scheindlin explained the different outcomes in the two cases by focusing on qualitative aspects of the alleged assistance.

Money is a fungible resource, as are building materials. However, poison gas is a killing agent, the means by which a violation of the law of nations was committed. The provision of goods specifically designed to kill, to inflict pain, or to cause other injuries resulting from violations of customary international law bear a closer causal connection to the principal crime than the sale of raw materials or the provision of loans.⁵⁴

Based on this analysis, Judge Scheindlin came to the conclusion that, “in the context of commercial services, provision of the means by which a violation of the law is carried out is sufficient to meet the *actus reus* requirement of aiding and abetting liability under customary international law.”⁵⁵ Given that money can never be the direct means through which human rights violations occur, the provision of commercial loans therefore seemingly cannot meet the *actus reus* test of aiding and abetting liability as defined by Judge Scheindlin, whatever its effect on the commission of offenses.

The implications of Judge Scheindlin's approach to *actus reus* and causation in suits for aiding and abetting become more readily apparent when looking at her analysis of the claims against the automotive and technologies defendants (in this case, in addition to banks, claims were also brought against corporations that provided the South African apartheid regime with automobiles, technologies, and arms), as the Court examines the *actus reus* of these defendants in a much more nuanced way than that of the defendant banks. This Article introduces some relevant features of this analysis, followed by a discussion of the consequences of this approach for cases against corporations for complicity in the context of commercial transactions in general, and commercial loans, in particular.

52. United States v. Von Weizsacker (“The Ministries Case”), 14 T.W.C., at 622 (1950).

53. “*The Zyklon B Case*”, *supra* note 51, at 93-103.

54. *In re South African Apartheid*, 617 F. Supp. 2d at 258.

55. *Id.* at 259.

2. *Claims Against the Technologies Defendants*

Regarding the technologies defendants, the Court first examined the allegations “that IBM aided and abetted the South African Government’s denationalization of black South Africans through the provision of computers, software, training, and technical support.”⁵⁶ In this instance, IBM sold “computers used to register individuals, strip them of their South African citizenship, and segregate them.”⁵⁷ They also helped to develop the software “specifically designed to produce identity documents and effectuate denationalization,” which Judge Scheindlin characterized as “indispensable” to South Africa’s “geographic segregation and racial discrimination.”⁵⁸ Additionally, IBM allegedly provided equipment that produced records “necessary to deliberately denationalize a large proportion of Black South Africans.”⁵⁹ Given IBM’s activities, Judge Scheindlin held that the *Ntsebeza* plaintiffs satisfied the *actus reus* requirement for aiding and abetting arbitrary denationalization and the crime of apartheid.⁶⁰

Equally, the *actus reus* requirement of aiding and abetting apartheid was met by allegations that “defendants IBM and Fujitsu supplied computer equipment ‘designed to track and monitor civilians with the purpose of enforcing the racist, oppressive laws of apartheid’” as well as the software and hardware “to run the system . . . ‘used to track racial classification and movement for security purposes.’”⁶¹ This amounted to substantial assistance of the crime of apartheid because it was essential in “implementing and enforcing the racial pass laws and other structural underpinnings of the apartheid system”⁶² and constituted “the means by which the South African Government carried out both racial segregation and discrimination.”⁶³

Demonstrating the nuances of this approach, the Court dismissed allegations that IBM aided and abetted cruel, inhuman, or degrading treatment (CIDT). Although the documents created by IBM software “helped target” individuals, the Court held that the computers were neither an “essential element” nor “the means” of CIDT.⁶⁴ The Court similarly rejected the argument that “every computer system provided to the Government of South Africa or South African defense contractors” was automatically “sufficiently tied to

56. *Id.* at 265.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.* at 268.

62. *Id.*

63. *Id.*

64. *Id.* at 265-66.

violations of customary international law.”⁶⁵ For example, the Court held that “the mere sale of computers to the Department of Prisons – despite the widely held knowledge that political prisoners were routinely held and tortured without trial – does not constitute substantial assistance to that torture.”⁶⁶ Finally, with regard to the allegation that IBM had supplied computers to armaments manufacturers that were crucial to the South African Defense Forces, the Court suggested that “the sale of equipment used to enhance the logistics capabilities of an arms manufacturer is not the same thing as selling arms used to carry out extrajudicial killing; it is merely doing business with a bad actor.”⁶⁷

These are significant clarifications of how Judge Scheindlin characterized the *actus reus* of aiding and abetting liability in the context of the provision of commercial services. First of all, even though her reliance on the *Zyklon B* case might have given a different impression, she emphasized that human rights violations can occur through means other than inherently physically harmful products. Products such as computers and software can equally qualify as means if they are specifically designed to implement particular policies or facilitate human rights violations, or if they are indispensable and essential for carrying them out. On the other hand, she rejected a finding of complicity where the computer systems were neither essential nor indispensable. The Court thus seems to replace analyzing the effects of computers and programs on the commission of the crimes with an assessment of whether they provided the direct means for committing these violations. Where, as in the allegations of CIDT, the computers and programs were not the direct means of perpetration, there was no need for further analysis of the link between the technology and the violations to assess whether its provision had a substantial effect.

It is certainly true that “the mere sale of computers to the Department of Prisons—despite the widely held knowledge that political prisoners were routinely held and tortured without trial—does not constitute substantial assistance to that torture,”⁶⁸ and that “the sale of computers to the South African Defense Forces does not constitute aiding and abetting any and all violations of customary international law that the military committed.”⁶⁹ Neither does “‘sustaining the apartheid regime’ render the technology defendants liable for aiding and abetting all violations of the law of nations committed in apartheid-era South Africa.”⁷⁰

However, given that the *actus reus* test is one of practical assistance that has a substantial effect on the commission of the offenses, the essential question

65. *Id.* at 268.

66. *Id.*

67. *Id.* at 268-69.

68. *Id.* at 268.

69. *Id.* at 269.

70. *Id.*

should be what effect, if any, the sale of computers had on the crimes' commission, rather than whether the underlying transaction provided the direct means for committing the violations.⁷¹ If a substantial effect requires that the product or service provided is the direct or indispensable means through which the violations occur, this has important implications for complicity liability of lenders, as money can never be the means through which violations occur.

3. *Claims Against Automotive Defendants*

Plaintiffs accused Daimler, Ford, and General Motors of having aided and abetted the apartheid regime in various ways, for example by selling both military and non-military vehicles to the army and the police that were used for raids in townships and controlling protests. The Court was satisfied that the plaintiffs' allegations against all three defendants were sufficient to sustain claims for aiding and abetting extrajudicial killing:

[They] sold heavy trucks, armored personnel carriers, and other specialized vehicles to the South African Defense Forces and the Special Branch, the South African police unit charged with investigating anti-apartheid groups. These vehicles were the means by which security forces carried out attacks on protesting civilians and other anti-apartheid activists; thus by providing such vehicles to the South African Government, the automotive companies substantially assisted extrajudicial killing.⁷²

The Court similarly found a claim of aiding and abetting extrajudicial killings and apartheid⁷³ sufficient where it alleged that: "Daimler sold 'Unimog' military vehicles to the South African Government, as well as components of the 'Casspir' and 'Buffer' vehicles that were used by internal security forces . . . to patrol the townships and . . . carry out extrajudicial killings."⁷⁴ The Court characterized these vehicles as "the means by which the South African Defense Forces killed black South Africans as part of the maintenance of a system of state-sponsored apartheid,"⁷⁵ which was sufficient to fulfill "the *actus reus* requirement of aiding and abetting, in this case of the crimes of extrajudicial killing and apartheid."⁷⁶

However, the allegations that Ford and GM sold cars and trucks to the South African police and military forces, and continued to do so after the imposition of export restrictions, were insufficient to support a claim because the particular vehicles "had no military customization or similar features that link[ed] them to an illegal use" and were "simply too similar to ordinary vehicle

71. *Id.*

72. *Id.* at 264.

73. *Id.* at 266.

74. *Id.*

75. *Id.*

76. *Id.*

sales.”⁷⁷ Again, the court focused on the inherent quality of the goods, rather than on the use the regime would make of them. However, this distinction seems arbitrary. Military vehicles could conceivably be sold for legitimate reasons, and ordinary vehicles could be used to carry out serious violations of international law. In line with the *actus reus* test of substantial effect, a more accurate test would focus on whether the sale of the vehicle, with or without military customization, substantially furthered the commission of the crime committed by the regime.⁷⁸ If a substantial effect can be shown, the *actus reus* of complicity liability is met and liability would depend on the defendant’s *mens rea*.

4. Claims Against the Banking Defendants

Judge Scheindlin’s strict approach towards *actus reus* meant that she easily rejected all allegations against banking defendants because the loans provided did not directly enable human rights violations:

The *Khulumani* plaintiffs’ claims against Barclays and UBS stem primarily from the provision of loans by the two banks and the purchase of South African defense forces bonds. . . [S]upplying a violator of the law of nations with funds—even funds that could not have been obtained but for those loans—is not sufficiently connected to the primary violation to fulfill the *actus reus* requirement of aiding and abetting a violation of the law of nations.⁷⁹

Given this sweeping rejection of liability, without any analysis of the use and purpose of the loans or the effect they had on the commission of gross human rights violations by the apartheid regime, it seems fair to conclude that Judge Scheindlin did not regard commercial lending as an activity that can give rise to complicity liability for the crimes it facilitated. This interpretation is aligned with the Court’s holding that commercial activities can only substantially affect the commission of gross human rights violations if they provide the direct means through which these violations are carried out.⁸⁰ An intermediate step is always necessary to link loaned funds to violations.

This *actus reus* or causation approach proffered by Judge Scheindlin thus exempts whole industries, such as finance, from responsibility without requiring a case-by-case analysis. Indeed, even if the defendant provided loans with the specific intent to further gross human rights violations, no liability would be incurred under Judge Scheindlin’s approach because the money provided was not the direct means to the violation.

77. *Id.* at 267 (“The sale of cars and trucks without military customization or similar features that link them to an illegal use does not meet the *actus reus* requirement of aiding and abetting a violation of the law of nations”).

78. But see *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1096, 1101 (C.D. Cal. 2010) (distinction made by the court was cited with approval).

79. *In re South African Apartheid*, 617 F. Supp. 2d at 269.

80. *Id.* at 258.

5. *Critical Reflections*

In the *South African Apartheid Litigation* case, the *actus reus* of complicity liability for the provision of commercial goods and services depended on two factors: (1) whether the goods were inherently dangerous or neutral, and (2) whether they were the direct means through which the crimes were committed. The Court excluded as too remote from the commission of the principal offense the provision of goods, such as money, that are inherently neutral, and which cannot, by their very nature, be the instrument with which violations are carried out. On the other hand, supplying goods that are specifically designed for harmful purposes or that provide the direct means for carrying out gross human rights violations does amount to the *actus reus* of complicity liability. In those cases, defendants can only avoid complicity liability if they show that they thought the goods would be used for legitimate purposes.⁸¹ With inherently harmful goods, an examination of the corporation's *mens rea* is therefore important to filter out those cases in which no liability arises. For neutral goods that are not the direct means of committing violations, however, no *mens rea* analysis is necessary as proof of liability already fails at the *actus reus* or causation stage. Therefore, while *mens rea* is irrelevant for neutral goods such as money, liability for other goods decisively depends on whether the company had the requisite *mens rea*.

The Court relied on the Rome Statute in support of its view that whether the goods provided constitute the means through which the crime is committed is relevant for deciding aiding and abetting liability.⁸² Article 25(3)(c) of the Statute makes an accessory to a crime liable if he or she "aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission."⁸³ The International Law Commission has likewise suggested that aiding and abetting liability requires that an accomplice "provide the kind of assistance which contributes directly and substantially to the commission of the crime, for example by providing the means which enable the perpetrator to commit the crime."⁸⁴ Providing the means for the commission of the offense thus clearly fulfils the *actus reus* of aiding and abetting liability. This constitutes only one example of an activity that could do so. However, the Rome Statute does not necessarily require providing the direct means in order to trigger complicity liability. Nevertheless, the court in *Doe v. Nestle* approved Judge Scheindlin's

81. *Id.* at 258, n. 157 ("Although such goods may have legitimate uses, that issue is addressed by the *mens rea* element").

82. *Id.* at 259, n. 158.

83. Rome Statute of the International Criminal Court art. 25(3)(c), July 1, 2002, 2187 U.N.T.S. 90.

84. Rep. of the Int'l Law Comm'n, 48th Sess., May 6–July 26, 1996, 21, U.N. Doc. A/51/10 (1996).

approach,⁸⁵ although it imparted a slightly different focus on the discussion. While it agreed that direct instrumentality was the test for finding liability, the Court downplayed the difference between neutral and non-neutral goods and instead looked at the nature of the transaction. It concentrated on the idea that ordinary commercial transactions, without more, do not violate international law.⁸⁶

Doe v. Nestle supported this conclusion with the decision in *Corrie v. Caterpillar*.⁸⁷ In that case, Palestinians living in the Gaza Strip and the West Bank filed an ATCA claim against a bulldozer manufacturer.⁸⁸ The plaintiffs claimed that they had suffered harm, including death and loss of home, as a result of demolitions by Israeli military using bulldozers bought from the defendant.⁸⁹ They alleged that the defendant knew or should have known that the bulldozers sold to the Israeli army would be used for such purposes.⁹⁰

In *Corrie*, the Court rejected a finding of liability, holding that “[o]ne who merely sells goods to a buyer is not an aider and abettor of crimes that the buyer might commit, even if the seller knows that the buyer is likely to use the goods unlawfully, because the seller does not share the specific intent to further the buyer’s venture.”⁹¹ In *Doe v. Nestle*, the Court contrasted the sale of bulldozers with the provision of customized military vehicles in the *South African Apartheid Litigation* case.⁹² From this comparison, the Court draws the conclusion that “a plaintiff must allege something more than ordinary commercial transactions in order to state a claim for aiding and abetting human rights violations.”⁹³ This is uncontested, as commercial transactions alone do not result in any form of liability. The more important question in the context of an analysis of the *South African Apartheid Litigation* case is whether this means that commercial transactions should be excluded at the *actus reus* level, unless additional factors such as the customization of the goods are present, or whether even ordinary commercial transactions can amount to practical acts of assistance that have a substantial effect on the commission of the principal offender’s crimes.

85. *Doe v. Nestle*, S.A., 748 F. Supp. 2d 1057 (C.D. Cal. 2010)

86. *Id.* at 1099.

87. *Id.* at 1095. The court in *Doe v. Nestle* also based this view on Nuremberg case law and on *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, (E.D.N.Y. 2007); *See Nestle*, 748 F. Supp. 2d at 1088-92, 1096-97, 1099-1100. Its analysis of these decisions will be discussed later on in this Article.

88. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019 (W.D. Wash. 2005), *aff’d on other grounds*, 503 F.3d 974, 977 (9th Cir. 2007)

89. *Corrie*, 403 F. Supp. 2d at 1027 at 1023.

90. *Id.*

91. *Id.* at 1027.

92. *Nestle*, 748 F. Supp. 2d at 1095.

93. *Id.* at 1096.

The decision in *Corrie* seems to point towards the latter interpretation. In *Corrie*, it seems to have been decisive for discarding liability that the “seller does not share the specific intent to further the buyer’s venture.”⁹⁴ The Court therefore does not suggest that the sale of the bulldozers to the Israeli army did not have a substantial effect on the destruction of the homes. Instead, the determinative factor for excluding liability was the lack of *mens rea* on the part of the seller with regard to the illegal use of the goods supplied, not the commercial character of the transaction.

This becomes even clearer when taking into account that the Court’s approach in *Corrie* was informed by reliance on *Blankenship*.⁹⁵ Albeit in the context of discussing liability for criminal conspiracy, rather than aiding and abetting liability under the ATCA, the Court in *Blankenship* suggested that:

“Mere” sellers and buyers are not automatically conspirators. If it were otherwise, companies that sold cellular phones to teenage punks who have no use for them other than to set up drug deals would be in trouble, and many legitimate businesses would be required to monitor their customers’ activities . . . Yet this does not get us very far, for no rule says that a supplier *cannot* join a conspiracy through which the product is put to an unlawful end.⁹⁶

Blankenship therefore does not lend support to the view that commercial transactions cannot result in liability. The issue was explained more clearly in *Pino-Pérez*, another non-ATCA case dealing with criminal aiding and abetting claims:⁹⁷ “One who sells a small – or for that matter a large – quantity of drugs to a kingpin is not by virtue of the sale alone an aider and abettor. It depends on what he knows and what he wants[.]”⁹⁸ The Supreme Court in *Direct Sales*,⁹⁹ yet another drug related criminal conspiracy case that was equally decided outside of the framework of the ATCA, also rejected the view that “one who sells to another with knowledge that the buyer will use the article for an illegal purpose cannot, under any circumstances, be found guilty of conspiracy with the buyer to further his illegal end.”¹⁰⁰

Even though these cases have been decided under a different legal framework, the ATCA cases cited and relied upon *Blankenship*¹⁰¹ to inform the

94. *Corrie*, 403 F. Supp. 2d at 1027.

95. *Id.*

96. *United States v. Blankenship*, 970 F.2d 283, 285-86 (7th Cir. 1992) (emphasis in original). In *Blankenship*, the defendant let his house trailer to a group that used it to cook methamphetamine, accepted a down-payment for the lease but then got cold feet and dropped out of the agreement. *Id.* at 284.

97. *United States v. Pino-Pérez*, 870 F.2d 1230, 1232 (7th Cir. 1989) (defendant was accused of aiding and abetting the operations of a kingpin whom he supplied with illegal drugs).

98. *Id.* at 1235.

99. *Direct Sales Co. v. United States*, 319 U.S. 703, 704-707 (1943) (petitioner was a drug company that sold drugs by mail order to a physician who resold them illegally).

100. *Id.* at 709.

101. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005); *Doe v. Nestle*,

discussion of the relevant liability standards for the provision of commercial goods, and *Blankenship*, in turn, referred to *Direct Sales* and *Pino-Pérez*.¹⁰² These cases teach that, in the particular context of criminal liability for conspiracy or aiding and abetting, commercial transactions that might in some way further criminal offenses do not always result in liability. However, the commercial nature of the transaction does not *per se* exempt the actor from such liability. The *mens rea* of the supplier with regard to the illegal use of the goods provided is much more important than the commercial character of the transaction for determining liability. Particularly instructive in this respect is the analysis carried out by the Supreme Court in *Direct Sales*:

All articles of commerce may be put to illegal ends. But all do not have inherently the same susceptibility to harmful and illegal use. Nor, by the same token, do all embody the same capacity, from their very nature, for giving the seller notice the buyer will use them unlawfully. Gangsters, not hunters or small boys, comprise the normal private market for machine guns. So drug addicts furnish the normal outlet for morphine which gets outside the restricted channels of legitimate trade. This difference is important for two purposes. One is for making certain that the seller knows the buyer's intended illegal use. The other is to show that by the sale he intends to further, promote and cooperate in it. . . . The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latter's inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. Additional facts, such as quantity sales, high pressure sales methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise.¹⁰³

While not providing binding precedents for courts delineating the limits of aiding and abetting liability in ATCA cases, these considerations are nevertheless interesting when reconsidering the analysis carried out in *South African Apartheid Litigation*. The approach adopted in *Direct Sales* supports the view that while the inherent quality of the goods or services provided, or the their relation to the commission of violations, might influence the depth of the *actus reus* and *mens rea* analysis that is required in each case, these factors should not be decisive in themselves and cannot replace a case-by-case analysis.

The implications of the foregoing discussion become clear when applying them, by way of example, to Judge Scheindlin's discussion of the claims against the automotive defendants. The military specifications of the vehicles might then have an impact at both the *actus reus* and the *mens rea* levels, but they should not be determinative at either. To the extent that military vehicles have a

at 28.

102. *United States v. Blankenship*, 970 F.2d 283, 286 (7th Cir. 1992).

103. *Direct Sales Co.*, 319 U.S. at 710-11.

different and more substantial effect on the commission of the crimes than ordinary vehicles, this would need to be demonstrated in each case, not simply implied from the military specifications of the vehicles in and of themselves. At the same time, the inherent quality of the goods could be relevant for determining the mental state of the defendants, as the illegitimate use might be more obvious to the corporation where the good has inherently harmful qualities. Importantly, the *mens rea* would have to be established on a case-by-case basis, both where the goods are inherently harmful and where they are not, as what gives rise to liability is the mental state of the corporation in relation to the usage of the goods.

To eliminate any need to perform a case-by-case analysis of the effect of the act of assistance on the violation, and of the proximity of the defendant to it, as follows from Judge Scheindlin's approach in the *South African Apartheid Litigation* case, means that certain acts (particularly providing funding, but also selling goods that are not inherently harmful but might potentially be used for harmful purposes) are automatically shielded from liability. A corporation could, for example, escape liability by selling only commercial, but not military vehicles to a regime, with the knowledge or even intent that human rights violators use these vehicles to commit gross human rights violations. Where the impact of the sale on the violations is the same, there is no justifiable reason to distinguish between the two sales. It would be arbitrary to impose liability in one case but not the other.¹⁰⁴

Admittedly, Judge Scheindlin's approach provides an efficient, bright-line rule, removing the need to develop more refined criteria according to which the substantial effect of commercial activities on gross human rights violations can be established. In the context of commercial loans, this is not an easy task. However, convenience and the difficulties of defining criteria cannot justify adopting an approach that leads to arbitrary results regarding liability for commercial activity. It is necessary to find a principled way to distinguish between acceptable business activities and those that give rise to complicity liability, and the net must not be so wide as to hold corporations indiscriminately liable for all offenses committed by regimes with which they do business. Nevertheless, the *actus reus* of aiding and abetting should not depend on the nature of the corporate activity, but rather on its effect on the commission of the offense. Therefore, the effect of the corporation's commercial activity, as well as its *mens rea*, need to be subjected to a thorough analysis in each case. Absence of such review would create a considerable gap in corporate accountability, encouraging, or at least providing no incentive to refrain from, business transactions that facilitate gross human rights violations indirectly. This would often leave victims of such violations without effective remedies.

104. See also Norman Farrell, *Attributing Criminal Liability to Corporate Actors*, 8 J. INT. CRIMINAL JUSTICE 873, 891 (2010).

The undesirable consequences of the approach adopted in *South African Apartheid Litigation* become particularly obvious with regard to liability for financing gross human rights violations. In that context, it has the effect of absolving commercial lenders from all complicity liability, no matter what effect the loans might have on the commission of gross human rights violations and regardless of the *mens rea* of the financier. On the other hand, the approach might also have unfair consequences by presuming causation where inherently dangerous goods are provided to a regime that uses them to commit grave human rights violations. Under the *South African Apartheid Litigation* analysis, the fine line between acceptable business transactions and complicity liability would rest on *mens rea* alone.

III.

LIABILITY FOR FUNDING GROSS HUMAN RIGHTS VIOLATIONS IN THE LIGHT OF NUREMBERG CASE LAW

In *South African Apartheid Litigation*, the Court's approach to *actus reus* and causation in the context of commercial loans decisively relied on Nuremberg case law, in particular the Court's understanding that the Nuremberg Military Tribunal's decision in the *Ministries Case* against Karl Rasche set a precedent that commercial lending does not give rise to such liability.¹⁰⁵ This Section will examine some of the relevant Nuremberg cases, analyzing whether the *South African Apartheid Litigation* interpretation does justice to the decision against Rasche. This Section also will explore more generally what courts may learn from cases decided in Nuremberg regarding liability for financing.

A. *The Case Against Rasche*

Karl Rasche was a member of the board of managers of the Dresdner Bank. In the report of the Office of Military Government, United States (OMGUS), he was described as "one of the key liaisons between the Dresdner Bank and the SS, Nazi Party, and government so that the bank might function as an integral part of the Nazi war machine."¹⁰⁶ He was charged with different counts of war crimes and crimes against humanity. The Tribunal started its discussion of his liability on count five (war crimes and crimes against humanity, atrocities and offenses committed against civilian populations) with the statement that:

The evidence clearly establishes that the Dresdner Bank loaned very large sums of money to various SS enterprises which employed large numbers of inmates of concentration camps, and also to Reich enterprises and agencies engaged in the

105. *Id.* For a similar reading of that decision see *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 293 (2d Cir. 2007) (Korman, J., concurring); for additional reading, see Chimène Keitner, *Conceptualizing Complicity in Alien Tort Cases*, 60 HASTINGS L. J. 61, 91-92 (2008).

106. CHRISTOPHER SIMPSON, WAR CRIMES OF THE DEUTSCHE BANK AND THE DRESDNER BANK: OFFICE OF THE MILITARY GOVERNMENT (U.S.) REPORTS 396 (Holmes and Meier 2002).

so-called resettlement programs.¹⁰⁷

The Tribunal had to decide whether these loans would give rise to the personal criminal liability of Rasche for the crimes charged under count five. In order to address the issue, the Tribunal first looked at Rasche's criminal responsibility for having been a member of Himmler's Circle of Friends, and for having approved, and in some instances even insisted on, large annual contributions by Dresdner Bank to a fund placed at Himmler's personal disposal.¹⁰⁸ Himmler was the Reichsfuehrer of the SS and the German Minister of the Interior, and he was also responsible for the extermination policy in Germany's concentration camps. The Tribunal rejected any liability of Rasche related to these contributions on the grounds that there was no evidence that "Rasche knew that any part of the fund to which the bank made contributions was intended to be or was ever used by Himmler for any unlawful purposes."¹⁰⁹

This statement suggests that, had Rasche known that the funds made available to Himmler were used or had been intended to be used for unlawful purposes (i.e., had the necessary *mens rea* been present), he might have incurred liability for approving or encouraging those contributions. Moreover, the Tribunal seems to suggest that it would not have been necessary to show that the specific contributions made by Dresdner Bank were intended to be used for unlawful purposes, but rather merely that any part of the fund toward which these contributions were made had such an intended use. This sets quite a low *actus reus* standard, which takes into account the fungibility of money. On the other hand, the Tribunal implies a high *mens rea* threshold when suggesting that it cannot infer solely from the fact that Rasche knowingly provided funds to Himmler that Rasche had the requisite knowledge regarding the unlawful use of the fund.

However, the Tribunal held that Rasche did have the requisite knowledge for the loans Dresdner Bank made to SS enterprises, which employed slave labor and otherwise funded the Nazi resettlement program.¹¹⁰ The Court reasoned that banks generally seek to learn the purposes of their loans as a matter of practice and found it inconceivable that Rasche did not have the necessary knowledge.¹¹¹

It is in this context that the Tribunal made its well-known statement that

107. United States v. Von Weizsacker ("The Ministries Case"), 14 T.W.C., at 621 (1950).

108. *Id.* at 621-22.

109. *Id.* at 622.

110. *Id.* "The defendant is a banker and businessman of long experience and is possessed of a keen and active mind. Bankers do not approve or make loans in the number and amount made by the Dresdner Bank without ascertaining, having, or obtaining information or knowledge as to the purpose for which the loan is sought, and how it is to be used. It is inconceivable to us that the defendant did not possess that knowledge, and we find that he did."

111. *Id.*

has since been interpreted by some courts¹¹² and commentators¹¹³ as authority for a general rejection of liability for commercial loans that finance gross human rights violations or other serious violations of international law.

The real question is, is it a crime to make a loan, knowing or having good reason to believe that the borrower will use the funds in financing enterprises which are employed in using labor in violation of either national or international law? Does [Rasche] stand in any different position than one who sells supplies or raw materials to a builder building a house, knowing that the structure will be used for an unlawful purpose? A bank sells money or credit in the same manner as the merchandiser of any other commodity. It does not become a partner in enterprise, and the interest charged is merely the gross profit that the bank realizes from the transaction, out of which it must deduct its business costs, and from which it hopes to realize a net profit. Loans or sale of commodities to be used in an unlawful enterprise may well be condemned from a moral standpoint and reflect no credit on the part of the lender or seller in either case, but the transaction can hardly be said to be a crime. Our duty is to bring to justice those guilty of violating international law, and we are not prepared to state that such loans constitute a violation of that law.¹¹⁴

This statement has been interpreted in a variety of ways regarding the reasons for which the Tribunal rejected Rasche's criminal liability in this context. It has sometimes been suggested that the Tribunal rejected his liability for making the loans because it insisted on a more stringent *mens rea* standard than knowledge.¹¹⁵ However, given that the Tribunal applied a *mens rea* standard of knowledge to the analyses of both of the donations made to Himmler and the loans to the various SS enterprises, this does not seem plausible. Indeed, nothing in the above statement suggests that Rasche's intent regarding the use of the loans would have made any difference in establishing his criminal liability. Instead, it seems that Judge Scheindlin was right in suggesting that Rasche was found not guilty in this context because the Tribunal was of the view that making commercial loans, even with clear knowledge regarding their unlawful use, did not satisfy the *actus reus* for complicity liability.¹¹⁶

The Court rejected charges against Rasche under count six (war crimes and crimes against humanity, plunder and spoliation) for the same reason as those

112. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 292-93 (2d Cir. 2007) (Korman, J., concurring); *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009); *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1088-90 (C.D. Cal. 2010).

113. Chimène Keitner, *supra* note 105 at 91-92.

114. *United States v. Von Weizsacker* ("The Ministries Case"), 14 T.W.C., at 622 (1950).

115. *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244, 259 (2d Cir. 2009); *Khulumani*, 504 F.3d at 276 (Katzmann, J., concurring in part, dissenting in part); Shriram Bhashyam, *Knowledge or Purpose? The Khulumani Litigation and the Standard for Aiding and Abetting Liability Under the Alien Tort Claims Act*, 30 CARDOZO L. REV. 245, 269 (2008); Michael Ramsey, *supra* note 8, at 307.

116. See also Norman Farrell, *supra* note 104 at 887-888; Katherine Gallagher, *Civil Litigation and Transnational Business*, 8 J. INT. CRIMINAL JUSTICE 745, 763 (2010); Andrei Mamolea, *The Future of Corporate Aiding and Abetting Liability Under the Alien Tort Statute: A Roadmap*, 51 SANTA CLARA L. REV. 79, 128-29 (2011).

under count five. These charges concerned activities in Poland, Russia, and the Baltic countries that largely consisted of giving financial assistance to agencies that were active in Germany's spoliation program in these territories.¹¹⁷ Thus, as in the context of Rasche's liability under count five for the commercial loans made to the SS, the Tribunal rejected the possibility that liability under count six would be triggered by making funds available to those who committed crimes.

However, the general conclusion widely drawn from this case that commercial loans are always exempt from complicity liability¹¹⁸ is put into doubt when examining the Tribunal's discussion of Rasche's liability under count seven, which implies that making loans can fulfill the *actus reus* of aiding and abetting liability. This count alleged war crimes and crimes against humanity in the context of slave labor for having "participated in the financing of SS enterprises which used concentration camp labor on a wide scale and under inhumane conditions."¹¹⁹ It is interesting to look at the Tribunal's reasoning in some detail.

Careful consideration of the evidence as adduced by the prosecution and by the defense fails to reveal that the defendant Rasche did in fact wrongfully participate "in sponsoring, supporting, approving, and obtaining approval for loans totaling millions of reichsmarks to SS enterprises which used concentration camp labor." The testimony reveals that over time the Dresdner Bank did loan various amounts to SS enterprises that employed concentration camp labor. But the prosecution failed to establish its contention that Rasche was a bank decision-maker with respect to the making of such loans. Further, it appears that such loans were usually secured.¹²⁰

The Tribunal added that even if Rasche had played a decisive role in the granting of the loans to the SS, it would be difficult to find him guilty of participation in the slave-labor program on that account as "[t]he evidence adduced by the prosecution to show knowledge on the part of Rasche as to what was taking place in the SS enterprises with respect to slave labor . . . [was] unconvincing."¹²¹ Because Rasche testified credibly as to having no personal knowledge of the slave-labor program, he was not subject to complicity liability under count seven.¹²² Therefore, the Tribunal's refusal to find Rasche liable

117. *United States v. Von Weizsacker* ("The Ministries Case"), 14 T.W.C., at 784 (1950) ("As hereinbefore indicated, on this question in discussions in our treatment of count five, and in view of the evidence generally with respect to the credits here involved, we do not find adequate basis for a holding of guilty on account of such loans"). He was convicted, though, for having actively participated in the illegal takeover of banks and companies and in Aryanization programs in Bohemia-Moravia and Holland.

118. *Khulumani*, 504 F.3d at 292-93 (Korman, J., concurring); *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 258 (S.D.N.Y. 2009); Chimène Keitner, *supra* note 105 at 91-92.

119. *United States v. Von Weizsacker* ("The Ministries Case"), 14 T.W.C., at 853 (1950).

120. *Id.*

121. *Id.* at 853-54.

122. *Id.* at 854-55 ("The defense testimony was to the effect that the defendant had no such

turned on insufficient proof of knowledge and on his limited role in making the loans.

While the Tribunal emphasized the ordinary commercial nature of the loans,¹²³ these statements were made in the context of a detailed analysis of the particular role played by Rasche in granting them, and of his knowledge with regard to their use. This suggests that the commercial character of the transactions was mainly significant for giving Rasche little reason to be aware of the unlawful nature of the activities being financed. However, there is no reason to infer from this that their commercial nature meant that these loans could not have resulted in Rasche's liability. If this were true, the detailed discussion undertaken by the Tribunal in order to reject Rasche's responsibility under count seven would have been superfluous. Instead, it seems that the Tribunal rejected Rasche's liability under count seven because making loans is an activity that is *per se* exempt from liability, but rather because there was not sufficient proof to justify holding Rasche personally criminally liable for the loans made by Dresdner Bank.

Looking at the decision against Rasche in its entirety, the judgment does not suggest that complicity liability for commercial loans is always excluded. At best, the decision lends limited support to the approach in *South African Apartheid Litigation*. As its conclusion in this respect is primarily based on the *Rasche* decision, which rejected all liability for loans and other inherently neutral commercial goods, it stands on rather weak ground.

B. The Case Against Puhl

Another relevant Nuremberg decision regarding the liability of bankers is that of Emil Puhl. Puhl had been Deputy President of the German Reichsbank during the Third Reich and played an active role in arranging "for the receipt, classification, deposit, conversion and disposal of properties taken by the SS from victims exterminated in concentration camps."¹²⁴ He had, *inter alia*, been actively involved in organizing the recasting of gold from the teeth and crowns of concentration camp inmates. According to the Tribunal:

The receipt, realization, and disposition of stolen goods can hardly constitute a

knowledge. We cannot go so far as to enunciate the proposition that the official of a loaning bank is chargeable with the illegal operations alleged to have resulted from loans or which may have been contemplated by the borrower. Rasche as an official of the loaning bank under the circumstances surrounding the loans here under consideration, as revealed by the evidence, did not thereby become a criminal partner of the SS in the slave-labor program. The Tribunal finds the defendant Rasche not guilty under count seven").

123. *Id.* at 853 ("It appears that the loans, despite the claims of the prosecution to the contrary, were for the most part short-term loans and bear all the indications of having been conducted with the same objectives in mind as usually prompt the making of loans by any banking institution").

124. *Id.* at 609.

banking operation.¹²⁵ . . . That this was not looked upon as an ordinary transaction within the scope of its corporate purposes or official functions by the Reich Bank officials, including Puhl, is evidenced by the extreme secrecy with which the transaction was handled¹²⁶ . . . His part in this transaction was not that of a mere messenger or businessman. He went beyond the ordinary range of his duties to give directions that the appropriate departments of the bank handle the matter secretly. It is to be said in his favor that he neither originated the matter and that it was probably repugnant to him. . . . But without doubt he was a consenting participant in part of the execution of the entire plan, although his participation was not a major one. We find him guilty under count five.¹²⁷

Whereas Rasche's activities were typical for any bank official, Puhl had clearly engaged in activities that cannot be regarded as part of normal banking practices. Whereas "banks routinely lend money, they presumably do not routinely launder gold teeth, making the latter conduct seem more egregious and worthy of criminal punishment."¹²⁸ Indeed, unlike the mere provision of funds, receiving and laundering stolen property is, in itself, usually regarded as criminal behavior,¹²⁹ made more serious by the fact that the gold teeth were likely obtained through murder.

Puhl was also charged under count seven (war crimes and crimes against humanity, slave labor) with having been active in financing enterprises that were primarily created to exploit slave labor, including the negotiation of a massive loan between the SS and DEST, a company specifically designed to utilize concentration camp labor.¹³⁰ He was also accused of having assisted DEST in "securing additional large loans, obtaining reductions on interest rates on such loans, and receiving extensions of time for repayment."¹³¹ However, although Puhl had held positions of considerable responsibility and authority, the Tribunal held that he did not play a decisive role and stressed that it was "doubtful whether defendant Puhl did more than act as a conduit in these particular transactions."¹³² Accordingly, the Tribunal dismissed charges against Puhl on this count.

It seems that here again, just as in the case against Rasche regarding slave labor, the Tribunal regarded facilitating the loan as potentially relevant, but did not consider Puhl's role as sufficiently established to result in individual criminal liability.

125. *Id.* at 617.

126. *Id.* at 618.

127. *Id.* at 620-21. (Count five consists of war crimes, crimes against humanity, and atrocities and offences committed against civilian populations.)

128. Chimène Keitner, *supra* note 105 at 92.

129. I am grateful to Dr. Jeff King, Senior Lecturer in Law, University College of London, for bringing this point to my attention.

130. *United States v. Von Weizsacker* ("The Ministries Case"), 14 T.W.C., at 850-51 (1950).

131. *Id.* at 851.

132. *Id.* at 852.

C. *The Case Against Funk*

The case against Walther Funk resulted in a conviction, *inter alia*, for loans to the SS that furthered slave labor. Funk had been the Minister of Economics and also the President of the German Reichsbank. The findings of the Nuremberg Tribunal that resulted in Funk's conviction were based on several grounds. He was found guilty of having "entered into an agreement with Himmler under which the Reichsbank was to receive certain gold and jewels and currency from the SS and instructed his subordinates, who were to work out the details, not to ask too many questions." Based on this agreement, the Reichsbank received objects stolen from persons who had been exterminated in the concentration camps, including money, jewelry, watches, and gold from eyeglasses, teeth, and fillings. In addition to these activities that clearly went beyond the ordinary tasks of a politician and banker:

As Minister of Economics and President of the Reichsbank, Funk participated in the economic exploitation of occupied territories . . . As President of the Reichsbank, Funk was also indirectly involved in the utilization of concentration camp labor. Under his direction the Reichsbank set up a revolving fund of 12,000,000 Reichsmarks to the credit of the SS for the construction of factories to use concentration camp laborers.¹³³

Without further discussion, the Tribunal concluded that while it did not find Funk to be guilty on count one (crimes against peace), they regarded him guilty under counts two, three, and four (war crimes and crimes against humanity in various respects).¹³⁴ Given the lack of analysis on the part of the Tribunal, it is not clear what role the loan for concentration camp labor played in reaching a guilty verdict. While, therefore, it is not possible to conclude with certainty that the loan in itself would have resulted in Funk's conviction, it was clearly one factor the Tribunal regarded as important. Thus, the decision demonstrates that making loans might give rise to criminal responsibility for aiding and abetting under international law.

D. *The Case Against Flick*

Finally, in the *Flick* case,¹³⁵ two industrials, Friedrich Flick and Otto Steinbrinck, were held criminally liable because they had contributed funds to the SS with knowledge of the crimes committed by that organization. The Tribunal first stated that an organization like the SS that commits war crimes and crimes against humanity on a large scale could be nothing other than

133. United States v. Brandt ("The Medical Case"), 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 171, 305-06 (Nuernberg Military Tribs. 1949).

134. *Id.* at 307.

135. United States v. Flick ("The Flick Case"), 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 1217-23 (Nuernberg Military Tribs. 1952).

criminal.¹³⁶ It continued that, “One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes.”¹³⁷ The Tribunal went on to emphasize that:

It remains clear from the evidence that each of them gave to Himmler, the Reich Leader SS, a blank check. His criminal organization was maintained and we have no doubt that some of this money went to its maintenance. It seems to be immaterial whether it was spent on salaries or for lethal gas. So we are compelled to find from the evidence that both defendants are guilty on count four.¹³⁸

Thus, they were convicted even though the prosecution could not show that any part of the money donated by either of them was directly used for criminal activities of the SS. This is an interesting approach to one of the most complex issues in the context of liability for providing funds, that is, whether liability requires establishing a link between a particular loan or donation and specific violations committed by the recipient. Just as the Tribunal hinted in *Rasche*, in the context of financing, it is not necessary to show that the specific contributions made by individual defendants were intended for unlawful purposes. Rather, it is sufficient that some part of the receiving fund had such an intended use.¹³⁹ Funding that goes toward an organization with such clearly criminal purposes and characteristics as the SS must be regarded as contributing to maintaining it, eliminating the need to examine the exact use of the funds provided.

While *mens rea* is not specifically discussed in the *Flick* decision, it seems as if, unlike in the *Rasche* case, the Tribunal infers knowledge of the unlawful use that would be made of the money from the nature of the SS and the fund made available to Himmler.¹⁴⁰ In *Rasche*, on the other hand, equally with regard to contributions made to Himmler, the Tribunal failed to find that the character

136. *Id.* at 1217.

137. *Id.*

138. *Id.* at 1221.

139. *But see* Christoph Burchard, *Ancillary and Neutral Business Contributions to ‘Corporate-Political Core Crime’*, 8 J. INT. CRIMINAL JUSTICE 919, 936-37 (2010), who suggests that the liability of the defendants in the *Flick* case rests exclusively on their membership in a criminal organization, the SS, and does therefore not provide any guidance as to the standards that apply with regard to liability as an accessory to the crime. However, given that the indictment under count four was based on the fact that they were “accessories to, abetted, took a consenting part in, were connected with plans and enterprises involving, and were members of organizations or groups connected with: murders . . .” *United States v. Flick* (“The Flick Case”), 6 T.W.C., at 1223 (1952), and that the Tribunal finds them guilty on that count, concluding that they were accessories to the crimes committed by the SS, it is difficult to share Burchard’s unequivocal conclusion in this respect, even though the Tribunal refers to their liability only in terms of their membership in the SS. *United States v. Flick* (“The Flick Case”), 6 T.W.C., at 1216-17 (1952).

140. *United States v. Flick* (“The Flick Case”), 6 T.W.C., at 1217 (1952) (“An organization which on a large scale is responsible for such crimes can be nothing else than criminal. One who knowingly by his influence and money contributes to the support thereof must, under settled legal principles, be deemed to be, if not a principal, certainly an accessory to such crimes”).

of the recipient individual and organization implied that the lender had knowledge of the illegitimate purposes for the funds.¹⁴¹

E. Conclusions

Prior to the trials discussed above, OMGUS issued reports on the war crimes of Deutsche Bank and Dresdner Bank¹⁴² that highlighted the important role of private banks and of particular bankers, including Rasche,¹⁴³ in preparing the German economy for the war.¹⁴⁴ In addition to analyzing many other activities carried out or coordinated by these banks, the report stressed the essential functions of bank loans for the criminal policies of the Nazi regime generally, as well as for supporting the war, in particular.¹⁴⁵ It is striking that the findings of the OMGUS Reports were not considered in the Nuremberg Tribunal's discussions concerning complicity liability for individual financial officers.

1. How to Interpret the Nuremberg Case Law

Any attempt to interpret the holdings in the different cases discussed above and to reconcile their disparate outcomes with regard to loans has to take account of the fact that the Nuremberg Tribunals did not provide detailed legal justifications of all parts of their decisions. Consequently, it is not always clear what the decisive features were that sufficiently distinguished the various scenarios and resulted in their different outcomes. This makes it difficult to draw from the decisions precise and coherent principles with regard to the question of whether and under what circumstances lending in general, and commercial lending in particular, might give rise to aiding and abetting liability. There is, for example, no indication in the case law as to the importance, if any, that might have been attached to the fact that Rasche was a private banker while Funk was the president of the Reichsbank, a bank owned and controlled by the state, and an important member of the Nazi government, and Puhl the deputy president of the Reichsbank.

It is equally unclear to what extent the difference in outcomes in *Flick* and *Rasche* rests on the fact that Flick was accused of making personal financial contributions to Himmler in order to secure political favors, whereas Rasche was accused of making a commercial loan on behalf of Dresdner Bank. For the Court in *Doe v Nestle*, this was indeed the decisive difference between the two

141. See discussion *supra* Section III(A).

142. Christopher Simpson, *supra* note 106.

143. *Id.* at 396.

144. *Id.* at 105-24.

145. *Id.* at 38-40.

cases.¹⁴⁶ It explained Rasche's acquittal and Flick's conviction by an inference from Nuremberg cases that "[w]hen a business engages in a commercial *quid pro quo*-for example, by making a loan to a third party-it is insufficient to show merely that the business person knows that the transaction will somehow facilitate the third party's wrongful acts."¹⁴⁷ Liability would, on the other hand, be the consequence where the business acts "in a non-commercial, non-mutually-beneficial manner, as with the banker in *The Flick Case* who gratuitously funded the SS's criminal activities . . . or the chemical-company employees in the *Zyklon B Case* who provided the gas, tools, and specific training that facilitated the Germans' genocidal acts."¹⁴⁸ According to the Court, "[r]egardless of whether the holdings are categorized as turning on the defendant's *actus reus* or the *mens rea*, the ultimate conclusion is clear: ordinary commercial transaction[s], without more, do not violate international law."¹⁴⁹

The analysis raises several problems. First of all, while a financial donation like that made by Flick can easily be categorized as both non-commercial and non-mutually-beneficial, it is not obvious why the Court identified the *Zyklon B* case as one in which the business person acted in a "non-commercial, non-mutually-beneficial manner." Tesch produced and sold poisonous gas and provided training regarding its use for killing concentration camp inmates, which he did as a profitable business transaction. The fact that these are clearly reprehensible actions does not deprive them of their commercial nature.

More importantly, the conclusion that "ordinary commercial transaction[s], *without more*, do not violate international law"¹⁵⁰ does not extend very far.¹⁵¹ The interesting question is, rather, that of determining what exactly is this "more" that would turn a commercial transaction into a violation of international law. Despite the contrary suggestion of the Court in *Doe v. Nestle*, it is essential to distill whether these holdings turn on the *actus reus* or the *mens rea* of aiding and abetting liability. If they were based on the *actus reus*, then "more" would presumably have to embody an activity that goes beyond making a mere commercial transaction. In a *mens rea* based interpretation, on the other hand, "more" would be the mental element with which the commercial transaction was carried out.

The problems with glossing over the Nuremberg cases' distinction between *actus reus* and *mens rea* become apparent in the *Nestle* court's comparison of

146. *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1089-90, 1094-96 (C.D. Cal. 2010).

147. *Id.* at 1094.

148. *Id.* at 1095.

149. *Id.* at 1090.

150. *Id.*

151. See also the discussion of US case law on criminal conspiracy and aiding and abetting liability in the context of commercial transactions, *supra* Section II(C)(5).; See also *United States v. Blankenship*, 970 F.2d 283, 285-86 (7th Cir. 1992) (author's emphasis).

the *Farben*¹⁵² and *Zyklon B*¹⁵³ cases.¹⁵⁴ In both cases, industrialists were accused of supplying the Nazis with large quantities of the poison gas Zyklon B that was used to exterminate concentration camp members. In the *Farben* case, the defendants were acquitted, whereas the *Zyklon B* case resulted in a conviction. The Court in *Doe v. Nestle* suggested that the different outcomes rest on the distinction that, “[i]n one case, the defendants had provided the tools and the training on using those tools for illegal purposes; in the other case, the defendants provided only the tools and were unaware of the illegal acts being done.”¹⁵⁵ As the quote itself demonstrates, there were differences both on the *actus reus* and the *mens rea* side. In *Zyklon B*, the industrialists had gone beyond supplying the gas; in *Farben* the relevant *mens rea* could moreover not be established. Indeed, the acquittal in the *Farben* case seems to have rested entirely on a lack of *mens rea*,¹⁵⁶ while the consideration of whether or not the *actus reus* consisted solely in a commercial transaction does not seem to have had any relevance for the outcome. It is, in fact, highly unlikely that, had the relevant *mens rea* with regard to the intended use of the poison gas by the Nazis been established, the Court would have acquitted the defendants on the basis that this was no more than a commercial transaction.

In *Zyklon B*, on the other hand, the defendants’ *mens rea* could be demonstrated.¹⁵⁷ Thus, the “more” in the *Zyklon B* case that was missing in the *Farben* case was the presence of the requisite *mens rea*, which explains the acquittal in one case and the conviction in the other. A clear distinction between the *actus reus* and *mens rea* elements of complicity liability is thus essential to understand the different outcomes in these two cases, rather than the commercial/non-commercial nature of the transaction. This is not to say that the fact that the defendants in the *Zyklon B* case participated more closely in the killings than those in *Farben* has no relevance, as this deepened participation made it easier to infer the necessary *mens rea* in the *Zyklon B* case.

152. United States v. Krauch (“The I.G. Farben Case”), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 1169 (Nuernberg Military Tribs. 1953).

153. U.N. War Crimes Comm’n, LAW REP. OF TRIALS OF WAR CRIMINALS (Vol. 1), Case. No. 9, The Zyklon B Case, The Trial of Bruno Tesch and Two Others., at 93-103 (1947).

154. *Nestle*, 748 F. Supp. 2d at 1090-91.

155. *Id.* at 1091.

156. United States v. Krauch (“The I.G. Farben Case”), 8 T.W.C. at 1169 (1953) (“The proof is quite convincing that large quantities of Cyclon-B were supplied to the SS by Degesch and that it was used in the mass extermination of inmates of concentration camps, including Auschwitz. But neither the volume of production nor the fact that large shipments were destined to concentration camps would alone be sufficient to lead us to conclude that those who knew of such facts must also have had knowledge of the criminal purposes to which this substance was being put. Any such conclusion is refuted by the well-known need for insecticides wherever large numbers of displaced persons, brought in from widely scattered regions, are confined in congested quarters lacking adequate sanitary facilities”).

157. “The Zyklon B Case”, *supra* note 51, at 102.

The conviction of Funk was in part based on the accusation that he made funding available to the SS for the construction of factories to use concentration camp inmates as slave laborers.¹⁵⁸ The far-reaching approach to responsibility for financing activities that was adopted in the *Flick* case equally demonstrates that a sufficient link between funding and gross violations of international law can exist.¹⁵⁹ The discussion of Rasche's liability under count seven implies that commercial loans can result in responsibility for aiding and abetting.¹⁶⁰ Thus, a closer look at Nuremberg case law does not support the categorical rejection of liability for financing activities in general and commercial loans in particular, as suggested by the Court in *South African Apartheid Litigation* based on its reading of the *Rasche* decision under count five.¹⁶¹

When assessing what lessons can be learned from Nuremberg for corporate complicity cases before US courts, one cannot overlook that the Nuremberg trials dealt with the liability of individuals, not corporations. Consequently, the prosecution in each case needed to establish that the individual who stood trial had acted in a way that justified criminal conviction: It was insufficient to attribute responsibility directly to the relevant corporations.¹⁶² The *IG Farben Case* makes the relevance of this distinction particularly clear. There, the Tribunal explained that the individual's responsibility for corporate actions requires proof that "an individual defendant was either a participant in the illegal act or that, being aware thereof, he authorized or approved it."¹⁶³

The position of the individual defendants within the corporation, including their decision-making authority and individual contributions in the context of the relevant transactions, were, accordingly, a crucial factor for establishing liability. The Tribunal found that Funk exercised a sufficiently influential position to be held personally criminally liable for the loans he authorized; whereas Puhl, although also holding a position of authority, did not play a

158. United States v. Brandt ("The Medical Case"), 1 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 305-06 (Nuernberg Military Tribs. 1949).

159. United States v. Flick ("The Flick Case"), 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 1217-23 (Nuernberg Military Tribs. 1952).

160. United States v. Von Weizsacker ("The Ministries Case"), 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 853-55 (Nuernberg Military Tribs. 1950).

161. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 269 (S.D.N.Y. 2009).

162. Florian Jessberger, *On the Origins of Individual Criminal Responsibility under International Law for Business Activity*, 8 J. INT. CRIMINAL JUSTICE 783, 794-95 (2010) (suggesting in this respect that "[h]ere, an issue which concerns the practice of international criminal law to this day becomes obvious: the difficulty of attributing a crime to a certain person as a (factual) problem of proof, not one of law").

163. United States v. Krauch ("The I.G. Farben Case"), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 1153 (Nuernberg Military Tribs. 1953).

decisive role and the Tribunal acquitted him of the charges related to securing the loans. The same findings led the Tribunal to the acquittal of Rasche under count seven. Thus, it seems that whether or not funding activities gave rise to liability depended, at least in part, on the role played by the individual in initiating or granting the loan.

The focus on individual as opposed to corporate responsibility is clearly an important difference between Nuremberg case law and that of US courts on the liability of corporations under the ATCA. In the latter, no individual responsibility of members of the corporation needs to be shown.¹⁶⁴ Thus, even to the extent that Nuremberg case law, in particular the acquittal of Rasche on count five, is interpreted in the way suggested in *South African Apartheid Litigation*, it would not automatically follow that corporate responsibility for similar activities would also have to be declined. This would only be the case if it could be shown that the reasons for which individual liability was rejected by the Nuremberg tribunals similarly apply to corporate liability. Where the Nuremberg cases found that there was no liability due to the individual defendant's role within a corporation, a US court analyzing corporate liability under the ATCA is not similarly precluded. Moreover, liability under the ATCA might be easier to demonstrate given the lesser burden of proof in civil as opposed to criminal cases.

2. *Developments in International Law Since Nuremberg*

Although Nuremberg may be one source of persuasive authority for US courts analyzing ATCA claims, international law has further developed in the area of complicity liability since those decisions were handed down. The international legal discourse has increasingly taken up the issue of corporate complicity liability, in general,¹⁶⁵ and legal discourse has started denouncing companies that finance human rights abuses.¹⁶⁶ Had the Court in *South African Apartheid Litigation* taken account of the international legal discourse after Nuremberg, it might have reached a more nuanced decision regarding whether commercial activities, including loans, can be sufficiently linked to gross human rights violations to give rise to complicity liability.

164. See *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011); *Flomo v. Firestone Natural Rubber Co., LLC*, 643 F. 2d 1013 (7th Cir. 2011); *Sarei v. Rio Tinto, PLC*, Nos. 02–56256, 02–56390, 09–56381, 2011 WL 5041927 (9th Cir. Oct. 25, 2011); *But see Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111 (2d Cir. 2010) (rejecting the existence of corporate liability for aiding and abetting under the ATCA).

165. See, e.g., Int'l Comm'n of Jurists, *supra* note 1, Vol. 2: *Criminal Law and International Crimes* (2008), Vol. 3: *Civil Remedies*; See also Anita Ramasastry, *Corporate Complicity: From Nuremberg to Rangoon, An Examination of Forced Labor Cases and Their Impact on the Liability of Multinational Corporations*, 20 BERKELEY J. INT'L L. 91, 100, 113-14, 158-59 (2002) (arguing that the *Rasche* decision is outdated in that international criminal law and accomplice liability have since developed); Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *supra* note 4 at 174.

166. Shaw W. Scott, *supra* note 4 at 1533-34.

The International Commission of Jurists, for example, argues that:

[If corporate officials] have the necessary knowledge as to the impact of their actions, it is irrelevant that they only intended to carry out normal business activities. For example, vendors who sell goods or materials . . . can be responsible as accomplices if they have knowledge, judged objectively, that the purchaser would use them to commit crimes under international law.¹⁶⁷

Awareness of the link between financing and violations of international law is also increasing.¹⁶⁸ In this respect, the International Commission of Jurists suggests that “criminal liability of a financier will depend on what he or she knows about how his or her services and loans will be utilized and the degree to which these services actually affect the commission of a crime.”¹⁶⁹ Others speak of a “trend towards criminalizing the ‘ordinary’ financing and furthering of international treaty crimes,”¹⁷⁰ and they emphasize the general recognition that it is necessary “to prevent the commission of international crimes from the very outset by drying up their financial and material foundations.”¹⁷¹

However, international law has not given the same attention to financing gross violations of human rights as financing has received in other areas, such as anti-corruption, organized crime, and terrorism.¹⁷² It is therefore necessary to address the extent to which legal principles and standards developed in these contexts can be generalized and applied to the question of liability for funding gross human rights violations. In particular, US case law on funding terrorism raises helpful similarities and differences that may reveal potential arguments in the ATCA context of funding gross human rights violations committed by governments.

167. Int’l Comm’n of Jurists, *supra* note 1, Vol. 2 at 22 (in the context of *mens rea*).

168. See, e.g., Anita Ramasastry (1998), *supra* note 4; Shaw W. Scott, *supra* note 4; Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *supra* note 4; Juan Pablo Bohoslavsky & Mariana Rulli, *supra* note 4.

169. Int’l Comm’n of Jurists, *supra* note 1, Vol. 2 at 39-40.

170. Christoph Burchard, *supra* note 139 at 931.

171. *Id.*

172. Indeed, when suggesting that international law has developed in the context of complicity for financing, Shaw W. Scott, *supra* note 4 at 1533-34, makes reference to general developments in the context of international codes of conduct for transnational corporations, but more specifically to those in the context of money-laundering and funding of terrorist activities, and also to the UN International Convention for the Suppression of the Financing of Terrorism. Christoph Burchard, *supra* note 139 at 931, similarly refers to the UN International Convention for the Suppression of the Financing of Terrorism. See also INÉS TÓFALO, *Overt and Hidden Accomplices: Transnational Corporations’ Range of Complicity for Human Rights Violations*, in *TRANSNATIONAL CORPORATIONS AND HUMAN RIGHTS* 335, 345-46 (Olivier De Schutter ed., Hart 2006) (refers to anti-terrorist funding laws and U.N. Security Council Resolutions on asset freezing for such funding).

IV.

LESSONS FROM LEGAL APPROACHES TO FUNDING TERRORISM

In the context of the fight against terrorism, more and more attention has been paid to the primary importance of tackling the funding made available to terrorists. The International Convention for the Suppression of the Financing of Terrorism,¹⁷³ which was adopted by the UN General Assembly in 1999, stresses in its preamble “that the financing of terrorism is a matter of grave concern to the international community as a whole” and “that the number and seriousness of acts of international terrorism depend on the financing that terrorists may obtain.”

In the United States, the US Anti-Terrorism Act (ATA) makes it a criminal offense to provide material support or resources, knowing or intending that they are to be used in preparation for, or in carrying out, violations of certain laws.¹⁷⁴ The legislative definition of “material support or resources” includes currency, monetary instruments, financial securities, and financial services.¹⁷⁵ The statute prohibits providing, attempting to provide, or conspiring to provide material support or resources to designated foreign terrorist organizations, thus expressly criminalizing the act of funding or providing other financial services to such organizations.¹⁷⁶ Organizations can be designated as a foreign terrorist organization (FTO) if they are engaged in terrorist activity or terrorism that threatens “the security of United States nationals *or* the national security [national defense, foreign relations, *or* the economic interests] of the United States.”¹⁷⁷ The ATA provides criminal and civil penalties for whomever, “by any means, directly or indirectly, unlawfully and willfully provides or collects funds with the intention that such funds be used, or knowledge that such funds are to be used” in order to carry out a terrorist act.¹⁷⁸ Finally, Section 2333 provides US nationals who were injured by an act of international terrorism with the civil remedy of triple damages.

This shows that with respect to funding terrorism, legislators regard money as a particularly dangerous agent, and far-reaching liability is especially created to tackle the financiers of terrorists and terrorism. This stands in stark contrast to the approach in *South African Apartheid Litigation*, where the Court considered money to be an innocent agent that was always too far removed from the

173. G.A. Res 54/109, U.N. Doc. A/RES/54/109 (Dec. 9, 1999).

174. 18 U.S.C. § 2339A (2009).

175. 18 U.S.C. § 2339A(b)(1) (2009).

176. 18 U.S.C. § 2339B (2009); *See also* Nina Crimm, *High Alert: The Government's War on the Financing of Terrorism and its Implications for Donors, Domestic Charitable Organizations, and Global Philanthropy*, 45 WM. & MARY L. REV. 1341 (2004) (detailed discussion of U.S. Anti-Terrorism legislation).

177. 8 U.S.C. § 1189(a)(1)(C) (2006) (emphasis added).

178. 18 U.S.C. § 2339C (2009).

violations carried out to give rise to complicity liability.¹⁷⁹

This dichotomy can be explained in part by the significant factual and legal differences between funding terrorism and providing loans to regimes that commit gross human rights violations. An analysis of the approach adopted in US cases in which victims of terrorist attacks file lawsuits against banks is nevertheless interesting as it can provide a different view of the link between financing and gross international law violations. Indeed, some of the legal issues arising in those cases are very similar to those the Court had to address in *South African Apartheid Litigation*. First, both types of cases involve what defendants allege is no more than routine commercial provision of banking services. Second, both cases raise the same basic questions about how to define liability given the fungibility of money and the difficulty with linking individual financial contributions to specific harmful acts. While most of the cases arising in the terrorism context are argued under the ATA, some are argued under the ATCA and are based on the same legal principles that are applicable in complicity cases for funding gross human rights violations.

A. Relevance of the Routine Nature of Banking Activities

Several of the US terrorism-related cases dealt with the question of whether providing commercial banking services can give rise to liability for the crimes committed by their recipients. However, unlike *South African Apartheid Litigation*, in the terrorism context, the question was not limited to the particular issue of bank loans, but extended to banking services more broadly.

In one case, *Burnett v. Al Baraka Inv. and Development Corp.*,¹⁸⁰ victims of the terrorist attacks of September 11, 2001 sued individuals and entities, including banks and charitable foundations, for funding and supporting Al Qaeda. The complaint included allegations against Al Rajhi, a Saudi Arabian banking and investment corporation. The plaintiffs' main allegation was that Al Rajhi was the primary bank for a number of charities that serve as Al Qaeda front groups and that "funnel terrorism financing and support"¹⁸¹ through Al-Rajhi's financial system. The Court held that Al Rajhi was not liable because he was merely a conduit of funds.

The act of providing material support to terrorists, or "funneling" money through banks for terrorists is unlawful and actionable, but . . . Al Rajhi is alleged only to be the funnel. Plaintiffs offer no support, and we have found none, for the proposition that a bank is liable for injuries done with money that passes through its hands in the form of deposits, withdrawals, check clearing

179. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009); *See also* *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057 (C.D. Cal. 2010).

180. *Burnett v. Al Baraka Inv. and Dev't Corp.*, 274 F. Supp. 2d 86 (D.D.C. 2003).

181. *Id.* at 109.

services, or any other routine banking service.¹⁸²

This sounds as if routine commercial activities, which as such are not forbidden, can never form the *actus reus* of liability on the part of banks. However, other decisions cast doubt on this interpretation. In *In Re Terrorist Attacks on September 11, 2001*,¹⁸³ victims of the attacks sued entities that allegedly provided assistance to Al Qaeda. The Court considered defendant bank's knowledge of how its services were being used and held that "there can be no bank liability for injuries caused by money routinely passing through the bank. Saudi American Bank is not alleged to have known that anything relating to terrorism was occurring through the services it provided."¹⁸⁴ Thus, the Court indicated that liability may have been available had the bank had knowledge that their services were being used for terrorism purposes. This suggests that an important factor for the Court was the bank's lack of *mens rea*, rather than the absence of an *actus reus*. While this statement was made in the context of deciding whether the provision of routine banking services can amount to material support to a terrorist organization, the Court in the same decision rejected a claim against Al Rajhi Bank for aiding and abetting terrorists on the grounds that no allegations were made that the defendant bank knew that the recipients of the money supported terrorism. The Court did not give any indication that it would have rejected aiding and abetting liability had the necessary knowledge been established.¹⁸⁵

The decision in *Weiss v. National Westminster Bank*,¹⁸⁶ in which victims of terrorist attacks in Israel brought a claim against National Westminster Bank (NatWest) for allegedly facilitating the activities of terrorist organizations, lends support to the interpretation that the decision in *In Re Terrorist Attacks on September 11, 2001* rests decisively on the *mens rea* of the banking defendant. NatWest argued that the Court should rely on *In Re Terrorist Attacks on September 11, 2001*¹⁸⁷ for the proposition that basic banking services, such as account maintenance, should be excluded from the definition of financial services in Section 2339(B)(a)(1), the provision of which the bank was accused.¹⁸⁸ The Court found the defendant bank liable and clarified that routine banking services are not *per se* exempt from liability.

182. *Id.*

183. *In re Terrorist Attacks on September 11, 2011*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005).

184. *Id.* at 834.

185. *Id.* at 832-33 ("Plaintiffs claim Al Rajhi Bank aided and abetted the September 11 terrorists by donating to certain Defendant charities and acting as the bank for these Defendants. New York law and the courts interpreting the ATA in Boim make very clear that concerted action liability requires general knowledge of the primary actor's conduct. Even with the opportunity to clarify their claims against Al Rajhi Bank, the Burnett Plaintiffs do not offer facts to support their conclusions that Al Rajhi Bank had to know that Defendant charities ... were supporting terrorism").

186. *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609 (E.D.N.Y. 2006).

187. *In re Terrorist Attacks on September 11, 2011*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005).

188. *Weiss*, 453 F. Supp. 2d at 624.

The Defendant misconstrued the *Terrorist Attacks* decision. In holding that there could be no liability on the basis of “routine banking business” that Court did not mean that the provision of basic banking services could never give rise to bank liability. Rather the Court relied on the routine nature of the banking services to conclude that the defendant bank had no knowledge of the client’s terrorist activities.¹⁸⁹

The fact that the services provided are routine banking services is relevant for showing the bank may not have suspected that it was providing assistance to the commission of terrorist acts. Conversely, courts can more easily infer such knowledge from non-routine banking services that are naturally suspicious. The relevance of the routine nature of the service thus lies, primarily, in the realm of determining the relevant *mens rea* of the defendant. A similar approach was adopted in *Strauss v. Credit Lyonnais*.¹⁹⁰

In both *Strauss* and *Weiss*, the relevant statements were made in the context of an analysis of liability for providing material support to terrorist organizations, thus clarifying that making available routine banking services can amount to the provision of material support as defined in Section 2339A(b)(1). At the same time, in both cases, the plaintiffs’ claims for aiding and abetting liability for rendering routine banking services were rejected on the grounds that “[t]he maintenance of a bank account and the receipt or transfer of funds does not constitute substantial assistance.”¹⁹¹ The Courts relied on *In Re Terrorist Attacks on September 11, 2001*¹⁹² as a precedent to support their views in this respect. However, as seen above, in that case the Court rejected the claim for aiding and abetting liability on the same grounds as that for the provision of material support (i.e., because defendants’ lacked knowledge for *mens rea*, not because of the routine nature of their services).

Goldberg v. UBS is another decision where the Court accepted that routine banking services might amount to the provision of material support, but did not give rise to aiding and abetting liability. The Court relied *In Re Terrorist Attacks on September 11, 2001* and the statement in *Boim I* that funding *simpliciter* cannot result in civil liability¹⁹³ to support its view that “performing three wire transfers for ASP [Association de Secours Palestinien] fail[s] to establish ‘substantial assistance’ of the sort required to support an aiding and abetting

189. *Id.* at 625; See also *In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 489 (S.D.N.Y. 2010).

190. *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at *12 (E.D.N.Y. October 5, 2006).

191. *Id.* at *9; *Weiss*, 453 F. Supp. 2d at 621; See also *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009).

192. *In re Terrorist Attacks on September 11, 2001*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005).

193. *Boim v. Quranic Literacy Inst. and Holy Land Found. for Relief and Dev’t (“Boim I”)*, 291 F.3d 1000, 1011 (7th Cir. 2002).

claim.”¹⁹⁴ The relevant part of *Boim I* reads as follows:

To say that funding *simpliciter* constitutes an act of terrorism is to give the statute [the ATA] an almost unlimited reach. Any act which turns out to facilitate terrorism, however remote that act may be from actual violence and regardless of the actor’s intent, could be construed to “involve” terrorism . . . [T]he complaint cannot be sustained on the theory that the defendants themselves committed an act of international terrorism when they donated unspecified amounts of money to Hamas, neither knowing nor suspecting that Hamas would in turn financially support the persons who murdered David Boim. In the very least, the plaintiffs must be able to show that murder was a reasonably foreseeable result of making a donation. Thus, the Boims’ first theory of liability under Section 2333, funding *simpliciter* of a terrorist organization, is insufficient because it sets too vague a standard, and because it does not require a showing of proximate cause.¹⁹⁵

This holding addresses a theory of primary liability based on the assumption that the provision of funding involves violent conduct and consequently amounts to an act of terrorism and would, therefore, make the funder liable as the principal offender. Thus, it is not evident why it would constitute authority regarding the scope and limits of secondary liability for aiding and abetting the principal offender. More importantly, the Court does not seem to be saying that funding cannot amount to “‘substantial assistance’ of the sort required to support an aiding and abetting claim,” as suggested by the Court in *Goldberg*,¹⁹⁶ but rather that funding without the necessary *mens rea* and without being the proximate cause of the violent acts committed cannot give rise to liability. Thus, as in *In Re Terrorist Attacks on September 11, 2001, Boim I* does not lend support to a rejection of aiding and abetting liability for certain banking activities where *mens rea* as well as proximate cause can be shown.

The role of routine banking services in aiding and abetting liability also lies at the heart of the decisions in *Linde v. Arab Bank*¹⁹⁷ and *Almog v. Arab Bank*.¹⁹⁸ The plaintiffs in both cases made detailed allegations against the defendant bank, suggesting that it materially supported the efforts and goals of several terrorist organizations, including Hamas. They alleged mainly two types of support: (1) providing banking services, including maintaining accounts, for these organizations; and (2) administering the distribution of benefits made available by the Saudi Committee, a committee created in Saudi Arabia to raise funds to support the objectives of the relevant terrorist organizations, to the families of Palestinian “martyrs” and those wounded or imprisoned in perpetrating terrorist attacks.¹⁹⁹

Arab Bank argued that it merely provided routine banking services, a

194. *Goldberg*, 660 F. Supp. 2d at 425.

195. *Boim I*, 291 F.3d at 1011-12.

196. *Goldberg*, 660 F. Supp. 2d at 425.

197. *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 588 (E.D.N.Y. 2005).

198. *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

199. *Id.* at 262-263; *Linde*, 384 F. Supp. 2d at 576-77.

defense rejected by the Court in both cases. In *Almog*, it was argued in this respect that:

Arab Bank ignores that acts which in themselves may be benign, if done for a benign purpose, may be actionable if done with the knowledge that they are supporting unlawful acts. Nothing in the amended complaints suggests that Arab Bank is a mere unknowing conduit for the unlawful acts of others, about whose aims the Bank is ignorant. Given plaintiffs' allegations regarding the knowing and intentional nature of the Bank's activities, there is nothing "routine" about the services the Bank is alleged to have provided. Thus, plaintiffs' allegations with respect to Arab Bank's knowledge and conduct are sufficient under their first factual theory.²⁰⁰

*Doe v. Nestle*²⁰¹ interprets the outcome in *Almog* as based on the fact "that the defendant bank did not 'merely provide . . . routine banking services' that benefitted the terrorist organization,"²⁰² and therefore regards *Almog* as supporting *Doe's* view that "[t]he act of providing financing, without more, does not satisfy the *actus reus* requirement of aiding and abetting under international law."²⁰³ Rather, "some additional assistance beyond financing" is necessary, such as in *Almog*, where the bank went beyond holding and transferring funds and "took the extra step of 'solicit[ing] and collect[ing]' those funds for Hamas."²⁰⁴

Similarly, whereas the Court in *Goldberg* held that routine banking services might amount to the provision of material support but does not give rise to aiding and abetting liability, the *Linde* court held that performing wire transfers to unlawful organizations could qualify as aiding and abetting the overall terrorist scheme. The *Goldberg* court distinguished itself by observing that in *Linde*, "the bank was alleged to have acted essentially as the officially designated administrator for terrorism incentive payments."²⁰⁵

However, even though the services provided in *Almog* and *Linde* clearly went beyond the provision of ordinary banking services for the terrorist organizations concerned, the above quote from *Almog* referred to the Court's conclusions with regard to the plaintiff's theory that involved liability for providing banking services and was not related to the additional activities of which the bank was accused. The same applies to the *Linde* quote. In both cases the discussion confirms the argument that the determinative factor for

200. *Almog*, 471 F. Supp. 2d at 291; *See also* *Linde*, 384 F. Supp. 2d at 588 ("Although the Bank would like this court to find, as did the court in *In re Terrorist Attacks*, that it is engaged in "routine banking services," here, given plaintiffs' allegations regarding the knowing and intentional nature of the Bank's activities, there is nothing "routine" about the services the Bank is alleged to provide").

201. *Doe v. Nestle*, S.A., 748 F. Supp. 2d 1057 (C.D. Cal. 2010).

202. *Id.* at 1097.

203. *Id.* at 1099.

204. *Id.*; *See also, In re Chiquita Brands Int'l, Inc. Alien Tort Statute & S'holder Derivative Litig.*, 792 F. Supp. 2d 1301, 1339-1340 (S.D. Fla. 2011).

205. *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009)

distinguishing harmless routine banking services from those that might result in liability is the bank's *mens rea*. It is this knowledge of the purpose for which the services are being used, and of the unlawful acts they might be facilitating, which distinguishes routine from non-routine banking services.²⁰⁶ Under this interpretation, the fact that a bank only provided routine commercial services does not automatically exclude the *actus reus* of liability, nor does the routine nature of the services stand in the way of establishing a sufficient causal link. Instead, the nature of the service, whether it is routine and/or commercial, is primarily relevant for the *mens rea* question, not the *actus reus*. It might be easier to assume knowledge that the banking services facilitate terrorist activities if the transactions themselves fall outside of the ordinary, than in cases where routine services are being provided.²⁰⁷

The relevant parts of the *Almog* decision stem from an analysis of the bank's liability under the ATCA,²⁰⁸ while the Court in *Linde* reached a similar conclusion when examining the issue in the context of a claim under the ATA. It thus seems fair to assume that the relevant arguments and conclusions are not based on the specificities of the anti-terrorism legislation but, rather, also apply to complicity liability outside of that specific legislative framework. At least in the context of funding terrorism,²⁰⁹ the routine or commercial nature of financial services does not automatically exclude the *actus reus* of liability for aiding and abetting. When financial services further terrorist acts, liability rests on the *mens rea* with which the services were provided, not the type of service.

B. Actus Reus and Causation in the Context of Funding Terrorism

As this prior discussion shows, some courts have concluded that defendants accused of providing "routine" banking services are not automatically shielded from liability. These courts must then determine the relevant liability standards. In this context, the controlling statute may determine the standard chosen. As explained above, when establishing liability for aiding and abetting under the ATCA, the relevant *actus reus* standard requires practical assistance that has a substantial effect on the commission of the violation of the law of nations carried out by the principal actor.²¹⁰ Where a case is brought under the ATA, the

206. For a similar interpretation see *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609, 624 (E.D.N.Y. 2006).

207. See also *Wultz v. Iran*, 755 F. Supp. 2d 1, 52-53 (D.D.C. 2010).

208. *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 268 (E.D.N.Y. 2007) (with regard to the Bank's liability for aiding and abetting under the ATA, the court held that "With respect to aiding and abetting liability, the financial services provided by Arab Bank, and the administration of the benefit plan, are alleged to have provided substantial assistance to international terrorism and encouraged terrorists to act Thus, Arab Bank's alleged conduct is a sufficient basis for liability under the broad scope of the ATA").

209. *Id.* at 291.

210. See *supra* section II(C)(1).

relevant standard depends on the exact provision on which the claim is based.

In many of the terrorism cases that involved the provision of banking services and/or funds, the plaintiffs rely on several provisions of the ATA simultaneously. In most cases, it is alleged that the banks or funders violated the prohibitions to provide material support under Sections 2339A, 2339B, and 2339C, and that this gives rise to civil liability pursuant to Section 2333.²¹¹ At least in one case, plaintiffs argued that funding the commission of terrorist attacks amounts on its own to an act involving terrorism that creates primary liability under Section 2333.²¹² To the extent that the claims allege aiding and abetting liability,²¹³ they usually argue that such liability arises out of assisting one of the acts listed in Section 2332, which includes murder, attempted murder, and serious bodily injury. Where aiding and abetting liability is at issue, courts seem to apply a substantial assistance standard.²¹⁴

When interpreting the meaning of material support in the context of the ATA, courts emphasized that the term “relates to the type of aid provided rather than whether it is substantial or considerable.”²¹⁵ Support under Section 2339A is therefore automatically regarded as material, regardless of its intensity or effect. In *Holder v. Humanitarian Law Project*, the US Supreme Court explained: “Material support is a valuable resource by definition. Such support frees up other resources within the organization that may be put to violent ends.”²¹⁶ Justice Breyer,²¹⁷ in line with the majority view on this point, suggested that where the alleged support consisted in the provision of financial services, there is a presumption that such support has a significant likelihood of furthering terrorism, as “[t]hose kinds of aid are inherently more likely to help an organization’s terrorist activities, either directly or because they are fungible in nature.”²¹⁸

211. See, e.g., *Goldberg v. UBS AG*, 660 F. Supp. 2d 410 (E.D.N.Y. 2009); *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704 (E.D.N.Y. October 5, 2006); *Weiss v. Nat’l Westminster Bank PLC*, 453 F. Supp. 2d 609 (E.D.N.Y. 2006).

212. *Boim v. Quranic Literacy Inst. and Holy Land Found. for Relief and Dev’t (“Boim I”)*, 291 F.3d 1000 (7th Cir. 2002).

213. Courts’ views are divided as to whether liability under the ATA is primary or secondary liability. *Boim v. Holy Land Found. for Relief and Dev’t (“Boim III”)*, 549 F.3d 685 (7th Cir. 2008) and *Goldberg*, 660 F. Supp. 2d 410 adopt a primary liability approach, while other courts recognize aiding and abetting liability under the ATCA. See, e.g., *In re Terrorist Attacks on September 11, 2011*, 349 F. Supp. 2d 765 (S.D.N.Y. 2005); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005); see also *Wultz v. Iran*, 755 F. Supp. 2d 1, 54-55 (D.D.C. 2010).

214. See, for example, *Linde*, 384 F. Supp. 2d at 574.

215. *Boim I*, 291 F.3d at 1015.

216. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010).

217. *Id.* at 2741 (Breyer, J., dissenting that where support consisted of mere speech or association, to provide material support should be understood to require that the funder knows that “his support bears a significant likelihood of furthering the organization’s terrorist . . . not just its lawful, aims”).

218. *Id.*

One of the main reasons for this broad approach to liability is the criminal nature of the organizations the money goes to, as well as that of their activities. Indeed, the very fact that an organization is designated as a foreign terrorist organization (FTO)—and many of the US cases refer to funding made available to FTOs—means that “the specified organizations ‘are so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.’”²¹⁹ It is thus assumed that funding that goes to an FTO furthers terrorist activities, and the designation of the organization “[p]uts a donor on notice that the recipient is likely to use the material support for illegal purposes—or, more generally, that the material support will always free up resources for the FTO to commit its unlawful acts.”²²⁰

All of this seems to suggest that the mere act of providing material support to terrorist organizations in the form of funding might give rise to liability. This was the conclusion of the Seventh Circuit in *Boim III* in an *en banc* rehearing.²²¹ Gunmen allegedly acting on behalf of Hamas killed a US citizen in Israel. His parents sued various individuals and groups with connections to terrorist organizations, including charities, for having provided financial support to Hamas. The case was brought under the legal framework of the ATA.²²² As Section 2339B had not been enacted at the time the attack was carried out, the Court derived liability from a “chain of incorporations by reference (section 2333(a) to section 2331(1) to section 2339A to section 2332).”²²³ One of the main issues in the *Boim* litigation was whether it was necessary to show a causal link between the donations made by the defendants and the death of David Boim. If so, how could this be achieved, given the fungibility of money? In particular, how close did the defendants have to be to the commission of the terrorist offense?

Judge Posner delivered the majority opinion in *Boim III*, explaining that the civil remedies provided in Section 2333 are important because “[d]amages are a less effective remedy against terrorists and their organizations than against their financial angels”²²⁴ and “suits against financiers of terrorism can cut the terrorists’ lifeline.”²²⁵ He therefore characterized the availability of civil

219. See, e.g., *Id.* at 2712 (citing Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), 18 U.S.C. § 2339B (note on Findings and Purpose)).

220. Benjamin Yaster, *Resetting Scales: An Examination of Due Process Rights in Material Support Prosecutions*, 82 N.Y.U. L. REV. 1353, 1382 (2018); See also Tom Stacy, *The “Material Support” Offense: The Use of Strict Liability in the War Against Terror*, 14 KANSAS J.L. & PUB. POL’Y 461, 462-63 (2005).

221. *Boim v. Holy Land Found. for Relief and Dev’t (“Boim III”)*, 549 F. 3d 685 (7th Cir. 2008).

222. *Id.* at 688.

223. *Id.* at 690.

224. *Id.*

225. *Id.* at 691.

remedies as “a counterterrorism measure.”²²⁶ He then suggested that an act that in itself would be too slight to warrant a finding that it had caused the harm suffered by the victim might become “wrongful because it is done in the context of what others are doing,”²²⁷ that it would be sufficient to establish that there was a substantial probability that the defendant’s act had caused the harm,²²⁸ and that a defendant can be held liable:

even though there was no proven, or even likely, causal connection between anything he did and the injury. It was enough to make him liable that he had helped to create a danger; it was immaterial that the effect of his help could not be determined—that his acts could not be found to be either a necessary or a sufficient condition of the injury.²²⁹

The majority then applied its general considerations on causation to the case before it and invited to consider:

an organization solely involved in committing terrorist acts and a hundred people all of whom know the character of the organization and each of whom contributes \$1,000 to it, for a total of \$100,000. The organization has additional resources from other, unknown contributors of \$200,000 and it uses its total resources of \$300,000 to recruit, train, equip, and deploy terrorists who commit a variety of terrorist acts one of which kills an American citizen. His estate brings a suit under section 2333 against one of the knowing contributors of \$1,000. The tort principles that we have reviewed would make the defendant jointly and severally liable with all those other contributors. The fact that the death could not be traced to any of the contributors . . . would be irrelevant. The knowing contributors as a whole would have significantly enhanced the risk of terrorist acts . . . and this would be true even if Hamas had incurred a cost of more than \$1,000 to kill the American, so that no defendant’s contribution was a sufficient condition of his death.²³⁰

This seems to relieve the plaintiffs of any burden to show causation and, in fact, seems to hold financial donors to a terrorist organization liable for all harm inflicted by it, however minor their donations, and without a requirement to establish that the funding in any way facilitated the occurrence of the particular harm for which the plaintiffs seek relief.²³¹

While this approach to interpreting material support seems consistent with *Humanitarian Law Project*, most civil courts tend to insist on a proximate cause requirement in the context of civil litigation, and they continue to do so in the aftermath of both *Boim III* and *Humanitarian Law Project*.²³² Indeed, cases

226. *Id.*

227. *Id.* at 696-97 (quoting W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 52, at 354 (5th ed. 1984)).

228. *Id.* at 697.

229. *Id.* at 697 (referring to *Keel v. Hainline*, 331 P.2d 397 (Okla. 1958)).

230. *Id.*

231. See also *Boim III*, 549 F.3d at 706 (Rovner, J., dissenting) and 719 (Wood, J., dissenting).

232. See, e.g., *Rothstein v. UBS AG*, 772 F. Supp. 2d 511, 513-14 (S.D.N.Y. 2011); *Wultz v. Iran*, 755 F. Supp. 2d 1, 53 (D.D.C. 2010); for a discussion see *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 633-34, 646 (S.D. Tex. 2011).

analyzing the implications of the Supreme Court decision in *Humanitarian Law Project* for civil liability in the context of funding terrorism made it clear that by the act of providing material support in and of itself does not trigger civil remedies, but rather only if the material support was the proximate cause for the injuries suffered by the plaintiffs. In *Rothstein*, after the Court of Appeals remanded the action based on the decision in *Humanitarian Law Project*, the Court held that:

Humanitarian Law Project does not address Section 2333(a)'s proximate causation requirement. Section 2333 is a remedial civil statute that provides compensation to victims who demonstrate they were injured "by reason of" an act of international terrorism. As such, establishing a proximate causal relationship between the defendant's conduct and the plaintiff's injuries is an indispensable element of a Section 2333(a) civil damages claim. By contrast, Section 2339 is a purely criminal measure that has no causation element . . . and all that is needed to sustain a Section 2339B prosecution is proof that the defendant knowingly engaged in prohibited conduct. Accordingly, any potential connection between *Humanitarian Law Project's* analysis of Section 2339B and this Court's analysis of Section 2333's proximate causation element would appear to be strained at best and more likely irrelevant.²³³

Thus, in cases where civil liability under Section 2333 for providing material support is at issue, the requirement that the plaintiff was injured "by reason" of an act of international terrorism makes it necessary causation, particularly proximate cause, in order to link the defendant to the plaintiff's injury.

In the context of ATA litigation, most courts require for proximate cause that "defendant's actions were 'a substantial factor in the sequence of responsible causation,' and that the injury was 'reasonably foreseeable or anticipated as a natural consequence.'"²³⁴ This standard closely resembles substantial effect, but applies here in material support cases alleging civil responsibility. Although there are differences between funding terrorism and funding gross human rights violations, an analysis of how these cases approach proximate causation might then shed light on the question of whether, under certain circumstances, funding can have a substantial effect on the violations carried out by its recipient. This would run contrary to the decision in *South African Apartheid Litigation* that "supplying a violator of the law of nations with funds—even funds that could not have been obtained but for those loans—is not sufficiently connected to the primary violation to fulfill the *actus reus* requirement of aiding and abetting a violation of the law of nations."²³⁵

The issue of what causal link must be shown between the funding by the defendants and the offenses committed in civil claims for providing material support to terrorist organizations was discussed in some detail in *Goldberg v*

233. *Rothstein*, 772 F. Supp. 2d at 516; *See also Abecassis*, 785 F. Supp. 2d at 633-34.

234. *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at *17 (E.D.N.Y. October 5, 2006).

235. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 269 (S.D.N.Y. 2009).

UBS,²³⁶ *Weiss v National Westminster Bank*,²³⁷ and *Strauss v Credit Lyonnais*.²³⁸ In *Goldberg*, the relatives of a victim of a terrorist attack in Israel sued UBS for having made wire transfers to ASP, an institution that was part of Hamas' financial infrastructure.²³⁹ With regard to the question of proximate cause, the Court argued that it was sufficient that the plaintiffs had alleged:

[T]he defendant transferred funds from a designated terrorist organization, ASP, to Tulkarem Zakat, an organization controlled by Hamas in the West Bank territory, . . . [had] identified three specific transfers to Tulkarem Zakat, the last of which occurred a few weeks before the terrorist bombing that killed Stuart Scott Goldberg . . . [and] that Hamas, an organization claimed to control Tulkarem Zakat, was responsible for the bombing of Bus 19.²⁴⁰

The Court also interpreted the ATA as expressing congressional intent to find companies liable for financial support, although money is always fungible and causation may be impossible to demonstrate:

Common sense requires a conclusion that Congress did not intend to limit recovery to those plaintiffs who could show that the *very dollars* sent to a terrorist organization were used to purchase the implements of violence that caused harm to the plaintiff. Such a burden would render the statute powerless to stop the flow of money to international terrorists, and would be incompatible with the legislative history of the ATA.²⁴¹

Weiss v. National Westminster Bank, a case in which victims of terrorist attacks in Israel brought a claim against National Westminster Bank (NatWest) for facilitating the activities of terrorist organizations, also addressed the issue of proximate causation.²⁴² NatWest had argued that in order to succeed with their claim, "plaintiffs must allege, for example, that the funds supplied by the defendant were used to buy the specific weapons and train the specific men who killed or injured the plaintiffs."²⁴³ The Court disagreed, suggesting that to prove proximate cause, it would be sufficient to assert, as the plaintiffs did, that NatWest reasonably foresaw that "funds provided directly to known terrorist groups would be used to perpetrate terrorist attacks."²⁴⁴ The Court justified its conclusion by looking to legislative history as well as to Congress' intent to impose "liability at any point along the causal chain of terrorism,"²⁴⁵ its view that "foreign organizations that engage in terrorist activity are so tainted by their criminal conduct that any contribution to such an organization facilitates that

236. *Goldberg v. UBS AG*, 660 F. Supp. 2d 410 (E.D.N.Y. 2009).

237. *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609 (E.D.N.Y. 2006).

238. *Strauss*, 2006 WL 2862704.

239. *Goldberg*, 660 F. Supp. 2d at 416-17.

240. *Id.* at 430.

241. *Id.* at 429.

242. *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609 (E.D.N.Y. 2006).

243. *Id.* at 631.

244. *Id.* at 632 n. 17.

245. *Id.* at 631 (quoting S. REP. NO. 102-342, at 22 (1992)).

conduct,”²⁴⁶ and its belief that because of the fungibility of money, “giving support intended to aid an organization’s peaceful activities frees up resources that can be used for terrorist acts.”²⁴⁷

In *Strauss v. Credit Lyonnais*,²⁴⁸ a case based on similar facts brought against Credit Lyonnais by the same plaintiffs that sued NatWest in *Weiss*, the Court suggested that:

Because money is fungible, it is not generally possible to say that a particular dollar caused a particular act or paid for a particular gun. If plaintiffs were required to make such a showing, 2333(a) enforcement would be [so] difficult that the stated purpose would be eviscerated. Rather, where the provision of funds to a terrorist organization is a substantial factor in carrying out terrorist acts, it is thus the proximate cause of the terrorist attacks engaged in the organization.²⁴⁹

In *re Chiquita Brands*,²⁵⁰ the Court cited the standards established in *Weiss* and *Strauss* with approval.²⁵¹ In that case, US citizens and the relatives of deceased US citizens who were kidnapped, held hostage, and murdered by the Colombian guerrilla organization known as Fuerzas Armadas Revolucionarias de Colombia (FARC), sued Chiquita for making numerous and substantial secret payments to FARC, and for providing FARC with weapons, ammunition and other supplies. The Court rejected the argument that the assistance allegedly provided to FARC by Chiquita was not substantial because of FARC’s vast resources. According to the Court:

Plaintiffs have alleged sufficient facts from which a reasonable trier of fact could conclude that Chiquita’s actions of providing material support to FARC would fund some of FARC’s terrorist activities, including the kidnappings and murders of Americans. Thus, Plaintiffs have sufficiently alleged proximate causation.²⁵²

How substantial do individual financial contributions need to be in order to result in liability? Judge Wood suggested in her dissenting opinion in *Boim III* that it would be necessary to demonstrate that the defendant’s “actions amounted to at least a sufficient cause of the terrorist act that killed David Boim, even if, on these facts, there were multiple such causes.”²⁵³ According to her, this would require a showing that the defendant donated to Hamas “an amount that would have been sufficient to finance the shooting at the Beit El bus

246. *Id.* (quoting Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. 104-32, § 301(a)(7), 110 Stat. 1214, 1247 (1996)).

247. *Id.* at 631-632 (quoting Humanitarian Law Project v. Reno, 205 F.3d 1130, 1136 (9th Cir. 2000)); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 585 (E.D.N.Y. 2005).

248. *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704 (E.D.N.Y. October 5, 2006).

249. *Id.* at 18.

250. *In re Chiquita Brands Int’l, Inc. Alien Tort Statute & S’holder Derivative Litig.*, 792 F. Supp. 2d 1301 (S.D. Fla. 2011).

251. *Id.* at 1313-14.

252. *Id.* at 1312.

253. *Boim v. Holy Land Found. for Relief and Dev’t (“Boim III”)*, 549 F. 3d 685, 723 (7th Cir. 2008).

stop.”²⁵⁴ Where a finding of causation is based on the danger of harm created by a collective action, plaintiffs would need to show that each act was in itself substantial enough to have had the potential of causing the harm on its own. This approach was questioned in *In re Terrorist Attacks on September 11*:

Al Qaeda’s ability to accomplish the coordinated large-scale terrorist attacks of September 11th is dependent on the cumulative efforts and contributions of untold thousands over an extended period of time. The commingling of funds and services, and the fungible nature of money itself, essentially renders it impossible to identify the specific material support, (much less the original source thereof), that enabled al Qaeda to commit a particular terrorist attack. Individually, the financial or other material support provided by a particular person or entity may be of insignificant value. Yet, it is the collective contributions of all such sponsors that gives birth to a repository of seemingly endless financial, military, and logistical resources, from which the terrorist organization draws upon with impunity to carry out its violent attacks against innocent civilians. Such a reality bears directly on the issues of temporal and causal proximity.²⁵⁵

Thus, because the relevant consideration is the creation of danger through collective action, it is enough that the total of the donations is sufficiently substantial to cause the harm, although, as will often be the case with financial donations, the risk does not stem from coordinated acts, but rather from the cumulative effect of individual contributions.

In all of these cases, the courts acknowledged the same problem that the Court in *South African Apartheid Litigation* struggled with: the fungible nature of money makes it difficult, if not in most cases impossible, to link a specific financial contribution to a particular violation committed. However, in the terrorism context, this led the courts to adopt a broad “substantial factor” approach to proximate cause,²⁵⁶ instead of concluding that the link between money and violations is always too remote to result in liability.²⁵⁷ For an act of funding to be regarded as the proximate cause of an act of terrorism, they did not require a demonstrable causal link between the money and the specific attack suffered by the plaintiffs.²⁵⁸

In the terrorism context, the courts find it sufficient to show that the supply of money is a substantial factor in the commission of terrorist offenses by the recipient group.²⁵⁹ It does not matter how the group used the defendant’s money,

254. *Id.* at 724.

255. *In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 492-93 (S.D.N.Y. 2010).

256. *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at *17 (E.D.N.Y. October 5, 2006).

257. *See, e.g.*, *Rothstein v. UBS AG*, 647 F. Supp. 2d 292, 295 (S.D.N.Y. 2009); *Wultz v. Iran*, 755 F. Supp. 2d 1, 53 (D.D.C. 2010); for a discussion see *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 632-33, 646 (S.D. Tex. 2011).

258. *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 429-30 (E.D.N.Y. 2009); *Weiss v. Nat’l Westminster Bank PLC*, 453 F. Supp. 2d 609, 632 (E.D.N.Y. 2006).

259. *In re Terrorist Attacks*, 718 F. Supp. 2d at 492-93.

or that the group may not have needed the defendant's money to carry out its offenses.²⁶⁰ Although the courts insist on the need to show proximate causation, they seem prepared to assume that money plays a substantial role in the commission of terrorist attacks, rather than requiring that this be proved in each case.²⁶¹ This approach seems to reflect the Supreme Court's view in *Humanitarian Law Project* that there is a significant likelihood that material support in the form of funding furthers terrorism because of its fungible nature and its potential to free up "other resources within the organization that may be put to violent ends."²⁶²

Liability standards thus seem fairly broad in the terrorism context, but they are not without limits. In some of the civil cases on liability for funding terrorism filed under the ATA, courts held that no proximate causal link existed between the funding and the terrorist attacks that harmed the plaintiffs. In *Rothstein v UBS*,²⁶³ for example, victims and families of victims of terrorist attacks committed by Hamas and Hezbollah in Israel sued UBS. They alleged that the bank assisted the Government of Iran in financially supporting Hamas and Hezbollah by transferring US currency to Iran. The Court summarized the plaintiff's case against UBS as follows:

The Iranian government is a recognized sponsor of terrorism and has funded and supported Hamas, Hezbollah, and other Palestinian terrorist organizations; . . . these terrorist organizations require US cash dollars to carry out their activities; and . . . UBS's involvement in banknote transactions with Iranian counterparties had the effect of providing US cash dollars to the Iranian government, which, in turn, supplied the aforementioned terrorist organizations with US cash dollars that were used to facilitate terrorist acts.²⁶⁴

The Court rejected the claim that UBS had thereby indirectly facilitated the harm suffered by the victims at the hands of the terrorist groups, finding that:

Plaintiffs . . . must at a minimum allege facts that show a proximate causal relationship between UBS's transfers of funds to Iran and Hamas' and Hezbollah's commission of the terrorist acts that caused plaintiffs' injuries. This they have entirely failed to do. Among many other deficiencies in the causal chain, the First Amended Complaint . . . does not allege that UBS is a primary or even relatively significant source of US banknotes for the Iranian government . . . Further still, there are no specific allegations showing that the terrorist groups here in question raise their funds from monies transferred from Iran.²⁶⁵

The Court distinguished *Strauss v. Credit Lyonnais*²⁶⁶ and *Linde v. Arab*

260. *In re Chiquita Brands Int'l, Inc. Alien Tort Statute Derivative Litigation*, 690 F. Supp. 2d 1296, 1314-15 (S.D. Fla. 2010); *Wultz*, 755 F. Supp. 2d at 6.

261. *Weiss*, 453 F. Supp. 2d at 631-32.

262. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725 (2010).

263. *Rothstein v. UBS AG*, 647 F. Supp. 2d 292 (S.D.N.Y. 2009).

264. *Id.* at 293.

265. *Id.* at 294.

266. *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704 (E.D.N.Y. October 5, 2006).

*Bank*²⁶⁷ on the basis that in those two cases, the plaintiffs had suggested a “direct involvement between the defendant banks and the terrorist organizations or “fronts” those organizations directly controlled,”²⁶⁸ while no such direct relationship was alleged in *Rothstein*.²⁶⁹ Thus, not only was the impact of the supply of US currency to the Iranian government on the terrorist acts insufficiently demonstrated, but the link between the defendants and the terrorists was regarded as too tenuous to result in liability.²⁷⁰

The causation standards thus far discussed all stem from litigation under the ATA. However, some of the cases dealing with liability for funding terrorism brought claims under the ATCA. In *Almog v. Arab Bank*,²⁷¹ when analyzing whether Arab Bank’s conduct had a substantial effect on the international law violations carried out by the terrorists, the Court found that plaintiffs had sufficiently alleged that “their injuries were caused by suicide bombings or other attacks perpetrated by the terrorist organizations to which Arab Bank provided banking services.”²⁷² However, the plaintiffs would “have to prove that the Bank provided these services to the particular group responsible for the attacks giving rise to their injuries.”²⁷³ Arab Bank went beyond providing financial services, as it played an active role in the implementation of the benefit plan. The Court nevertheless specifically stated that substantial effect was sufficiently alleged under both theories of the plaintiffs,²⁷⁴ and the first liability theory was based only on the provision of financial services.²⁷⁵ This case suggests that the mere provision of financial services could in itself result in complicity liability under the ATCA, as long as it substantially assisted terrorism. This presupposes that financial services can facilitate terrorist acts.

The decision applies standards similar to those derived from litigation under the ATA in the context of aiding and abetting liability under the ATCA. Liability requires a link between the defendant’s act of assistance and the

267. *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571 (E.D.N.Y. 2005).

268. *Rothstein*, 647 F. Supp. 2d at 294.

269. *Id.*

270. *Rothstein* was cited with approval in *Wultz v. Iran*, 755 F. Supp. 2d 1, 22 (D.D.C. 2010) (stressing the decisive nature of the fact that money had allegedly been transferred directly by the Bank of China to accounts held on behalf of the Palestinian Islamic Jihad).

271. *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257 (E.D.N.Y. 2007).

272. *Id.* at 291.

273. *Id.*; *See also Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 585 (E.D.N.Y. 2005) (similar claim discussed under the ATA).

274. *Almog*, 471 F. Supp. 2d at 291 (“Plaintiffs’ allegations with respect to the substantial effect of Arab Bank’s conduct in bringing about the underlying violations of a norm of international law are also sufficient under both factual theories”).

275. *Id.* at 290 (“plaintiffs’ first factual theory focuses on Arab Bank’s knowing provision of banking services, including the maintenance of accounts, for HAMAS and other terrorist organizations, terrorist front organizations, and individual supporters of terrorist organizations”).

organization to which the financial services were provided, but not between the service and the specific violation that was carried out. This stands in stark contrast to the approach adopted in *South African Apartheid Litigation*, but it needs to be taken into account that the Court in *Almog* was influenced by the fact that the acts of complicity occurred in the context of terrorism. The Court stressed that its approach was:

supported by the fact that Arab Bank's alleged conduct is exactly the type of conduct that the applicable Conventions and related US laws are aimed at preventing. Both the Conventions and the ATA highlight the enabling nature of such conduct in bringing about the underlying violations of international law.²⁷⁶

Indeed, in all of the cases discussed above, the adoption of a broad "substantial factor" approach to proximate cause in order to overcome the causation problems due to the fungibility of money was clearly driven by the consideration that a higher standard of causation would undermine the objective to cut off all funding for terrorist organizations.

C. Funding of Organizations with Multiple Purposes

One aspect of funding regimes that commit gross human rights violations is that however bad their human rights record, or however corrupt, regimes use funds to carry out a multitude of functions. The fungibility of money might then have a different impact than in the context of funds donated to terrorist organizations, as it might be more difficult to infer routinely that the funds made available to a government will go towards the realization of goals that are prohibited by international law. Comparable problems arose in some of the cases on terrorism financing to organizations that carry out charitable functions, or cases on financing regimes deemed to be state sponsors of terrorism.

In *Boim III*,²⁷⁷ the Court addressed the liability of financiers who fund organizations that engage in both terrorist and social welfare services. The case involved financial donations made to Hamas, an organization that undertakes terrorist activities as well as social welfare services and charitable work.²⁷⁸ The majority in *Boim III* was unequivocal in holding that directing support exclusively towards the non-violent activities of the organization did not excuse complicity liability.²⁷⁹ The Court reasoned that the fungibility of money made it possible for Hamas to receive a donation of money earmarked for social services and then transfer an amount equal to the donation from its social services "account" to its terrorism "account."²⁸⁰ Additionally, the Court opined that

276. *Id.* at 293.

277. *Boim v. Holy Land Found. for Relief and Dev't ("Boim III")*, 549 F. 3d 685 (7th Cir. 2008).

278. *Id.* at 698.

279. *Id.* at 698-99.

280. *Id.*

Hamas' social welfare activities indirectly reinforced its terrorist activities by enhancing Hamas's popularity among the Palestinian population and funding schools that indoctrinate children.²⁸¹ This led to the far-reaching conclusion that anyone who knowingly contributes to an organization that engages in terrorism is knowingly contributing to the organization's terrorist activities, even if the money was explicitly dedicated to supporting its charitable work.²⁸²

In *Holder v. Humanitarian Law Project*, the US Supreme Court endorsed this view in holding that, "Money is fungible, and '[w]hen foreign terrorist organizations that have a dual structure raise funds, they highlight the civilian and humanitarian ends to which such moneys could be put.' . . . [but] '[f]unds raised ostensibly for charitable purposes have in the past been redirected by some terrorist groups to fund the purchase of arms and explosives.'"²⁸³

Despite the existence of such a danger, it is doubtful that this reasoning provides sufficient justification for dispensing with any proximate cause requirement in civil litigation and for holding each donor indiscriminately liable for terrorist acts. In his dissent, Judge Rovner rightly criticized the majority's approach to causation by emphasizing that it does not leave room to distinguish individuals who purposely fund terrorism from those who are further removed and whose donation has "at most, an indirect, uncertain, and unintended effect on terrorist activity."²⁸⁴ He argued instead that the degree of responsibility of funders should depend on who money was being donated to and for what purposes. In this respect, he distinguished several scenarios, explaining:

If indeed the defendants were directing money into a central Hamas fund out of which all Hamas expenses—whether for humanitarian or terrorist activities—were paid, it would be easy to see that the defendants were supporting Hamas's terrorism even if their contributions were earmarked for charity. In fact, the case is not as simple as that. For example, much of the money that defendant HLF provided to Hamas apparently was directed not to Hamas per se but to a variety of zakat committees and other charitable entities, including a hospital in Gaza, that were controlled by Hamas. . . . if the zakat committees and other recipients of HLF's funding were mere fronts for Hamas or were used to launder donations targeted for Hamas generally, then those donations ought to be treated as if they were direct donations to Hamas itself. But to the extent that these Hamas subsidiary organizations actually were engaged solely in humanitarian work and HLF was sending its money to those subsidiaries to support that work, HLF is one or more significant steps removed from the direct financing of terrorism and the case for HLF's liability for terrorism is, in my view, a much less compelling one. Defendant AMS is yet another step removed, in that AMS is alleged to have contributed money not to Hamas but to HLF²⁸⁵

281. *Id.*

282. *Id.*

283. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725-26 (2010).

284. *Boim v. Holy Land Found. for Relief and Dev't* ("Boim III"), 549 F.3d 685, 705 (7th Cir. 2008).

285. *Id.* at 706.

Judge Rovner accepted that donations to Hamas's humanitarian activities make other funds available for terrorism and provide cover to enhance Hamas's image.²⁸⁶ However, he contested that someone who makes donations to Hamas's charitable subsidiaries automatically provides material support to Hamas's terrorist acts. Instead, "the donor must at least know that the financial or other support he lends to Hamas *will be used* to commit terrorist acts."²⁸⁷ Rejecting a general rule in favor of liability for any funding that might find its way to a terrorist organization, he stressed the importance of determining a sufficiently close link between the funding and the terrorist acts for which the funders are being held liable.²⁸⁸

Establishing such a link would require distinguishing between financial support provided to a terrorist organization directly from financial support provided to a charitable entity controlled by that organization, or an intermediary organization.²⁸⁹ In the first scenario, the funder is sufficiently close to the terrorist organization to be held liable for terrorist acts, whereas in the latter situations deciding proximity would require a detailed examination.²⁹⁰ While it is not necessary to link donations or other support to a specific terrorist act, Judge Rovner suggested that it needs to be proved that the support the defendants were alleged to have given Hamas were a cause of Hamas's terrorism²⁹¹ and could be linked to the specific terrorist acts carried out by Hamas against the plaintiffs. Expert evidence by someone "familiar with Hamas's financial structure, or with the financing of terrorism generally"²⁹² is necessary to link the various types of support provided to Hamas, including donations to its humanitarian activities, with its terrorist acts. He argued that:

Where it is open to question, as I believe it is, whether even humanitarian support given to Hamas, to its charitable subsidiary, or to a hospital or other institution that receives funding from Hamas, actually contributes to Hamas's terrorist activities, it should be left to fact finding in individual cases . . . to evaluate, based on the evidence presented in those cases, what types of support to Hamas and its affiliated entities actually cause terrorism.²⁹³

The further removed the financier is from the organization carrying out the terrorist act, the more thorough this analysis has to be.²⁹⁴ Judge Wood equally cautioned in her dissent that a showing of proximate cause was essential to decide "how far down the chain of affiliates, in this shadowy world, the statute

286. *Id.* at 708.

287. *Id.* at 709.

288. *Id.*

289. *Id.* at 706.

290. *Id.*

291. *Id.* at 710.

292. *Id.*

293. *Id.*

294. *Id.*

was designed to reach, and how deeply Hamas must be embedded in the recipient organization.”²⁹⁵

To summarize, it seems as if a consensus existed in *Boim III* that where funding was provided directly to Hamas, a causal link between the funding and the terrorist acts carried out by that organization would be assumed, though Judge Wood warns that the donation should be sufficiently substantial to have furthered the terrorist activities.²⁹⁶ The main distinction between the majority and the dissenting opinions focuses on evaluating cases in which donations only indirectly benefit Hamas. While the majority assumes liability even then, the minority requires a thorough analysis of a causal link and the relevant *mens rea* in order to hold a donor liable for terrorist activities.

In *Abecassis v. Wyatt*,²⁹⁷ the Court highlighted that the majority approach in *Boim III* could potentially lead to almost limitless liability, by raising the following hypothetical questions:

Could [liability] extend to a man in St. Louis who lacks significant understanding of the OFP or Hussein’s funding of terrorism but who is generally aware that Hamas is a Palestinian terrorist group that targets Israelis, and who fills his car with gasoline that the service station had purchased from a refining company that had purchased it from another company that had paid kickbacks to Hussein to receive its allocation of Iraqi oil?²⁹⁸

While the Court in *Abecassis* appreciated that such far-reaching liability was not intended by the *Boim III* majority, it nevertheless pointed out that by removing causation and requiring no more than a *mens rea* of awareness that the final recipient of the funds was a terrorist organization, the principles developed in *Boim III* left the limits of liability wide open.²⁹⁹

The *Abecassis* situation is distinguishable from *Boim III* because the payments at issue were made to a regime, not to a terrorist organization.³⁰⁰ In this case, the defendants, companies, and individuals involved in the oil business purchased oil from Iraq either directly from Hussein’s government or through third parties that purchased from Hussein’s government in violation of the United Nations Oil for Food Program (OFP).³⁰¹ The plaintiffs allege that the oil purchased from Iraq included payments in the form of illegal kickbacks to Hussein through secret bank accounts in Jordan.³⁰² These bank accounts allegedly funded reward payments to families of suicide bombers killed while carrying out terrorist attacks. According to the plaintiffs, such payments were

295. *Id.* at 724.

296. *Id.*

297. *Abecassis v. Wyatt*, 704 F. Supp. 2d 623 (S.D. Tex. 2010).

298. *Id.* at 664.

299. *Id.*

300. *Id.* at 627.

301. *Id.*

302. *Id.*

important to recruiting terrorists.³⁰³

Given that the plaintiffs did not suggest that Hussein himself had carried out the terrorist attacks of which they were the victims, the Court held that to succeed with their claim, they would have had to allege, “at a minimum, that each defendant knew that the oil it was buying through the OFP was tied to a kickback to Hussein and that Hussein was using OFP kickback money to fund terrorism that targeted American nationals.”³⁰⁴

The Court found that the plaintiffs’ inferences were too speculative.³⁰⁵ No factual allegation was presented that the money illegally given to Hussein was paid to the family of terrorists.³⁰⁶ The kickback could have had multiple uses other than promoting terrorist attacks against the plaintiffs.³⁰⁷ In fact, one of the news articles cited in the plaintiffs’ complaint states that Hussein used the money to “rearm his troops and sustain the luxury that he and his supporters enjoy.”³⁰⁸

Thus, where the recipient of funds was not directly engaged in the terrorist attacks, the Court required a showing that the money of the defendants, or at least money stemming from the fund into which the defendants had made their payments, found its way to the organization that committed the terrorist attack that harmed the plaintiffs.³⁰⁹ The Court was not prepared to infer from the fungibility of money that any payment to a third party who supports a terrorist organization renders the funder liable on the basis that his or her money freed up funds the third party could then use to support the terrorist organization.

In 2011, the Court rendered a new decision based on an amended complaint in which the plaintiffs specified their allegations by introducing additional newspaper articles from the relevant period, suggesting that Hussein made reward payments to the families of Palestinian martyrs and generally supported terrorist attacks against Israel.³¹⁰ The Court held that the allegations of the kickback scheme, the evidence of Hussein’s use of funds to pay families of suicide bombers, and the evidence that such payments were well-known “create a high likelihood” that the money made available to Hussein would be used to promote terrorist attacks.³¹¹ The Court reasoned that:

Because money is fungible, even if Hussein had not used the funds given to him by the defendants for terrorism, the use of the kickbacks for a different purpose would have freed money otherwise needed for that purpose and made it available

303. *Id.*

304. *Id.* at 665.

305. *Id.* at 644.

306. *Id.*

307. *Id.*

308. *Id.*

309. *Id.*

310. *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 623 (S.D. Tex. 2011).

311. *Id.* at 647-48.

for terrorist activities. . . . like giving a loaded gun to a child, or giving money to Hamas, giving money to a state sponsor of terrorism in knowing violation of strict rules set for transacting business with that country is an act dangerous to human life.³¹²

This change in approach was relied on heavily in *Humanitarian Law Project*³¹³ and *Boim III*.³¹⁴ Unlike those two cases, however, the Court in *Abecassis* adopted a proximate cause requirement. Even though it was acknowledged that the link between the plaintiffs' injuries and the defendants was tenuous, it was nevertheless regarded as sufficient.

In the context of its proximate cause analysis, the Court considered the implications of the fact that the money had been made available to a government rather than a terrorist organization.³¹⁵ In its previous decision, the Court had emphasized the fact that the Hussein regime could not be compared to the front organizations in *Boim III* that were accused of funneling money to Hamas, because Iraq was a "recognized sovereign nation with a variety of responsibilities and pursuing a variety of interests, with whom American and other companies were encouraged to do business, with restrictions."³¹⁶ This seems to suggest that because states carry out a multitude of legitimate functions, even with state sponsors of terrorism, it cannot be assumed that they will use all available funds to finance terrorism. How a sovereign state decides to use its finances might break the chain of causation between the defendant and the terrorist attacks. In the second *Abecassis* decision, the Court returned to the question of differences:

[There are] differences between paying money to a state sponsor of terrorism and paying money to a foreign terrorist organization. Iraq under Hussein was not the same as Hamas or the terrorist organizations in *Humanitarian Law Project* who were "so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct." Money provided to Iraq was not tainted in the same way as money provided to a designated foreign terrorist organization. Oil companies were permitted and even encouraged to do business with Iraq. But they were restricted to doing so within the bounds of the OFP. The allegations are that the defendants all knowingly bypassed the strict rules of the OFP by agreeing to pay the kickbacks described. The purpose of these kickbacks was clearly to provide money to Hussein for unlimited discretionary use rather than the very limited humanitarian uses permitted for money paid to the OFP escrow account. Given the expanded allegations about Hussein's publicly stated dedication to, and involvement in, attacks on Israel, it was foreseeable that if given off-book money, Hussein would use at least some of it to support terrorist attacks in that country intended and likely to target Americans.³¹⁷

312. *Id.* at 647.

313. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2725-26 (2010).

314. *Boim v. Holy Land Found. for Relief and Dev't* ("Boim III"), 549 F. 3d 685 (7th Cir. 2008).

315. *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 649 (S.D. Tex. 2011).

316. *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 666 (S.D. Tex. 2010).

317. *Abecassis*, 785 F. Supp. 2d at 649.

The Court thus put some limits on the analogy with the views promoted in *Humanitarian Law Project* and *Boim III* regarding the fungibility of money and the resulting “freeing up [of] funds” theory in the context of money made available to state sponsors of terrorism. Giving funds to a state sponsor of terrorism only seems to give rise to far-reaching assumption of liability if the money was paid in violation of an existing sanction system. This decision aligns with that in *Rothstein*, another case in which money was given to a state sponsor of terrorism. In this case, Iran, rather than to a terrorist organization directly, and the Court reasoned that restrictions on supporting terrorist organizations did not equally apply to state sponsors of terrorism, because:

“Congressional policy determinations are likely to be quite different with respect to the two entities, as reflected by the fact that 50 U.S.C.App. [section] 2405(j)(1) permits certain transactions with state sponsors of terrorism as long as a valid license is obtained.”³¹⁸

Consequently, not every financial loan or donation to a regime, even one that is regarded as a state sponsor of terrorism, will result in liability for terrorist acts financially supported by that regime. Since regimes might pursue a multitude of purposes, many of which are legitimate, there might be good cause to make money available to them. The all-encompassing prohibition of providing financial support to terrorist organizations and the approach to civil liability of funders of terrorism cannot be easily transferred to states. Rather, such far-reaching liability is only triggered by a violation of specific regulations, restrictions or sanctions that were put in place precisely to avoid making funds available to those states outside of confined and strictly controlled circumstances.

While the Court in *Abecassis* mentioned this only in passing, the change in approach might have been triggered in part by the fact that the amended complaint alleged a violation of Section 2332D, which makes it an offense to engage in financial transactions with a country that is designated as a state sponsor of terrorism outside of existing regulations.

V.

CONSEQUENCES FOR COMPLICITY LIABILITY FOR FINANCING GROSS HUMAN RIGHTS VIOLATIONS

Turning to the context of funding regimes that commit gross human rights violations, where should courts draw the line between acceptable business practices and activities that make the corporation complicit in these violations? It is clear that merely doing business with regimes does not result in complicity liability.³¹⁹ Nor does assisting a regime reflexively equate with facilitating the

318. *Rothstein v. UBS AG*, 772 F. Supp. 2d 511, 516 (S.D.N.Y. 2011).

319. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009).

violations it carries out.³²⁰ Formulated differently, commercial activities, without more, do not give rise to aiding and abetting liability.³²¹ In the context of ATCA cases for complicity liability, these principles have been understood by some courts to mean that commercial loans are not close enough to the violations committed, and their impact is not direct enough, to satisfy the *actus reus* of aiding and abetting liability in the form of practical assistance that has a substantial effect on the occurring abuses. Thus, the Court in *South African Apartheid Litigation* held that commercial loans and other routine banking services do not result in complicity liability.³²²

In the context of funding terrorism, on the other hand, the courts refused to exempt routine banking services *per se* from liability.³²³ In *Almog*, the Court reached such a conclusion applying the ATCA,³²⁴ which suggests that the provision of funds can satisfy the *actus reus* of aiding and abetting liability under the ATCA and thus might have a substantial effect on the gross international law violations carried out by the recipients.³²⁵ It moreover indicates that no reasons inherent in the cause of action under the ATCA point towards a general exclusion of funding from such liability. This means that when determining actions under the ATCA for complicity liability of lenders to regimes that commit gross human rights violations, nothing would prevent the courts from regarding the provision of funding, including routine commercial funding, as meeting the *actus reus* requirement of complicity liability where its substantial effect on the commission of these offences can be shown in the individual case.

This is also in line with US case law on complicity liability for the provision of commercial goods and services other than funding, both in the

320. *Id.*; see also *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 Civ. 7955 (GEL), 2008 WL 4378443, at *4 (S.D.N.Y. Sept. 25, 2008).

321. *Doe v. Nestle, S.A.*, 748 F. Supp. 2d 1057, 1090 (C.D. Cal. 2010).

322. *In re South African Apartheid*, 617 F. Supp. 2d at 269; *Nestle*, 748 F. Supp. 2d at 1099.

323. *In re Terrorist Attacks on September 11, 2011*, 349 F. Supp. 2d 765, 832-34 (S.D.N.Y. 2005); *In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 489 (S.D.N.Y. 2010); *Linde v. Arab Bank, PLC*, 384 F. Supp. 2d 571, 588 (E.D.N.Y. 2005); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 291 (E.D.N.Y. 2007); *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609, 625 (E.D.N.Y. 2006); *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at *12 (E.D.N.Y. October 5, 2006). However, some courts suggested that such services did not meet the "substantial assistance" requirements of aiding and abetting liability; see *Strauss*, 2006 WL 2862704 at *9; *Weiss*, 453 F. Supp. 2d at 621; *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 425 (E.D.N.Y. 2009). For a critical discussion of this approach see *supra* section IV(A).

324. *Almog*, 471 F. Supp. 2d at 291 ("Arab Bank ignores that acts which in themselves may be benign, if done for a benign purpose, may be actionable if done with the knowledge that they are supporting unlawful acts").

325. Another case where aiding and abetting liability for the provision of funding was not excluded *per se* in an action under the ATCA is that of *Mastafa*, 2008 WL 4378443, will be discussed *infra* in this section.

context of litigation under the ATCA³²⁶ and that of criminal aiding and abetting and conspiracy cases.³²⁷ Such cases equally suggest that the commercial nature of a transaction does not in itself result in an exemption from liability.

The courts either explicitly argued that the routine/commercial nature of the transactions was significant primarily when examining the defendant's *mens rea*, because routine transactions might raise less ground for suspicion with regard to the harmful use of the funds provided,³²⁸ or implied such a conclusion.³²⁹ At the same time, they rejected the view that the routine nature of these services means that they do not substantially further terrorism or the commission of other offenses.³³⁰

South African Apartheid Litigation clearly adopts a different approach in exempting the providers of commercial services, including loans, from complicity liability unless they were the direct means through which the principal offense was carried out.³³¹ To the extent that this approach might be explained by the Court's reliance on the *Ministries* case as the decisive authority on this matter, this case provides a weak basis for exempting the providers of

326. *Corrie v. Caterpillar, Inc.*, 403 F. Supp. 2d 1019, 1027 (W.D. Wash. 2005), *aff'd on other grounds*, 503 F.3d 974, 977 (9th Cir. 2007).

327. *See, e.g.*, *Direct Sales Co. v. United States*, 319 U.S. 703, 709-712 (1943); *United States v. Blankenship*, 970 F.2d 283, 285-86 (7th Cir. 1992); *United States v. Pino-Pérez*, 870 F.2d 1230, 1235 (7th Cir. 1989).

328. *Direct Sales Co.*, 319 US at 711 ("The difference between sugar, cans, and other articles of normal trade, on the one hand, and narcotic drugs, machine guns and such restricted commodities, on the other, arising from the latter's inherent capacity for harm and from the very fact they are restricted, makes a difference in the quantity of proof required to show knowledge that the buyer will utilize the article unlawfully. Additional facts, such as quantity sales, high pressure sales methods, abnormal increases in the size of the buyer's purchases, etc., which would be wholly innocuous or not more than ground for suspicion in relation to unrestricted goods, may furnish conclusive evidence, in respect to restricted articles, that the seller knows the buyer has an illegal object and enterprise"); *Pino-Pérez*, 870 F.2d at 1235 ("One who sells a small-or for that matter a large-quantity of drugs to a kingpin is not by virtue of the sale alone an aider and abettor. It depends on what he knows and what he wants"); *Weiss*, 453 F. Supp. 2d at 625 ("In holding that there could be no liability on the basis of 'routine banking business' that court did not mean that the provision of basic banking services could never give rise to bank liability. Rather the court relied on the routine nature of the banking services to conclude that the defendant bank had no knowledge of the client's terrorist activities").

329. *Almog*, 471 F. Supp. 2d at 291 ("Given plaintiffs' allegations regarding the knowing and intentional nature of the Bank's activities, there is nothing 'routine' about the services the Bank is alleged to have provided"); *Corrie*, 403 F. Supp. 2d 1019, 1027, *aff'd on other grounds*, 503 F.3d at 977 ("[o]ne who merely sells goods to a buyer is not an aider and abettor of crimes that the buyer might commit, even if the seller knows that the buyer is likely to use the goods unlawfully, because the seller does not share the specific intent to further the buyer's venture"); *In re Terrorist Attacks on September 11, 2011*, 349 F. Supp. 2d 765, 834 (S.D.N.Y. 2005) ("there can be no bank liability for injuries caused by money routinely passing through the bank. Saudi American Bank is not alleged to have known that anything relating to terrorism was occurring through the services it provided").

330. *See* discussion *supra* sections II(C)(5) and III(A).

331. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 259, 264-69 (S.D.N.Y. 2009).

commercial loans from all potential civil complicity liability.³³² Indeed, just as in the US cases in the areas of funding terrorism and criminal complicity on the basis of commercial transactions, Nuremberg case law suggests that the commercial nature of a transaction is primarily relevant in the context of a *mens rea* analysis.³³³ Moreover, it does not exclude commercial loans as such from complicity liability.³³⁴

Consequently, complicity liability should not generally exempt all commercial loans. Instead, it should depend on a thorough analysis of both the *actus reus* and the *mens rea* in every case in which such liability is alleged. An approach that does not exempt *per se* any activities or transactions from liability avoids the consequence that lenders are *ex ante* freed from all complicity liability, and therefore provides legal incentive to employ due diligence in assessing the potential impact their loans might have on gross human rights violations.

Such an exemption would be particularly objectionable in light of the main lesson learned from the funding of terrorism cases, i.e., that money, far from always being harmless, can be a particularly dangerous commodity. While money is neutral in itself, it is an essential prerequisite for an indefinite range of activities that could and would not take place without it. The effect of money, whether beneficial or harmful, does not depend on its inherent quality, but rather on how it is being used by those who receive it.³³⁵ This, however, is also true for other goods, including those that are considered to be inherently harmful. Even with a product such as the poison gas Zyklon B, the direct and primary cause of resulting harm is its use for detrimental purposes, not the provision of gas by itself. The main difference with money is that an additional act must take place for the harmful result to occur, such as purchasing of the means through which the violations can be carried out. However, this does not mean that, for example, financing the purchase of Zyklon B could not be as essential for the killings carried out with this gas than the purchase of the gas itself. That the link is more direct and obvious in the latter case does not mean that it can therefore not also be substantial in the former.

332. See discussion *supra* sections III(A) and III(E)(1).

333. United States v. Von Weizsacker (“The Ministries Case”), 14 TRIALS OF WAR CRIMINALS BEFORE THE ERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 853-54 (Nuernberg Military Tribs. 1950) (“even if it were assumed that the defendant Rasche took or played a decisive role in the granting of said applications for loans to the SS it would be difficult to find him guilty of participation in the slave-labor program on that account. The evidence adduced by the prosecution to show knowledge on the part of Rasche as to what was taking place in the SS enterprises with respect to labor is very unconvincing”). See further discussion *supra* section III(E)(1).

334. See discussion *supra* section III(E)(1). In this respect, the acquittal of Rasche under count five, on which the court in the South Africa case primarily relied, is an exception rather than representative of Nuremberg case law on this issue.

335. Rita Roca & Francesca Manta, *Values Added, The Challenge of Integrating Human Rights into the Financial Sector* (The Danish Institute for Human Rights), 2010, at 6.

If a case-by-case analysis is required, this raises the question of what link between the money and the violations is necessary for a finding of liability. Here a close look at the case law on funding terrorism might be helpful, as courts have in that context grappled with the issue in depth. Clearly, analogies between funding terrorism and funding gross human rights violations must be approached with caution, given that the legal status of terrorist organizations is not the same as that of a sovereign state. However, both scenarios also have similarities, as they deal with the impact of financial assistance, including routine commercial banking services, on serious crimes committed by their recipients.

The majority of courts in the terrorism cases analyzed above require a showing of proximate cause demonstrating that the funds were a substantial factor in the resulting terrorist activities and that the resulting harm was a reasonably foreseeable consequence of the funding. However, plaintiffs are not required to show that without the particular funding, the acts could not have been carried out.³³⁶ This seems to coincide nicely with the *actus reus* and causation standards accepted *South African Apartheid Litigation*, (i.e., the requirement of an act of practical assistance that needs to have a substantial effect on the commission of the violation, without necessarily being a *conditio sine qua non*).³³⁷

Nevertheless, Judge Scheindlin deduced from the nature and fungibility of money that loans can never be sufficiently close to the violations to result in complicity liability of the commercial lender,³³⁸ while in the context of funding terrorism, the courts draw the opposite conclusion.³³⁹ This difference might be explained by the fact that even where cases on funding terrorism were argued and decided under the ATCA rather than the ATA, the courts emphasized that their approaches to the standards of liability were influenced by the policy decisions expressed in relevant international instruments as well as the ATA.³⁴⁰ Liability standards are therefore defined broadly in the terrorism context to give effect to specific legislative and policy decisions.³⁴¹

Treaties such as the International Convention for the Suppression of the Financing of Terrorism—which reflect the conviction that money is not always neutral and thus might be a particularly dangerous commodity—do not exist

336. See, e.g., *Goldberg v. UBS AG*, 660 F. Supp. 2d 410, 429 (E.D.N.Y. 2009). See also discussion *supra* section IV(B).

337. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257-58 (S.D.N.Y. 2009).

338. *Id.* at 269.

339. See, for example, *Boim v. Holy Land Found. for Relief and Dev't* (“Boim III”), 549 F. 3d 685, 691 (7th Cir. 2008); *Goldberg*, 660 F. Supp. 2d at 429; *In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 492-93 (S.D.N.Y. 2010); *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 649 (S.D. Tex. 2011).

340. *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 293 (E.D.N.Y. 2007).

341. See, e.g., *Strauss v. Credit Lyonnais, S.A.*, No. CV-06-0702 (CPS), 2006 WL 2862704, at *18 (E.D.N.Y. October 5, 2006); *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609, 631-32 (E.D.N.Y. 2006); *Goldberg*, 660 F. Supp. 2d at 429.

with regard to the financing of gross human rights violations. However, the absence of an international convention on this issue only means that states are under no international treaty obligation specifically to tackle the financing of gross human rights violations. It does not follow that funding directed towards such financing is therefore shielded from complicity liability.

The lack of a treaty and specific domestic legislation means, however, that unlike the terrorism cases, courts hearing claims in the area of financing gross human rights violations neither have to, nor can they, derive liability standards by relying on clearly defined policy decisions. Indeed, while the ATA expressly targets the provision of material support in the form of funds and other financial services, this is not the case in ATCA litigation for complicity in gross human rights violations. Courts are left to decide how to apply the general liability standards of the ATCA to cases of financing violations of the law of nations, and whether and to what extent to draw on the principles developed in the context of funding terrorism.

The similarities between the two situations could militate in favor of borrowing the liability standards from the terrorism context. Judge Posner's statement in *Boim III* concerning the significance of civil remedies against the financiers as an effective measure to "cut the terrorists' lifeline,"³⁴² for example, might equally apply to funders of gross human rights violations. This is emphasized by a powerful quote from the former South African Prime Minister John Voster, who stated that "each bank loan, each new investment is another brick in the wall of our continued existence."³⁴³ Indeed, many regimes that commit gross human rights violations depend on foreign funds in order to finance their policies, and sometimes even for their survival. In his *Study of the impact of foreign economic aid and assistance on respect for human rights in Chile*, Antonio Cassese remarked:

[I]n some cases, the flow of capital goods can help prop up the repressive system, by making it economically viable: in this way, the economic assistance becomes instrumental in maintaining and prolonging in time disregard for civil and political freedoms.³⁴⁴

Based on a thorough statistical analysis of the Chilean budget during the first years of the Pinochet dictatorship, Cassese concluded that an adverse effect on human rights might even arise in cases where the donor or lender gave financial assistance with the purpose of promoting the protection of human rights, as such assistance can free up other resources that the primary violator may then use to

342. *Boim III*, 549 F.3d at 691.

343. Complaint at 391, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) available at www.khulumani.net/attachments/259_Khulumani%20Complaint.pdf.

344. U.N. Comm'n on Human Rights, Sub-Comm'n on Prevention of Discrimination and Prot. of Minorities, Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile, 19-20, U.N. Doc. E/CN.4/Sub.2/412 (July 20, 1978).

prolong the repression.³⁴⁵

This shows that both the far-reaching effect of funding in general, and the problems raised by the fungibility of money in particular, are not unique to the context of terrorism.³⁴⁶ Rather, these also arise in the context of providing funds to states that commit gross human rights violations.³⁴⁷ Indeed, a bank lending money to a government usually cannot control the use of these funds any more than funders who earmark money to terrorist organizations for financing charitable projects. In both scenarios, the effects of monetary contributions on the commission of crimes need to be established in spite of the fungible nature of money.

Despite these similarities, a key difference between the terrorism cases and funding violating regimes is that the former are organizations with criminal purposes. As such, prohibitive action may be taken against them: Their assets can be frozen,³⁴⁸ membership is often criminalized,³⁴⁹ and in the United States they might be designated as foreign terrorist organizations.³⁵⁰ Thus, FTOs clearly stand outside of legal confines. Sovereign states, on the other hand, in principle receive the protection of international law, and the international community recognizes acts of the governments of sovereign states, even where these governments have come into power and/or govern their country by violating domestic law or the use of violence.³⁵¹ Moreover, even governments that regularly commit gross human rights violations tend to carry out a multitude of legitimate state functions. It is accordingly more facially suspect to interact with a known terrorist organization than to do business with a state. The former will often be unlawful in itself, while doing business with a rogue state is only unlawful under very narrow circumstances.³⁵²

However, the case of Hamas shows that the line between terrorist organizations and governments cannot always be drawn neatly. In some circumstances, terrorist organizations might assume what in other contexts would be a state function, e.g., the provision of social welfare services.³⁵³

345. *Id.* at 24. See also Isabel Letelier & Michael Moffitt, *Supporting Suppression: Multinational Banks in Chile*, RACE & CLASS, Oct. 1978, at 111.

346. *Boim III*, 549 F.3d at 698-699. See also Strauss, 2006 WL 2862704, at *18.

347. Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *supra* note 4 at 183-197; Juan Pablo Bohoslavsky & Mariana Rulli, *supra* note 4. For a similar discussion, on the question of odious debt, see SABINE MICHALOWSKI (2007), *supra* note 5 at 53-54.

348. See, e.g., S.C. Res. 1267, U.N. Doc. S/RES/1267 (Oct. 15, 1999); Council Regulation 881/2002, 2002 O.J. (L 139/9) (EC); Fin. Action Task Force, *International Best Practices – Freezing Terrorist Assets*, (Jun. 23, 2009), available at <http://www.fatf-gafi.org/dataoecd/30/43/34242709.pdf>.

349. This is not the case in the US, but in the U.K., see Terrorism Act 2000, § 11 (Eng.).

350. 8 U.S.C. § 1189(a) (2006).

351. ANTONIO CASSESE, INTERNATIONAL LAW 117-120 (2d ed. 2005).

352. E.g., where the state was designated a state sponsor of terrorism.

353. As discussed with regard to Hamas in *Boim v. Holy Land Found. for Relief and Dev't*

Moreover, they might come into power and ultimately form the government of a country.³⁵⁴ Conversely, governments such as that of Iraq under Saddam Hussein can be regarded as state sponsors of terrorism³⁵⁵ or stand accused of carrying out terrorist attacks.³⁵⁶ Nevertheless, the discussions in *Abecassis*³⁵⁷ and *Rothstein*³⁵⁸ show that in the terrorism context, the courts clearly distinguish terrorist organizations from state sponsors of terrorism and apply different principles when determining the liability of the funder in each case.

Mastafa is one of the few cases that has dealt with the issue of complicity liability for making available funds to a state outside of the terrorism context.³⁵⁹ *Mastafa* provides an interesting case study for a comparison of liability standards because (i) it involved money paid to a state rather than an FTO, (ii) considered liability for gross human rights violations instead of terrorist attacks, and (iii) was decided under the ATCA rather than the ATA. The plaintiffs in *Mastafa* were Kurdish women who alleged that their husbands had been imprisoned, tortured, and killed by the Saddam Hussein regime. They brought a claim against Australian Wheat Board (AWB) and against Banque Nationale De Paris Paribas (BNP), the latter of which is of greatest interest for current purposes.

Just like *Abecassis*, *Mastafa* involved alleged kickbacks paid to Saddam Hussein in the context of the OFP. AWB had sold wheat to Iraq under the OFP and paid fees for “inland transportation” and other service to the Hussein regime as a condition for its continued sales under the OFP. According to the plaintiffs, these payments were in fact “kickbacks,” “designed to provide the Hussein regime with hard currency the sanctions otherwise denied it.”³⁶⁰ To implement the OFP, an escrow account was created in which purchasers of Iraqi oil could deposit payment, while sellers of authorized goods received payment from it, all under the control of the UN Secretary General.³⁶¹ That account was

(“Boim III”), 549 F. 3d 685 (7th Cir. 2008).

354. See Peter Margulies, *Laws of Unintended Consequences: Terrorist Financing Restrictions and Transitions to Democracy*, 20 N.Y. INT’L L. REV. 65 (2007).

355. *Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 666 (S.D. Tex. 2010).

356. *Mastafa v. Australian Wheat Bd. Ltd.*, No. 07 Civ. 7955 (GEL), 2008 WL 4378443 (S.D.N.Y. Sept. 25, 2008).

357. *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 649 (S.D. Tex. 2011) (“Iraq under Hussein was not the same as Hamas or the terrorist organizations in *Humanitarian Law Project* who were ‘so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.’ Money provided to Iraq was not tainted in the same way as money provided to a designated foreign terrorist organization”).

358. *Rothstein v. UBS AG*, 772 F. Supp. 2d 511, 516 (S.D.N.Y. 2011) (“Congressional policy determinations are likely to be quite different with respect to the two entities, as reflected by the fact that 50 U.S.C. App. § 2405(j)(1) permits certain transactions with state sponsors of terrorism as long as a valid license is obtained”).

359. *Mastafa*, 2008 WL 4378443.

360. *Id.* at *2.

361. *Id.* at *1.

administered by BNP. BNP was accused of aiding and abetting the international law violations carried out by Saddam Hussein by disbursing funds from the escrow account to AWB, which used some portion of those funds to pay kickbacks to the Hussein regime.³⁶² When discussing the liability of BNP, the Court reasoned:

[A]iding the Hussein regime is not the same thing as aiding and abetting its alleged human rights abuses . . . It is not enough that a defendant provide substantial assistance to a tortfeasor; the “substantial assistance” must also “advance the [tort’s] commission.” . . . providing the Hussein regime with funds — even substantial funds — does not aid and abet its human rights abuses if the money did not advance the commission of the alleged human rights abuses.³⁶³

Thus, the Court refused to make the broad assumption that all financial support to a regime that commits gross human rights violations automatically has a substantial effect on the violations carried out because it will at least free up funds that can then be dedicated to that purpose. However, it did not require that “the particular funds provided were used to commit the abuses, or that without the funds the Hussein regime would not have been able to commit such abuses, so long as the assistance is ‘a substantial factor in causing the resulting tort.’”³⁶⁴

This quote implies that, contrary to the view of the Court in *South African Apartheid Litigation*,³⁶⁵ the provision of funds to a regime can have a sufficiently substantial effect on the violations it carries out to trigger aiding and abetting liability of the funder. Nevertheless, in *Mastafa* the claim was ultimately rejected. The Court suggested that:

It is unnecessary to decide whether it would suffice, in the present case, for plaintiffs to allege facts that plausibly suggest that the \$220 million in kickbacks “substantially assisted” the regime to commit its human rights abuses by allowing it to maintain power and function as a minimally effective government, as plaintiffs do not specifically allege facts in support of this proposition.³⁶⁶ Even if AWB’s payments to the Hussein regime did substantially assist in the commission of human rights abuses, plaintiffs fail adequately to allege that BNP knew that the money it disbursed to AWB was being used to make such payments.³⁶⁷

Thus, the Court dismissed the claim because of insufficient factual allegations to show substantial assistance, and also because the complaint did not adequately establish that BNP had acted with the necessary *mens rea*. As a consequence, the Court did not have to expand on the issue of precisely how it

362. *Id.* at *4.

363. *Id.*

364. *Id.*

365. However, even though coming to a different conclusion with regard to the question of funding at 269, the court cited the above *Mastafa* statements with approval, see *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009).

366. *Mastafa*, 2008 WL 4378443 at *4.

367. *Id.* at *5.

can be shown that “the assistance is ‘a substantial factor in causing the resulting tort.’”³⁶⁸

The liability standard applied in *Mastafa* is very similar to the standard governing the proximate cause analysis in most decisions on funding terrorism. This demonstrates the standard’s relevance beyond the terrorism context. However, though courts require a showing of proximate cause in the terrorism context, the terrorism cases often infer the substantial effect of funding on terrorist attacks where money was made available to the terrorist organization that carried out the attacks at issue or front groups for that organization.³⁶⁹

Conversely, in the context of funding provided to states, courts have rejected this general inference, even where a state sponsor of terrorism receives money directly. Such rejection is premised on the argument that governments, even those that are widely regarded as “state sponsors of terrorism,” carry out a wide range of legitimate functions.³⁷⁰ Therefore, it is difficult to sustain that, like FTOs, states are “so tainted by their criminal conduct that any contribution to such an organization facilitates that conduct.”³⁷¹ Consequently, where money was provided to such states, courts only applied the “freeing up of funds” theory to causation if the funder violated sanction regimes or other regulations in place to limit access to funds for other than humanitarian purposes.³⁷² These prohibitions are based on, and put the lender on notice of, the assumption that all funding made in violation of the regulations will be used, either directly or indirectly, for the furtherance of terrorism. To automatically infer that all loans made to a regime finance, or at least have a substantial impact on, the gross human rights violations it carries out, instead of funding legitimate state tasks, would therefore be problematic.

Without simply inferring liability, it is not easy to establish the effect financing has on human rights violations. Just as with other products or transactions, the more directly a loan is linked to the violations committed by the borrowing regime, the easier it is to establish causation.³⁷³ Where the violation would not have taken place without the loan, the necessary link between a loan and gross human rights violations committed by the borrower is clearly established. However, as the contribution does not need to be a *sine qua non* of

368. *Id.*

369. *See, e.g., In re Terrorist Attacks on September 11, 2001*, 718 F. Supp. 2d 456, 492-93 (S.D.N.Y. 2010).

370. *See, e.g., Abecassis v. Wyatt*, 704 F. Supp. 2d 623, 644 (S.D. Tex. 2010); *Abecassis v. Wyatt*, 785 F. Supp. 2d 614, 649 (S.D. Tex. 2011); *Rothstein v. UBS AG*, 772 F. Supp. 2d 511, 516 (S.D.N.Y. 2011).

371. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2712 (2010).

372. *Abecassis*, 785 F. Supp. 2d at 649; *see also, Rothstein*, 772 F. Supp. 2d at 516.

373. *See Adam McBeth, Holding the Purse Strings: The Continuing Evolution of Human Rights Law and the Potential Liability of the Finance Industry for Human Rights Abuses*, 23 NETH. Q. HUM. RTS. 7, 24–25 (2005).

the commission of these violations,³⁷⁴ such a showing is not required. It would also be sufficient to establish that the violations would have taken place differently,³⁷⁵ for example with less intensity or over a shorter period of time.³⁷⁶

A loan can make an important contribution to a gross human rights violation whether or not the money lent to the regime is directly used to finance this violation. It might, for example, indirectly facilitate the violation by adding to the financial resources of the regime or by providing a stabilizing effect on the political position of the regime.³⁷⁷ The crucial question is how close the link needs to be between the loan and the violation, and how significant the impact of the loan, to conclude that the loan had a substantial effect on the violations carried out against the victims, thereby creating lender responsibility. Where the loan had the direct purpose of financing the violations, for example where money is provided for the purchase of arms to be used in extra-judicial killings, such a link seems obvious, but these cases will be rare. More relevant and much more complicated are the situations in which a loan that is not directly linked to the violations allows the regime to free up resources with which to buy the arms necessary to carry out human rights abuses, or where loans stabilize a regime that commits such violations, thereby intensifying and/or prolonging their occurrence.

Bearing in mind the lesson from the cases on funding terrorism—that the question of how to define the *actus reus* and proximate cause needs to be approached with the consequences of the fungibility of money in mind³⁷⁸—it should not be necessary to establish a link between the fund and the specific violation committed by the regime to which the funding was provided. This is comparable to the approach of the Court in *South African Apartheid Litigation* with regard to the liability of the automotive and technologies defendants, where no showing of a causal link between a particular military vehicle or customized computer program and the violation suffered by the victim was required to establish liability of the defendant automotive and technology companies.³⁷⁹

374. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257 (S.D.N.Y. 2009) (quoting *Prosecutor v. Furundžija*, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 209 (Dec. 10, 1998)).

375. *Prosecutor v. Tadić*, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 688 (May 7, 1997) (“While there is no definition of “substantially”, it is clear from the aforementioned cases that the substantial contribution requirement calls for a contribution that in fact has an effect on the commission of the crime. This is supported by the foregoing Nürnberg cases where, in virtually every situation, the criminal act most probably would not have occurred *in the same way* had not someone acted in the role that the accused in fact assumed”) (emphasis added) (quoted in *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 244 F. Supp. 2d 289, 324 (S.D.N.Y. 2003)); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 287 (E.D.N.Y. 2007). See also *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 257-58 (S.D.N.Y. 2009).

376. For a discussion see Sabine Michalowski & Juan Pablo Bohoslavsky, *supra* note 5 at 77.

377. *Id.* at 75-77; see also Shaw W. Scott, *supra* note 4 at 1531-32.

378. See *supra* Section IV(B).

379. *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228, 264-69 (S.D.N.Y. 2009).

Indeed, such a showing would in most cases be impossible to make and to require it would exclude liability in the vast majority of cases. Rather, it was sufficient that the type of assistance provided could have had a substantial effect on the violations that occurred.

It is admittedly more complicated to determine whether financial assistance has a substantial effect on the commission of an offense than to determine the effects of products that can be the direct means through which the violations are carried out. The most convincing analysis of how to determine whether financial assistance had a causal relationship with the crimes carried out by the recipient of the money is that presented by Judge Rovner in his dissenting opinion in *Boim III*.³⁸⁰ When determining how to establish causation in the context of funding allegedly made to Hamas, Rovner suggested that, given the dual functions of Hamas as terrorist organization and provider of social welfare services, liability of someone making a financial donation to Hamas for the terrorist attacks it carries out could not simply be inferred.³⁸¹ While no link between a specific donation and the particular terrorist offense suffered by the victim needed to be established, it was necessary to show at a minimum a causal link between the support provided to Hamas and the organization's terrorist activities.³⁸² This could be achieved by carrying out an analysis of all the circumstances of each case in order to determine whether or not funding had a causal effect on the terrorist acts carried out by the organization.³⁸³ Such an assessment would require the expertise of someone "familiar with Hamas's financial structure, or with the financing of terrorism generally."³⁸⁴

This suggestion of a need for a detailed financial assessment seems feasible for establishing a causal link between money made available to states and gross

380. *Boim v. Holy Land Found. for Relief and Dev't* ("Boim III"), 549 F. 3d 685 (7th Cir. 2008).

381. *Id.* at 710. In support of his view, Judge Rovner relied heavily on the majority opinion in *Boim v. Holy Land Found. for Relief and Dev't* ("Boim II"), 511 F. 3d 707 (7th Cir. 2007) which he himself delivered. There the court suggested that even though an assumption that financial support to terrorist organizations might support their terrorist activities could be valid, "the plaintiffs still must offer some proof that permits a finding by a preponderance of the evidence that the defendants' conduct caused terrorist activity that included the shooting of David." *Boim II*, 511 F.3d at 741. The court clarified that "the nature and significance of a defendant's action along with its chronological relationship to the terrorist act that injured the plaintiff would be important considerations in assessing whether the defendant caused the plaintiff's injury . . . the more significant the support provided by a defendant, the more readily one might infer that support was a cause of later terrorist acts." *Boim II*, 511 F.3d at 741-742. To the extent that plaintiffs rely on a "freeing up of funds" theory, the court required a showing that "by providing funding to Hamas's other activities, including the hospitals, schools, and other charitable missions that it sponsors, a donor frees up Hamas resources for, or otherwise makes possible, Hamas's terrorist activities," thus refused to impose liability "without *some* evidence of a causal link between a defendant's conduct and Boim's murder." *Boim II*, 511 F.3d at 742.

382. *Boim III*, 549 F.3d at 710.

383. *Id.*

384. *Id.*

human rights violations carried out by their governments. In the context of commercial loans, this might in fact be a more suitable liability criterion than in the context of individual donations made to the charitable branches of a terrorist organization. Banks have both the means and the expertise to consider the impact and use made of sovereign loans.³⁸⁵

One way to put this into practice would be to apply a holistic analysis to the relationship between financing and human rights. Antonio Cassese suggested this in his report to the UN on the situation in Chile.³⁸⁶ Although not written with the purpose of developing criteria for complicity liability of financiers, this report nevertheless addresses some of the issues that are of interest here.³⁸⁷ Cassese argues:

To assess the impact of . . . foreign economic assistance on human rights in Chile it is necessary to consider how this assistance is used, what measures the recipient Government takes in the area covered by the assistance, and, more generally, what kind of economic and social policy it implements . . . All depends on the way the recipient Government allocates its own resources, as well as on the general context within which it utilizes the inflow of foreign resources.³⁸⁸

Cassese concluded that “there arises a relationship in which economic assistance often appears instrumental in perpetuating or at least maintaining the current situation of gross violations of human rights”³⁸⁹ because “the bulk of this assistance helps to strengthen and maintain in power a system which pursues a policy of large-scale violations of these rights.”³⁹⁰ Even where money is made available for human rights related programs, “[o]ften, the Government uses this assistance to replace national resources, which are diverted to other ends, including that of financing the repressive system.”³⁹¹ Cassese also states:

[I]n some respects, the flow of capital goods can help prop up the repressive system, by making it economically viable: in this way, the economic assistance becomes instrumental in maintaining and prolonging in time disregard for civil and political freedoms.³⁹²

To perform an assessment of the economic and political context in which a loan is granted and going to be used is not beyond the tasks that corporations are

385. For a discussion see, e.g., Brief for Essex Transition al Justice Network et al. as Amici Curiae Supporting Ibañez Manuel Leandro and others, Juzg. Fed. Civil y Comercial Federal Juzg. Fed., 95.019/2009, “Ibañez Manuel Leandro y otros casos c. Diligencia preliminar contra instituciones financieras no determinadas,” at 82-89, available at <http://www.reports-and-materials.org/Intl-banks-complicity-in-Argentina-Amicus-Curiae-Mar-2010.doc>.

386. U.N. Comm’n on Human Rights, Sub-Comm’n on Prevention of Discrimination and Prot. of Minorities, Study of the Impact of Foreign Economic Aid and Assistance on Respect for Human Rights in Chile, U.N. Doc. E/CN.4/Sub.2/412 (July 20, 1978).

387. See also Juan Pablo Bohoslavsky & Mariana Rulli, *supra* note 4.

388. U.N. Doc. E/CN.4/Sub.2/412 at 15.

389. *Id.* at 24.

390. *Id.*

391. *Id.*

392. *Id.* at 19-20.

in a position to carry out. Such evaluations form to some extent part of existing due diligence expectations with regard to assessing the risks involved in banking transactions.³⁹³ These general due diligence standards are complemented by the emerging concept of human rights due diligence, the importance of which was recently articulated by the special representative of the UN Secretary General (SRSG) on the issue of human rights and transnational corporations and other business enterprises, John Ruggie.³⁹⁴ The due diligence responsibilities identified include avoiding complicity.³⁹⁵ A report by the SRSG specifically dedicated to questions of sphere of influence and complicity emphasized that as part of its due diligence responsibilities in the context of avoiding complicity in human rights violations:

[A] company needs to understand the track records of those entities with which it deals in order to assess whether it might contribute to or be associated with harm caused by entities with which it conducts, or is considering conducting business or other activities. This analysis of relationships will include looking at instances where the company might be seen as complicit in abuse caused by others.³⁹⁶

While the SRSG's framework deals with corporate human rights due diligence more generally, calls for comprehensive human rights impact assessments in the

393. These include, for example, the responsibility to Know Your Customer (KYC). This responsibility has largely been developed in the context of money laundering. *See, e.g.*, Fin. Action Task Force, *FATF 40 Recommendations*, Recommendation 5(d), at 5 (Oct. 2003) (suggesting in this context that financial institutions should conduct "ongoing due diligence on the business relationship and scrutiny of transactions undertaken throughout the course of that relationship to ensure that the transactions being conducted are consistent with the institution's knowledge of the customer, their business and risk profile, including, where necessary, the source of funds"), available at <http://www.fatf-gafi.org>; *Customer Due Diligence for Banks* (Basel Comm. on Banking Supervision), Oct. 2001, at para. 4 (highlighting the importance of KYC beyond that context: "The Basel Committee's approach to KYC is from a wider prudential, not just anti-money laundering, perspective. Sound KYC procedures must be seen as a critical element in the effective management of banking risks") and para. 43 ("even in the absence of such an explicit legal basis in criminal law, it is clearly undesirable, unethical and incompatible with the fit and proper conduct of banking operations to accept or maintain a business relationship if the bank knows or must assume that the funds derive from corruption or misuse of public assets"), available at <http://www.bis.org/publ/bcbs85.pdf>. *See also* Brief for Essex Transitional Justice Network et al. as Amici Curiae Supporting Ibañez Manuel Leandro, *supra* note 385 at 383-88, where these principles are linked to complicity liability for financing gross human rights violations.

394. U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corp. and Other Bus. Enters., *Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework*, *Human Rights Council, Principles 17 and 18*, A/HRC/17/31 (Mar. 21, 2011) (by John Ruggie).

395. *Id.* at Principle 17 ("Human rights due diligence: (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships"). *See also* Commentary to Guiding Principle 17.

396. U.N. Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corp. and Other Bus. Enters., *Promotion and Protection of All Human Rights, Civil Political, Economic, Social and Cultural Rights, Including the Right to Dev't, Clarifying the Concepts of "Sphere of Influence" and "Complicity"*, ¶ 22, U.N. Doc. A/HRC/8/16 (May 15, 2008) (by John Ruggie).

context of financing are also increasing,³⁹⁷ manifesting a growing awareness of the importance of the link between financing and human rights violations.³⁹⁸

When considering the scope of due diligence in the context of sovereign lending, a country's bad record with regard to human rights violations does not put a government in the same position as a terrorist organization. Accordingly, financing made available to it does not automatically result in complicity liability of the lender. However, the country's record should put the lender on notice that there is a heightened risk that its loans might directly or indirectly facilitate such violations. Where a regime is widely known to commit gross human rights violations, as was the case with South Africa under apartheid,³⁹⁹ it could be argued that lenders have a heightened due diligence obligation to inquire into the use of the money they are lending with respect to the violations taking place.⁴⁰⁰

To determine whether or not a loan had a substantial effect on gross human rights violations committed by a regime in a case such as South Africa under apartheid, courts should assess the extent to which the regime depended on the loans for financing the violations it carried out. This might include "whether the loans had an effect on the military's budget and expenditures,"⁴⁰¹ or the extent to which the country needed the loans to stay in power. For this, the amount lent to the regime would be clearly important. The combination of the nature of the regime and the scale of the loan might give rise to a presumption that these loans had a substantial impact on the policies and acts of that regime, including its commission of gross human rights violations.⁴⁰²

However, unlike in terrorism cases, lending to a regime that commits massive human rights violations does not, in itself, give rise to liability. Therefore, a defendant could rebut the presumption of liability if a thorough

397. While this concept is mainly used in the context of project financing, *see, e.g.*, EQUATOR PRINCIPLES, <http://www.equator-principles.com> (last visited Mar. 4, 2012), it is also employed with regard to other banking activities more generally, *see, e.g.*, Rita Roca & Francesca Manta, *supra* note 335.

398. *See, e.g.*, Anita Ramasastry (1998), *supra* note 4; Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *supra* note 4; Juan Pablo Bohoslavsky & Mariana Rulli, *supra* note 4; Sabine Michalowski & Juan Pablo Bohoslavsky, *supra* note 5; *See also* Louis A. Pérez & Deborah M. Weissman, *Public Power and Private Purpose: Odious Debt and the Political Economy of Hegemony*, 32 N.C.J. INT'L L. & COM. REG. 699, 701 (2007).

399. Numerous UN resolutions expressed the international community's condemnation of the human rights situation. For an overview see First Amended Complaint at 93-115, *In re South African Apartheid Litigation*, 617 F. Supp. 2d 228 (S.D.N.Y. 2009) (No. 03 Civ. 4524).

400. For a discussion of duties to investigate risks where companies have reason to believe that 'their products or services could be misused in order to perpetrate gross human rights abuses' see Int'l Comm'n of Jurists, *supra* note 1, Vol. 3 at 31 (2008).

401. Juan Pablo Bohoslavsky & Veerle Opgenhaffen, *supra* note 4 at 175.

402. Brief for Essex Transition al Justice Network et al. as Amici Curiae Supporting Ibañez Manuel Leandro, *supra* note 385 at 89; *see also* Sabine Michalowski & Juan Pablo Bohoslavsky, *supra* note 5, at 84-85.

assessment of the impact of the loan on the spending policy of the government were to show that the money was used for legitimate government purposes. This is, again, similar to the analysis that needs to be carried out with regard to other types of assistance, such as the sale of military vehicles, where the nature of the regime and that of the vehicle might give rise to the assumption that the vehicles would be used for unlawful killings, but it must be open to the defendant corporations to demonstrate that this was not the case.

A final question is to what extent liability can be based on the fact that loans for beneficial purposes might free up funds that will then be used for other purposes. While it is probable that this will be the case in many instances, this should not be a sufficient basis for liability. The arguments developed in the state sponsor of terrorism context are valid here. Sovereign lending is not allowed, but there might be good reasons, such as humanitarian purposes, to supply funding to such states. Indeed, as the discussions surrounding the refusal to provide banking services in Gaza show, it might have human rights implications or even give rise to liability *not* to provide such services where they are essential to avoid a humanitarian crisis.⁴⁰³

This addresses the criticism that corporate complicity liability under the ATCA runs counter to the fact that, in many of the relevant cases, not only was no policy of divestment pursued by the United States or other governments, but governmental policies actively encouraged engagement in the relevant countries.⁴⁰⁴ Simply doing business with such a state does not trigger complicity liability. Instead, it should depend on a thorough case-by-case analysis of the impact of the act of the corporation on gross human rights violations. Therefore, corporations are free to engage constructively with regimes, even those that commit gross human rights violations on a large scale, as long as they avoid any complicity in these violations. Indeed, complicity liability in the context of financing should not aim to or result in cutting off all states with dubious human rights records from all foreign lending. Rather, it should seek to avoid lending that substantially furthers the international law violations carried out by the regime. This cannot conflict with constructive engagement, as there is nothing constructive about complicity in human rights violations.⁴⁰⁵ Conversely, constructive engagement cannot give corporations a blank check to be complicit in gross human rights violations carried out by regimes with which they are engaging.⁴⁰⁶

403. See Dana Weiss & Ronen Shamir, *Corporate Accountability to Human Rights: The Case of the Gaza Strip*, 24 HARV. HUM. RTS. J. 155 (2011).

404. *In re South African Apartheid Litigation*, 346 F. Supp. 2d 538, 554 (S.D.N.Y. 2004).

405. Richard L. Herz, *The Liberalising Effects of Tort: How Corporate Complicity Liability Under the Alien Tort Statute Advances Constructive Engagement*, 21 HARV. HUM. RTS. J. 207, 222 (2008).

406. *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 298 (2d Cir. 2007) (Hall, J., concurring) ("business imperatives [do not] require a license to assist in violations of international

Re-examining the case against the banks in *South African Apartheid Litigation* in light of these considerations, the Court should not have rejected the claims outright. Rather, it should have carried out a detailed analysis of the impact the loans specified in the complaint had on the crimes that injured the plaintiffs. While most of the allegations against the defendant banks do not refer to the financing of particular crimes, such a relationship was not necessary. It would have been sufficient to show that some of the loans went to the security forces, as long as it could be established that these loans had a significant impact on the commission of atrocities by these forces.

The assertions that, without the funding provided by Barclays and UBS, the apartheid regime could neither have maintained control over the civilian population nor maintained and expanded its security forces to the same degree⁴⁰⁷ would have required an application of the holistic approach discussed above. Alleging that the defendant banks “directly financed the South African security forces that carried out the most brutal aspects of apartheid,”⁴⁰⁸ is not in itself sufficient to show a substantial effect of the loans on the violations carried out by the security forces, but could form the basis of an investigation into the effects of the loans on these violations. In particular, asserting that the loans “supported increased spending on internal security, . . . [and] defense expenditures due to the growing costs of policing the apartheid state”⁴⁰⁹ would have merited a further analysis of the impact, if any, the loans had on apartheid crimes.

The liability standards suggested here present a challenge for courts determining complicity liability in the context of financing. Indeed, many specifics of the criteria delimiting liability need to be developed further and refined. However the difficulty of the task is not a reason to exempt from liability those whose loans potentially had an effect on the commission of gross human rights violations or to deprive victims of a remedy, without any investigation. Additionally, the complexity of the assessment needed to link a loan with violations suffered by victims is far from unusual in tort cases. Courts must often conduct onerous investigations to determine liability⁴¹⁰ or apply creative approaches to liability to avoid unfair and undesirable results.⁴¹¹

law”).

407. First Amended Complaint at 151, *Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254 (2d Cir. 2007) available at http://www.hausfeldllp.com/content_documents/9/KhulumaniClassActionComplai.pdf.

408. *Id.* at 152.

409. *Id.* at 169.

410. For example in the context of medical malpractice suits which might raise complex causation issues that can only be determined with the help of various experts. *See, e.g.*, *Manning v. King's College Hospital NHS Trust*, [2008] EWHC (QB) 1838. *See also* *Sheeley v. Mem'l Hosp.*, 710 A.2d 161 (R.I. 1998).

411. For example, if the particular nature of a tortfeasor's contribution makes it difficult to determine a causal link to the harm that arose, as happened in cases where a person suffered harm

One result of the approach suggested in this Article is that the relevance of the commercial or routine nature of a transaction primarily comes to the fore in the analysis of the *mens rea*. To adopt a more inclusive *actus reus* test might have the consequence of shifting the distinction between legitimate and illegitimate activities from the *actus reus* or causation element(s) to the *mens rea* element in the context of complicity liability. This could lend support to current attempts to adopt a more rigid *mens rea* standard and require that the accomplice act with the purpose of bringing about the human rights violations,⁴¹² as opposed to attaching liability where the a donor or lender rendered assistance with knowledge that the violations were likely to occur.⁴¹³ Indeed, it has been observed in a different context that laxer *actus reus* standards are frequently combined with tougher *mens rea* standards, and *vice versa*.⁴¹⁴ For example, in the recent *Kiobel* decision, Judge Leval, concurring, highlights that the often-voiced worries of unlimited liability of corporations are unfounded as long as the applicable *mens rea* standard is one of purpose rather than knowledge.⁴¹⁵ This implies, therefore, that these concerns would be warranted if liability were not kept within bounds by a rigid *mens rea* standard.

While a discussion of the *mens rea* is beyond the scope of this Article, it should be noted that the less rigid *mens rea* standard of knowledge is both the standard widely recognized in international law⁴¹⁶ and the appropriate standard

because of exposure to asbestos in the course of his/her employment, but it could not be shown with certainty which employer was responsible for the exposure that caused the illness, courts have shown creativity and determined that it would be sufficient to show that on the balance of probabilities, the act of the defendant materially increased the risk of a known source of harm to which the claimant had been exposed. *See, e.g.*, *Fairchild v. Glenhaven Funeral Servs. Ltd.*, [2002] UKHL 22. For an application of this principle to the situation of funding gross human rights violations, *see* Brief for Essex Transition al Justice Network et al. as Amici Curiae Supporting Ibañez Manuel Leandro, *supra* note 385 at 75.

412. *See* *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009).

413. *Id.* (rejecting what had been the accepted *mens rea* test in the context of ATCA litigation); *See, e.g.*, *Doe v. Unocal*, 395 F.3d 932, 950-51 (9th Cir. 2002); *Cabello v. Fernandez-Larios*, 402 F.3d 1148 (11th Cir. 2005); *In re "Agent Orange" Product Liability Litigation*, 373 F. Supp. 2d 7, 54 (E.D.N.Y. 2005); *Almog v. Arab Bank PLC*, 471 F. Supp. 2d 257, 291 (E.D.N.Y. 2007).

414. Albin Eser, *Individual Criminal Responsibility*, in 1 *THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY* 767, 801 (Antonio Cassese et al. eds., 2002); Christoph Burchard, *supra* note 139 at 938.

415. *Kiobel v. Royal Dutch Petroleum Co.*, 621 F.3d 111, 158 (2d Cir. 2010) (Leval, J., concurring in judgment).

416. *See, e.g.*, *United States v. Von Weizsacker* ("The Ministries Case"), 14 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 622 (Nuernberg Military Tribs. 1950); U.N. War Crimes Comm'n, LAW REP. OF TRIALS OF WAR CRIMINALS (Vol. 1), Case, No. 9, The Zyklon B Case, The Trial of Bruno Tesch and Two Others, at 93-103 (1947) at 101; *United States v. Flick* ("The Flick Case"), 6 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 1217 (Nuernberg Military Tribs. 1952); *United States v. Krauch* ("The I.G. Farben Case"), 8 TRIALS OF WAR CRIMINALS BEFORE THE NUERNBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 [T.W.C.], at 1169 (Nuernberg Military Tribs. 1953);

for policy reasons.⁴¹⁷

Prosecutor v. Akayesu, Case No. ICTR-96-4-T, 545 (Sept. 2, 1998); Prosecutor v. Bagilishema, Case No. ICTR-95-1A-T, 44-46 (June 7, 2001); Prosecutor v. Furundžija, Case No. IT-95-17/1, Trial Chamber Judgment, ¶ 245 (Dec. 10, 1998); Prosecutor v. Vasiljević, Case No. IT-98-32-T, 71 (Nov. 29, 2002), *aff'd*, Case No. IT-98-32-A, Appeals Judgment, 102 (Feb. 25, 2004); *see also* Prosecutor v. Aleksovski, Case No. IT-95-14/1-A, ¶¶ 162-63 (Mar. 24, 2000); Prosecutor v. Tadić, Case No. IT-94-1-T, Trial Chamber Judgment, ¶ 678, 692 (May 7, 1997).

417. The recent decision in *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011) along with the ATCA cases decided prior to the *Talisman* decision of 2009, *e.g. Unocal*, 395 F.3d 932 and *In re "Agent Orange"*, 373 F. Supp. 2d 7 show that courts regard themselves as perfectly capable of distinguishing acceptable business transactions from those that result in liability when the applicable standard of *mens rea* is that of knowledge. For a discussion see also, for example, Wim Huisman & Elies van Sliedregt, *Rogue Traders: Dutch Businessmen, International Crimes, and Corporate Complicity*, 8 J. INT. CRIMINAL JUSTICE. 803, 822-23 (2010).

2012

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Michael Gervais

Recommended Citation

Michael Gervais, *Cyber Attacks and the Laws of War*, 30 BERKELEY J. INT'L LAW. 525 (2012).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol30/iss2/6>

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Cyber Attacks and the Laws of War*

By Michael Gervais**

I. INTRODUCTION

In 1949, John Von Neumann—a mathematician and an early architect of computing systems—presented at the University of Illinois a series of lectures called the *Theory and Organization of Complicated Automata*, where he explored the possibility of developing machines that self-replicate.¹ Von Neumann envisioned machines that could build self-copies and pass on their programming to their progeny. While his thought experiment had legitimate applications, such as large-scale mining, many observers also consider it to be the theoretical precursor to the modern-day computer virus.² Self-replication is a defining characteristic of computer viruses and worms. Through self-replication, the computer code propagates and populates computers exponentially. Computer viruses and worms have the capacity for constructive applications, but they are most often malware—malicious software that is hostile, intrusive, and unwelcome.³

The first generation of malware in the 1970s was mostly experimental and did little damage beyond using computer memory and annoying its victims. When personal computing took hold in the 1980s, malware evolved into something more destructive. Viruses, worms, and other forms of malware spread quickly throughout the Internet, destroying data, overloading systems, and

* A version of this article originally appeared in the *Journal of Law and Cyber Warfare*. Michael Gervais, *Cyber Attacks and the Laws of War*, 1 *J.L. & Cyber Warfare* 1 (2012). It has been modified and reprinted here with the express permission of the *Journal of Law and Cyber Warfare*.

** Michael Gervais graduated in 2011 from Yale Law School, where he served as senior editor of the *Yale Journal of International Law* (YJIL). He is currently serving as a law clerk to Chief Judge Alex Kozinski of the Ninth Circuit Court of Appeals. Before law school, Michael Gervais spent time serving as an AmeriCorps* VISTA and as a Jesse M. Unruh Assembly Fellow in the California State Legislature.

1. *When Did the Term 'Computer Virus' Arise?*, *SCI. AM.* (Oct. 19, 2001), <http://www.scientificamerican.com/article.cfm?id=when-did-the-term-compute>.

2. *Id.*

3. *Malware*, OXFORD ENGLISH DICTIONARY ONLINE, <http://www.oed.com/view/Entry/267413?redirectedFrom=malware#eid> (last visited Mar. 1, 2012).

generally causing havoc.⁴ The Advanced Research Projects Agency (ARPA)—a research wing of the US Department of Defense (now known as DARPA)⁵—responded by funding a Computer Emergency Response Team at Carnegie Mellon University to coordinate and respond to computer security issues.⁶ Additionally, ARPA asked the National Research Council (NRC) to study the “security and trustworthiness” of American computing and communications systems. In 1991, the NRC issued its report. Presciently, the report noted that “[t]omorrow’s terrorist may be able to do more damage with a keyboard than with a bomb.”⁷

It has been twenty years since the NRC highlighted the risks to computer systems. Since then, the global community has grown more reliant upon the everyday use of computers and the Internet. The ever-increasing interdependence of computer networks has sparked a parallel growth in the complexity of cyber attacks. As computer systems have evolved, so have the attacks. Infrastructure, the financial system, commerce, government operations, including the military and, ultimately, national security have gone online, leaving the “security and trustworthiness” of the computing and communications system increasingly vulnerable to hostile actors. With each new cyber attack, nation-states are seeing the potential vulnerabilities—as well as opportunities—of an interconnected society.⁸ Cyberspace has become a new battleground for warfare.

The lawfulness of cyber warfare remains unsettled. The international community designed the international instruments that form the laws of war in response to kinetic technologies. As warfare evolves with new technologies, our understanding of how to interpret these international instruments changes as well. Although decision makers remain uncertain as to how to apply the laws of war to cyber attacks, recent events confirm that cyber warfare is operational. Although still in its infancy, the capabilities of cyber attacks are innumerable. This article examines the capabilities of a cyber attack and the relationship between cyber attacks and the existing international instruments that govern the laws of war.

4. *The History Of Computer Viruses*, VIRUS-SCAN-SOFTWARE.COM, <http://www.virus-scan-software.com/virus-scan-help/answers/the-history-of-computer-viruses.shtml> (last visited Mar. 2, 2011); see also *Morris Worm*, TECHOPEDIA, <http://www.techopedia.com/definition/27371/morris-worm> (last visited Mar. 1, 2012).

5. DARPA and ARPA are used interchangeably because the agency recently switched its name from the Advanced Research Projects Agency (ARPA) to the Defense Advanced Research Projects Agency (DARPA).

6. *Meet CERT*, SOFTWARE ENG’G INST., CARNEGIE MELLON UNIV., http://www.cert.org/meet_cert/#bkgd (last visited Feb. 5, 2012).

7. SYS. SEC. STUDY COMM., NAT’L RESEARCH COUNCIL, *COMPUTERS AT RISK: SAFE COMPUTING IN THE INFORMATION AGE* (1991).

8. Marco Roscini, *World Wide Warfare—Jus Ad Bellum and the Use of Cyber Force*, 14 MAX PLANCK U.N.Y.B. 85, 97-98 (2010).

Part I discusses the architecture of cyberspace and how it operates. Part II examines the framework of international humanitarian law and its application to cyber warfare. Ultimately, I contend, the international instruments in place do not answer all the relevant questions that cyber attacks generate. Indeed, they cannot even answer all the questions surrounding the forms of warfare that they were created to govern. However, these international instruments are helpful in determining how cyber attacks ought to be understood under the existing *jus ad bellum* (use of war) and *jus in bello* (wartime conduct) frameworks.

A. *Short History of Cyberspace and Its Architecture*

The Internet is a by-product of the science and technology race of the Cold War. After World War II, tension quickly escalated between the United States and the Soviet Union. The Soviet Union's launch of the Sputnik satellite in 1957 caused particular alarm in the United States.⁹ The launch changed world perception of the United States as a technological superpower, creating a sense of vulnerability among the American people, and elevating the international status of the Soviet Union.

With the threat of nuclear war looming over the nation, the US government responded to the perceived gap with a shift in strategy that emphasized technology and science.¹⁰ The federal government poured money into science, engineering, mathematics education and research at all levels. Among its many initiatives, the United States created and funded the Advanced Research Projects Agency (ARPA) within the Department of Defense a few months after the launch of Sputnik. Its task was to maintain the technological superiority of the US military and prevent "technological surprise." It would prove invaluable for the creation of the Internet.¹¹

One concern for the military was the theoretical ability of a Soviet nuclear strike to disable completely American communications systems. The prevailing view was that the command and control structure of the US government and military could not withstand such an attack. Therefore, military analysts saw a robust communications network that would survive an attack as a necessity in any nuclear confrontation.¹²

The critical component of survivability was a technique called "distributed communications." Under conventional communication systems, such as

9. *Videos of 50 Years of DARPA Achievements, The Formative Years: 1958–1975*, DARPA, http://www.darpa.mil/VideoFiles/01_-_The_Formative_Years_1958_-_1975_200807171333371.wmv (last visited Feb. 5, 2012).

10. Larry Abramson, *Sputnik Left Legacy for U.S. Science Education*, NPR (Sept. 30, 2007), <http://www.npr.org/templates/story/story.php?storyId=14829195>.

11. *Creating & Preventing Strategic Surprise*, DARPA, <http://www.darpa.mil> (last visited Feb. 5, 2012).

12. See *Videos of 50 Years of DARPA Achievements, The Formative Years: 1958–1975*, *supra* note 9.

telephone networks, switching, i.e., the process of channeling data from input to output ports, was concentrated and hierarchical.¹³ Thus, a call went to a local office, then to a regional or national switching office if a user needed a connection beyond the local area.¹⁴ Under this system, if a local office were destroyed, many users would be cut off. Responding to this communications threat, Paul Baran, a researcher at the Air Force's think tank, the Rand Corporation, conceived of a distributed system composed of multiple switching nodes with many attached links.¹⁵ Under Baran's system, if one node failed, the information would simply take an alternative route. This redundancy made cutting off service to users more difficult.¹⁶ Moreover, Baran proposed locating the nodes far from population centers to make the system more secure.¹⁷

Most importantly, Baran created a technique of switching to move data through the network as packets—a series of binary numbers (“bits”).¹⁸ This innovation proved vital for several reasons: (1) fixed-size packets simplified the design of switching nodes, (2) breaking messages into bits of information made it harder for spies to eavesdrop on communications, and (3) the system was more efficient and flexible for sharing a data link.¹⁹ Although packet switching was inherently more complex because packets of information had to be reassembled for the user, researchers made the system for data transmission less costly to build.²⁰ By reducing the costs of the system, it increased the feasibility of creating a highly redundant and therefore survivable communications system.²¹

Meanwhile, ARPA hired J.C.R. Licklider to head the Information Processing Techniques Office (IPTO).²² Before joining IPTO, Licklider had imagined a nationwide network of “thinking centers,” with responsive, real-time computers.²³ This vision underlay the ARPANET—the precursor to the Internet. As head of the IPTO, Licklider funded technology that put his ideas into practice. In addition, he warned that the dozen or so independent projects would produce incompatible machines, incompatible computer languages, and incompatible software.²⁴ However, it was not until the third IPTO director—

13. JANET ABBATE, INVENTING THE INTERNET 11 (2000).

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.* at 17–18.

19. *Id.* at 19.

20. *Id.* at 20.

21. *Id.*

22. See Mitch Waldrop, *DARPA and the Internet Revolution*, in *DARPA: 50 YEARS OF BRIDGING THE GAP* 78, 78 (2008), <http://www.darpa.mil/WorkArea/DownloadAsset.aspx?id=2554>.

23. *Id.* at 79.

24. *Id.* at 79–80.

Robert Taylor—that IPTO organized the fledgling projects around the country around a common vision. Rather than ARPA funding dozens of independent projects, Taylor decided that it was necessary for the remote projects to share computing resources.²⁵ It was time to build a “network of networks.”

To create the ARPA network, researchers made several critical technical decisions, which defined its architecture and that of its successor—the Internet. These decisions have ongoing implications for cyber attacks.

First, because there was insufficient funding for ARPA to build its own wires across the country, the government had to move its data through the *civilian* infrastructure already in place—the AT&T telephone system.²⁶ Second, the government utilized Baran’s packet-switching concept. Thus, digital messages were broken into segments of fixed lengths rather than sent through the network continuously.²⁷ This feature protected against static and distortion by isolating errors and giving the system a chance to fix them. Third, the ARPA network was decentralized.²⁸ Adhering to Baran’s concept of a survivable communications system, rather than engage a master computer to sort and route the packets, each ARPA site read the digital address on the packet as it came in. The site then accepted the packet if the address was local or sent it in the right direction.²⁹ Finally, instead of asking each site to run packets through its main computers, researchers built Interface Message Processors (IMPs)—the precursor to the modern router—that handled all the routing chores.³⁰ By using IMPs to handle routing, the main computers on the network had to learn only the IMP’s language rather than the language of each computer on the network.³¹

The next challenge was figuring out how to make all of the computers to work together. Because ARPANET linked together many one-of-a-kind machines,³² it was necessary for the various computers to adopt a standard universal protocol.³³ By 1974, Robert Kahn and Vinton Cerf designed the standard protocol that is still in place today—the Transmission Control Protocol/Internet Protocol (TCP/IP).³⁴ TCP/IP specifies how data should be formatted, addressed, transmitted, routed, and received at the destination. Over the next few years, Kahn and Cerf developed several operational versions of the protocol and, by 1982, the TCP/IP was reliable enough for the Department of

25. JAMES GILLIES & ROBERT CAILLIAU, *HOW THE WEB WAS BORN: THE STORY OF THE WORLD WIDE WEB* 16 (2000).

26. Waldrop, *supra* note 22, at 80.

27. *Id.*

28. *Id.* at 81.

29. *Id.*

30. *Id.*

31. *Id.* at 84.

32. ABBATE, *supra* note 13, at 48.

33. See Waldrop, *supra* note 22, at 84.

34. *Id.* at 85.

Defense to make it the standard for military computer networking.³⁵ Finally, in 1983, ARPANET switched over to TCP/IP—and the Internet was born.³⁶

Each of these decisions was critical to the formation of the modern-day Internet, but they also created a greater number of targets for cyber attacks. Furthermore, the decision to intertwine the civilian and military infrastructure made it difficult to determine which targets are valid under the law of armed conflict. Despite such consequences, these decisions clearly *did* facilitate communication between computers.

Once the fundamental architecture was in place, the private sector and researchers across the nation collaborated and improved upon others' ideas to build applications that popularized the Internet for mass consumption. These applications included E-mail, the World Wide Web,³⁷ file transferring, and a host of other programs connecting users to what is known as “cyberspace.”³⁸ Moreover, with the advent of personal computers and Internet Service Providers (ISPs), which linked users to the Internet through the public domain, other networks began to connect to one another, which eventually made ARPANET obsolete.³⁹

Thus, over a period of thirty years, the initial problem of how to design a survivable system of communication yielded a tool that forever changed how people communicate. But the growing integration of computers into individuals' lives also made the vulnerabilities of cyberspace increasingly apparent. The entire Internet is shared between civilian and military uses, and between the United States and its adversaries. This level of interconnectedness may be the Internet's greatest virtue—expanding the number of users and creating a global marketplace of ideas—but it also presents a grave security risk.

The largest threats in cyberspace are not accidental. Rather, bad actors design malware to access a computer system without the owner's informed consent. Malware—similar to software—consists of programs or protocols that tell computers what to do. Those instructions are often destructive, intrusive, or annoying. Unfortunately, just as software has become more innovative and sophisticated over time, so, too, has malware. What began with initial users testing a computer system's capabilities by exploiting its vulnerabilities⁴⁰ has escalated into the use of malware to commit cyber crimes. As personal computing and the Internet have grown, the number and impact of bad actors

35. *Id.*

36. *Id.*

37. Tim Berners-Lee, a computer programmer at CERN, developed the World Wide Web as a simpler way to provide access to research materials.

38. *Cyberspace*, OXFORD ENGLISH DICTIONARY ONLINE, <http://oed.com/view/Entry/240849?redirectedFrom=cyber%20space#eid> (last visited Mar. 1, 2012).

39. Waldrop, *supra* note 22, at 85.

40. Thomas M. Chen & Jean-Marc Robert, *The Evolution of Viruses and Worms*, in STATISTICAL METHODS IN COMPUTER SECURITY 265, 268 (Thomas M. Chen ed., 2005).

has dramatically increased.

The first versions of malware appeared on the ARPANET as experimental self-replicating programs.⁴¹ Designed to annoy or harass users, these programs usually were harmless, boastful programming challenges or pranks between anonymous users. For example, the first computer virus—the Creeper Virus—simply displayed the message, “I’m the Creeper: Catch me if you can!”⁴² Shortly after its release, the Reaper—the first antivirus program—removed the Creeper Virus.⁴³ In 1988, however, the Morris Worm demonstrated the potential for widespread harm by infecting ten percent of computers connected to the Internet.⁴⁴ It was not long before states began using malware as a method of attacking adversaries in what is now known as a cyber attack.

B. What Is Cyber Warfare?

As developed nations become reliant upon computer systems in every sector of society, opportunities increasingly arise for adversaries to strike inexpensively, remotely, and effectively with little risk. For that reason, states and non-state actors turn to cyberspace to conduct warfare with greater frequency. This Section explores cyber warfare’s theater of conflict as well as the definition of a cyber attack in relation to cyber warfare, cybercrime, and other hostile actions taken online.

1. Cyber War’s “Theater of Conflict”

An integral aspect of evaluating cyber warfare’s legal status is determining the active “theater of conflict.” If an attack occurs within the active theater of conflict, the law of armed conflict governs. But when a conventional attack occurs outside of the geographically limited theater of conflict, it is less clear how the laws of war apply.⁴⁵

The challenge in defining the theater of conflict in cyber space is that any particular operation will instantaneously cross components of the Internet infrastructure, which is spread throughout multiple countries. Thus, defining the theater of conflict is not as simple as equating cyberspace infrastructure to other

41. *Id.*

42. Joseph L. Flatley, *Creeper the First Computer Virus Is 40 Years Young Today*, ENGADGET (Mar. 17, 2011), <http://www.engadget.com/2011/03/17/creeper-the-first-computer-virus-is-40-years-young-today/>.

43. *Id.*

44. Brian Krebs, *A Short History of Computer Viruses and Attacks*, WASH. POST (Feb. 14, 2003), <http://www.washingtonpost.com/ac2/wp-dyn/A50636-2002Jun26> (last visited Mar. 1, 2012); *Morris Worm*, *supra* note 4.

45. Job C. Henning, *Embracing the Drone*, N.Y. TIMES (Feb. 20, 2012), <http://www.nytimes.com/2012/02/21/opinion/embracing-the-drone.html?pagewanted=all>.

forms of civilian or military infrastructure.⁴⁶ Fortunately, neither law nor custom supports confining a conflict to geographical boundaries. Such a constraint becomes dangerously illogical in conflicts that inherently cross borders.

Cyber warfare also allows combatants to fight from extreme distances, which raises a number of ethical and moral considerations. Not unlike the concerns raised in relation to those operating Predator drones,⁴⁷ cyber attackers are far from the battlefield. Being removed from the horrors of war, cyber attackers risk becoming emotionally detached from the effects of their attacks, increasing the possibility of unnecessary harm, suffering, and collateral damage.

However, while such ethical and moral considerations warrant exploration, the laws of war do not present additional restraints in this respect. For example, international law does not differentiate between hand-to-hand combat and an intercontinental ballistic missile. Similarly, cyberspace should be treated like any other theater of conflict regardless of its expanse or the location of those participating in cyber attacks.

2. Defining Cyber Warfare

The all-encompassing term “cyber war” is not an apt description for hostile actions in cyberspace because of the wide range of possible intended effects of an attack. It is helpful to be more specific by distinguishing between cyber attacks and cyber exploitation.

The only international agreement that approaches a definition for cyber attacks is the Council of Europe’s Convention on Cybercrime—a multilateral treaty that increased cooperation among signatories to combat cyber crimes such as fraud, child pornography, and copyright infringement.⁴⁸ Because the Convention has not been widely adopted, it is not binding as customary international law.⁴⁹ But the Convention demonstrates that international concern exists regarding the use of cyber attacks, and it recognizes a state’s duty to prevent these attacks. The treaty aims to harmonize the domestic criminal laws of the signatory states, including adoption of appropriate legislation to criminalize the enumerated cyber offenses. Most relevant for cyber attacks are

46. See, e.g., Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I) art. 48, June 8, 1977, 1125 U.N.T.S. 3 [hereinafter Protocol I].

47. Similar arguments have been made about the “playstation mentality” of drone warfare. See, e.g., PHILIP ALSTON, REPORT OF THE SPECIAL RAPporteur ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS 25 (2010), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>.

48. Council of Europe, Convention on Cybercrime art. 4, *opened for signature* Nov. 23, 2001, E.T.S. No. 185.

49. *Convention on Cybercrime*, COUNCIL OF EUROPE, <http://conventions.coe.int/Treaty/Commun/ChercheSig.asp?NT=185&CM=8&DF=28/10/2010&CL=ENG> (last visited Mar. 1, 2012).

the Convention's provisions on data and system interference. The Convention requires signatories to adopt laws that criminalize "the damaging, deletion, deterioration, alteration or suppression of computer data without right,"⁵⁰ as well as "the serious hindering without right of the functioning of a computer system" by similar means.⁵¹ While the Convention falls short of regulating cyber attacks, its incipient efforts at defining cyber attacks at an international level remain significant.

The Department of Defense has not yet defined cyber warfare.⁵² But one workable definition of a cyber attack offered by the US Army's *DCSINT Handbook No. 1.02* is: "The premeditated use of disruptive activities, or the threat thereof, against computers and/or networks, with the intention to cause harm or to further social, ideological, religious, political or similar objectives. Or to intimidate any person in furtherance of such objectives."⁵³ The methodology of a cyber attack involves a deliberate action taken to "alter, disrupt, deceive, degrade, or destroy adversary computer systems or networks or the information and/or programs resident in or transiting these systems or networks."⁵⁴ Often, cyberattackers intend to destroy the entities reliant on a computer system or network rather than the computer system or network itself.⁵⁵

By comparison, cyber exploitation is the use of a deliberate cyber action that seeks to extract confidential information from an adversary's computer system or network.⁵⁶ The goal of cyber exploitation is to obtain information from a computer network without the user's knowledge, which amounts to a modern form of espionage. Espionage is illegal under the domestic laws of most nations, but it is not illegal under international law.⁵⁷

Throughout history, nation-states have undertaken espionage by using agents to infiltrate and collect information about adversaries. Now, it is available from the comfort of one's home. Just as cyber criminals use computer systems to enhance their illicit activity, so have state governments. (As one intelligence

50. *Id.*

51. *Id.* art. 5.

52. Elizabeth Montalbano, *Auditors Find DOD Hasn't Defined Cyber Warfare*, INFORMATIONWEEK (Sept. 14, 2010), <http://www.informationweek.com/news/government/security/227400359>.

53. U.S. ARMY TRAINING & DOCTRINE COMMAND, DCSINT HANDBOOK NO. 1.02, CRITICAL INFRASTRUCTURE THREATS AND TERRORISM, at VII-2 (2006).

54. JOINT CHIEFS OF STAFF, DEPARTMENT OF DEFENSE DICTIONARY OF MILITARY AND ASSOCIATED TERMS, JOINT PUBLICATION 1-02, at 65 (2010, as amended through Jan. 15, 2002), http://www.dtic.mil/doctrine/new_pubs/jp1_02.pdf (defining "computer network attack," which is used interchangeably with "cyber attack").

55. COMM. ON OFFENSIVE INFO. WARFARE, NAT'L RESEARCH COUNCIL, TECHNOLOGY, POLICY, LAW, AND ETHICS REGARDING U.S. ACQUISITION AND USE OF CYBERATTACK CAPABILITIES 80 (William A. Owens et al. eds., 2009).

56. *Id.* at 81.

57. Roscini, *supra* note 8 at 93.

expert wrote, if you want to keep a secret, don't write it down.⁵⁸ The modern twist might be, if you want to keep a secret, don't make it digital.) Cyber espionage, defined as the “unauthorized probing of a target computer's configuration to evaluate its system defenses or the unauthorized viewing and copying of data files,” is a low-cost and low-risk tool for state governments.⁵⁹ Using the same techniques that cyber criminals utilize for gaining confidential information—such as malware, phishing,⁶⁰ and code injection⁶¹—state governments now engage in intelligence and commercial espionage.⁶²

Anecdotal evidence suggests that cyber espionage is a familiar practice among state governments. Electronic trespassers probe US defense networks thousands of times each day.⁶³ Israel is particularly direct about its exploration of cyber espionage tactics. The Israeli Defense Forces' chief of military intelligence Major General Amos Yadlin explained that “[u]sing computer networks for espionage is as important to warfare today as the advent of air support was to warfare in the 20th century.”⁶⁴ Since at least 2002, China has directed cyber espionage toward the United States in what the Department of

58. THOMAS POWERS, *THE MAN WHO KEPT THE SECRETS* 165 (1983).

59. *CYBERPOWER AND NATIONAL SECURITY* 423–24 (Franklin D. Kramer et al. eds., 2009).

60. Typically, the cyber attacker sends spam E-mail that appears to come from a legitimate user or institution. The spam E-mail urges the recipient to click on a link, which leads the user to a fraudulent website designed to look legitimate or innocuous. When the user enters confidential information, the fraudulent website records the information the recipient enters and sends it back to the attacker. See KELLIE BRYAN ET AL., *CYBER FRAUD: TACTICS, TECHNIQUES, AND PROCEDURES* 27 (James Graham et al. eds., 2009).

61. Code injection exploits a bug in computer program. An attacker injects code into a computer program to change its execution. Cyber criminals use vulnerabilities in commercial websites to introduce their own commands that will give them access to confidential information in the databases of websites. Most commonly cyber criminals target credit card information and social security numbers. Theoretically, a cyber attacker could employ a similar attack on “secure” databases that are connected to a government website. See James Verini, *The Great Cyberheist*, N.Y. TIMES (Nov. 10, 2010), http://www.nytimes.com/2010/11/14/magazine/14Hacker-t.html?_r=2&scp=1&sq=alberto%20gonzalez&st=cse.

62. Corporations regularly report data breaches. These reports show that the cyber espionage direct efforts both at corporations with classified national security contracts and companies with proprietary information, seeking to obtain a competitive edge in the global economy—a security risk in its own right. In 2009, President Obama estimated that, “last year alone, cyber criminals stole intellectual property from businesses worldwide worth up to one trillion dollars.” President Barack Obama, Remarks by the President on Securing Our Nation's Cyber Infrastructure (May 29, 2009), <http://www.whitehouse.gov/the-press-office/remarks-president-securing-our-nations-cyber-infrastructure>.

63. William J. Lynn III, Deputy Secretary of Defense, Remarks at the Defense Information Technology Acquisition Summit (Nov. 12, 2009), <http://www.defense.gov/speeches/speech.aspx?speechid=1399>.

64. David Eshel, *Killer Apps*, DEF. TECH. INT'L, Feb. 1, 2010, at 39, <http://www.military.com/features/0,15240,210486,00.htm>; see also David A. Fulghum et al., *Cyber-Combat's First Shot*, AVIATION WEEK & SPACE TECH., Nov. 25, 2007, at 28, <http://www.aviationweek.com/aw/generic/story.jsp?channel=defense&id=news/aw112607p2.xml>.

Defense has termed Operation Titan Rain.⁶⁵ One report states that China has already downloaded at least ten terabytes of data from the Non-classified Internet Protocol Router Network.⁶⁶ Ten terabytes is enough space to store the entire printed collection of the Library of Congress in digital format. Additionally, cyber exploitation can serve as a modern form of reconnaissance that lays the groundwork for other forms of attack.

Nevertheless, cyber espionage and exploitation fails to rise to the level of warfare because the purpose or outcome of both cyber espionage and exploitation is to monitor information and not to affect a computer system's functionality. The possibility of using cyber exploitation as a precursor to a cyber attack raises a separate set of legal questions beyond the scope and purpose of this Article. Although similar to traditional espionage in that cyber espionage may violate any number of domestic laws or international agreements, it does not violate international laws of war. Therefore, as used here, "cyber attacks" will not refer to espionage or reconnaissance performed via cyber exploitation.

II. THE LAWS OF WAR IN CYBERSPACE

The laws of war provide the framework for when it is acceptable to resort to the use of force (*jus ad bellum*) and governs the limits of acceptable wartime conduct (*jus in bello*). Together, international treaties and customary international law articulate the principles that nations rely upon to determine the lawfulness of their forceful conduct. The first section has two parts and examines the framework of *jus ad bellum* to assess (1) whether cyber attacks violate the general prohibition on the "use of force" under Article 2(4) of the United Nations (UN) Charter, and (2) whether a cyber attack can reach the threshold of "armed attack" that triggers the right to self-defense under Article 51. The second section examines the consequences under international law of hostile cyber operations that do not rise to the level of an armed attack. The final section evaluates the *jus in bello* regime, which governs the conduct of warfare, to determine how cyber attacks should operate under the law of armed conflict.

A. *Jus Ad Bellum—Recourse to Force*

1. *Do cyber attacks violate the general prohibition on the use of force?*

Article 2(4) of the UN Charter declares that "[a]ll Members shall refrain in their international relations from the threat or *use of force* against the territorial integrity or political independence of any state, or in any other manner

65. KRAMER, *supra* note 59, at 85.

66. *Id.*

inconsistent with the Purposes of the United Nations.”⁶⁷ Determining whether a cyber attack violates this general prohibition on the use of force requires an understanding of 1) how force is interpreted in international law, and 2) whether cyber attacks can reach the appropriate level under those standards.⁶⁸

One place to begin this analysis is the Vienna Convention on the Law of Treaties, which provides the rules of treaty interpretation. Although adopted after the Charter, international law experts generally agree that the Convention’s rules reflect customary international law.⁶⁹

Article 31 of the Convention states that “[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.”⁷⁰ The ordinary meaning of “force” is broad and encompasses conventional notions of kinetic attacks as well as other coercive measures.⁷¹ Other coercive measures include: financial instruments, i.e., granting or withholding economic indulgences from a target; diplomatic instruments, i.e., negotiation and advocacy between state representatives; and ideological or propagandistic instruments, which deploy carefully selected signs and symbols to relevant sectors of society with the design of influencing the governing elite.⁷² Under a broad reading of “force,” each of these instruments—military, economic, diplomatic, and ideological—could be subject to regulation under the Charter.

However, in light of the “object and purpose” of the Charter, “force” should be read more narrowly. The express aim of the United Nations is to maintain international peace and security, as well as “to save succeeding generations from the scourge of war.”⁷³ That suggests the notion of force in 1945 was limited to the military instrument. The drafting history of the Charter reinforces this conclusion. The *travaux préparatoires* shows that a proposal was submitted to extend the scope of Article 2(4) to other strategic instruments—

67. U.N. Charter art. 2, para. 4 (emphasis added).

68. Even if a cyber attack does not rise to the level of force prohibited under Article 2, a cyber attack may still be inconsistent with international law. Massive Distributed Denial of Service (DDoS) attacks that target the business, government and commercial sectors of an adversary for a political purpose certainly constitutes a prohibited intervention. See *infra* notes 83–85 and accompanying text. The International Court of Justice states that “[t]he principle of non-intervention involves the right of every sovereign State to conduct its affairs without outside interference . . . it is part and parcel of customary international law.” See also *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14 (June 27) (observing that the UN Charter does not cover the whole area of the regulation of the use of force).

69. Georg Ress, *Interpretation of the Charter*, in *THE CHARTER OF THE UNITED NATIONS: A COMMENTARY* 13, 18 (Bruno Simma et al. eds., 2002).

70. Vienna Convention on the Law of Treaties art. 31, *opened for signature* May 23, 1969, 1155 U.N.T.S. 331, 340.

71. *Black’s Law Dictionary* defines “force” as “power, violence, or pressure directed against a person or thing.” *BLACK’S LAW DICTIONARY* 717 (9th ed. 2009).

72. W. MICHAEL REISMAN & JAMES E. BAKER, *REGULATING COVERT ACTION* 28–42 (1992).

73. U.N. Charter pmbl.

specifically, to economic coercion.⁷⁴ The United Nations ultimately rejected this proposal.⁷⁵ By explicitly excluding economic coercion from the definition of force in the drafting of Article 2(4), and implicitly rejecting ideological and diplomatic instruments as well, the drafters signaled that the determination of whether a nation has used force in violation of Article 2(4) focuses only on military instruments.

However, concluding that the Charter embraces a relatively narrow meaning of “force” does not end the analysis. Because the International Court of Justice (ICJ) has stipulated that the Charter does not encompass the whole area of the regulation of force, and that it is appropriate to turn to customary international law to determine the regulation of force as well, this Article also references international agreements and decisions of the international court to discern how force is regulated under customary international law⁷⁶

Cyber weapons are versatile and can be either a supporting actor in the theater of conflict or the main event. They are not monolithic weapons whose use leads to straightforward answers about whether they violate the prohibition on force. Rather, the innumerable harmful effects caused by cyber attacks makes their categorization both more complex and more necessary. The effects of a cyber attack can range from a simple inconvenience (such as a DDoS attack that disrupts web traffic temporarily), to physical destruction (such as changing the commands to an electrical power generator causing it to explode), and even to death (such as disrupting the emergency lines to first responders so that calls cannot be made to police or ambulance services). But treating all forms of cyber attack as a use of force would require an implausibly broad reading of Article 2(4) that includes non-physical damage. A more nuanced approach is needed.

Another challenge is that the intensity and temporal scope of a cyber attack can transform an event from a low-level aggressive act to a prohibited use of force. In *Armed Activities on the Territory of the Congo*, (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, 165 (Dec. 19), the ICJ determined that a violation of Article 2(4) resulted from the “magnitude and duration” of Uganda’s actions.⁷⁷ Therefore, magnitude and duration of an attack are appropriate factors for consideration in any model that analyzes the coercive tactics employed by a

74. See Doc. 2, G/7 (e)(4), 3 U.N.C.I.O. Docs. 251, 252–53 (May 6, 1945) (Brazilian amendment proposals).

75. See Summary Report of Eleventh Meeting of Committee I/1, Doc. 784, I/1/27, 6 U.N.C.I.O. Docs. 331, 334, 559 (June 4, 1945).

76. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. US), 1986 I.C.J. 14 (June 27) (observing that the United Nations Charter, the convention to which most of the United States’ argument is directed, does not cover the whole area of the regulation of the use of force in international relations because customary international law continues to exist alongside treaty law).

77. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, 165 (Dec. 19) (“The unlawful military intervention by Uganda was of such a *magnitude and duration* that the Court considers it to be a grave violation of the prohibition on the use of force expressed in Article, 2 paragraph 4, of the Charter.”).

state. Beyond these factors, several possible models exist for determining whether a cyber attack rises beyond mere coercion to a use of force.

The first approach to analyzing force is to examine the method of delivery. Under this model, cyber weapons are categorized by the specific method of delivering an attack on an adversary. Whether it is a virus, worm, network intrusion, or some other cyber attack, this model prohibits cyber attacks based on how they are executed. The severe damage that particular types of cyber attack can inflict worldwide relative to the limited effects of narrowly designed exploits provides the basis for this approach. Of course, certain cyber weapons are inherently more destructive and dangerous than others. Under conventional warfare, specific treaties have already emerged around atomic, biological, chemical, and nuclear weapons. A convention that specifically regulates cyber weapons would be the natural evolution of weapons treaties. The challenge a cyber weapon-specific approach faces is that technology changes quickly; any international agreement deeming a particular type of cyber attack unlawful might be outdated by the time it is ratified.

The second approach to analyzing force views cyber weapons under a strict liability model. Adherents to this model deem any use of cyber attacks against critical infrastructure to be a use of force.⁷⁸ Many nations have already audited their critical infrastructure to determine where they are vulnerable to the consequences of a cyber attack.⁷⁹ The next step would be to authorize self-defense against cyber attacks that target critical infrastructure. Proponents of strict liability argue that it is an appropriate model because of the instantaneous destructive nature of cyber attacks. Once a cyber attacker has targeted critical infrastructure, an imminent threat exists that, at least arguably, creates a sufficient level of harm to justify anticipatory self-defense.

The weakness of this model is that the effects of cyber attacks may be indiscriminate and uncontrolled once unleashed. Cyber attacks do not always intentionally target the critical infrastructure that they eventually disrupt. And even if a cyber attack targets critical infrastructure, such as the banking and finance system, the strict liability approach introduces interpretive difficulties by collapsing the distinctions between armed violence, coercion, and interference. Even more troubling is that a strict liability model would authorize self-defense for the most benign offenses.

The third approach to analyzing force examines cyber attacks as instruments equivalent to traditional kinetic weapons by looking at the direct

78. WALTER GARY SHARP SR., *CYBERSPACE AND THE USE OF FORCE* 129-31 (1999).

79. The United States, for example, has outlined several types of infrastructure—the physical and cyber assets of public and private institutions in agriculture, food, water, public health, emergency services, government, defense industrial base, information and telecommunications, energy, transportation, banking and finance chemicals and hazardous materials, and postal and shipping—the destruction or incapacity of which would cripple the nation's defensive or economic security. Roscini, *supra* note 8, at 117.

results of an attack. If the result would be considered a prohibited use of force when caused by a kinetic weapon, then a cyber weapon should be no different. Thus, a cyber attack is a use of force if the attacker seeks to cause direct physical destruction, injury, or death. This approach removes the need to examine the instrument of delivery, and it allows the international community to adapt the Charter to evolving technology while accounting for nuances in the intensity of a cyber attack.⁸⁰

The flaw in this approach is that most cyber attacks do not directly cause physical damage or death. For example, a cyber attack that temporarily shuts down the communication lines for emergency police and ambulance services may not cause physical damage or deaths directly, but it could easily cause both indirectly. Drawing the line between direct and indirect effects of a cyber attack is extremely difficult.

Michael N. Schmitt posits a model that has gained traction among legal scholars. Schmitt advocates for a consequence-based approach.⁸¹ This framework requires examining whether the reasonably foreseeable consequences of a cyber attack resemble the consequences of a conventional attack. Schmitt provides six criteria for evaluating the consequences of cyber attacks on the target state: severity, immediacy, directness, invasiveness, measurability, and presumptive legitimacy. If the cyber attack shares enough commonalities in the six factors, extension of the prohibition on force is justified. The benefit of this model is that it addresses how to evaluate cyber attacks that are coercive but do not directly result in physical damage, injury, or death.

Consider two examples from the widely reported Russian cyber attack on Estonia. During World War II, the Soviet Union placed a bronze memorial statue in Tallinn, Estonia. Estonians today view the statue as a symbol of Soviet occupation and political repression following World War II, while ethnic Russians in Estonia see the statue as a tribute to fallen Soviet soldiers. In April 2007, the Estonian authorities decided to remove the controversial statue. The result of this decision was two nights of mass protests and riots in Estonia known as “Bronze Night.” In the weeks following Bronze Night, Estonia’s digital infrastructure experienced a massive cyber attack originating mostly in Russia. Russian “hacktivists”⁸² used massive DDoS attacks to target Estonia’s web servers and bring web traffic to a halt.⁸³ Specific targets included news and

80. IAN BROWNLIE, *INTERNATIONAL LAW AND THE USE OF FORCE BY STATES* 362 (1963). This method also allows for the characterization of chemical and biological weapons as a use of force under the Charter despite the cause of injury and death from those weapons not being a kinetic result of the instrument.

81. Michael N. Schmitt, *Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework*, 37 *COLUM. J. TRANSNAT’L. L.* 885 (1999).

82. Hacktivists are also popularly called “patriotic hackers.”

83. *A Cyber Riot*, *THE ECONOMIST*, May 10, 2007, <http://www.economist.com/node/9163598>;

government websites.

Under Schmitt's criteria, the severity of this cyber attack falls short of the use of force. While the cyber attacks were immediate, the consequences were minimal. There was no physical damage or measurable suffering. The disruptions mostly caused a temporary inconvenience. The disruption of web traffic caused by the attack was indirectly related to the likely intended coercive effect, which was to reverse the Estonian government's decision to remove the statue. The attack was intrusive and presumptively illegitimate, but the net results did not sufficiently resemble the use of force. One commentator astutely described the cyber attacks as being "more like a cyber riot than a military attack."⁸⁴

There was, however, a cyber attack during this episode that brought down phone lines to emergency services, which presents a more troublesome scenario that jeopardized human life and limb. The severity of that cyber attack has consequences equivalent to a use of force. What matters in that cyber attack is not that it potentially inflicted severe consequences, but that it was liable to produce such consequences.⁸⁵ It can be assumed that the result of the cyber attack was immediate and created a measurable level of suffering for those who were not able to access police or ambulances in an emergency. In that instance, the cyber attack should rise to the level of force under Schmitt's framework despite the indirectness of its consequences.

These Bronze Night examples demonstrate that a consequence-based model is flexible enough to distinguish between different levels of attacks within the same conflict. In one instance, the consequence-based approach finds that a cyber attack should be considered forceful enough to be unlawful under Article 2(4). In the other, the consequences are too minimal to rise to the level of force. This model accounts for the nuances of a cyber attack's intensity without ignoring the indirect effects of a cyber attack. By comparison, under the text of the Charter alone, neither cyber attack amounts to a prohibited use of force.

The deficiency of Schmitt's approach is that extending its principles outside the regime of cyber weapons introduces measures of coercion not traditionally included in the prohibition on force, such as economic, diplomatic, or ideological coercion. An alternative approach might be to scrap the Schmitt model altogether when the targets are economic, diplomatic, and ideological instruments of the state, which is not without precedent given that the Charter

War in the Fifth Domain, THE ECONOMIST, July 1, 2010, <http://www.economist.com/node/16478792>; Arthur Bright, *Estonia Accuses Russia of 'Cyberattack'*, CHRISTIAN SCI. MONITOR, May 17, 2007, <http://www.csmonitor.com/2007/0517/p99s01-duts.html>.

84. Shaun Waterman, *Who Cyber Smacked Estonia?*, UNITED PRESS INT'L, June 11, 2007, http://www.spacewar.com/reports/Who_Cyber_Smacked_Estonia_999.html.

85. See, e.g., U.N. Security Council, 3245th mtg., U.N. Doc. S/PV.3245 (June 27, 1993) (demonstrating the support for the label of "armed attack" urged by the United States for the failed attempt to assassinate former President George H.W. Bush in 1993).

does something similar. (In the Charter, the military instrument is presumptively forceful in Article 2(4), leaving out the economic, diplomatic, and ideological modes of coercion.)

Another criticism of the Schmitt model is that it offers little guidance as to the weight of each of the six factors. Such indeterminacy will lead to great variance in the rules of engagement in cyberspace. One way to modify the Schmitt model slightly is to tier the factors. For example, presumptive legitimacy should be a first-tier factor. Once a state has determined that an attack is not a legitimate use of force, the next tier to consider would be the severity and invasiveness of the attack. Following this, the immediacy, directness, and measurability of an attack would help a state determine whether a cyber attack is a prohibited use of force.

Because cyber attacks are so versatile and variable in their methods and purposes, a unilateral approach to regulation leaves much to be desired. There is no perfect method for analyzing cyber attacks with current technology. Effects-based models require a post-hoc analysis that may take days, weeks, or longer to determine the extent of an attack, which is an unacceptable timeframe for responding to an equivalent kinetic attack. But a strict liability model raises the possibility of wrongly escalating force in response to a low-level cyber attack. Technologies to identify and assess cyber attacks in real-time may eventually make this a moot point. Until then, classifying a cyber attack by a degree of force is only one of many hurdles for decision makers.

2. *Does a cyber attack reach the threshold of “armed attack” that triggers the right to self-defense under Article 51 of the UN Charter?*

When there is a conflict between nations, the Charter demands that members “[s]ettle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.”⁸⁶ Thus, the authority for a state’s use of force originates either from the UN Security Council or by the state’s right to act in individual or collective self-defense. The lingering question is whether cyber attacks can reach the threshold of “armed attack” that triggers the right to self-defense under Article 51 of the Charter. Article 51 states:

Nothing in the present Charter shall impair the inherent right of individual or collective self-defence *if an armed attack occurs* against a member of the United Nations, until the Security Council has taken the measures necessary to maintain international peace and security.⁸⁷

Is there a difference between an “armed attack” under Article 51 and a “use of force” under article 2(4)?

Some scholars argue that *any* use of force by regular armed forces

86. U.N. Charter art. 2(3).

87. U.N. Charter art. 51 (emphasis added).

constitutes a *per se* armed attack.⁸⁸ Under this view, any offensive action by a military cyber unit is an armed attack because it emanates from the armed forces of a state. The United States, China, Iran, Israel, and other nations around the world have already established military cyber units.⁸⁹ Offensive actions by these cyber units would be considered a *per se* armed attack that triggers the right to exercise individual or collective self-defense. The danger is that a single errant soldier could embroil a nation in a protracted conflict if his or her action permits the target state to respond in self-defense.⁹⁰ But this danger also exists outside the realm of cyberspace, so this concern represents a difference in degree rather than kind.

Others reject the *per se* approach, arguing that the ICJ's "scale and effects" test is more appropriate to determine when Article 51 is triggered. This is consistent with the ICJ's position that there is a substantive distinction between the "use of force" and an "armed attack." In *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. US), 1986 I.C.J. 14, 202 (June 27), the ICJ defined the difference as primarily one of "scale and effects."⁹¹ Thus, not every use of force warrants the exercise of the right of unilateral self-defense. To know whether a cyber attack meets the threshold of "armed attack" requires knowing where the *de minimis* threshold lies. However, this is a vague and fact-specific rule.

Under such a regime, interpretive power shifts to institutional bodies such as the United Nations and the ICJ. Perhaps it is ideal to involve the international community in determining whether a nation can rightfully respond in self-defense. But the "scale and effects" test also leaves a targeted state less guidance to determine whether an armed response is lawful.

Regardless of the scale or effect of an attack—whether it is kinetic or cyber—the type of weapon used in an "armed" attack is immaterial. In an advisory opinion concerning nuclear weapons, the ICJ referred to Articles 2(4) and 51, stating that "[t]hese provisions do not refer to specific weapons. They apply to any use of force, regardless of the weapons employed."⁹² The Security Council reaffirmed this sentiment when it authorized the United States to

88. See, e.g., E. Wilmhurst, *Principles of International Law on the Use of Force by States in Self-Defense* (Chatham House International Law Working Paper 2005), http://www.chathamhouse.org.uk/files/3278_ilpforce.doc.

89. Roscini, *supra* note 8, at 97-98.

90. *Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda)*, 2005 I.C.J. 116, 214 (Dec. 19) ("According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.")

91. *Military and Paramilitary Activities in and Against Nicaragua (Nicar. v. U.S.)*, 1986 I.C.J. 14, 202 (June 27).

92. *Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion*, 1996 I.C.J. 226, 244 (July 8).

respond forcefully in self-defense to the 9/11 attacks, where the “weapons” were hijacked airplanes. Thus, under the “scale and effects” test, a cyber attack depending could lawfully trigger the right of self-defense under Article 51 if it inflicts substantial destruction upon important elements of the target state.

So where does the *de minimis* threshold lie? Customary practice suggests that under conventional notions of force, even small-scale bombings, artillery, naval or aerial attacks qualify as “armed attacks” activating Article 51, as long as they result in, or are capable of resulting in, destruction of property or loss of lives.⁹³ By contrast, the firing of a single missile into some unpopulated wilderness as a mere display of force would likely not be sufficient to trigger Article 51, despite violating Article 2(4).

What would the firing of a missile into unpopulated wilderness equate to in cyberspace? A cyber attack that merely creates an inconvenience might be a prohibited use of force, but it would not rise to the level of an armed attack. In comparison, a cyber attack capable of substantially destroying property or causing the loss of lives should trigger the right to self-defense.

Modern weapons—such as cyber weapons—have created new complications for states attempting to comply with the self-defense exception of the Charter. For example, when the Charter was written, weapons of mass destruction had yet to be developed. First strikes were incapable of the widespread destruction enabled by modern weapons. Today, states faced with strict compliance to Article 51 run the risk of total annihilation. Thomas M. Franck—a notable international law scholar—criticized the irrationality of the Charter’s requirements, writing that “[t]aken literally, Articles 2(4) and 51 together seem to require a state to await an actual nuclear strike against its territory before taking forceful countermeasures. If this is what the Charter requires, then, to paraphrase Mr. Bumble, the Charter is ‘a ass.’”⁹⁴ As Franck suggests, it is unreasonable to expect a state to comply with the Charter to the point of its total destruction.

The prospect of total or significant destruction has led states to turn to customary international law for the determination of when it is appropriate to forestall an attack. Under customary international law, anticipatory self-defense is a legitimate preemptive strategy. The *Caroline* test formulates the customary understanding of anticipatory self-defense. It states that for an action of anticipatory self-defense, a state must show that the “necessity of self-defense was instant, overwhelming, leaving no choice of means, and no moment of deliberation.”⁹⁵ Even where each condition is met, forceful actions of anticipatory self-defense cannot be “unreasonable or excessive; since the act,

93. Y. DINSTEIN, *WAR AGGRESSION AND SELF-DEFENCE* 193 (2001).

94. Thomas M. Franck, *Who Killed Article 2(4)? Or: Changing Norms Governing the Use of Force by States*, 64 AM. J. INT’L. L. 809, 820 (1970).

95. R.Y. Jennings, *The Caroline and McLeod Cases*, 32 AM. J. INT’L. L. 82 (1938).

justified by the necessity of self-defense, must be limited by that necessity, and be kept clearly within it.”⁹⁶

Sophisticated cyber attacks are designed to overwhelm a target state’s computer systems instantaneously. There are, of course, cyber attacks that a state might foresee and counteract. A state might discover evidence of a cyber attacker’s attempted network intrusion, an audit of computer systems might reveal unauthorized backdoors or malware, or targeted states might uncover an online forum that serves as a gathering place for hacktivists to trade information and tools prior to a coordinated attack. In such cases, the target state is previously aware of a planned cyber attack and may invoke its right to respond in anticipatory self-defense if the *Caroline* test criteria are met. Where met, a state might lawfully disable the servers that host the online forum where cyber attackers are gathering, assuming the state has no other means by which to forestall the imminent attack(s).

3. *Attributing State Responsibility*

Before a state responds in self-defense, several considerations must be weighed. One issue is whether the cyber attack should be treated as a law enforcement matter or a national security matter. Relevant to this determination is whether the level of force used in the cyber attack rises to that of an armed attack, as discussed in Section II(a)(ii). Another consideration is whether the state whence the attack originated is complicit. If the act of self-defense is not in immediate response to an ongoing attack, the state must impute responsibility before launching its cross-border counter-attack. Establishing state responsibility in the area of cyber attacks requires understanding states’ duties to one another, particularly regarding non-state actors operating within their jurisdiction.

In 2001, the International Law Commission issued the Draft Articles on State Responsibility, which articulates the international jurisprudence on state responsibility. Article 1 states that “[e]very internationally wrongful act of a State entails the international responsibility of that State.”⁹⁷ This notion of state responsibility is supported by state practice as well as *opinio juris*. In the *Corfu Channel Case*, (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9), the ICJ examined the threshold to attribute responsibility for actions within a state’s borders.⁹⁸ The ICJ held that territorial sovereignty is not only an essential foundation of international relations, but also that under customary international law, every state also has an obligation “not to allow knowingly its territory to be used for acts contrary to the rights of other states.”⁹⁹ This formulation, however, does not

96. *Id.*

97. 2001 Draft Articles on the Responsibility of States for Internationally Wrongful Acts, U.N. Doc. A/CN.4/L.602/Rev. 1 art. 1 (July 26, 2001) [hereinafter *State Responsibility*].

98. *Corfu Channel Case* (U.K. v. Alb.), 1949 I.C.J. 4 (Apr. 9).

99. *Id.* at 22.

account for the subtleties in degree of state responsibility. Should a state be held internationally responsible for a single soldier or patriotic hacker that uses a cyber attack to destroy critical infrastructure of an adversary? These questions merit further exploration.

i. State Actors

There is little controversy that, if a state's agent attacks another state, then the hostile conduct is attributable to the state. Article 4 of the Draft Articles on State Responsibility declares that "[t]he conduct of any State organ shall be considered an act of that State under international law."¹⁰⁰ A state organ is understood to be all the individual or collective entities that make up the organization of the state and act on its behalf.¹⁰¹

This principle is a codification of customary international law. It reflects the assumption that a state is fully responsible for its agents—even when those agents act outside the scope of their duties. In *Armed Activities on the Territory of the Congo*, (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, 214 (Dec. 19), the ICJ held that "[a]ccording to a well-established rule of a customary nature . . . a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces."¹⁰² This rule also applies to a person or entity that is not an organ of the state but nevertheless exercises elements of governmental authority.¹⁰³ This extends to private or public entities that a state may charge with elements of authority normally associated with the government. For example, if the British government employs private defense companies and authorizes them to conduct active defense measures, the conduct of the private defense company is imputed to Britain. As the Commentary to the Draft Articles on State Responsibility notes, "[i]f it is to be regarded as an act of the State for purposes of international responsibility, the conduct of an entity must accordingly concern governmental activity and not other private or commercial activity in which the entity may engage."¹⁰⁴ This formulation is consistent with the "effective control" test discussed earlier. Similarly, a state may not coerce another state to do its bidding without accountability. Article 17 of the Draft Articles on State Responsibility holds a state internationally responsible for wrongful acts that "it directs and controls another State in the commission of," if

100. State Responsibility, *supra* note 97, at art. 4.

101. *Id.* art. 2 commentary.

102. *Armed Activities on the Territory of the Congo* (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, 214 (Dec. 19) ("According to a well-established rule of a customary nature, as reflected in Article 3 of the Fourth Hague Convention respecting the Laws and Customs of War on Land of 1907 as well as in Article 91 of Protocol I additional to the Geneva Conventions of 1949, a party to an armed conflict shall be responsible for all acts by persons forming part of its armed forces.").

103. State Responsibility, *supra* note 97, at art. 5, 8; *see Hyatt Int'l Corp. v. Iran*, 9 Iran-U.S. C.T.R. 72, 88-94 (1985).

104. State Responsibility, *supra* note 97, at art. 5.

the state exercising the direction and control does so knowingly.¹⁰⁵ This test harkens back to the era of the *Corfu Channel Case* and its mandate that a state not knowingly allow an attack to originate from its territory. This is particularly important in the area of cyber attacks because of their surreptitious and uncontrollable nature.

As mentioned, many states have already begun developing cyber units within their military or intelligence apparatuses. States have also delegated some elements of their cyber attack capabilities to the private sector. One state might even consider using *another* state to launch an attack on its behalf. Although tracing a cyber attack is a formidable technical challenge, if the targeted state successfully traces a cyber attack to source state's cyber unit or to an entity acting with the authority or under the control of the source state, the latter ought to be held responsible.

ii. Non-State Actors

A harder question, in both the realm of cyberspace and traditional warfare, is determining whether it is appropriate to attribute state responsibility when non-state actors perpetrate an attack. Article 51 of the Charter does not provide instruction on whether a state may respond with force to a non-state actor. Non-state actors, usually hacktivists, present a complicated issue for targeted states.

Hactivists are usually private citizens motivated by nationalistic or ideological feelings who possess sufficient skill to participate in a cyber attack. The nature of cyberspace permits hacktivists to launch attacks on another state from anywhere, at will, without government direction. Hacktivists' freedom to engage in cyber attacks from virtually anywhere in the world allows them to operate from the territory of a third party. Any action taken against a hacktivist in the territory of a third party state raises questions about violating that state's sovereignty, as well as whether the third party state has certain rights and obligations. The Charter does not explicitly address this facet of international conflict, leaving a legal loophole that hacktivists may exploit.

Yet custom and practice demonstrate that states can—and do—respond with force to non-state actors. The international response to the 9/11 attacks on the United States validated this principle of customary international law. After 9/11, the Security Council passed Resolution 1368, which reaffirmed the “inherent right” of the United States to respond in self-defense in accordance with Article 51 of the UN Charter.¹⁰⁶ Weeks later, when it was clear that non-state actors had committed the 9/11 attacks, the United States still received nearly universal support, including from the Security Council, when it invoked

105. *Id.* at art. 17.

106. S.C. Res. 1368, U.N. Doc. S/Res/1368 (Sept. 12, 2001) (Threats to International Peace and Security Caused by Terrorist Acts).

its right to respond in self-defense.¹⁰⁷

On what basis do we attribute responsibility to a state for the actions of its non-state actors? If the state directs or controls the non-state actors, regardless of whether the non-state actors are within its jurisdiction, there are several bases for which to hold the state responsible. However, “lone wolf” hackers—those who act without endorsement of the state—present a more complicated matter.

Under the original *Corfu Channel* formulation, if a state may not knowingly allow its territory to be used for acts that violate another state’s rights, then *mutatis mutandis* a state may not knowingly allow non-state actors within its borders to attack another state. More recently, the Articles on State Responsibility augment the *Corfu Channel* test by imputing responsibility to a state if “the person or group of persons is in fact acting on the instructions of, or under the *direction or control* of, that State in carrying out the conduct.”¹⁰⁸

The Articles on State Responsibility articulates the rule of the *Nicaragua* case. In *Nicaragua*, the issue brought before the ICJ was whether the United States was responsible for the actions of the contra guerillas in their rebellion against the Nicaraguan government. The Court held that to find the United States responsible would require “effective control” over the non-state actor group and also the exercise of that control with respect to the specific operation in which breaches were committed.¹⁰⁹ Such a finding would imply that state control extends beyond its immediate territory. Thus, if a state is in “effective control” of non-state actors operating in another territory, it may be held responsible for their actions. The Declaration on the Strengthening of International Security proclaims that every State has the duty to refrain from organizing, instigating, or participating in acts of civil strife or terrorist acts *in another state*. Under this standard, if a state organized, assisted, and controlled hackers as proxies, responsibility for their agents’ actions is imputed to the state with respect to the specific operations “controlled” by the state, wherever they might occur.

On the other hand, the International Criminal Tribunal for the Former Yugoslavia articulated a lower “overall control” test in *Prosecutor v. Tadic*, Case No. IT-94-1-T, Sentencing Judgment, ¶ 120 (July 14, 2007).¹¹⁰ The *Tadic* tribunal acknowledged that this standard “to some extent equates the group with

107. S.C. Res. 1373, U.N. Doc. S/Res/1373 (Sept. 28, 2001) (Threats to International Peace and Security Caused by Terrorist Acts).

108. State Responsibility, *supra* note 97, at art. 8 (emphasis added).

109. *Nicar. v. U.S.*, 1986 I.C.J. at 202.

110. *Prosecutor v. Tadic*, Case No. IT-94-1-T, Sentencing Judgment, ¶ 120 (July 14, 2007). This lower standard was criticized by the ICJ in the *Genocide Case* as being unsuitable because it “has the major drawback of broadening the scope of State responsibility well beyond the fundamental principle governing the law of international responsibility.” Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosn. & Herz. v. Serb. & Montenegro*), Judgment, 2007 I.C.J. 43 (Feb. 26).

State organs proper.”¹¹¹ The *Tadic* standard was applied only to participants in an organized and hierarchically structured group, such as a military or paramilitary force.

An example of such a paramilitary group is the Russian Business Network, which is often associated with Russia’s political and military elite, though it is not a formal participant. The Russian Business Network was intimately involved in the cyber attacks on Estonia and Georgia, attacks for which Russia denied its own involvement. Under the “overall control” test, the relationship between the Russian Business Network and the Russian State should be sufficient to impute state responsibility.

As for individuals and unorganized groups, the *Tadic* tribunal accepted the higher “effective control” standard to impute state responsibility. In order to meet the “effective control” test, the *Tadic* tribunal determined that there must be “specific instructions or directives aimed at the commission of specific acts,” or, in the absence of direction, that there be a public endorsement of the acts *ex post facto*.¹¹² Article 11 of the Draft Articles on State Responsibility declares that “[c]onduct which is not attributable to a state under the preceding Articles shall nevertheless be considered an act of that State under international law if and to the extent that the State acknowledges and adopts the conduct in question as its own.”¹¹³

The *United States Diplomatic and Consular Staff in Tehran (U.S. v. Iran)*, 1980 I.C.J. 3 (May 24), case is evidence of this principle in practice. The seizure of the US embassy and its personnel by militants was endorsed by the Iranian State. The ICJ held that Iran’s approval translated into state responsibility for the actions of the militants. Under this framework, if individuals or unorganized groups of hacktivists use a cyber attack to destroy a power plant in another state and their host state unequivocally approves the action, the attack will be imputed to that host state.

The hardest question for state attribution is whether a state is responsible for lone wolf hacktivists that operate without active encouragement from a state. In this scenario, international law requires states to take reasonable preventive measures. The Convention on Cybercrime, for instance, requires signatories to adopt domestic laws that criminalize cyber attacks. How far a state’s duty extends to prevent lone wolf hacktivists remains undetermined. For instance, must a state adapt its technology in some way, for example by removing online anonymity? Such a requirement raises serious questions about the liberty and privacy interests of individuals. But this is an issue that is more clearly within the range of domestic law, rather than the laws of war, and thus outside the scope of this Article.

111. *Tadic*, Case No. IT-94-1-T, at ¶ 121.

112. *Id.* at ¶ 132.

113. State Responsibility, *supra* note 97, at art. 11.

What if a state were required by international law to take reasonable measures to protect other states from foreseeable cyber attacks? Under that standard, a state that knows of cyber attackers launching attacks must take reasonable steps to fulfill its duty, by stopping the attacks, bringing the attackers to justice, or preventing further attacks. If a state does not cooperate, the targeted state may respond unilaterally in self-defense under Article 51. If a state knowingly allows—either through action or omission—a non-state actor to commit an attack, the state would be held internationally responsible. But if the state undertakes sufficient measures to protect other states, and a cyber attack still manages to originate from its territory, the state would not be responsible.

Since the 9/11 attacks, scholars argue that there has been a shift in the doctrine on state responsibility.¹¹⁴ Arguably, pre-9/11, a state would be held responsible for the actions of hacktivists operating within its territory if it could be shown that the state exercised “effective control” over them. State responsibility did not extend to knowingly harboring perpetrators of attacks. Since 9/11, this understanding of state responsibility has been challenged. Evidence of this change is seen in the overwhelming international support for the US campaign against Al-Qaeda.¹¹⁵ This change is perhaps best encapsulated by the Security Council’s endorsement of US actions when it adopted Resolutions 1368 and 1373.¹¹⁶ In Resolution 1368, the Security Council explicitly stated that those who aided, supported, or *harbored* the perpetrators of the 9/11 attacks would be held accountable.¹¹⁷

This view of state responsibility remains controversial. It suggests a remarkable shift from the standards articulated in *Nicaragua* and *Tadic*. Those who dispute the shift in the doctrine of state responsibility claim that the Security Council resolutions were an exceptional response to an exceptional set of circumstances. Perhaps, however, the international response can also be explained on the grounds that harboring the perpetrators of the 9/11 attacks is similar to endorsing their actions, which implies that the state is knowingly in violation of its duty to prevent attacks from its territory.

This change puts a high burden on states in the realm of cyberspace without any direction as to compliance. Cyber attacks can be executed from virtually anywhere, meaning that every state could potentially be held internationally responsible, even where its only nexus to the attack was the attacker’s presence on its soil for the moment that it took to plug in and execute the attack.

Regardless of which standard is used, a state may not attribute state responsibility and then immediately respond with force. Rather, the victim state

114. Sonja Cenic, *State Responsibility and Self-Defence in International Law Post 9/11: Has the Scope of Article 51 of the United Nations Charter Been Widened as a Result of the US Response to 9/11?*, 14 AUSTL. INT’L L.J. 201 (2007).

115. *Id.* (discussing support for the American military campaign in Afghanistan).

116. S.C. Res. 1368, *supra* note 106; S.C. Res. 1373, *supra* note 107.

117. S.C. Res. 1368, *supra* note 106 (emphasis added).

must request that the offending state comply with its international obligations.¹¹⁸ If the offending state does not comply, the targeted state may impute state responsibility and act accordingly.

B. *Cyber Attacks Not Covered by Jus Ad Bellum*

Cyber attacks that rise to the level of a prohibited use of force or that cross into the threshold of armed attack are regulated by *jus ad bellum*, which was designed to govern warfare. This Section, however, will examine how to regulate cyber attacks that fall below the level of a use of force and are consequently not covered by *jus ad bellum* protections. It is divided into two parts: the first part discusses cyber attacks that involve the use of economic, diplomatic, or ideological instruments. The second part examines low-intensity cyber attacks involving the use of the military instrument.

1. *Coercive Non-Military Instruments in Cyberspace*

Low-intensity conflicts are conducted using the four strategic modes discussed previously: military, economic, diplomatic, and ideological. Regardless of whether these instruments are used as a tool of persuasion or coercion, their intended outcome is to influence the behavior of the targeted state. While the Charter deals primarily with the military instrument, cyber attacks are versatile enough to fit within the other modes. This Section will examine the following scenarios using the non-military modes of coercion—economic, ideological, and diplomatic—and how international law might govern them:

Economic: A cyber attacker takes the New York Stock Exchange offline to undercut confidence in the integrity of the American financial markets.

Ideological: A cyber attacker manipulates the Internet pages of American politicians to associate them with radical positions with the intention of undermining their domestic political support.

Diplomatic: A cyber attacker steals classified cables from the US Department of State and publishes them online to embarrass the diplomatic corps of the United States.

i. *The Economic Instrument*

Hackers already appear to have penetrated into the computer systems that

118. Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 55-56 (Sept. 25) (“In the first place [countermeasures] must be taken in response to a previous international wrongful act of another State and must be directed against that State. . . . Secondly, the injured State must have called upon the State committing the wrongful act to discontinue its wrongful conduct or to make reparation for it. . . . [Third] the effects of a countermeasure must be commensurate with the injury suffered, taking account of the rights in question.”).

control the New York Stock Exchange.¹¹⁹ While no damage appears to have ensued, these breaches illustrate the extraordinary opportunity for economic devastation. A cyber attack undermining the international community's faith in the financial markets would cause a vast economic disruption with worldwide ramifications. How might international law treat such an attack?

As previously mentioned, Article 2(4) did not categorize economic coercion as a prohibited use of force. Nowhere in the Charter is economic coercion prohibited. The Charter does, however, mention that economic sanctions are permitted when called for by the Security Council.¹²⁰

In practice, economic coercion is an accepted tactic in international relations. States regularly use loans, credits, and foreign aid, among other means, to influence state action in designed ways. As will be discussed, economic coercion is also an lawfully accepted method of deprivation that states use as a countermeasure, also known as retorsions. While domestic laws may prohibit covert methods of economic coercion such as bribes or payments for intelligence, there is no comparable prohibition in international law. In fact, some experts argue that economic modes of coercion are welcome when the alternative is to resort to military force.¹²¹ (Note that this does not mean that economic coercion is unregulated or ought to be lawful; extreme forms of economic coercion ought to be unlawful.)

W. Michael Reisman and James Baker III offer one explanation for the unlawfulness of such an extreme method of economic coercion. "[W]e would surmise that where the particular unilateral economic strategy raises costs as a means of securing desired behavior, it would be viewed as lawful. Where it would seriously undermine a political, economic or, if practiced widely, disrupt the international economic system, it would, like other *undiscriminating* strategies that injure unrelated parties, probably be viewed as unlawful."¹²² An action that would strike the heart of the American economy would certainly rise to an indiscriminate strategy that injures an unacceptable number of non-combatant parties.

ii. *The Ideological Instrument*

In previous cyber conflicts, cyber attackers have defaced the websites of political leaders as a form of psychological operation. The process of mischaracterizing politicians is regularly witnessed during election cycles. Would a state violate its international obligations by employing a cyber attack

119. Devlin Barrett, *Hackers Penetrate NASDAQ's Computers*, WSJ, Feb. 5, 2011, <http://online.wsj.com/article/SB10001424052748704709304576124502351634690.html>.

120. U.N. Charter art. 41.

121. Seid-Hohenveldern, *The United Nations and Economic Coercion*, 18 BELGIAN REV. INT'L L. 9, 12 (1984).

122. REISMAN & BAKER, *supra* note 72, at 30 (emphasis added).

that discredited an American politician, e.g., by associating him or her with radical positions to undermine his or her support, thereby intervening in the United State's political process?

The ideological instrument is an attempt by an external actor to influence the body politic of a state for the purpose of changing its behavior. The democratic nature of cyberspace makes it particularly vulnerable to the ideological instrument. Virtually anyone can access the Internet, allowing a message to gain widespread traction more easily than traditional measures of propaganda. The combination of the worldwide audience and the ease with which a cyber attacker can implant a message makes cyberspace a fertile ground for using the ideological instrument.

The ideological instrument presents a struggle between free speech and a state's responsibility to promote non-interference in the affairs of other states. While the Charter is silent on the use of the ideological instrument as a method of coercion, a number of international agreements restrict or limit the use of the ideological instrument for hostile purposes.

The General Assembly has set forth its view of propaganda. In Resolution 110, the international body "condemns all forms of propaganda . . . which is either designed or likely to provoke or encourage any threat to the peace, breach of the peace, or act of aggression."¹²³ Subsequent resolutions have also sought to proscribe conduct for "war mongering" and "hostile propaganda."¹²⁴ State practice, however, demonstrates that these resolutions have little to no effect on state conduct. Thus, the international community has not come to a workable resolution of the tension between a state's promotion of domestic free speech and a state's responsibility to adhere to the principle of non-interference.

There are several well-known convictions for violations of the prohibition on inciting violence through propaganda. Notably, these convictions arise in the context of genocide. In the Nuremberg Trials, the newspaper publisher and author Julius Streicher was convicted for a crime against humanity for inciting murder and extermination in World War II.¹²⁵ In *Prosecutor v. Jean Paul-Akayesu*, Case No. ICTR 96-4-T (Sept. 2, 1998), the International Criminal Tribunal for Rwanda determined that Akayesu intended to incite genocide against the Tutsi group in Rwanda.¹²⁶

Outside of genocide, the operational mode of international law as it relates to the ideological instrument is an *ad hoc* approach more concerned with the method of communication and how it is controlled than the effect of its content.

123. G.A. Res. 110 (II), at 88-93, 1947-1948 U.N.Y.B. 14 (Nov. 3, 1947).

124. Declaration on the Inadmissibility of Intervention and Interference In the Internal Affairs of Sates, II(j); G.A. Res. 2625 (Declaration on Friendly Relations).

125. The Trial of German Major War Criminals: Proceedings of the International Military Tribunal Sitting at Nuremberg Germany, Part 22, 501-02 (1950).

126. *Prosecutor v. Jean-Paul Akayesu*, Case No. ICTR 96-4-T (Sept. 2, 1998).

Thus, a cyber attacker that sought to influence the internal body politic of an adversary by manipulating the webpages of American politicians to associate them with radical positions is likely a lawful action under international law. The same action might nevertheless be unlawful under domestic criminal laws.

The action's lawfulness does not stop a state from responding with proportional countermeasures to a hostile cyber attack, which could create tension between a state's countermeasures and the promotion of free speech. The danger lies in the possibility that the internal elite will resort to a restriction on free communication when it is used to threaten their power. The potential threat to free speech should encourage a state to restrain itself in how broadly it interprets a cyber operation that involves the ideological instrument.

iii. The Diplomatic Instrument

The diplomatic instrument consists of communication among the elites of nation-states and international organizations. Operationally, elites conduct much communication in secret, without domestic or international appraisal. Although the end product often results in a public international agreement, the process necessarily involves a high level of confidentiality.

Customary practice and treaties prohibit the use of coercion against diplomats. The protection extends in varying degrees to a diplomat's person, papers, personal property, facilities, communications, and movements. Article 29 of the Vienna Convention on Diplomatic Relations states: "The person of the diplomatic agent shall be inviolable. He shall not be liable to any form of arrest or detention. The receiving State shall treat him with due respect and shall take all appropriate steps to prevent any attack on his person, freedom or dignity." A similar protection applies to consular posts under the Vienna Convention on Consular Relations. Furthermore, the Convention on the Prevention and Punishment of Crimes against Internationally Protected Persons, Including Diplomatic Agents, extends protection from coercion to heads of state, foreign ministers, and any representatives of a state or international organization entitled to special protection under international law when a protected person is in a foreign state.

The nearly universal condemnation of violations against the diplomatic instrument of a state shows that a cyber attacker that steals classified cables from the US Department of State and then publishes them online to embarrass the US diplomatic corps would be in violation of international law. Such an attack would surely violate the dignity of the diplomat and his or her papers.

Each of the above is an example of a non-military action facilitated by a cyber attack. Technology permits a hostile state to act more quickly, inexpensively, and with a larger projection than in the past. Yet, the traditional governing regimes still apply. Moving coercive actions online does not mean that the actions are now unregulated; the traditional instruments that govern the economic, diplomatic, and ideological modes still apply. Hostile actions

prohibited offline are equally prohibited if committed in cyberspace.

2. *Low-Intensity Uses of the Military Instrument in Cyberspace*

In many instances, despite a hostile or tense relationship, a cyber attack is not sufficiently grave for the *jus ad bellum* regime to govern. Low-intensity cyber attacks have consequences that are not significant enough to pass the de minimis threshold that triggers the right of a state to respond in self-defense under Article 51. While the action might be considered a prohibited use of force, the cyber attack may be insufficiently grave to warrant unilateral action. Even fewer guidelines exist insofar as a low-intensity cyber attack falls below the “use of force” threshold. But even these actions are subject to regulation through human rights law and international treaties.

Human rights law may impede states that seek to coerce others through low-intensity cyber attacks. Article 17 of the International Convention on Civil and Political Rights (ICCPR) states that “[n]o one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.”¹²⁷ Cyber attackers that gain remote-access to a user’s computer files or that falsify electronic records to besmirch an individual run afoul of this ICCPR provision

Another problematic area of human rights law for cyber attackers is Article 19, which seemingly prohibits cyber attacks that target computer networks with the intent of obstructing communication. Article 19 states that “[e]veryone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.” Cyber attacks that inhibit access to the Internet or other telecommunications—such as a DDoS attack—violate Article 19. Enforcement, however, presents a significant challenge to cyber attack victims, which is a characteristic problem of human rights law. Again, the difficulties of international actors in cyberspace are not so different from the troubles of conventional international law.

How might a state respond to cyber attacks that do not trigger the right of self-defense? Does a targeted state have to absorb all low-intensity hostile actions without flinching or does international law permit a response? If a response is lawful, are there restraints on how a state may respond to low-intensity cyber attacks? Even without a clear set of rules, states can and do unilaterally respond to low-intensity cyber attacks that fall short of an armed attack. Thus, this Section necessarily considers what rules ought to apply for responding to low-intensity attacks.

127. International Covenant on Civil and Political Rights, G.A. Res. 2200A, art. 17, U.N. GAOR, 21st Sess., U.N. Doc. A/RES/2200 (Dec. 16, 1966), 999 U.N.T.S. 171 (entered into force Mar. 23, 1976).

A state may always respond to actions that it perceives to be hostile, so the question of where a cyber attack falls on the armed attack scale is moot. Rather, the question is, how might a state *lawfully* respond? The answer does depend on the magnitude and duration of the attack. Under international law standards, countermeasures must comply with the principles of necessity and proportionality. Accordingly, although a cyber attack may not merit self-defense, a state may nonetheless respond to it in kind.

Customary practice permits countermeasures in response to low-intensity attacks.¹²⁸ Countermeasures consist of either retorsions or reprisals and they are not limited to responding to wrongs inflicted by armed force. Countermeasures often respond to both economic and political wrongs.

Retorsions are unfriendly but lawful actions. States undertake them to remedy a hostile action—like a low-intensity cyber attack—committed by an adversary. In the world of cyber attacks, such a remedial action might involve shutting off the hostile state’s access to internal servers until the targeted state feels secure that no more cyber attacks are forthcoming.

In contrast, reprisals are actions that would be otherwise unlawful, but are a justified response to an adversary’s unlawful actions. Before engaging in reprisals, a state must comply with several criteria. First, the state must take countermeasures in response to a wrongful action directed against it.¹²⁹ Second, the targeted state must have called upon the aggressor to discontinue his or her wrongful conduct or make reparation for it.¹³⁰ Third, the effects of the countermeasure must be commensurate with the injury suffered.¹³¹ In essence, the countermeasure must consider the intention and consequences of the precipitating wrongful act.

For instance, in 2009, the United States publicly announced its intention to conduct a cyber war exercise known as Cyber Storm—to test the defense of computer networks—in collaboration with other nations including Japan and South Korea. Shortly after the announcement, the North Korea media responded by characterizing the pending exercise as a cover for an invasion. During the Fourth of July holiday, a botnet began a DDoS attack against US and South Korean government websites and international companies. Richard Clarke claims in *Cyber War* that during this attack US websites were hit with as many as one million requests per second. The attack was substantial enough to bring down the Department of Treasury, Secret Service, Federal Trade Commission, and the Department of Transportation web servers for some time over the

128. REISMAN & BAKER, *supra* note 72, at 90.

129. *Report of the International Law Commission on the Work of its Thirty-first Session: State Responsibility*, [1980] 2 Y.B. Int’l L. Comm’n 117, (1980) (quoting R. Int’l Arb. Awards, vol. 2, at 1056-57).

130. *Id.*

131. Gabcikovo-Nagymaros Project (Hung. v. Slov.), 1997 I.C.J. 7, 55-56 (Sept. 25).

following week.¹³²

In such a scenario, the United States could lawfully respond with proportionate countermeasures. Retorsions would include the United States shutting down access to its servers from North Korean servers. The nature of botnets, however, makes this an unlikely scenario. Botnets often hijack computers all over the world, and shutting down access to domestic servers from all international communication is an overly broad response. Thus, the United States might turn to other methods of retorsions to remedy the attack. For example, the United States might publicly condemn North Korea for its actions.

At the same time, the United States might also undertake reprisals in response to North Korea's cyber attack. Once the United States or South Korea determines that the DDoS attacks rise to the level of a prohibited use of force, and if demands to discontinue or provide reparation are ignored, the United States could respond in kind with its own DDoS attacks against North Korea. However, cyber reprisals have little effect in states like North Korea that are less technologically reliant than the United States.¹³³

The ICJ has acknowledged the existence of countermeasures as a lawful right of a state, although the international community has sought to limit armed reprisals.¹³⁴ In *Nicaragua*, the court stipulated that a state might respond with proportionate countermeasures to a prohibited use of force that does not reach the gravity of an armed attack.¹³⁵ In *Case Concerning Oil Platforms* (Iran v. U.S.), 2003 I.C.J. 161, ¶ 64 et seq., Judge Simma expanded on what a proportionate countermeasure may include when he stated that proportionate countermeasures “consist[] of defensive measures designed to eliminate the specific threat . . . at the time of the specific incidents.” This indicates that countermeasures are subject to the limitations of necessity and proportionality. Another foreseeable possibility is that “less grave” attacks may be accumulated for the purposes of assessing a self-defense claim. In these instances, consecutive attacks are linked in time, source, and cause. The incidents on their own are not sufficient to trigger Article 51, but the cumulative effect can transform the series of incidents into an armed attack, so that a targeted state may respond in self-defense. This suggests that a response is not strictly limited

132. *U.S. Eyes N. Korea for 'Massive' Cyber Attacks*, MSNBC (July 9, 2009), http://www.msnbc.msn.com/id/31789294/ns/technology_and_science-security/; Stan Schroeder, *Has North Korea Started the First Cyber War?*, MASHABLE (July 8, 2009), <http://mashable.com/2009/07/08/north-korea-cyber-war/>.

133. Cf. Michael Breen & Joshua A. Geltzer, *Asymmetric Strategies as Strategies of the Strong*, PARAMETERS, Spring 2011, at 41 (explaining why cyber attacks against the United States qualify as true asymmetric strategies).

134. Declaration on the Inadmissibility of Intervention and Interference In the Internal Affairs of States, II(j); G.A. Res. 2625 (Declaration on Friendly Relations) (“States have a duty to refrain from acts of reprisal involving the use of force.”).

135. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 249 (June 27).

to the event that changed the tide, but may look retrospectively at the accumulation of activity. Thus, a large-scale response may be appropriate to a series of accumulated small-scale cyber attacks. For many, such a possibility is unsatisfying. It suggests that the United States might respond to a DDoS attack with missile strikes, if the DDoS attack can be linked to a pattern of low-level cyber attacks.

This result is similar to how states respond to cross-border hit-and-run tactics of non-state actors. If each incident were considered in isolation, the target state would have little recourse. It might act in reprisal against the state if the target state could attribute responsibility. But reprisal would require a proportionate countermeasure to the incident, which might be insufficient to deter future attacks. If a state is able to accumulate the events and exercise its right of self-defense, it is permitted to respond on a larger scale in a planned and coordinated effort against its attackers. This doctrine, while controversial, has been invoked by several states.¹³⁶ The ICJ even implicitly acknowledged the accumulation doctrine in the *Oil Platforms* decision. It noted that “the question is whether that attack, either in itself *or in combination* with the rest of the ‘series of attacks’ cited by the United States can be categorized as an ‘armed attack’ on the United States justifying self-defence.”¹³⁷ The court ultimately concluded that, “[e]ven taken cumulatively,” the incidents did not amount to an armed attack. Article 15 of the Draft Articles on State Responsibility assigns responsibility “when the action or omission occurs which, taken with the other actions or omissions, is sufficient to constitute the wrongful act.”¹³⁸

The accumulation doctrine is noteworthy in the realm of cyberspace. There have been relatively few—if any—cyber attacks that when taken in isolation amount to an armed attack. There are many examples, however, of a series of cyber attacks that target a state. A series of cyber attacks, if accumulated, may result in the targeted state exercising its right to self-defense under Article 51. But the threshold remains high and should still depend partly on the gravity of the individual cyber attacks. For example, the Russian cyber attacks on Estonia mentioned earlier comprised a series of incidents that lasted for several weeks, causing disruption in both communication and services in the public and private sectors. If Estonia had been able to attribute the attacks to Russia, Estonia might have invoked the accumulation doctrine with respect to the relentless cyber attacks. Whether the international community would consider the accumulated attacks sufficient to trigger the right to respond in self-defense would depend on

136. Tom Ruys, *The Intangible ‘Armed Attack’: Evolutions in Customary Practice Pertaining to the Right of States to Self-Defence and the Quest for a Definition of ‘Armed Attack’ Under Article 51 UN Charter 259* (2009) (unpublished Ph.D. dissertation, Catholic University of Leuven) (on file with author).

137. *Case Concerning Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 64 et seq. [hereinafter *Oil Platforms*].

138. *State Responsibility*, *supra* note 97, art. 15.

the magnitude and duration of the “less grave” exhibitions of cyber attacks. That test involves a high threshold that will be difficult for most victims of cyber attacks to demonstrate.

In practice, most cyber attacks fall below the threshold of an armed attack. Many even fall below the threshold of a prohibited use of force. This does not mean that states must stand by defenseless. States can, and do, respond to coercive tactics undertaken by hostile states with countermeasures. But the responding state must first call upon the aggressor to discontinue its wrongful conduct or make reparations. The target state may respond only if the hostile state fails to comply with its request.

A state’s response to low-intensity cyber attacks is nevertheless constrained. Any countermeasure is governed by the principles of necessity and proportionality. Thus, the effects of the countermeasure must be commensurate with the injury suffered. A state may only go beyond a proportionate countermeasure if it is responding to a series of attacks. Thus, while each individual attack remains below the threshold of an armed attack, taken together the attacks constitute an armed attack. Again, this threshold remains high in international law.

3. *Covert Cyber Attacks*

Due to the sensitive nature of national security, states do not widely disseminate information regarding their cyber capabilities. Secrecy is a necessary quality for an effective cyber attack. Without secrecy, the intended target may effectively defend or prevent an attack. Thus, there is little public information on the current stockpile of cyber weapons or how they are used in practice.

What the public does know is that most cyber attacks occur covertly,¹³⁹ where the perpetrator is an unknown actor or where the cyber attack itself is unknown. The exposed “covert” operations—such as the cyber attacks on Estonia—are publicly known due to their widespread effects on civil society or because the attack had an observable physical manifestation. There is also the possibility that information regarding a cyber attack is deliberately unveiled to deter adversaries or because the victim publicly condemns the action.

Regardless of how the public learns of a cyber attack, the scraps of available public information indicate that a vast majority of cyber attacks is committed covertly, outside the context of war. Does an action’s lawfulness change based on whether a perpetrator’s identity is concealed? How should

139. “Covert” in this section refers to the target’s inability to identify its attacker. While “covert” may also refer to a state operation of which its constituents are unaware, this section will refer to “covert” in the former sense. While a serious issue that deserves further scrutiny, a state that conceals its operations from its domestic audience is more closely attached to domestic law and policy concerns.

international law govern covert cyber operations?

There are times when secrecy benefits the international public order. For one, an outcome achieved without force by a covert operation avoids escalation into a military conflict and its attendant costs.

On the other hand, the danger of covertness lies in the lack of state accountability. For example, if a state overtly seeks to stop its adversary's nuclear weapon program, its adversary receives domestic and international public condemnation from others, who also wish to stop the nuclear weapon program. The element of transparency has two important functions for the regulation of force. First, the overt operation puts the adversary on notice of what actions it must take to cease the coercive actions. Second, the architect of coercion is held accountable in an overt operation, and its actions are subject to domestic and international public and legal appraisal. Neither function is present during a covert operation.

The prohibition on the use of force under Article 2(4) does not distinguish between covert and overt attacks. If one subscribes to the textual myth of the Charter, the element of covertness does not tip the scales of justice. The Charter does not articulate tiers of unlawfulness that account for the injustice to states unable to identify what actions must take place to cease a covert attack or hold their covert attacker accountable. Under the Charter, a prohibited armed attack is unlawful whether committed covertly or overtly, and the element of covertness generally does not factor into the determination of lawfulness.

Nonetheless, the element of covertness may transform an otherwise lawful operation into an unlawful attack. There are two areas that shed light on the lawfulness of covert operations. These are the prohibition on perfidious conduct and legitimate *ruses de guerre*.

The laws of war permit a state to engage in a *ruse de guerre*. *Ruses de guerre* mislead the adversary into making a tactical mistake by catching the adversary off-guard. As articulated in Article 37 of the first Additional Protocol, a state may engage in the use of camouflage, decoys, mock operations, and misinformation, among other tactics.¹⁴⁰ Secrecy and deception inhere to the effectiveness of these tactics. A cyber attack that employs a disinformation campaign by failing to secure misleading documents in military databases, such that an adversary steals false information, is a legitimate *ruse de guerre*. One of the incentives to employ a cyber attack is that its covertness gives an attacker a tactical advantage. After all, an enemy possesses no right to be notified before an attack, nor does the enemy possess the right to be free from surprise attacks or ambushes.

The deceptive tactics of the attacker, however, are still constrained. Article 37 of the first Additional Protocol prohibits killing, injuring, or capturing an adversary by resort to perfidy. The provision defines perfidy as “[a]cts inviting

140. Protocol I, *supra* note 46, art. 37.

the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence.”¹⁴¹ Among the enumerated examples of perfidy is the feigning of civilian, non-combatant status. Similarly, under Article 4 of the Third Geneva Convention, a state’s forces must “carry arms openly” and have a “fixed distinctive symbol recognizable at a distance.”¹⁴²

In *Ex parte Quirin*, a group of German soldiers during World War II removed their uniforms so that they could slip into the United States in civilian clothing. The US Supreme Court held that while the intended targets—US war facilities—were legitimate and lawful targets, it was “the absence of uniform that render[ed] [the German soldiers] liable to trial for violation of the laws of war.”¹⁴³ Thus, the noumenal element of covertness *can* transform an otherwise lawful operation into an unlawful action under international law.¹⁴⁴ The laws of war tolerate ruses to mislead an adversary, but not to the extent of misleading an adversary of one’s status as a non-combatant.

The purpose of these provisions is to make the lawful combatants in a conflict identifiable so that a targeted state may discriminate between lawful combatants and civilians. The Commentary clarifies who are combatants and who are civilians.¹⁴⁵ By separating combatants and civilians into separate categories, civilians are better protected and the evils of war are mitigated.

To comply with the laws of war, a state must ensure that its forces are distinguishable from the civilian population. Those laws require combatants to self-identify by means of a fixed distinctive symbol, although they do not specify what else a state’s forces must do to comply. Although a fixed distinctive symbol is often a uniform, it is possible that other symbols could comply.

In cyberspace, however, the requirement to wear a uniform does not make sense. But an identifying line of code is both possible and consistent with the intent of Article 4. However, both obligations within the Third Geneva Convention apply to the cyber attacker and not to the cyber weapon. A state could formally comply with the strict language of this provision by having its cyber attackers in uniform while safely tucked thousands of miles away from the

141. *Id.*

142. Convention [No. III] Relative to the Treatment of Prisoners of War, Aug. 12, 1949, Art. 4, 6 U.S.T. 3316, 75 U.N.T.S. 287.

143. *Ex parte Quirin*, 317 U.S. 1, 15 n. 12 (1942).

144. State practice does not always follow this standard. In World War II, a British officer was commended for using civilian clothing to infiltrate a German base to kill a general. W. Hay Parks, *Memorandum of Law: Executive Order 12333 and Assassination*, ARMY LAW, Dec. 1989, at 6.

145. Jean de Preux, et al., *The Geneva Conventions of 12 August 1949: Commentary: III Geneva Convention Relative to the Treatment of Prisoners of War* 46–47 (ICRC 1960) (Jean S. Pictet, ed.) (A.P. de Heney, trans).

“battlefield,” thereby reducing the distinctive symbol obligation to an empty requirement.

In practice, the operational norm is not aligned with the aspirational message of the Charter. Scholars such as W. Michael Reisman and James Baker III make the case that operations, which may be lawful if done overtly, might be unlawful if undertaken covertly.¹⁴⁶ Thus, some covert cyber attacks would be less permissible than identical overt cyber attacks.

Factors condition the international response to covert actions. Among these are whether the covert action (1) is executed through the military instrument or another mode of coercion; (2) involves independent and disproportionate violations of other norms governing violence; (3) is governmental or non-governmental; and (4) is a single operation or integrated into an overall mission.¹⁴⁷ Together, these factors influence whether the international community considers the covert nature of the action unlawful.

The laws of war are designed to regulate the use of force and moderate its consequences. Clear rules of how to operate on a battlefield—or in cyberspace—brings order to war and protection for noncombatants. To the extent possible, trust must exist that each participant is fighting under the same operational code. The absence of trust leads to escalating paranoia that encourages higher levels of violence and treachery, putting noncombatants at a greater risk.

Do covert cyber attacks put civilians at risk of being misidentified as the perpetrators? At times states have been wrongly accused of perpetrating a cyber attack, so it is conceivable that a reprisal or an act in self-defense aimed at an accused state could cause civilian deaths.¹⁴⁸ Further, the scenario of a targeted state misattributing an attack to civilians and taking action in violation of international law is more likely in peacetime than in conflict. During a conflict, a cyber weapon operates like any other. Though it may cross into the threshold of perfidy, the element of covertness during a conflict should not transform an otherwise lawful attack into a violation of the laws of war. In a conflict, the participants are known. If a cyber attack occurs, it is likely attributed to the adversary state rather than to a civilian group, thereby mitigating the effects on civilian life of a countermeasure. A covert cyber attack that is executed during a conflict is less likely to raise questions than one where the targeted state is not on notice of what actions it may take to cease the operation.

The situation is different during peacetime. A state is not on notice of who

146. REISMAN & BAKER, *supra* note 72, at 30.

147. *Id.* at 67-72.

148. In the 1998 Solar Sunrise attacks, computers based in the United Arab Emirates breached military computers in the United States. It was later reported that it was not an attacker actually from the United Arab Emirates behind the attack, but an Israeli teenager and two high school students from California. Christopher C. Joyner & Catherine Lotrionte, *Information Warfare as International Coercion: Elements of a Legal Framework*, 12 EUR. J. INT'L L. 825, 839 (2001).

is attacking or what actions it can take to stop an attack. Take, for instance, an action meant to coerce a country by targeting its economy. Economic coercion is necessarily overt. Such a strategy is meant to coerce rather than destroy. By acting overtly, an actor communicates a message designed to change the behavior of the target. A covert use of the same strategy delivers no message, as the targeted state will not know the identity of the actor. Without the identity, the targeted state is bereft of strategies it might adopt to terminate the action—does the state comply with the aggressor’s demands or take countermeasures? Otherwise lawful conduct *executed covertly* ought to be factored into the lawfulness of a cyber attack during peacetime. Although, even if the element of covertness was given more weight during peacetime, a cyber attacker could post its demands anonymously, thereby reducing the effect of covertness in determining the lawfulness of the action.

The rules of engagement in cyberspace are still emerging. During this incipient stage, adversaries continue to test the tolerance of one another and the international community. Toleration for covert actions below a certain threshold has emerged as part of the current paradigm. States endure cyber attacks without resorting to international fora when the consequences are minimal and have little effect on the balance of powers.

Legal considerations of covertness will gain greater resonance as states increasingly employ covert cyber attacks to achieve their goals. There is no bright-line rule on whether a covert cyber attack will be held unlawful by the international community for the reason of its covertness. Whether a covert cyber attack is held unlawful depends on a number of contextual factors, including: (1) who perpetrates the attack, (2) who is the target, (3) whether civilians are at risk, (4) whether the intended outcome is to coerce or to destroy, (5) whether the target is afforded an opportunity preceding the covert operation to change its offensive behavior, (5) whether the attack complies with *jus in bello* obligations, and ultimately, (6) whether the covert cyber attack complies with the fundamental policies of the Charter.

C. *Jus in bello: Conduct of Cyber Warfare*

Once a state has entered into a conflict, the use of force is governed by *jus in bello*. Under *jus in bello*, even states that have the lawful right to use force still have limitations in how they use it. *Jus in bello* is largely derived from the Hague Conventions,¹⁴⁹ the Geneva Conventions,¹⁵⁰ and the associated

149. Hague Convention IV Respecting the Laws and Customs of War on Land, Annex, Oct. 18, 1907, 36 Stat. 2277, 205 Consol. T.S. 277 [hereinafter Hague IV].

150. See The Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6.3 U.S.T. 3114, 3116, T.I.A.S. No.3362, at 3, 75 U.N.T.S. 31, 32 [GC I]; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, Aug. 12, 1949, 6.3 U.S.T. 3217, 3220, 75 U.N.T.S. 85, 86 [GCII]; Geneva Convention Relative to the Treatment of Prisoners of War, Aug.

protocols,¹⁵¹ much of which is considered customary international law. In the words of the Saint Petersburg Declaration of 1868, the aim of the laws of war is to “alleviate as much as possible the calamities of war.”¹⁵² This section examines how the law of armed conflict ought to apply to cyber attacks. The restraints on how a state conducts its use of force is not contingent on the weaponry used, so transposing the principles of international humanitarian law to the use of cyber attacks—despite being a new weapon of warfare—is not only possible but also appropriate given its growing popularity as a coercive tactic. The following Sections will discuss the traditional schema of *jus in bello*—military necessity, distinction, proportionality, perfidy, and neutrality—in relation to cyber attacks.

1. *Military Necessity*

When a cyber attacker is party to a conflict, international humanitarian law restricts the use of force to targets that will accomplish valid military objectives. Considered customary international law,¹⁵³ Article 52 of the Additional Protocol to the Geneva Conventions limits lawful targets to “those objects which by their nature, location, purpose or use make an effective contribution to military action and whose total or partial destruction, capture, or neutralization, in the circumstances ruling at the time, offers a definite military advantage.”¹⁵⁴ Notably, Article 23 of the Fourth Hague Convention forbids destruction or seizure of property “unless such destruction or seizure be imperatively demanded by the necessities of war.” Violating the principle of military necessity is considered a “war crime” in the Rome Statute of the International

12, 1949, 6.3 U.S.T. 3316, 3318, 75 U.N.T.S. 135, 136 [GC III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6.3 U.S.T. 3516, 3518, 75 U.N.T.S. 287, 288 [GC IV] [all four hereinafter Geneva Conventions].

151. See Protocol I, *supra* note 46; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, opened for signature Dec. 12, 1977, U.N. Doc. A/32/144, reprinted in 16 I.L.M. 1442 (1977) [hereinafter Protocol II].

152. Saint Petersburg Declaration Renouncing the Use, in Time of War, of Explosive Projectiles Under 400 Grammes Weight Preamble (1868), <http://www.icrc.org/ihl.nsf/FULL/130?OpenDocument> (last visited March 15, 2011).

153. See, e.g., U.S. DEP’T OF ARMY, FIELD MANUAL 27-10: THE LAW OF LAND WARFARE 14 (2005); see also Michael J. Matheson, *The United States Position on the Relation of Customary International Law to the 1977 Protocols Additional to the 1949 Geneva Conventions*, 2 AM. U. J. INT’L L. & POL’Y 419, 420 (1987).

154. Protocol I, *supra* note 46, art. 52; see also Case No. 47, *The Hostages Trial*, The United States of America vs. Wilhelm List, et al., United States Military Tribunal, Nuremberg, pg. 66, (ix) *The Plea of Military Necessity*, <http://www.ess.uwe.ac.uk/wcc/List4.htm> (“Military necessity permits a belligerent, subject to the laws of war to apply any amount and kind of force to compel the complete submission of the enemy with the least possible expenditure of time, life and money.”); *Oil Platforms (Iran v. U.S.)*, 2003 I.C.J. 161, ¶ 73 (Nov. 6) (“The requirement of international law that measures taken avowedly in self-defense must have been necessary for that purpose is strict and objective, leaving no room for any “measure of discretion”).

Criminal Court.¹⁵⁵ Valid targets are thereby limited to those objects contributing to an adversary's war efforts or those whose damage or destruction creates a definite military advantage.

A cyber attack that targets an adversary's military computer systems satisfies the condition of military necessity by virtue of their exclusive military association. Great opportunity exists to attack the computer systems of a modern military. Modern militaries use computer systems for every facet of operations.

But determining whether a target creates a "definite military advantage" is complicated. Presumably, this requirement limits cyber attacks with indeterminate military advantages. The complexity of computer systems makes calculating military advantage a challenge. The value of a cyber weapon often lies in its cascade effect on systems that rely upon the initial target. Most cyber attackers do not have sufficient information to predict the indirect effects of an attack. A cyber attacker that penetrates into the computer systems of an electrical generator *might* gain a military advantage, but the system may have unforeseen layers that prevent such an advantage from occurring. In these circumstances, the military advantage is not definite enough to satisfy the condition of military necessity.

Similar to conventional warfare, the conundrum is that cyber attacks could be deemed as creating a "definite military advantage" *ex post* whereas an *ex ante* analysis of the same attack might not come to the same conclusion. The definitiveness of the military advantage *ex post* is apparent only if the attack is successful. A cyber attacker could defend challenges to its use of force by creating an information log that records what information the attacker knew about the target system at the time of attack. While the laws of war do not require such recordkeeping, an information log would be a relatively simple way to shield the attacker's decision to invoke military necessity to target an object.

Ultimately, the evaluation of whether a cyber attack arose from military necessity will rely on a case-by-case determination. (This is similar to the evaluation of military necessity in traditional attacks.) In each instance, a cyber attacker must affirmatively determine that the attack offers a military advantage.

2. *Distinction*

Military necessity is weighed against other limiting principles, including the principle of distinction. Article 48 of the Additional Protocol—considered a customary definition of distinction—requires attackers to "at all times distinguish between the civilian population and combatants, and between civilian objects and military objectives." Article 51 of the Additional Protocol requires attackers to ensure that "the civilian population and individual civilians . . . enjoy general protection against dangers arising from military operations"

155. Rome Statute of the International Criminal Court, art. 8(2)(a)(iv), (1998), <http://untreaty.un.org/cod/icc/statute/rome.htm> (last visited March 26, 2011).

and “not be the object of attack.”¹⁵⁶ Article 51, therefore, prohibits “indiscriminate attacks.” Notably, the Rome Statute identifies the failure to distinguish between civilians and combatants as a “war crime.” The purpose of distinction is to restrict attacks to combatants and military objectives only.

Civilians who directly participate in hostilities are not protected.¹⁵⁷ By virtue of participating, the civilian forfeits his protected status. But non-participating civilians sometimes die in attacks, and such civilian deaths are not *per se* war crimes. The principle of distinction allows for some civilian death as long as state makes reasonable efforts to distinguish between combatants and civilians, and to refrain from intentional attacks on civilians and civilian targets. The difficulty with making this distinction with respect to cyber attacks is that in cyber space, there is often an undefined and fuzzy line between military and civilian targets. (See, for example, the description in Section I(A) of how ARPA used the civilian infrastructure provided by AT&T to accomplish its goals.) To determine whether cyber attacks meet the requirements of distinction, a cyber attacker must establish (i) whether the attack sufficiently distinguishes between civilian and military targets, taking into account the dual-use of most Internet infrastructure, and (ii) whether the cyber attacks are conducted indiscriminately and without regard to the civilian population.

i. Do Cyber Attacks Distinguish Between Civilian and Military Targets?

The laws of war are in place to ensure that parties to a conflict target combatants rather than civilians, and, if civilians are targeted, to ensure that such individuals have forfeited their protected status. To determine whether cyber attacks properly distinguish between civilian and military targets, one must understand where the distinction between the two lies.

Combatants consist of all *organized* armed forces, groups, and units that are under the command of the state.¹⁵⁸ These individuals may rightfully participate in hostilities. Under the law of armed conflict, combatants are required to distinguish themselves from the civilian population while they are engaged in an attack or in a military operation preparatory to an attack.¹⁵⁹ Non-combatants are understood to be civilians and enemy personnel out of combat.¹⁶⁰

156. Protocol I, *supra* note 46, art. 51; *see also* Protocol II, *supra* note 151, art. 13 (providing that “[t]he civilian population and individual civilians shall enjoy general protection against the dangers arising from military operations” and also “the civilian population . . . as well as individual citizens, shall not be the object of attack”).

157. Protocol I, *supra* note 46, art. 51.

158. *Id.* art. 43.

159. *Id.* art. 44(3).

160. *Id.* art. 50(1).

The definition of a lawful combatant under international humanitarian law requires a level of *organization* or state *command responsibility*. These traits are present within states with armed forces that have cyber capabilities. This also includes the *ad hoc* groups, such as the Russian Business Network, that receive implicit consent to act and, arguably, even direction from the state in their cyber attacks. The international humanitarian law definition of combatant is an awkward fit for cyberspace, where unorganized individuals can readily participate in cyber attacks against an adversary, as when hacktivists perform DDoS attacks for patriotic or ideological reasons. In those instances, should the targeted state be permitted to respond with a proportionate level of force? This is a pertinent question as cyber weapons become increasingly available to the masses.

In the realm of cyber war, hacktivists do not fall within the definition of lawful combatants and therefore are not treated as protected civilians under Protocol I “for such time as they take a direct part in hostilities.”¹⁶¹ Therefore, during the time that hacktivists participate in a conflict, they are valid targets. However, any use of force against them is limited by the principle of proportionality. To the extent that hacktivists “carry arms openly” and are responding defensively, they could fit into the category of *levee en masse*, and receive Prisoner of War status under Article 4(a)(6) of the Third Geneva Convention, which extends protections to:

Inhabitants of a non-occupied territory, who on the approach of the enemy spontaneously take up arms to resist the invading forces, without having had time to form themselves into regular armed units, provided they carry arms openly and respect the laws and customs of war.

What it means to “carry arms openly” in cyberspace is undefined as of yet. The efficacies of most cyber weapons stems from their ability to allow cyber attackers to penetrate a computer system undetected and inject their attack.

Cyber attacks often come quickly and without warning. There can be a significant lag time before the targeted state determines the source of the cyber attack. Regardless of a state’s inclination to respond with force once it discovers the hacktivist source, it is prohibited from doing so if the hacktivist is no longer participating directly in the conflict. The relative ease with which civilians can participate in cyber attacks and remain undetected makes this limitation a true threat to targeted states. Such hacktivists momentarily become acceptable military targets, but they quickly return to their civilian status while remaining a potential threat. This problem can be partially addressed by shifting responsibility to states to prohibit, prevent, or stop cyber attacks from originating on their Internet infrastructure. States that do not comply would be internationally responsible. However, the level of control necessary for a state to comply with such a duty bumps up against the freedoms valued online. The proper balance of liberty in cyberspace and national security will be at the heart

161. *Id.* arts. 47, 51 (3); *see also* Protocol II, *supra* note 151, art. 13.

of future debate over regulation of cyber attacks.¹⁶²

A related concern under the principle of distinction is when a cyber attacker forces a civilian to participate in a conflict. Civilian computers cannot ordinarily be classified as military objects unless they are participating directly in military activities. Cyber attackers can hijack civilian computers to incorporate them in a botnet attack against an adversary, thus involving these computers in military activities.

Such hijacking involves two violations. First, the cyber attacker unlawfully attacks civilian computers with malware that forces the computer to respond to the cyber attacker's command. The targeted state can then respond with a proportionate counter-attack against these hijacked computers, causing collateral damage to civilian infrastructure. In this case, the original cyber attacker is responsible for the subsequent damage to the civilian property caused by the targeted state. Second, the cyber attacker unlawfully forces civilians to participate in hostilities. Under the Fourth Geneva Convention, protected persons may be compelled to do only work "which is not directly related to the conduct of military operations."¹⁶³ By creating a cyber weapon composed of civilian computers, a cyber attacker unlawfully forces civilians to participate in direct military operations. This is the cyber equivalent of a "human shield." DDoS attacks and social engineering tactics that involve civilians are questionable tactics that deserve exacting scrutiny to determine whether they violate international law principles.

Further, as previously suggested, distinguishing between civilian and military objects is complicated in cyber war.¹⁶⁴ Targeting purely military objects will not violate the principle of distinction. However, there are cyber attacks that deliberately target objects to kill civilians or destroy civilian objects. Such attacks are clearly unlawful under the law of armed conflict. In practice, however, cyber attacks targeting civilians have been more of an inconvenience

162. See, e.g., Jim Garamone, *Lynn Seeks Australian Cooperation in Cybersecurity*, AM. FORCES PRESS SERV. (Feb. 13, 2010) <http://www.defense.gov/news/newsarticle.aspx?id=57951> ("We have the same tension you do between how do we balance between protecting this incredibly important national asset and protecting peoples' civil liberties and the right not to face governmental intrusion . . . We're still working through ways to balance that"); see also *Cybersecurity Discussion with General Keith B. Alexander*, CTR. FOR STRATEGIC & INT'L STUDIES (June 3, 2010), <http://csis.org/event/cybersecurity-discussion-general-keith-b-alexander-director-national-security-agency> ("We want to protect - some say the Constitution is not a suicide pact, and I agree, but it's also not something that we're just going to throw out our civil liberties and privacy. We were built on that. That's how our country was built. We want to ensure that we do our part to it. My responsibility, as the director of NSA, is to ensure that what we do comports with law.").

163. Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 40, 6 U.S.T. 3516, 75 U.N.T.S. 287; see also Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 147, 6 U.S.T. 3516, 75 U.N.T.S. 287. (explaining that a grave breach includes, "compelling a protected person to serve in the forces of a hostile Power").

164. Protocol I, *supra* note 46, art. 52.

than a threat to life or safety. For instance, in 2008, tensions arose between Georgia and Russia over the separatist regions of Abkhazia and South Ossetia. The conflict escalated into war in August of 2008. Along with kinetic attacks, cyber attackers operated from Russia. Massive DDoS attacks targeted Georgia's political websites using psychological warfare tactics, such as placing images of Adolf Hitler alongside pictures of the Georgian President. Hacktivists targeted media outlets and government websites during times of physical attacks, making communication particularly difficult and chaotic. Cyber attackers targeted CNN and BBC web servers in Georgia, blocking access to international news as well.¹⁶⁵ The attack on the media caused confusion. For the majority, however, the cyber attacks were only a temporary inconvenience. If the attacks had threatened the safety of civilians or damaged civilian property, they would have been unlawful.

A harder determination to make is whether it is unlawful to attack dual-use objects that serve both civilian and military purposes. Cyber attackers may categorize a variety of dual-use objects as legitimate military targets, such as civilian infrastructure, to the extent that it is employed for military purposes. This category includes power-generating stations, telecommunications, and bridges, among other civilian infrastructure used by the military during wartime.

In the realm of cyberspace, most Internet infrastructure can serve as a dual-use object because military systems are so often interwoven with civilian infrastructure. The US military's global communications backbone consists of seven million computing devices on thousands of networks across hundreds of installations in dozens of countries.¹⁶⁶ One study approximates that ninety-five percent of the telecommunications of the Department of Defense travels through the Public Switched Network.¹⁶⁷ Private investment in the underlying infrastructure of the Internet was a key factor in its worldwide spread. Unfortunately, the inter-connected nature of military and civilian infrastructure complicates the lawfulness of cyber attacks by making much of the Internet a dual-use object.

165. Dancho Danchev, *Coordinated Russia vs. Georgia Cyber Attack in Progress*, ZDNET (Aug. 11, 2008), <http://www.zdnet.com/blog/security/coordinated-russia-vs-georgia-cyber-attack-in-progress/1670>; *Cyberwar 2.0: Russia v. Georgia*, DEFENSETECH (Aug. 13, 2008), <http://defensetech.org/2008/08/13/cyber-war-2-0-russia-v-georgia/>; *Cyber attacks on Georgia Websites Tied to Mob, Russian Government*, LA TIMES (Aug. 13, 2008), <http://latimesblogs.latimes.com/technology/2008/08/experts-debate.html>; Brian Krebs, *Russian Hacker Forums Fueled Georgia Cyber Attacks*, WASHINGTON POST, (Oct. 16, 2008), http://voices.washingtonpost.com/securityfix/2008/10/report_russian_hacker_forums_f.html; John Markoff, *Before the Gunfire*, NY TIMES (Aug. 12, 2008), <http://www.nytimes.com/2008/08/13/technology/13cyber.html?ref=europe>

166. William J. Lynn III, *Defending a New Domain: The Pentagon's Cyber Strategy*, FOREIGN AFFAIRS (Sept./Oct. 2010), <http://www.foreignaffairs.com/articles/66552/william-j-lynn-iii/defending-a-new-domain>.

167. Jeffrey T.G. Kelsey, Note, *Hacking into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare*, 106 MICH. L. REV. 1427 (2008).

The decision to employ cyber attacks when targeting dual-use objects necessarily hinges on the intent of the attack. A cyber attacker may lawfully target a dual-use object when the purpose of the attack is to gain a military advantage. Contrast this with an attack whose purpose is to demoralize the populace. In the latter case, the attacker is not acting lawfully because the primary object of the attack is not to undermine the military but to undermine civilians' political support for the conflict.

ii. Are Cyber Attacks Conducted Indiscriminately?

Even if a cyber attack properly distinguishes between a civilian and combatant, a cyber attacker must ensure that its attack operates discriminately to comply with the civilian/combatant distinction. Indiscriminate attacks are those that are so imprecise as to cause collateral damage. Some degree of collateral damage is expected in wartime. After all, war is messy. The proportionality requirement is an attempt to limit states from engaging in a foreseeably excessive level of force by requiring states to use lesser methods of force that reduce unnecessary collateral damage when possible.

Article 57 of Additional Protocol I declares that, "when a choice is possible between several military objectives for obtaining a similar military advantage, the objective to be selected shall be the attack on which may be expected to cause the least danger to civilian lives and to civilian objects."¹⁶⁸ Customary law as reflected in Article 57 of the Additional Protocol requires attackers to take "constant care" and "all reasonable precautions" to spare the civilian population and civilian objects. The Additional Protocol, Article 51(4) defines three types of indiscriminate attacks, including attacks that: (1) "are not directed against a specific military objective," (2) "cannot be directed at a specific military objective," and (3) "cannot be limited as required by [international humanitarian law]."¹⁶⁹

As the definition implies, restraint and control are necessary traits to satisfy the requirement of discrimination. Ideally, cyber weapons would be designed in a manner that permits their operation only against military objects. But this is not always possible. Therefore, the limiting principle is that the more narrowly designed the cyber weapon is to achieve its intended objective, the more likely it is to meet the requirements of discrimination. Importantly, the restraints in international humanitarian law are not meant to be a suicide pact. A state that possesses the ability to design a narrowly tailored cyber weapon is not required to use it if the implementation will endanger its own forces. A state that believes a cyber attack has a thirty percent chance of success in taking down an adversary's radar system might choose to engage in a kinetic aerial bombardment with a higher rate of success to avoid risking the lives of their

168. Protocol I, *supra* note 46, art. 57(3).

169. *Id.* art. 51(4).

own soldiers.

All things being equal, in many instances, a cyber attack is preferable to a kinetic attack. A cyber attack that takes down an electrical generator will have less physical damage and fewer civilian deaths than a comparable kinetic attack from an aerial bomber. The ability of a cyber attack to disable an adversary's systems without an explosion is inherently more discriminating than a kinetic attack that destroys the same system but also kills the technician operating the system.

But the relative inability of a cyber attack to discriminate raises questions of its lawfulness. Military systems are usually more secure than civilian systems. Therefore, it is easier to unleash a cyber attack that targets a civilian system on which the military relies rather than to attack the military system directly. Further, predicting and understanding the outcome of a cyber attack requires a substantial amount of intelligence on the systems targeted. Even with this information, the number of factors outside of a cyber attacker's control can mean that a cyber attack unintentionally spreads beyond the intended target. Cyber attacks that employ a virus or a worm, for example, can quickly spiral out of control, infiltrating civilian systems and causing damage to property that far surpasses the intent of the cyber attacker.

One example of a cyber attack designed to distinguish between a civilian and a military object with the intent of attacking discriminately is the Stuxnet worm that targeted nuclear facilities in Iran. Stuxnet, a sophisticated computer worm designed to attack industrial control systems, appeared in the cyber ecosystem in 2010.¹⁷⁰ The worm had two main components. One was designed to force Iran's centrifuges to spin out of control. The other was to deceive operators into thinking the machines were operating normally when they were actually tearing themselves apart. The level of sophistication was unprecedented. Not only was Stuxnet designed to upload information about the system it infected to a command-and-control server so that attackers could pick their targets and change how they physically operate, it also appears that it was designed to trigger its payload only for the Iranian nuclear program.

Stuxnet targeted computers known as controllers, which run industrial machinery. These controllers are critical to the successful operation of the

170. Robert McMillan, *Stuxnet Worm Hit Industrial Systems*, COMPUTERWORLD (Sept. 14, 2010), http://www.computerworld.com/s/article/print/9185419/Siemens_Stuxnet_worm_hit_industrial_systems?taxonomyName=Network+Security&taxonomyId=142; Stuxnet Worm Hits Iran Nuclear Plant Staff Computers, BBC (Sept. 26, 2010), <http://www.bbc.co.uk/news/world-middle-east-11414483>; Ed Barnes, *Stuxnet Worm Still Out of Control at Iran's Nuclear Sites, Experts Say*, FOX NEWS (Dec. 9, 2010), <http://www.foxnews.com/scitech/2010/12/09/despite-iranian-claims-stuxnet-worm-causing-nuclear-havoc/>; Christopher Dickey et. al., *The Shadow War*, NEWSWEEK (Dec. 13, 2010), <http://www.newsweek.com/2010/12/13/the-covert-war-against-iran-s-nuclear-program.html>; Yaakov Katz, *Stuxnet Virus Set Back Iran's Program by 2 Years*, JERUSALEM POST (Dec. 15, 2010), <http://www.jpost.com/IranianThreat/News/Article.aspx?id=199475>.

uranium enrichment facilities necessary for a nuclear program. The Stuxnet worm became operational when it detected a specific configuration of controllers running a particular set of processes found only in an enrichment plant. While the Stuxnet worm infected civilian industrial control systems around the world, its harmful effect operated directly and exclusively on specific systems and conditions present in Iran's nuclear program. The Stuxnet worm satisfies the criteria of distinction because the worm was designed for a specific military target—assuming the Natanz plant is not a civilian nuclear energy program—and did not indiscriminately destroy civilian computer systems.¹⁷¹

Distinction is a problem for cyber attackers, whose targets are very frequently dual-use. However, if the intent of a cyber attack is to achieve a military advantage by targeting computer systems used for military objectives, and if the attackers conduct such attacks with reasonable precaution for likely collateral effects, cyber weapons are a more precise and adaptable means for attack than traditional weapons.

3. *Proportionality*

The principle of proportionality is similar to distinction in that it reflects concern with the consequences of an attack on civilians and civilian objects. Proportionality governs the degree and kind of force used to achieve a military objective by comparing the expected military advantage gained to the expected incidental damage caused to civilians and civilian objects. As one court notes, the laws of war “create[] a delicate balance between two poles: military necessity on one hand, and humanitarian considerations on the other.”¹⁷²

The principle of proportionality stems from Article 51 of Additional Protocol I, which states that force is prohibited where it “may be expected to cause incidental loss of civilian life, injury to civilians, damage to civilian objects, or a combination thereof, which would be excessive in relation to the concrete and direct military advantage anticipated.”¹⁷³ Article 57 similarly requires that attackers “refrain from deciding to launch an attack which may be expected to cause incidental . . . [but] excessive [losses] . . . in relation to the concrete and direct military advantage anticipated.” The Rome Statute incorporates proportionality within its enumeration of particular crimes. Article 8(2)(a)(iv) references “*extensive destruction* . . . not justified by military necessity” and Article 8(2)(b)(iv) states that “intentionally launching an attack in the knowledge that such attack will cause incidental loss . . . or damage . . .

171. Yaakov Katz, *supra* note 171.

172. HCJ 2056/04 Beit Sourik Village Council v. The Government of Israel [2004], art. 34 (Barak, C.J.), http://elyon1.court.gov.il/files_eng/04/560/020/A28/04020560.a28.htm (quoting Dinstein, *Legislative Authority in the Administered Territories*, 2 *Iyunei Mishpat* 505, 509 (1973)).

173. Protocol I, *supra* note 46, art. 51(5).

would be clearly *excessive in relation* to the concrete and direct overall military advantage anticipated.” In *Beit Sourik*, the court articulated the principle as focusing on “the relationship between the objective whose achievement is being attempted, and the means used to achieve it.”¹⁷⁴

An attack that results in civilian deaths or destruction to civilian property is not a *per se* violation. What is prohibited under the principle of proportionality is an attack that is reckless, or an attack that knowingly takes civilian lives or destroys civilian property in excess of what is necessary for accomplishing a military objective. That is not to say that there is only one appropriate means to achieve an end. Courts have recognized that there may be a zone of proportionality within which a commander has discretion to act.¹⁷⁵

Proportionality applies to the indirect effects of an attack as well. For instance, a cyber attack is responsible for the indirect effects on a civilian population caused by an attack on the control system of an electrical generator. Some attacks have such dangerous indirect effects that they are prohibited. As stated in Article 56 of Additional Protocol I, “works or installations containing dangerous forces, namely dams, dykes, and nuclear electrical generating stations, shall not be the object of an attack, even where those objects are military objectives, if such attack may cause the release of dangerous forces and consequent severe losses among the civilian population.”

The principle of proportionality ought to make attackers prefer a cyber attack to a kinetic attack. One of the benefits of a cyber attack is that it permits a state to minimize collateral damage. As previously noted, a cyber attack will usually be less deadly than a kinetic attack. Additionally, a cyber attack is potentially reversible. These traits are desirable for a state that wants to apply a level of proportionate force without causing a disproportionate number of civilian casualties.

There are challenges, of course, to whether a cyber attack can meet the necessary requirements to be considered lawful. For example, without a mechanism to reverse an attack, cyber attacks do not allow a target to surrender. Unlike an attack that uses a human operator who can assess changed conditions, a cyber attack that is unleashed into the cyber environment without the ability for recall cannot take into account a targeted state’s desire to surrender—a customary right under international law.

174. *Beit Sourik*, *supra* note 172; *see also* Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), 2005 I.C.J. 116, 147 (Dec. 19) (“The Court cannot fail to observe, however, that the taking of airports and towns many hundreds of kilometers from Uganda’s border would not seem proportionate to the series of transborder attacks it claimed had given rise to the right of self-defence, not to be necessary to that end.”).

175. *Beit Sourik*, *supra* note 172; *see also* FINAL REPORT TO THE PROSECUTOR BY THE COMMITTEE ESTABLISHED TO REVIEW THE NATO BOMBING CAMPAIGN AGAINST THE FEDERAL REPUBLIC OF YUGOSLAVIA, 50 (2003) (referring to the principle of proportionality in warfare, the committee “suggested that the determination of relative values must be that of the “reasonable military commander”).

As cyber attacks grow increasingly sophisticated, cyber attackers will be able to control them better. For instance, Stuxnet incorporated features designed to limit its effect. Rather than unleash a worm that caused malfunction in all the machines that it infected, Stuxnet operated on a specific target. The destructive effect self-activated only when it encountered the conditions present in that specific target. Stuxnet will also self-destruct when its lifecycle expires in 2012. Features like these better ensure that a cyber attack's effects are limited and proportionate to the military advantage that the attackers hope to gain.

Cyber attackers are not well positioned to refute claims of indirect collateral damage. This presents a problem when a targeted state brings a claim against a cyber attacker. A targeted state has an incentive to exaggerate the effects of force when presenting the attack to its populace and arguing for recourse before the international community. Disproving a state's claim that it experienced inordinate indirect effects from a cyber attack would be difficult. To overcome this problem, the burden of proof should remain with the targeted state. This also reduces the incentive for a state to bring unsubstantiated claims against the cyber attacker. Thus, a state that alleges a war crime would need to bring evidence that a cyber attack was the cause of a disproportionate amount of civilian property damage or death.

The proportionality analysis of a cyber attack must always be considered on a case-by-case basis. A formula that compares the number of civilians killed to the number of combatants killed is insufficient. Rather, one must consider the value of the target and whether the attack offered a definite military advantage and showed proper caution *vis-à-vis* civilian life and property.

4. *Perfidy*

The prohibition on perfidious conduct arises from the desire to restore peace without completely destroying one's adversary. Perfidy is a form of deception, in which one side insists that it is acting in good faith in conducting hostilities but, once an opportunity presents itself, deliberately acts in bad faith. Such unlawful conduct is prohibited under Additional Protocol I, which states that "[a]cts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law in armed conflict, with intent to betray that confidence, shall constitute perfidy."¹⁷⁶ Perfidious conduct is prohibited under the law of armed conflict because it undermines the ability to restore peace.

One example of prohibited perfidious conduct is if an adversary fires upon armed forces that have already raised the flag of surrender. Raising the flag of surrender carries the implicit promise to lay down arms. Under the prohibition on perfidy, firing in this circumstance is prohibited because using adherence to

176. Protocol I, *supra* note 46, art. 37; *see also* Hague IV, *supra* note 149, art. 23(b) ("to kill or wound treacherously individuals belonging to the hostile nation or army" is forbidden).

the law of armed conflict against an enemy is unlawful.

Cyber warfare is enticing for those who wish to indulge in perfidious conduct. Cyber attackers will find bountiful opportunities to influence or mislead adversaries because most sophisticated cyber attacks involve some level of concealment. However, concealment alone does not always present a violation of lawfulness. A *ruse de guerre* is a common tactic of conventional warfare. Actions such as surprise attacks, feigning attacks or retreats, and psychological tactics are all condoned as lawful efforts to influence or mislead an enemy.

Richard Clarke, Special Advisor to the President on Cybersecurity during the Bush administration, wrote in *Cyber War* of an American cyber attack employed in Iraq.¹⁷⁷ Just before the 2003 US invasion of Iraq, the United States hacked into the Iraqi Defense Ministry's E-mail system. In Clarke's account, the Iraqi military learned that their secret "closed-loop" private military network was compromised when US Central Command (CENTCOM) sent Iraqi military officers an E-mail.¹⁷⁸ CENTCOM stated in the E-mail that the US goal was only to displace Saddam Hussein and his sons from power and they had no interest in harming their forces. The E-mail promised that, if necessary, they would overwhelm any Iraqi opposition as they had done in the Gulf War in the 1990s. Not surprisingly, many Iraqi military officials followed CENTCOM's advice and chose to walk away from the battle before it even began.

CENTCOM's ruse is an example of a legitimate cyber *ruse de guerre*. However, not all cyber attacks will qualify as such. For instance, a cyber attack would violate the law of armed conflict if it were to send false information, thereby deceiving an adversary's forces into believing that the hostilities were over and inducing them to lay down their arms before a ground attack.

Cyber warfare presents additional complexities in that cyber attacks can deceive targeted states into believing an attack originated from another source, whether the source is a non-combatant or a third party. Under Article 37(1)(c) of the Additional Protocol, "the feigning of civilian, non-combatant status," is an example of prohibited perfidious conduct. Cyber attackers that trick adversaries into thinking the attack originated from a non-combatant or a civilian violate the laws of war.

But this provision applies only to actions directed against adversaries in armed conflict; thus, an action that tricks third parties to act against adversaries remains a grey area. Such cyber attacks occurred during the Russia-Georgia conflict. There, Russian hacktivists directed their botnets to send a barrage of traffic to the international banking community, pretending to be cyber attacks originating in Georgia. The international banks responded by automatically

177. Hague IV, *supra* note 149.

178. *Id.* art. 23(b).

shutting down access to the Georgian banking sector.¹⁷⁹

The cyber attack against Georgia reveals the potential for a much larger threat. Had the hacktivists aimed their attacks at another state in tension with Georgia, they could have instigated the opening of another front in Russia's war on Georgia. Such covert action would be perfidious, yet the law of armed conflict falls short of explicitly prohibiting such conduct.

Cyber attackers benefit from the failure of targeted states to detect or attribute cyber attacks. Sophisticated cyber attackers are able to operate in ways that make tracing attacks impossible. This is especially true if tracing an attack requires the cooperation of states with strong domestic privacy laws. The result is that military commanders face less accountability and have more incentives to use cyber weapons.

Perfidious conduct is reprehensible under international law because it punishes adversaries for following the laws of war, so concealing a cyber weapon alone during an armed conflict will not violate the prohibition on perfidy. But a cyber attack that employs an adversary's adherence to international humanitarian law against the adversary is in violation of the prohibition on perfidy.

5. *Neutrality*

The principle of neutrality permits a state to declare itself neutral to a conflict and thereby protects it from attack or trespass by belligerents. Neutral states remain protected as long as they do not militarily participate or contribute to belligerent states or allow their territory to be used for such militaristic purposes.¹⁸⁰ Notwithstanding these restrictions, a neutral state may maintain its relations with belligerents during hostilities.

The principle of neutrality is derived primarily from the Hague Conventions. The Hague Conventions outline (1) the rights of neutral states and their obligation not to participate in the conflict, and (2) the obligation of belligerents to respect the inviolability of neutral states.¹⁸¹ Cyber attacks

179. Dancho Danchev, *Coordinated Russia vs. Georgia Cyber Attack in Progress*, ZDNET (Aug. 11, 2008), <http://www.zdnet.com/blog/security/coordinated-russia-vs-georgia-cyber-attack-in-progress/1670>; *Cyberwar 2.0: Russia v. Georgia*, DEFENSETECH (Aug. 13, 2008), <http://defensetech.org/2008/08/13/cyber-war-2-0-russia-v-georgia/>; *Cyber attacks on Georgia Websites Tied to Mob, Russian Government*, LA TIMES (Aug. 13, 2008), <http://latimesblogs.latimes.com/technology/2008/08/experts-debate.html>; Brian Krebs, *Russian Hacker Forums Fueled Georgia Cyber Attacks*, WASHINGTON POST (Oct. 16, 2008), http://voices.washingtonpost.com/securityfix/2008/10/report_russian_hacker_forums_f.html; John Markoff, *Before the Gunfire*, NY TIMES (Aug. 12, 2008), <http://www.nytimes.com/2008/08/13/technology/13cyber.html?ref=europe>.

180. Hague Convention (V) Respecting the Rights and Duties of Neutral Powers and Persons in Case of War on Land, U.S.T.S. 540, 2 A.J.I.L. Supp. 117, art. 3, entered into force Jan. 26, 1910.

181. *Id.* art. 1.

jeopardize these distinct elements of neutrality. The question for cyber attackers is how the principle of neutrality applies—and whether it is relevant—in the area of cyber warfare.

Under the first clause—the neutral state’s obligation—the neutral state is prohibited from participating militarily in a conflict. To retain the title of neutrality, a state may not allow belligerents to move troops, munitions of war, or supplies through neutral territory. If a neutral state permits its territory to be used for these purposes, it loses its veil of neutrality and transforms into a legitimate target.

There is one exception to the inviolability of a neutral state’s territory. Under Article 8, a nation need not “forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables or of wireless telegraphy apparatus belonging to it or to companies or private individuals” as long as the neutral states permits the use of its telecommunications infrastructure impartially.¹⁸² Whether this exception applies to Internet infrastructure has not yet been tested.

An element of cyber attacks suggests that this exception should not apply in the domain of cyber warfare. Under the Hague Conventions, belligerents “are forbidden to move troops or convoys of either munitions of war or supplies across the territory of a neutral Power.”¹⁸³ Cyber attacks operate as weapons. They are capable of causing as much damage and destruction as kinetic weapons. When malware or a DDoS attack is routed through a neutral state, this provision ought to be implicated. If one conceives of cyber weapons as munitions of war, a state’s claim of neutrality relies upon whether a cyber attack is transmitted through its Internet infrastructure.

Under the second clause—the belligerent’s obligation to the neutral state—the belligerent must respect the inviolability of the neutral state. The perfidious use of cyber weaponry can make this requirement a challenge. A belligerent may not believe a state’s claim to neutrality if a cyber attack is designed to appear as if it originated from that state. The danger lies in that a neutral state attacked for this reason may lawfully respond in self-defense, thereby broadening the conflict and violence.

What are the obligations of a neutral state when it comes to cyber warfare? It is unrealistic to require the neutral state to prevent a cyber attack from originating in its territory because of the complex Internet infrastructure involved in perpetrating, as well as preventing, a cyber attack. Cyber battlefields do not exist in a concentrated area. The Internet infrastructure is disparate and extends globally. The method of “distributed communications” developed by Paul Baran and incorporated into the packet switching foundation of the Internet ensures that no user can realistically predict what route information, legitimate or malicious, will take to reach its destination. Information will take whatever is

182. *Id.* art. 8.

183. *Id.* art. 2.

the shortest route to its destination depending upon the real-time conditions at each node. The inability to predict what route malware will take to reach its destination combined with a duty to prevent facilitating an attack would require a neutral state to sever all of its Internet connections in order to remain neutral. Otherwise, a neutral state may unwittingly transmit a cyber attack either directly to the belligerent state or indirectly by routing through another “neutral” state. Such a requirement is impractical.

Neutral states ought to have a way to maintain their neutrality without being held to unrealistic limitations. One commentator suggests viewing the duty of a neutral state through the framework of the law of naval warfare. Under naval warfare, the test to evaluate a neutral party is the “means at its disposal.”¹⁸⁴ Thus, a neutral state would need only use the means at its disposal to detect and repel a belligerent’s cyber attack within its jurisdiction. Another option is to adopt an intent-based view of neutrality. Under this view, a belligerent does not violate the principle of neutrality unless it intentionally directs cyber weapons through the Internet nodes of a neutral state. Similarly, a neutral state would not be held responsible for unintentionally allowing a cyber weapon to pass through its jurisdiction. A state put on notice of an ongoing attack ought to cooperate to cease the attacks or else be held complicit.

It is important to maintain the principle of neutrality to prevent warfare from spreading. The infrastructure of the Internet presents practical problems for a state attempting to be neutral under the current international humanitarian law framework. A re-interpretation of neutrality that permits a state to maintain its neutrality despite its cyberspace infrastructure “facilitating” attacks is necessary to preserve the spirit of neutrality. A state ought to be able to maintain its neutrality as long as it upholds its duty “not to allow *knowingly* its territory to be used for acts contrary to the rights of other states.”

6. *Unnecessary Suffering*

The prohibition against unnecessary suffering restricts a state’s arsenal by prohibiting certain types of weapons. International humanitarian law recognizes that “[t]he rights of belligerents to adopt means of injuring the enemy is not unlimited.”¹⁸⁵ As noted in an ICJ advisory opinion on nuclear weapons, “states do not have unlimited freedom of choice of means in the weapons they use.”¹⁸⁶ The ICJ based its finding on the principle that, “[I]t is prohibited to cause unnecessary suffering to combatants: it is accordingly prohibited to use weapons

184. Hague Convention (XIII) Concerning the Rights and Duties of Neutral Powers in Naval War, art. 8, entered into force Oct. 18, 1907.

185. Hague IV, *supra* note 149, at art. 22

186. Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 226, 257 (July 8).

causing them such harm or uselessly aggravating their suffering.”¹⁸⁷

This prohibition encourages states to use the appropriate level of force to achieve their military ends. The basic idea is that harm should be no greater than is necessary to achieve legitimate military objectives. Under this principle, indiscriminate weapons, such as biological or chemical weapons, are unlawful.

The prohibition on unnecessary suffering cuts both ways in the realm of cyber warfare. On one hand, cyber attacks are often difficult to control, and thus, indiscriminate in their effects. A cyber weapon that employs the use of a worm can unintentionally infect millions of computers in its efforts to act on a single targeted network. Further, a discrete cyber attack can cause unnecessary suffering because it does not arouse suspicion and therefore leads to excessive harm. Consider, for instance, a cyber attack that targets the medical records of an enemy’s military commander. If the military commander is given improper treatment that causes unnecessary suffering, the cyber attacker arguably violates the principle against unnecessary suffering. Yet cyber weapons often present the lowest level of force that can be employed when compared with a traditional kinetic attack. A kinetic attack that bombs a building in order to shut down an electrical generator will result in more damage and destruction than a cyber attack targeted at the same electrical generator. Thus, military commanders will often find it preferable to use a cyber attack because these may spare lives and physical infrastructure.

Cyber attacks ought to be a preferred weapon in a state’s arsenal. Whether the cyber weapon violates the prohibition on unnecessary suffering is often a case-by-case determination that examines all relevant factors. A good rule of thumb is that a cyber attack is unlawful if its consequences are similar to a kinetic attack that violates the prohibition on unnecessary suffering.

III. CONCLUSION

Cyber attacks are here to stay. Cyber attacks provide a low-cost, remote, instantaneous, and powerful tactic of coercion or destruction, often without triggering accountability. These attributes guarantee that states and non-state actors will continue to develop and unleash cyber attacks in the foreseeable future.

This Article examined to what extent this new form of hostile behavior can be regulated under the existing regime of the laws of war. This Article considered how cyber attacks work, how they are being used in practice, and in what manner international humanitarian law relates to the use of cyber weapons. Without governance—and constraints—from international law, cyberspace will remain a relatively lawless battleground.

187. *Id.*

Many difficult questions arise when trying to fit cyberspace within a warfare regime constructed long before even the most visionary policy makers imagined cyber weapons. But the problems generated by cyber attacks are often similar to the problems of conventional attacks. The differences between conventional and cyber warfare are of degree, not of kind. Thus, the international humanitarian law regime governing conventional warfare can be effectively transposed to cyber attacks.

Cyber attacks present a litmus test for a nation's commitment to international law. The problem of attribution in cyberspace means that cyber attackers have the capability of coercion on a state without the resultant responsibility. Therefore, the cyber attacker may experience great temptation to violate principles and obligations of international law to achieve the attacker's ends. This threat has generated a substantial amount of interest in rethinking cyber security. While some experts have advocated for less online anonymity and more government control over the cyberspace infrastructure, other solutions exist that create fewer domestic liberty concerns.

The impetus that sparked the innovation of the Internet was the concern of the United States to build a survivable communications system. Today, states experience the same need to create resiliency in their cyberspace infrastructure. Responding to the threat of cyber attacks lies as much in the area of mitigation as it does in the area of attribution. Mitigation means creating systems of redundancy (colloquially known as back-ups) to ensure that systems stay online. Mitigation also means deploying greater intelligence to listen in on chatter of impending cyber attacks so that a state may properly preempt or prepare.

Whatever policies a nation implements to defend its cyberspace infrastructure from attackers, international law must play a role to deter unlawful action by making offenders accountable to international appraisal. An international treaty that regulates the rules of engagement online would certainly be a helpful addition to the corpus of the laws of war. However, in the current international climate, such an addition to the laws of international war is unlikely in the near future. Fortunately, the lack of a cyber war addendum to the laws of war does not mean that cyber attacks are unregulated. States may continue to rely on the existing regime of international law to regulate cyber attacks, while they await the international community's response to this modern form of waging battle.

2012

Occupational Hazards

Amir Paz-Fuchs

Yaël Ronen

Recommended Citation

Amir Paz-Fuchs and Yaël Ronen, *Occupational Hazards*, 30 BERKELEY J. INT'L LAW. 580 (2012).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol30/iss2/7>

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Occupational Hazards

Life is largely a matter of expectation.

Horace

Amir Paz-Fuchs and Yaël Ronen*

I.

INTRODUCTION

In July 2011, another small episode was written into the history of the Israeli occupation of the West Bank. For the first time in forty-four years of occupation, Palestinian workers engaged in a collective dispute with their Israeli employer. Forty Palestinian workers in the Sal'it quarry, located in the West Bank east of Jerusalem, went on strike, demanding that the management, comprised of Jewish Israelis, guarantee them fair employment conditions (including pensions), refrain from arbitrary dismissals, and sign a collective agreement entrenching these terms. This event came in the wake of recent important and interesting legal developments, which have contributed to the shaping of economic relations between Israel and the Palestinians, individually and collectively. These developments, which have received relatively little attention from legal commentators, merit documentation and analysis. This Article aims to fill this gap in legal research with respect to the discrete area of labor law. In particular, it examines the law applicable to the employment of Palestinian West Bank residents in Israeli West Bank settlements, as developed by judgments of the Israeli National Labor Court and High Court of Justice.

Since 1967 and for the first two decades of Israel's occupation of the West Bank and the Gaza strip, the Palestinian workforce has relied in an incremental fashion on work in Israel and for Israelis in the occupied territories.¹ From

* Dr. Amir Paz-Fuchs is a senior lecturer at Ono Academic College. Dr. Yaël Ronen is a senior lecturer at Sha'arei Mishpat College. Earlier versions of this Article were presented at the workshop on Precarious Workers held by the Minerva Center for Human Rights at the Hebrew University (April 2011) and at the Society of Legal Scholars Conference, held at the University of Cambridge (September 2011). We are grateful for the thoughtful comments of the participants in the workshop as well to those of Guy Harpaz, Michael Karayanni, David Kretzmer, Virginia Montavlou, and Yuval Shany. The usual caveats apply.

1. For an account and analysis of Palestinian employment in Israel up to the end of the late

11.8% of the workforce (which was 173,300 in total) in 1971, the share of Palestinians employed in Israel rose to 39.2% (of 277,700 in total) by 1987. The employment of almost 40% of the workforce outside the local market has no parallel in the world.² Taking into account unregistered workers, some estimate that the figure is closer to 70%.³

Since the first intifada in 1987, and even more significantly since the eruption of the second intifada in 2000, the number of Palestinians granted entry permits to Israel has fallen dramatically, to a little over 10% (28,000).⁴ Unemployment and poverty in the occupied territories has soared to over 50%, and those who were able searched for work in the settlements and in the Israeli-owned industries. An aggregation of available data suggests that the number of Palestinians lawfully employed by Israeli municipal councils and private enterprises in the West Bank (not including East Jerusalem) in agriculture, industry, construction and services is over 50,000.⁵ The Civil Administration assessed that a further 15,000 Palestinians were employed unlawfully (without permits).⁶

The terms of employment of Palestinians in the Israeli settlements, and more specifically the law governing them, were challenged in regional labor courts in the late 1990s, when Palestinian employees of several public and private Israeli employers submitted claims against their employers, demanding certain employment rights and benefits in accordance with Israeli law.⁷ The

1990s see Guy Mundlak, *Power Breaking or Power Entrenching Law: The Regulation of Palestinian Workers in Israel*, 20 COMP. LAB. L. & POL'Y J. 569 (1999).

2. NEVE GORDON, ISRAEL'S OCCUPATION 81 (2008).

3. YEHEZKEL LEIN, BUILDERS OF ZION 8 (1999).

4. ISRAELI KNESSET, GOVERNMENT POLICY PAPER ON FOREIGN WORKERS 5 (2010) (in Hebrew).

5. According to an Israeli Government policy paper, 25,000 Palestinians are employed in Israel. See *id.* By the end of 2010, Palestinians were being employed in Israel, settlements, and in industrial zones in the West Bank. See UNRWA, *The West Bank Labour Market in 2008: A Briefing Paper 2009*, UNITED NATIONS RELIEF AND WORKS AGENCY, 8 Table 2 (2009), <http://www.unrwa.org/userfiles/201001196450.pdf> [hereinafter UNRWA].

6. GILAD NATAN, PALESTINIAN WORKERS IN THE ISRAELI SETTLEMENTS IN JUDEA AND SAMARIA I (2007).

7. Israeli courts, including labor courts, acquire jurisdiction upon service of documents to the defendant. According to the Rules of Procedure documents may be served in the occupied territories as if they were served in Israel. See Rules of Procedure (Service of Documents in the Administered Territories), 5729-1969 KT 2482, 458, Nevo Legal Database (by subscription) (Isr.). Under the instructions of the Military Advocate General (and later Attorney General of Israel and President of the Supreme Court) Meir Shamgar, the State has never relied on the plea of a lack of *locus standi* with respect to alien residents of territory not under Israeli sovereignty. Meir Shamgar, *Legal Concepts and Problems of the Israeli Military Government – The Initial Stage*, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 31, 43 n.56 (Meir Shamgar ed., 1982) [hereinafter MILITARY GOVERNMENT]. For an international legal analysis of the Supreme Court's competence to review military enactments, see Eli Nathan, *The Power of Supervision by the High Court of Justice over Military Government*, in MILITARY GOVERNMENT IN THE TERRITORIES ADMINISTERED BY ISRAEL 1967-1980: THE LEGAL ASPECTS 109 (Meir Shamgar ed., 1982).

principal question examined by the regional labor courts was whether the labor relations in question were governed by Israeli law or by the territorial law of the West Bank, which is based on Jordanian law. The regional labor courts determined that the employment relations in question were governed by Israeli law. The employers appealed to the National Labor Court (NLC), which reversed the regional courts' judgments.⁸ While the NLC ruled that the labor relations between Palestinians and their Israeli employers in the settlements were governed by Jordanian law, it acknowledged that considerations of public policy and non-discrimination might require the application of certain rights guaranteed under Israeli law to Palestinian employees, on a case-by-case basis. The NLC remanded the cases back to the regional courts to be decided on their individual merits. An Israeli NGO, Worker's Hotline, submitted a petition to the Supreme Court sitting as the High Court of Justice (HCJ) against the NLC judgment.⁹ The HCJ reversed the NLC's judgment, and ruled that the employment contracts of the Palestinian employees are in fact governed by Israeli law.¹⁰

The different analyses made by the NLC and the HCJ highlight the intersection of different areas of law: choice of law, public international law (in particular the law of occupation), and labor law. This intersection raises interesting tensions for two main reasons: First, public international law maintains sovereignty and territory as its central tenants, yet this centrality is undermined, insofar as labor law is concerned,¹¹ by the growing mobility of labor and capital that renders national boundaries somewhat less relevant. Second, while public international law regulates occupation of territory, the exceptional duration of Israel's occupation of the West Bank (and perhaps the Gaza strip) has led to an economic entanglement between Israel and the territories in a manner not predicted by the framers of the international legal structure, nor adequately addressed by the law of occupation. We argue that the analyses by the courts of the choice of law question, while ostensibly informed by the fact that it arose in the context of a labor conflict, did not take into account of the importance of labor law. In addition, we highlight the public international legal implications of the rulings.

8. Labor Ct. (BS) 3000050/98 Givat Ze'ev v. Mahmoud 38 Labor Judgments 577 [2003] (Isr.). In Israel, labor cases are adjudicated, in the first instance, in regional labor courts. Appeals are reviewed by the National Labor Court (NLC). In exceptional cases, NLC decisions may be reviewed following a petition to the High Court of Justice (HCJ).

9. HCJ 5666/03 Worker's Hotline v. Nat'l Labor Ct. (Oct. 10, 2007), Nevo Legal Database (by subscription) (Isr.).

10. *Id.* at 1.

11. William B. Gould, *The Rights of Wage Earners: Of Human Rights and International Labor Standards*, 3 INDUS. RELATIONS L.J. 489 (1979); Guy Mundlak, *De-Territorializing Labor Law*, 3 L. & ETHICS HUM. RTS. 189 (2009); Brian Langille, *Core Labor Rights – The True Story*, 16 EUR. J. INT'L L. 409 (2005); Philip Alston, *'Core Labor Standards' and the Transformation of International Labour Law*, 15 EUR. J. INT'L L. 457 (2004); Jennifer Gordon, *Transnational Labor Citizenship*, 80 S. CAL. L. REV. 503 (2007).

While the challenges explored here are intimately linked to the phenomenon of occupation, the increased swiftness with which private companies worldwide are able to cross borders and set up enterprises outside of their state of origin makes the following analysis highly relevant to businesses worldwide. Thus, a 2003 report prepared for the International Labor Movement profiles sixteen of the most prominent corporations operating in Iraq in a wide variety of service arenas.¹² These include energy (e.g., Halliburton and KBR), construction (e.g., Bechtel Group, Stevedoring Services of America, Black and Veatch, Louis Berger, and Parsons), telecommunications (e.g., MCI Worldcom), consulting (e.g. ABT and CAI), and more.¹³ All the companies in the report already have experience in “transitional” and “post-war” crisis countries, and all have employed a low standard of labor relations with respect, *inter alia*, to unions and health and safety requirements.¹⁴

Part II of this Article provides a brief factual background. It describes the sources of labor law applicable in the West Bank, as well as the origins of, and judgment in, the *Worker's Hotline* case, which addressed the law applicable to the employment of Palestinians in the settlements. Part II concludes by explaining how employers have contravened the judgment's *raison d'être* by constructing employment arrangements that effectively circumvent the holding while staying loyal to its letter. We argue that such strategies are possible in part because of the HCJ's incorrect framing of the issue in the case. Part III addresses the law applicable to Israeli settlers in the West Bank, both generally and specifically with respect to labor law. It deals with a surprisingly common error concerning the legal basis that enables Israeli settlers to live in accordance with Israeli rather than Jordanian law. The understanding of the legal mechanisms applicable to Palestinian and to Israeli employees forms the basis for Part IV, which examines the actual significance of equality between employees, a principle extolled by the HCJ as a fundamental, for Palestinians working in the settlements. We argue that rather than pursuing equality in the applicable legal system, the HCJ should have pursued equality in the terms and conditions of work. We begin by considering the significance of each of these perceptions of equality. We argue that considerations of labor law and public international law militate against the blind pursuit of equality in the applicable legal system with respect to long-term occupation buttressed by forceful economic intervention. In this context, pursuing equality in the legal system risks obscuring an injustice both to individual interests and to collective ones, such as protection from annexation. We then explain the preference for pursuing equality as relating to conditions of work, and propose means by which this goal can be achieved. We conclude Part IV by indicating the economic reality that is

12. U.S. LABOR AGAINST THE WAR, PROFILE OF U.S. CORPORATIONS AWARDED CONTRACTS IN U.S./BRITISH OCCUPIED IRAQ (2003), available at <http://www.uslaboragainstar.org/downloads/CorpInvasionofIraq.complete.pdf>.

13. *Id.*

14. *Id.*

obscured by trite reference to equality, and caution that equality, an ostensibly laudable means of protecting a weak population, may be counterproductive if it is practiced as an abstract principle detached from the particular factual and legal context in which it is sought.

II. BACKGROUND

A. Labor Law in the West Bank

In the wake of the 1967 War, the territories occupied during the war, among them the West Bank, were placed under the administration of a military government, run by the Israel Defense Forces (IDF). Immediately upon its establishment, the military government proclaimed the law applicable in the West Bank, providing, *inter alia*:

2. The law which existed in the Region on June 7, 1967, shall remain in force, insofar as it does not in any way conflict with the provisions of this Proclamation or any other Proclamation or any Proclamation or Order which may be issued by me [i.e. the military commander], and subject to modifications resulting from the establishment of government by the Israeli Defense Force in the Region.

3(a). All powers of government, legislation, appointment and administration in relation to the region and its inhabitants shall henceforth vest in me alone and shall be exercised by me or by such person appointed by me or to act on my behalf.¹⁵

This proclamation was in line with the requirements of Article 43 of the Hague Regulations, which stipulate that the occupant “shall take all the measures in his power to restore, and ensure, as far as possible, public order and safety, while respecting, unless absolutely prevented, the laws in force in the country.”¹⁶

In consequence of the Proclamation and in line with the law of occupation, the prevailing local law in the West Bank (i.e., Jordanian law) remains in force unless amended or repealed by the enactments of the military government. The relationship between military enactments and local law was defined in a military enactment, which provided that “each security enactment has preference over any local law, even if it has not explicitly repealed the latter.”¹⁷

15. Proclamation Regarding Government and Law Arrangements (West Bank Region), 5727-1967, SH No. 2 (Isr.)

16. Hague Convention (IV) Respecting the Laws and Customs of War on Land and its Annex (Regulations Concerning the Laws and Customs of War on Land 1907), Oct. 19, 1907, 2227 T.S. No. 53 [hereinafter Hague Convention (IV)]; *see also* Geneva Convention (IV) Relative to the Protection of Civilian Persons in Time of War art. 64, Aug. 12, 1949, 75 U.N.T.S. 287 [hereinafter Geneva Convention (IV)].

17. Interpretation Order (West Bank Region), 5727-1967, No. 130, Sect. 8(a) (1967). This provision is redundant from an international legal perspective, since military enactments by definition override conflicting local law. A separate question, outside the scope of the present article,

In one of the early cases dealing with the legislative competence of the military government under Article 43 of the Hague Regulations, the HCJ ruled that the words “unless absolutely prevented” must be interpreted as referring not only to the military needs of the occupying army but also as imposing on the military government a duty to safeguard the economic and social interests of the population.¹⁸ Subsequently, the subject matter of Israeli military enactments has greatly expanded beyond narrow military exigencies and the safety of Israeli forces.¹⁹ Since 1967, military commanders have issued over 2,500 military enactments, in topics ranging from military, judiciary, and fiscal affairs, through welfare, health, and education, to import duties, postal laws, and the transportation of agricultural products.²⁰ Many military enactments regulating non-military affairs open with a declaration that they are “required for the benefit of the local population.”²¹ Among these military enactments, only a few (considered below) concern labor law.

The 1990s peace process made no change to the labor law regime in the West Bank. The 1995 Interim Agreement between Israel and the PLO on self-government in the West Bank and Gaza Strip transferred powers and responsibilities in the labor sphere to the Palestinian Authority, including regulation of, “*inter alia*, rights of workers, labor relations, labor conciliation, safety and hygiene in work places, labor accidents and compensation, vocational

is the legal validity of a military enactment that does not respect the law in force even though the military commander is not ‘absolutely prevented’ from such respect.

18. HCJ 337/71 Almakdassa v. Minister of Defense 26(1) PD 574, ¶ 9 [1972] (Isr.) (authors’ translation). This case concerned a military enactment amending the Jordanian Labor Law in order to enable the Military Commander to appoint members of an arbitration council for the resolution of labor disputes. The pre-existing Jordanian labor law required that the council be composed of representatives of employee organizations, but no such organizations existed. The HCJ confirmed the validity of the order in light of the military commander’s authority to address the needs of the population. *But see id.* (Cohen, J. dissenting) (arguing that the occupant’s duty is not to take up improvements which the former government failed to implement, at least not unless the resulting situation was intolerable). This minor labor dispute between a Palestinian employer and a Palestinian employee was the first time that the Israeli HCJ decided (implicitly, and without discussion) that it has jurisdiction to rule on issues taking place in the occupied territories. *See* Michael Sfar, *The Human Rights Lawyer’s Existential Dilemma*, 38 ISR. L. REV. 154, 157 (2005). The Court did not consider Article 64 of the Fourth Geneva Convention, which increases the power—and the responsibility—of the occupying power. *See* EYAL BENVENISTI, *THE INTERNATIONAL LAW OF OCCUPATION* 100–05 (1993) (reprint 2004).

19. All military enactments hold the same formal normative level. However, they are titled in a hierarchical fashion. Thus, there are “proclamations” and “orders” which are regarded as primary legislation, “regulations” that are secondary legislation, and notices that are of a lower order. In practice, there is a hierarchical significance to these designations. If a regulation conflicts with the authorizing “order,” the order will prevail. In addition, the authority to issue regulations has been at time delegated to various officials in the military government, while the authority to issue orders remains with the Military Commander.

20. GORDON, *supra* note 2, at 27.

21. *See, e.g.*, Insurance of Motor Vehicles Order (Third Party Risk) (Temporary Provision) (West Bank Region), 5727-1967, No. 55 (Jordan); Order Regarding Using Pesticide on Olive Trees Against Olive Flies (Judea and Samaria), 5736-1975, No. 645 (Jordan).

and professional training courses, cooperative associations, professional work associations and trade unions, [and] heavy machinery equipment.”²² However, the Interim Agreement excludes Israeli settlements from the scope of its provisions. Thus, the transfer of powers and responsibilities to the Palestinian Authority does not extend in any way to the settlements.²³ In short, labor law in the West Bank remains regulated largely by Jordanian law.

When Israeli forces entered the West Bank in 1967, the Jordanian Labor Law of 1960 (as amended in 1965)²⁴ was in force in the region. In 1972, Justice Cohen noted that the Jordanian Labor Law Code “is an excellent and modern law, which merits that its authority and splendor be retained.”²⁵ Perhaps for this reason, Israeli courts, which have generally demonstrated a preference for Israeli law in almost all private transactions between Israelis and Palestinian residents of the territories, exceptionally treated labor contracts between Israeli employers and Palestinian employees as governed by the local law of the territories, rather than by Israeli law.²⁶

Through the years Jordanian labor law has been amended through military enactments with respect to work accidents,²⁷ sick pay,²⁸ compensation claims, and certain administrative issues.²⁹ Particularly noteworthy are the 1982 Order on Employment of Workers in Certain Places (Judea and Samaria) and its 2007 amendment. The 1982 order duplicated Israel’s Minimum Wage Law to work for Israeli employers within the settlements.³⁰ The 2007 amendment extended the obligation to pay minimum wage to Israeli employers of Palestinian employees anywhere within the West Bank.³¹

Consistent with Justice Cohen’s appreciation, some labor rights under

22. Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, Isr.-Palest., annex III, appendix I, art. 21 Sept. 28, 1995, 36 I.L.M. 557 [hereinafter Israeli-Palestinian Interim Agreement].

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

24. Labor Law (Judea and Samria), 5720-1960, No. 21, *amended by* Labor Law (Judea and Samaria), 5725-1965, No. 2 (Jordan) (and subsequent amendments).

25. *Almakadssa*, HCJ 337/71, 26(1) PD at 586 (Cohen, J. dissenting (but not on this point)).

26. BENVENISTI, *supra* note 18, at 134.

27. *See, e.g.*, Order Regarding Work Accident Insurance (Judea and Samaria), 5736-1976, No. 662 (Jordan); Order Regarding the Labor Law (Work Accidents) (Judea and Samaria), 5736-1976, No. 663 (Jordan); Labor Law (Judea and Samaria), 5720-1960, No. 21, *amended by* Labor Law (Judea and Samaria), 5725-1965, No. 2 (Jordan) (and subsequent amendments).

28. *See* Order Amending the Jordanian Labor Law No. 21 of 1960 (Amendment No. 6) (Judea and Samaria), 5745-1985, No. 1133 (Jordan).

29. *See* Order Amending the Jordanian Labor Law No. 21 of 1960 (Judea and Samaria), 5731-1971, No. 439 (Jordan); Order Amending the Jordanian Labor Law, Law No. 21 of 1960 (Amendment) (Judea and Samaria) 5740-1980, No. 825 (Jordan).

30. Order Regarding Employment of Workers in Certain Locations (Judea and Samaria), 5742-1982, No. 967, art. 3 (Jordan) [Hereinafter Order No. 967].

31. Order Regarding Employment of Workers in Certain Locations (Amendment No. 3) (Judea and Samaria) (No. 1605) 5788-2007. Nov. 7, 2007, article 6, adding Article 3B to Order No. 967 [hereinafter Order No. 1605].

Jordanian law, as enacted over fifty years ago and modified by the military commander, are comparable to those guaranteed under Israeli law in the early twenty-first century. The Attorney General, in a brief submitted to the NLC, listed similarities between the two legal regimes with respect to matters falling within the rubrics of maximum daily and weekly hour limit, minimum wage, sick pay, annual leave, protection of minors and women, severance pay, accident compensation, labor administration, and settlement of disputes. While in most instances Israeli law is more generous, in some contexts Jordanian law is more beneficial, such as sick pay.³²

It should be noted, however, that the list submitted by the Attorney General is selective. It does not address various areas of labor law that are regulated under Israeli law but not under Jordanian law, including collective rights, such as the right to form unions, protection of unions and the right to strike—all of which are highly relevant to Palestinian employees' rights. While collective rights and collective agreements have governed the employment relations of the majority of employees in the Israeli labor force since soon after the establishment of the state in 1948,³³ no unions existed in the West Bank at that time.³⁴ Additionally, Jordanian law does not address, *inter alia*, leave to care for a sick family member, pay in lieu of annual leave, delay in payment of wages or of severance pay, equality at work, protection of employment for a pregnant employee, and protection against sexual harassment. Furthermore, rights enumerated under both regimes may have the same headings (e.g. working hours) but contain very different subsets (application, exemptions, sanctions, etc.), leading to a significant disparity between the two legal systems.³⁵

A further complication arises with respect to apparently identical provisions that differ in implementation. For example, minimum wage in Israel is paid on either an hourly or monthly basis, while in the occupied territories, Palestinians' minimum wage is always paid on an hourly basis.³⁶ The latter implementation exempts employers from paying for time during which work is suspended even though the employees remain at their disposal (e.g., when

32. See *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 16 (citing Attorney General's Brief (undated) (on file with the authors)).

33. GUY MUNDLAK, *FADING CORPORATISM* 62 (2008).

34. See *Almakdassa*, HCJ 337/71, 26(1) PD 574 (the military commander was ordered to staff the arbitration council, which was supposed to be composed of labor and employer unions, that had been inoperative under Jordanian rule, *inter alia*, because no such unions existed at the time). *But see* HCJ 507/85 *Tamimi v. Minister of Defense* 41(4) PD 57 [1987] (Isr.) (ruling that the military commander had to make the necessary arrangements for the establishment of a lawyers' union, even though no such union existed under Jordanian rule).

35. *E.g.*, under the heading of "Annual Leave," Israeli law allows cashing-in of annual leave pay if work terminates prior to the leave, while Jordanian law does not make a similar provision, even under the same heading. Brief of the Attorney General, *supra* note 32, at Appendix B.

36. *Minutes of the Knesset Standing Committee for the Assessment of the Problem of Migrant Workers* (July 3, 2007), at 15 (in Hebrew).

machinery breaks down).³⁷ Moreover, the formula for calculating minimum wage (extended in the occupied territories to all employees of Israelis) is the minimum monthly wage divided by the number of monthly working hours—186 under Israeli law, and 200 under Jordanian law.³⁸ This produces a significantly lower figure for a minimum hourly wage in the West Bank, despite the identical provisions under Israeli law and under the military enactment amending Jordanian law.

B. The Litigation: Worker's Hotline

The origin of the *Worker's Hotline* case lies in five judgments of regional labor courts, which applied Israeli law to the labor relations between Palestinian residents of the West Bank and their Israeli employers in the settlements. In *Giv'at Ze'ev*,³⁹ the Jerusalem regional labor court ruled in favor of fourteen Palestinian cleaners, employed by the municipal council of Giv'at Ze'ev, who claimed minimum wage, pension, travel expenses, convalescence pay, holiday pay, severance pay, advance notice, and wage incentives, all under Israeli law. In *Abir Ltd.*, a Palestinian day employee of Abir Textile Industries Ltd., an Israeli firm located in the Barkan industrial zone, claimed advance notice, severance pay, compensation for delay in wages, pay in lieu of annual leave and minimum wage, all under Israeli law. The Tel-Aviv regional labor court ruled in favor of the employee and Abir filed an appeal of this decision.⁴⁰ In a similar case, *Aqua Print Ltd.*, a Palestinian working for Aqua Print Ltd., an Israeli company located in the Ma'ale Efraim industrial zone, demanded similar benefits after being dismissed. Again, the Tel-Aviv regional labor court ruled in his favor.⁴¹ In *Tzarfati Car Services Ltd.*, a Palestinian employed by an Israeli garage located in the Ma'ale Adumim industrial zone, demanded severance pay and social benefits under Israeli law. The Jerusalem regional labor court rejected the employer's claim that Israeli labor law did not apply.⁴² Lastly, in *Nituv Management and Development Ltd.* the Tel-Aviv labor court denied a request for summary dismissal filed by the respondent company, which was based on the claim that the Israeli Severance Compensation Act (1963) did not apply to a Palestinian employee.⁴³

37. See HUGH COLLINS, KEITH D. EWING & AILEEN MCCOLGAN, *LABOUR LAW: TEXT AND MATERIALS* 378–79, 460 (2001).

38. Order Regarding Employment of Workers in Certain Locations (Judea and Samaria), 5742-1982, No. 967, art. 3 (Jordan); Order Regarding Employment of Workers in Certain Locations (Amendment 3) (Judea and Samaria), 5788-2007, No. 1605 (Jordan) (amending No. 967).

39. Labor Ct. 55/3-100 to 55/3-113 *Giv'at Ze'ev* (1997), Nevo Legal Database (by subscription) (Isr.).

40. Labor Ct. 57/3-2981 *Abir Ltd.* (1997), Nevo Legal Database (by subscription) (Isr.).

41. Labor Ct. 300309/99 *Aqua Print Ltd.* (2001), Nevo Legal Database (by subscription) (Isr.).

42. Labor Ct. 1097/99 *Tzarfati Car Services* (Sept. 11, 2000), Nevo Legal Database (by subscription) (Isr.).

43. Labor Ct. 35/3400 *Nituv Mgmt. and Dev.* (1998), Nevo Legal Database (by subscription)

Even this cursory overview reveals several important commonalities among the cases. First, they all involve Palestinian employees and Israeli employers. Second, the employees demanded minimum rights according to Israel statutory labor law. No claim was made regarding benefits arising from applicable collective agreements. Third, all the claims were accepted by regional courts. Amidst these commonalities, it should be noted that while four of the employers' appeals to the NLC involved Israeli companies from the private sector, situated in the West Bank, one appeal (*Giv'at Ze'ev*) involved a public sector employer (a municipality).

The employers in the five cases appealed to the NLC. The NLC chose to deal jointly with the substantive legal question that all the cases have in common: does Israeli labor law apply to the employment of Palestinians within a settlement in the West Bank by an Israeli corporation or public employer?⁴⁴

Under the Israeli choice of law doctrine, which draws on the common law, the law governing a contract is primarily that which the parties have chosen. Thus, an express stipulation on the matter will usually be given effect by the court. If the parties have not chosen a law, the court must identify the law to which the contract is most closely connected.⁴⁵

The NLC noted that in none of the cases were there written contacts or express stipulations of the applicable law.⁴⁶ It therefore followed the traditional, contact-based approach in order to identify the law to which the contracts were most closely connected, reversing the regional labor courts' judgments. The NLC started with the presumption that the contract is governed first and foremost by the law of the place of performance,⁴⁷ and then examined whether there was a country other than Jordan to which the contract was more closely connected under a weighted contact count, namely one which attaches different weight to various contacts.⁴⁸ The Court drew on the 1980 Rome Convention on the Law Applicable to Contractual Obligations (the "Rome Convention"),⁴⁹ and specifically Article 6(2) governing "Individual Employment Contracts." Article 6(2)(a) provides:

(a) . . . a contract of employment shall, in the absence of choice [by the parties], be governed by the law of the country in which the employee habitually carries

(Isr.).

44. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98.

45. *Worker's Hotline*, HCJ 5666/03 at ¶14 (quoting CA 419/71 Menora Liability and Secondary Insurance Co. Ltd v. Nomikos 26(2) PD 527, 531 [1972] (Isr.)). See also Council Convention on the Law Applicable to Contractual Obligations 80/934, art. 4(1), 1980 O.J. (L 266) 1. [hereinafter Rome Convention]; RESTATEMENT (SECOND) OF CONFLICT OF LAWS §88 (1971).

46. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 21.

47. See *Worker's Hotline*, HCJ 5666/03 at ¶ 14; *Menora*, CA 419/71, 26(2) PD at 531; Rome Convention, *supra* note 45, at arts. 4(1), 6(2); RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 45, § 188(2)(c).

48. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 24.

49. See Rome Convention, *supra* note 45, at art. 4(1); Consolidated Version of the Convention on the Law Applicable to Contractual Obligations, Jan. 6, 1998, 1998 O.J. (C027) 34.

out his work in performance of the contract . . . unless it appears from the circumstances as a whole that the contract is more closely connected with another country, in which case the contract shall be governed by the law of that country.⁵⁰

The NLC noted that the specific contacts to Israeli law were the identity of the employer, the currency of payment, the language of documents, the adherence to Israeli days of rest, and even the payment of tax in Israel. None of these, the court found, were indicative of the applicable law.⁵¹ In contrast, the contacts to Jordanian law included the facts that the contracts were performed in the West Bank, which was also the place of contracting; the place of business of the employer was the West Bank;⁵² and the employees were Palestinian residents of the West Bank.⁵³ On this basis, the NLC concluded that the contracts were more closely connected to Jordanian law.⁵⁴ It then added that public policy considerations may require completion of “gaps” in a contract governed by foreign law, with “certain Israeli rules that reflect universal norms applied by civilized nations acting under international standards to provide employees with reasonable protection.”⁵⁵ These rules would include the right to weekly rest, minimum pay, gender equality, and more.⁵⁶

Among the factors determining whether such completion was required as a matter of public policy, the Court pointed out that, in practice, Israeli and Jordanian law are very similar.⁵⁷ The NLC noted that not only have Israeli labor norms been incorporated into the law of the territory,⁵⁸ but that under normal conditions, Palestinian residents of the West Bank work both in Israel and in the West Bank for both public and private Israeli employers. Accordingly, the NLC found that there was “no justification for significant differences between the two systems,”⁵⁹ implying that there was no public policy consideration that justified the substitution of Jordanian law with Israeli law.⁶⁰ The Court’s consideration of

50. Rome Convention, *supra* note 45, at arts. 6(2).

51. *Givat Ze’ev*, Labor Ct. (BS) 3000050/98 at ¶ 29.

52. A contact that largely duplicates the former.

53. *Givat Ze’ev*, Labor Ct. (BS) 3000050/98 at ¶ 30.

54. *Id.* at ¶ 31.

55. *Id.* at ¶ 35.

56. *Id.*

57. *Id.* at ¶ 36(d).

58. The Court did not clarify which norms or how they had been incorporated in the law of the West Bank, but may have been referring to Order No. 967 and Order No. 1605, which apply Israeli minimum wage in the settlements and to Israeli employers throughout the West Bank. *See* Order Regarding Employment of Workers in Certain Locations (Amendment 3) (Judea and Samaria), 5788-2007, No. 1605 (Jordan); Order Regarding Employment of Workers in Certain Locations (Amendment 3) (Judea and Samaria), 5788-2007, No. 1605 (Jordan) (adding art. 3B to Order No. 967).

59. *Givat Ze’ev*, Labor Ct. (BS) 3000050/98 at ¶ 36(g). It is not clear whether the Court made a normative or a factual finding.

60. One might note that the notion of using of public policy not to reject the application of foreign law but to apply the law of the forum is exceptional.

the characteristics of the labor market⁶¹ drew upon public interests, namely the needs of the economic organization of both Israel and the West Bank. The Court then noted that since Israelis are employed in the settlements under Israeli law, *prima facie* different terms of employment for Israelis and Palestinians would be discriminatory and prohibited. This prohibition would stem either from administrative legal principles (applicable to public employers) or from the obligation of good faith, which entails equal treatment of employees (applicable also to private employers). In any case, any claim of discrimination, like the question of public policy, should be determined by the lower courts.⁶²

The NLC's analysis is a straightforward but inaccurate application of the European approach reflected in the Rome Convention. For one, the NLC examined each of the contacts separately, rather than together under a weighted count. Correctly pointing out that none of the contacts (e.g., the identity of the employer, the currency used, the language of documents, and even the incorporation of the provision of Israeli law regarding days of rest on Jewish holidays) would alone establish that a contract is more closely connected to Israel, the Court failed to take into account the cumulative effect of the numerous contacts, which may lead to a different conclusion. Furthermore, when examining the individual contacts, the Court merely noted that none of them indicated that Israeli law governed the contract. That, however, is not the question. The question is whether these contacts (together, or according to the Court, individually) create a strong enough connection to Israel to rebut the presumption that the law of the place of performance governs the contract. The NLC's failure to consider the cumulative effect of the numerous contacts to Israeli law, combined with its rejection of weighing each contact, could indicate that the only circumstance in which the presumption would have been rebutted is if the parties had expressly stipulated the applicable law. In that case, the entire interpretative exercise would not have been necessary.⁶³

The NLC noted that the presumption that the contract is governed by the law of the place of performance aims, *inter alia*, to protect migrant employees from exploitation by prohibiting employers in wealthier countries from shirking their responsibilities under their home country's law.⁶⁴ The NLC acknowledged

61. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 36(7).

62. *Id.* at ¶ 44. Recourse to public policy to ensure equality is only necessary with respect to the private employers. The municipal council is the arm of the military commander, who, as a public authority under Israeli law, is prohibited by Israeli administrative law from discriminating among employees. *Id.* at ¶ 43. See also H CJ 663/78 Kiryat Arba Adm. v. Nat'l Labor Ct. 33(2) PD 398, 403-04 [1979] (Isr.).

63. On the contact count approach under Israeli law, see Rhona Schuz, *On the 'Closest Connection' Approach in Israeli Private International Law*, 4 MOZNEI MISHPAT 349 (2005) (in Hebrew).

64. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 25. See also CivilC 83875/95 (TA) CivilC (TA) 83875/95 *Muhameda v. Yehoshua and Menora* (1998) Nevo Legal Database (by subscription) (unpublished) (in Hebrew) (Isr.).

that in the present case, such protection was irrelevant.⁶⁵ Indeed, the issue was not cross-border movement of employees, but rather the cross-border movement of employers. As one employer candidly argued, some private businesses relocate to the West Bank in order to benefit from the lower standard of living, the captive market, and water and land resources.⁶⁶ When the situation is one of international outsourcing, protection of the weaker party is guided by principles different to those reflected in the Rome Convention. This could have led the NLC to reject the presumption in the Rome Convention as a guide, or at least to diminish its relative weight.

Worker's Hotline, an Israeli NGO, appealed the NLC's judgment before the HCJ. The HCJ affirmed the NLC's holding that the appropriate choice of law method with respect to contracts is that contracts count. However, it rejected the dominance of a single territorial link in determining the law governing the contract. It first pointed out that both the Rome Convention and the U.S. Restatement of the Law (Second) Conflict of Laws, 1971 ("Second Restatement") call for an overall weighted evaluation of contacts with respect to each specific provision of a contract.⁶⁷ The court noted (inaccurately) that only the European system contains a presumption that the law of the place of performance is applicable to employment contracts.⁶⁸ The Court then emphasized that, to ensure a just outcome, a choice of law determination must take into account national and international public interests as well as personal interests. Where labor relations are concerned, particular weight should be given to the public, non-derogable content of rules⁶⁹ that address the power disparities between employer and employee.⁷⁰ This, the HCJ stated, is also the approach of the European and US systems.⁷¹ Furthermore, where concrete contacts are absent, the court may rely on objective ones, such as the law applicable to

65. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 25(d).

66. *Worker's Hotline*, HCJ 5666/03 at ¶ 10. *Nituv Management and Development* argued that employers who had moved their business to the West Bank had relied on lower production costs, based on the applicability of Jordanian law. See *Nituv Mgmt. and Dev.*, Labor Ct. (BS) 35/3400; SHIR HEVER, THE POLITICAL ECONOMY OF ISRAEL'S OCCUPATION—REPRESSION BEYOND EXPLOITATION 62 (2010). In 2001, Shimshon Bichler and Jonathan Nitzan estimated the economic value of the reliance on Palestinian labor at approximately 10 percent of Israel's GDP. See SHIMSHON BICHLER & JONATHAN NITZAN, FROM WAR PROFITS TO PEACE DIVIDEND 178 (2001) (in Hebrew).

67. *Worker's Hotline*, HCJ 5666/03 at ¶¶ 13–15.

68. *Id.* at ¶ 19. The U.S. Restatement includes the place of performance as a potential contact, noting also that if the place of negotiating the contract and the place of performance are in the same state, the local law of this state will usually be applied. RESTATEMENT (SECOND) OF CONFLICT OF LAWS, *supra* note 45, at § 188(3).

69. *Worker's Hotline*, HCJ 5666/03 at ¶ 17.

70. *Id.* at ¶ 21. This was the last mention of these power disparities in the judgment.

71. *Id.* at ¶ 22. This statement is inaccurate with respect to the European approach, where mandatory rules of both kinds do not play a role in determining the proper law of the contract but only mitigate its effects where necessary.

similar contracts, between similar parties, in similar circumstances.⁷²

With respect to the case at hand, the Court opined that since there is no single uniform legal system applicable in the settlements, the link between the employment relations and the West Bank law as the law of the place of negotiation and performance was particularly weak. Thus, the Court reasoned that in this situation the ordinary expectation that territorial law would apply is diminished, while other contacts gain importance, such as the currency, language of documents, days of rest, and even payment of tax in Israel in one instance (all of which were also noted by the NLC but not attributed much importance). The Court concluded that the labor relations of the Palestinian employees in the settlements were more closely connected to Israeli law than to Jordan and its law.⁷³

The Court then added that its conclusion was supported by the guiding principles of labor law, which call for a choice of law that would ensure equality between employees carrying out equivalent work⁷⁴ without distinction based on ethnicity or nationality.⁷⁵ According to the Court, since Palestinians are employed in Israel under Israeli law, and since Israelis are employed in the settlements under Israeli law (a fact which is only implied in the HCJ judgment and mentioned briefly in the NLC's ruling), equality requires that Palestinians in the settlements should also be employed under Israeli law.⁷⁶ The Court's analysis nonetheless disregards the fact that the choice of the place of performance as a connecting factor is itself a rule that aims, *inter alia*, to ensure equality between employees. In other words, the obstacle to equality among employees is not presented by the choice of law rule, but rather by the non-uniformity of the law that applies within the West Bank.

Finally, in a concurring opinion, Judge Jubran stressed Israeli law's prohibition of discrimination on ethnic or national grounds, as well as the international human right to equality in employment under ILO Convention Article 111 and the Universal Declaration of Human Rights.⁷⁷ Judge Jubran added that Israeli law should prevail over Jordanian law also because it is more protective of employees.⁷⁸ His opinion concluded that, "in practice, the Israeli exclaves are legally Israeli villages, at least with respect to the Israeli law and

72. *Id.* at ¶ 18.

73. *Id.* at ¶¶ 25–26.

74. *Id.* at ¶ 26.

75. *Id.* at ¶ 21.

76. *Id.* at ¶ 26.

77. *Id.* at ¶ 3 (Jubran, J. concurring). *See generally*, International Labor Organization, Discrimination (Employment and Occupation) Convention, July 5, 1958, I.L.O. No. 111, 362 U.N.T.S. 31; Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III), 71 (Dec. 10, 1948).

78. *Worker's Hotline*, HCJ 5666/03 at ¶ 10 (Jubran, J. concurring). On the 'better rule of law' doctrine as a means of resolving conflicts of law under U.S. law, see ROBERT A. LEFLAR, *Conflicts Law: More on Choice-Influencing Considerations*, 54 CAL. L. REV. 1584, 1587–88 (1996).

specifically labor law.”⁷⁹ Since the Israeli employees in the enclaves are governed by Israeli law, Palestinian employees should also be governed by Israeli law.⁸⁰

In sum, the HCJ’s ruling is based on three tiers:

1. The place of performance should not be overstated as a contact for a choice of law determination in contracts, neither in general nor in specific circumstances.
2. A weighted contacts count links the contracts most closely to Israeli law.
3. As a matter of legal policy, equality between employees requires that *identical law* apply to all employees, therefore Israeli law must apply also to labor relations between the Palestinian employees and their Israeli employers.

The HCJ’s opinion leans heavily on policy analysis, a characteristic of the US approach (in contrast to the NLC’s European approach). It differs from that of the NLC in two main respects. First, it attached different weight and significance to place of performance, leading to a diametrically opposite result of the NLC in the weighted contacts count. Second, while the NLC regarded equality between employees as no more than a potential public policy qualification to the application of the foreign law identified as the most closely related to the contract, the HCJ regarded such equality as an element in determining the choice of law rule itself. These different approaches as to the choice of law analysis have important ramifications in other areas of law that have barely been addressed by the Courts, namely public international law and labor law. These are explored in Part IV.

C. The Aftermath of Worker’s Hotline

Before widening the perspective of the analysis, however, it is important to highlight the judgment’s practical consequences. The goal of the HCJ, admirable as it was, can, and has been, easily frustrated. As Cass Sunstein notes, “[b]ecause rules have clear edges, they allow people to ‘evade’ them by engaging in conduct that is technically exempted but that creates the same or analogous harms.”⁸¹ As often happens in law and in employment law in particular, individuals and corporations react to the new rules by redesigning their conduct in a manner that preserves the economic structure and the power relations that the law intended to prohibit. Thus, the HCJ’s *Worker’s Hotline* ruling not only identified the justification for subjecting an employment relationship in the settlements to Israeli law under choice of law rules, but also, perhaps inadvertently, offered guidelines for the exemption of employment

79. *Worker’s Hotline*, HCJ 5666/03 at ¶11 (Jubran, J. concurring) (author’s translation).

80. *Id.*

81. Cass Sunstein, *Problems with Rules*, 83 CAL. L. REV. 953, 995 (1995). See also Yuval Feldman, *Ex Ante vs. Ex-Post: Optimizing State Intervention in Exploitive Triangular Employment Relationships*, 30 COMP. LAB. L. & POL’Y J. 751 (2009).

relationships from Israeli law. An Israeli employer may abide by *Worker's Hotline* and still manage to avoid the reach of Israeli law in two different fashions, both of which have already been put into practice.

One way in which an employer can stay true to the letter of *Worker's Hotline* yet circumvent its spirit is by entering into an express agreement with the employee on the issue of applicable law. In the HCJ's judgment as well as in subsequent rulings, the courts clarify that the legal analysis, which includes a choice of law determination (e.g., the contact count) and substantive legal principles (e.g., equality), is necessary because the parties did not agree on the applicable law. As could well have been expected, since the *Worker's Hotline* ruling, Israeli employers have drafted new contracts with their Palestinian employees stipulating that Jordanian law will govern the employment relationship.⁸² The validity and weight of these provisions has yet to be assessed by the courts. In particular, the courts will have to flesh out the principle that, barring exceptional circumstances,⁸³ the court will give effect to an express agreement by the parties regarding the law governing the contract.⁸⁴ In labor law employees' consent to waive their rights is met with suspicion (if not dismissal) in light of the existing power disparities,⁸⁵ such that waiver provisions are suspect even if they purport to address the applicable legal system rather than substantive law.⁸⁶ Such a waiver is analogous to employees' 'consent' to waive an entire bundle of rights, such as that associated with their status as employees.⁸⁷ Since employee status is the origin of an array of rights, it is ludicrous to suggest that although employees may not waive specific rights (e.g., minimum wage), they may waive their status as employees, which provides the basis for those rights. Along the same lines, the power disparities between employer and employee mean that suspicion should attach to an employee's consent (e.g., through a choice of law stipulation) to an employment

82. See, e.g., Labor Ct. (Jer.) 3452/09 Jahalin v. Municipality of Ma'ale Adumim (2011), Nevo Legal Database (by subscription) (unpublished) (Isr.). See also E-mail from Gilad Noam, Attorney, to author (May 1, 2011) (on file with authors).

83. In Labor Appeal, the NLC ruled that the agreement between two Israelis, signed in Israel, according to which Cyprus law would apply should not be respected. LaborA (Jer.) 418/06 Nehushtan v. Classica Int'l (2011), Nevo Legal Database (by subscription) (Isr.). According to the NLC, foreign law should apply only where there is true and informed consent, that includes familiarity with the law chosen. *Id.* In the relevant case, the NLC concluded that the sole reason for the purported application of Cyprus law was to avoid Israeli tax law. *Id.*

84. *Worker's Hotline*, HCJ 5666/03 at ¶ 23

85. PAUL DAVIES & MARK FREEDLAND, *KAHN-FREUND'S LABOUR AND THE LAW* 25–26 (3rd ed. 1983).

86. Fausto Pocar, *La protection de la partie faible en droit international privé*, COLLECTED COURSES OF THE HAGUE ACADEMY OF INT'L L. 188, 356 (1984); PETER NYGH, *AUTONOMY IN INTERNATIONAL CONTRACTS* 141–43 (1999). See, e.g., *Morrison v. Circuit City Stores, Inc.*, 317 F.3d 646, 668 (6th Cir. 2003).

87. KEITH W. WEDDERBURN, *THE WORKER AND THE LAW* 53–55 (1966). See *Young & Woods Ltd. v. West*, [1980] I.R.L.R.(CA) (Eng.) and the discussion in COLLINS, EWING & MCCOLGAN, *supra* note 36, at 546–48.

relationship under a legal structure that is less beneficial than the structure that would otherwise apply. Admittedly, since Jordanian law does have a real connection with the contract, under general choice of law doctrine, a choice of Jordanian law as that governing the contract would not be regarded, *prima facie*, as unreasonable or in bad faith.⁸⁸ Nonetheless, the particular context in which the matter arises (i.e., labor law) requires a more cautious approach. If the contact count is perceived as leading unambiguously to Israeli law, any other choice would be suspect as an attempt to circumvent protective rules.

Employers seeking to avoid the application of Israeli law to an employment relationship with Palestinian employees also frequently use manpower agencies and service providers, a highly prevalent technique in the Israeli labor market.⁸⁹ These firms are often used only for ‘payrolling’ purposes, creating the appearance that the agency or service provider is the legal employer, and thus allowing the true employer to circumvent obligations that would govern a direct employment relationship based in collective agreements.⁹⁰ The organization of work through chain suppliers rather than a single firm may establish conditions for potential injustice.⁹¹ In the context of choice of law, using an intermediary Palestinian company as a service provider or manpower agency to hire Palestinian employees may enable an Israeli employer to deliberately manipulate the contact count away from Israeli law. NGOs have begun to collect evidence of this practice,⁹² and one variant of such an arrangement has already reached the courts: following a public tender, the Civil Administration contracted a Palestinian employer to provide services in the Beitunya crossing between Israel and the West Bank. One of the Israeli companies competing for the tender, Dynamica 2002 Ltd., petitioned the HCJ, claiming that, following *Worker’s Hotline*, the winning offer should not have been considered since it relied on a pay structure (minimum wage and benefits) that was illegal under Israeli law.⁹³ The Civil Administration argued that a significant difference underlay the two cases: while *Worker’s Hotline* involved an Israeli employer,

88. Contrast with NYGH, *supra* note 86, at 140.

89. Guy Mundlak, *The Israeli System of Labor Law: Sources and Form*, 30 COMP. LAB. L. & POL’Y J. 159, 175 (2009); Guy Davidov, *Enforcement Problems in ‘Informal’ Labor Markets: A View from Israel*, 27 COMP. LAB. L. & POL’Y J. 3, 10 (2005).

90. See generally Judy Fudge, *The Legal Boundaries of the Employer, Precarious Work and Labour Protection*, in BOUNDARIES AND FRONTIERS OF LABOUR LAW 295 (Guy Davidov & Brian Langille eds., 2006); Simon Deakin, *The Changing Concept of Employer in Labour Law*, 30 INDUSTRIAL L. J. 72 (2001); Hugh Collins, *Independent Contractors and the Challenge of Vertical Disintegration to Employment Protection Laws*, 10 OX. J. LEGAL STUD. 353 (1990); ALAN SUPIOT, BEYOND EMPLOYMENT: CHANGES IN WORK AND THE FUTURE OF LABOUR LAW IN EUROPE 17–22 (2001).

91. Hugh Collins, *Ascription of Legal Responsibility to Groups in Common Patterns of Economic Integration*, 53 MODERN L. REV. 731, 736 (1990).

92. Kav LaOved, *Palestinian Workers in West Bank Settlements – 2008*, KAV LAOVED, (June, 20 2009), http://www.kavlaoved.org.il/media-view_eng.asp?id=2356.

93. HCJ 1234/10 Dynamica 2002 Ltd. v. Civil Adm., July 10, 2010, ¶ 12 (July 10, 2010), Nevo Legal Database (by subscription) (Isr.).

the case at hand concerned a Palestinian employer who was not bound by Israeli law. The HCJ was not provided with information as to the content of the contracts between the Palestinian employer and his employees. Proceeding on the assumption that there was no express agreement between the parties to apply Israeli law, it applied the contact count to determine which law should apply. The Court accepted the importance of the employer's identity as a determining factor in this count, and added that no contacts to the contrary (e.g., use of Hebrew as the language of the contracts, use of Israeli currency for payment, reliance on Jewish holidays as days of rest, etc.) had been proven. The Court concluded that the contract's *only* contact with Israeli law was the fact that the Civil Administration ordered the work. According to the Court, this contact was not sufficient for the application of Israeli law. The court therefore confirmed the validity of the Jordanian law-based offer.⁹⁴

The obvious conclusion from this recent judgment is that unless courts look at apparently innocuous agreements in context, Israeli employers can abide by the dictates of *Worker's Hotline* and still offer their employees terms that are only acceptable under Jordanian law, simply by incorporating a Palestinian company as an intermediary.⁹⁵

The principle of equality between Israeli and Palestinian employees is also easy to circumvent. For example, in *Dynamica* the Court reiterated the *Worker's Hotline* conclusion that Israeli and Palestinian workers may not work under different laws, but found that "unlike the situation in *Worker's Hotline*, where Palestinian and Israeli workers were employed together, here *only Palestinian workers* are involved."⁹⁶ Consequently, applying Jordanian law to the contracts of the Palestinian employees was not discriminatory.⁹⁷

Finally, it is possible to distinguish the terms of employment along national divides through legislation. In a case brought before the Be'er-Sheva Regional Labor Court, eighty-four Palestinians who had been employed in the Erez Industrial Zone (EIZ) brought claims against their Israeli employers for severance pay under Israeli law.⁹⁸ The EIZ is not a municipality inhabited and governed by Israeli citizens, but a territory controlled by the Israeli military. In one of the first cases to rely on the HCJ ruling in *Worker's Hotline*, the Regional Labor Court accepted the claim for severance pay.⁹⁹ The Court acknowledged that Israeli businesses had "flocked" to the EIZ over a period of thirty-six years

94. *Id.*

95. On the use of contact factors that are vulnerable to manipulation by one party, see Wilhelm Wengler, *The Significance of the Principle of Equality in the Conflict of Laws*, 28 L. & CONT. PROBLEMS 822, 831-32 (1963).

96. *Dynamica 2002 Ltd.*, HCJ 1234/10 at ¶ 12.

97. *Id.*

98. Labor Ct. (BS) 2142/06 Ashkantana v. Az-Rom (2008), Nevo Legal Database (by subscription) (Isr.).

99. *Id.*

to enjoy the advantages of cheap labor.¹⁰⁰ Yet, arguably, this was not sufficient a reason for the Court to conclude that the parties “agreed” to apply the territorial law (in this case, Egyptian law) to their contracts. On appeal, the NLC confirmed the application of Israeli law to the case at hand, but ruled that the Disengagement Plan (according to which Israeli settlements in the Gaza Strip have been dismantled and their residents removed into Israeli territory) should be viewed as a frustration of the employment contracts, exempting the employer from the obligation to pay severance to the Palestinian employees.¹⁰¹ At the same time, an inquiry into the rights of Israeli employees in the EIZ reveals that the Law for the Implementation of the Disengagement Plan (2005) states, *inter alia*, that *Israeli* employees who work in factories located in the Gaza Strip area, and who have lost their place of employment following the disengagement plan, are entitled to “adaptation” payments.¹⁰² Somewhat surprisingly, only Justice Rosenfeld, the dissenting judge in the NLC, raised the matter of discrimination between Israeli and Palestinian employees. She stated, “although it is true that the [d]isengagement law refers only to Israeli workers, while here we are concerned with Palestinian workers, it is unthinkable to distinguish between an Israeli and a non-Israeli worker when applying the legal definition of the end of the employment relationship.”¹⁰³ Apparently, it *is* thinkable, as the majority did not address the issue at all.

We find that various courts’ efforts to ascertain the rights of Palestinians who work for Israeli employers have led to a very unsatisfactory result. The reason for this result is that the courts have approached the entitlement to certain employees’ rights as a choice-of-law question. The situation is further complicated because Israeli employers in the West Bank are “repeat players”¹⁰⁴ that can (and arguably do) adjust their behavior according to judicial signals. To deal with this problem, we propose an alternative analysis, outside the choice of law issue. The substantive quandary stems from the fact that Israel controls areas in the West Bank; public and private Israeli employers employ Israelis and Palestinians in that area; and Israelis are entitled to a bundle of employment rights as if they were living in Israel. The question before us is whether this factual background calls for the conclusion that Palestinian employees should *also* be entitled to employment rights as if they were living in Israel. We continue our discussion by inquiring why Israelis working in the occupied territories are entitled to the same rights they would have if they were living in

100. *Id.* at ¶ 23.

101. The Court mentioned that over 1,000 Palestinian employees were already engaged in legal disputes against their former Israeli employers for severance pay following the disengagement. LaborA 256/08 *Koka v. Schwartz* ¶ 25 (2001), Nevo Legal Database (by subscription) (Isr.).

102. Law for the Implementation of the Disengagement Plan, 5795-2005 S.H. No. 1982 p. 142 sects. 49, 60 (Isr.).

103. *Koka*, LaborA 256/08 at ¶ 24 (Rosenfeld, J.).

104. Marc Galanter, *Why the ‘Haves’ Come Out Ahead: Speculation on the Limits of Legal Change*, 9 L. & SOC. REV. 95 (1974).

Israel. Then we examine the implications of this entitlement for Palestinians working for Israeli employers.

III.

FEELING AT HOME: WHY ARE ISRAELIS IN THE WEST BANK SUBJECT TO ISRAELI LAW?

There is a commonplace perception within Israel society (and beyond it) that Israeli settlers live in the settlements under Israeli law. In order to understand the source and implications of this perception, it is necessary to explicate the law applicable in the settlements.

The HCJ's starting point in *Worker's Hotline* was that the legal regime applicable in the West Bank is the law of occupation.¹⁰⁵ Under the law of occupation, local law that was in force prior to the occupation remains binding, unless it is amended by enactments of the military commander.¹⁰⁶

However, with respect to Israeli residents of the West Bank, there are four additional layers, commonly referred to as the 'law of the exclaves.' The Court only referred to two. The first layer consists of military enactments that duplicate a select body of Israeli legislation to the settlements' territory.¹⁰⁷ The other layer is Israeli legislation that applies to Israeli residents in the West Bank on a personal basis.¹⁰⁸ The purpose of these two layers of norms is to enable Israelis moving to the settlements to maintain their lifestyle as if they continued to live under Israeli sovereignty and law, despite the different legal regime to which they become formally subject. Consequently, the settlements have become exclaves where Israeli law applies, connecting them legally, economically, and socially to Israel.¹⁰⁹ The remaining two layers of norms make the legal regime applicable to settlers appear identical to Israeli law. One is comprised of collective agreements that govern the employment of Israeli employees in the occupied territories. The other is the consensual application of

105. In the past there was much dispute whether the West Bank and the Gaza Strip were occupied territories in terms of the Fourth Geneva Convention. Israel contended that they were not, since Jordan had no sovereign title to the territory. However, at no time did Israel claim that the West Bank was under Israeli sovereignty, nor was it ever disputed that it was an occupied territory within the terms of the 1907 Hague Regulations. Furthermore, from the early 1970s, Israel has undertaken to act in accordance with the humanitarian provisions of the Fourth Geneva Convention. In recent years, it has largely stopped arguing the *de jure* inapplicability of the Fourth Geneva Convention. See DAVID KRETZMER, *THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES* 198 (2002).

106. Hague Convention (IV), *supra* note 16, at art. 43.

107. See Order on Administration of Municipal Councils (Judea and Samaria) 1981, No. 892 (Isr.); *Worker's Hotline*, HCJ 5666/03 at ¶ 11.

108. Law for the Extension of the Emergency Regulations (Judea and Samaria—Criminal Adjudication and Judicial Assistance), 5767-1967 S.H. 517, art. 6B and the Annex at p. 20 (Isr.) (as extended and amended).

109. BENVENISTI, *supra* note 18 at 135.

Israeli law when an Israeli employer contracts with an Israeli employee in the settlements. These two layers, given the courts' failure to consider their unique relevance to the predicament facing Palestinian employees, merit special notice. The following sections consider each of the four avenues in greater detail, with particular reference to labor law.

A. The Military Commander's Enactments: The Municipal Councils' Code

In 1981, the Military Commander established the regional and municipal councils in the West Bank. The Order on Administration of Municipal Councils (Judea and Samaria) (No. 892) (1981) provides:

The IDF commander in the region may set in the Code rules for the administration of municipal councils and regarding powers and administrative arrangements concerning the affairs of council residents.¹¹⁰

The Military Commander subsequently enacted the Code of the Municipal Councils.¹¹¹ This Code, a military enactment, duplicates a host of Israeli primary and secondary legislation to the territory of the settlements (which are defined as municipal councils for the purpose of the Order). When Israeli legislation is amended, the Code is correspondingly amended.¹¹² Indeed, Justice Rivlin quotes Amnon Rubinstein, who pointed out, "a resident of Maale-Adumim [settlement], for example, is putatively subject to military rule and the local Jordanian law, but actually lives according to Israeli laws with respect to his personal law and with respect to the local authority where he lives. The military government is nothing but a sign, through which the Israeli law and administration operate."¹¹³

The Code provides that "rights, duties, authorities and sanctions provided by the laws incorporated in the Code will apply *mutatis mutandis* as if they were provided by the Code, but they will not govern a resident of the settlements with respect to a person who is not a resident, unless otherwise stipulated by the annexes."¹¹⁴ The effect of this provision is that the enforcement of obligations under the laws in the Code is only possible against a resident of the settlements

110. Order on Administration of Municipal Councils (Judea and Samaria), 5741-1981, No. 892 (Isr.). See also Order on Administration of Regional Councils, 5739-1979, No. 783 (Isr.).

111. Order on Administration of Municipal Councils (Judea and Samaria), 5741-1981, No. 892 (Isr.).

112. The Order concerning Administration of Municipal Councils (Judea and Samaria) (Amendment No. 4) allows the extension of the settlements' regime to areas outside them. See Order Concerning Administration of Municipal Councils (Judea and Samaria) (Amendment No. 4), 5767-1997 No. 1453 (Isr.). This order enables extension of the 'enclave law' to the industrial areas adjacent to the settlements. *Id.*

113. *Worker's Hotline*, HCJ 5666/03 at ¶ 11 (quoting Amnon Rubinstein, *The Changing Character of the "Territories": from Trust to a Legal Hybrid*, 11 IYUNEI MISHPAT 439 (1986) (in Hebrew)).

114. Order on Administration of Municipal Councils (Judea and Samaria) 1981, No. 892, art. 140 (B) (Isr.).

with respect to conduct towards other residents of the settlements, but not, for example, with respect to conduct towards Palestinians. Moreover, although the wording of this provision limits only enforcement of laws, it has been interpreted as limiting also the substantive content of the laws incorporated in the Code, so that the Code only benefits residents of the settlements (who are invariably Israeli nationals or registered residents). In short, the Code applies Israeli legislation (listed in the annexes) only in the settlements and only with respect to Israeli residents of the settlements.¹¹⁵

Annex 6 of the Code, entitled “Labor Law,” incorporates the following Israeli legislation: Minimum Wage Law, 1987;¹¹⁶ the Employment Service Law, 1959;¹¹⁷ the Foreign Workers Law, 1991;¹¹⁸ the Emergency Labor Law, 1967;¹¹⁹ cost of living allowance extension orders; those sections of the Collective Agreements Law, 1957, that are necessary for the application of extension orders to the settlements; Emergency Work Service, 1967; Foreign Workers Law, 1991; and secondary legislation authorized by these laws.¹²⁰

In *Givat Ze'ev* the NLC pointed out that the laws incorporated in the Code are not relevant to the case at hand.¹²¹ The HCJ only alluded to the Code when it mentioned “military enactments applicable only to the settlements.”¹²² However, the norms incorporated by the Code, such as enforcement mechanisms in the Minimum Wage Law, distinguish their beneficiaries not only on the basis of territory but also on an individual basis, since the Code is exclusive to Israeli residents in the settlements. Neither court considered it necessary to examine the legality of a legal instrument that applies in this discriminatory manner. It is worth noting that Israeli labor law does not generally differentiate between

115. *Id.*; Communication with Ariel Yosefi, Office of the Legal Advisor for Judea and Samaria, Military Advocate General's Office, Dec. 8, 2008.

116. The Municipal Councils Code applies the Israeli Minimum Wage Law 5748-1987, S.H. 1211, p. 68 to the benefit of Israeli residents of the settlements only. *See* Order on Administration of Municipal Councils (Judea and Samaria) 5741-1981, No. 892 (Isr.). Order No. 967, discussed above, extended the benefit of minimum wage to Palestinian employees of Israelis within the settlements. *See* Order Regarding Employment of Workers in Certain Locations (Judea and Samaria), 5742-1982, No. 967, Art. 3 (Jordan). Order 1605, extends this benefit to employees of any Israeli employer within the West Bank. *See* Order Regarding Employment of Workers in Certain Locations (Amendment 3) (Judea and Samaria), 5788-2007, No. 1605 (Jordan) (adding Art. 3B to Order No. 967). However, Israeli residents of the settlements benefit from all provisions of the Minimum Wage Law while Palestinian employees in the settlements benefit only from the basic right to minimum wages but not from the additional rules guaranteeing this right. *See* LaborA 786/06 Ben-Or Toys v. Akhram Sultan (2008), Nevo Legal Database (by subscription) (Isr.).

117. Employment Service Law, 5719-1959, S.H. 270 p. 32 (Isr.).

118. Foreign Workers Law (Illegal Employment), 5761-1991, SH 1349 p. 112 (Isr.).

119. Emergency Labor Law, 5727-1967, SH 503 p. 86 (Isr.).

120. Order on Administration of Municipal Councils (Judea and Samaria) 1981, No. 892, Annex 6, §1 (Isr.).

121. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98, at ¶14.

122. *Worker's Hotline*, HCJ 5666/03, at ¶11.

workers on the basis of their nationality;¹²³ the construction applicable to nationals in the West Bank is therefore exceptional.

B. Extraterritorial Application of Israeli Legislation

Israeli legislation provides that certain Israeli laws apply to Israeli individuals even outside Israel. Some legislation (e.g., extensive sections of the Penal Law of 1977) applies to Israeli nationals and residents regardless of where they are located.¹²⁴ Similarly, Israeli nationals and residents are subject to taxation in Israel even with respect to work performed outside the country.¹²⁵ Some legislation extends extraterritorially specifically to Israelis who reside in the West Bank. The Emergency Regulations (Judea and Samaria – Criminal Adjudication and Judicial Assistance of 1967) extend the application of seventeen Israeli laws to Israelis residing in the West Bank. These laws¹²⁶ do not apply to Palestinians, even when they are physically within the area of a settlement.¹²⁷ Other legislative instruments contain specific provisions that extend them to Israeli citizens (or persons entitled to citizenship, i.e., Jews) who are residents of the West Bank.¹²⁸ The legislation applicable extraterritorially in these manners does *not* include labor law. It is nonetheless of interest because it forms part of the background against which the employment relationship between Israeli employers and Palestinian employees is understood.

Alongside the extension of Israeli legislation to the West Bank through express stipulation in the law, Israeli legislation has also been extended to Israeli residents in the West Bank by judicial construction and interpretation. One example is *KPA Steel v. State of Israel*,¹²⁹ an appeal of a criminal conviction for tax evasion. The question before the HCJ was whether the interpretation of the

123. The term ‘nationality’ is used as the international aspect of citizenship, namely the formal link between a state and an individual.

124. Penal Law, 5777-1977, 8 LSI 133, art. 15 (Isr.)

125. Income Tax Order, 5707-1947, art. 2 (amended 1989) (Isr.).

126. Among which are key instruments such as the Law on Elections, Income Tax Ordinance, Social Security Law, and Military Service Law, as well as minor instruments such as the Law on Surrogacy Agreements (Approval of Agreement and Status of the Newborn).

127. The Emergency Regulations (Judea and Samaria – Criminal Adjudication and Judicial Assistance), *supra* note 107. Emergency Regulations constitute primary legislation under Israeli law. Their validity is temporary, and therefore they are renewed periodically. In 2007 the Emergency Regulations (Judea and Samaria – Criminal Adjudication and Judicial Assistance) (1967) were renewed for a period of 5 years, until 2012. Their validity was limited to exclude the Gaza Strip, to which they applied until then. *See* Law Amending and Extending the Emergency Regulations (Judea and Samaria and Gaza Strip) (Criminal Adjudication and Judicial Assistance), 5767-2007, SH No. 2100, p. 363.

128. *See, e.g.*, National Insurance Law [Consolidated Version], art. 378, 1995-5795, SH No. 1522, p. 207 (Isr.); National Insurance Regulations (Applicability to Special Types of Insurees), 5747-1987, KT No. 5022 p. 747 (Isr.).

129. *See* CrimA 123/83 KPA Steel v. Israel 38(1) PD 813, ¶ 8 [1984] (Isr.); CA 1432/03 Yinnon v. Kara’an 59(1) PD 345 [2004] (Isr.).

provision in the Income Tax Ordinance extended its application to Israelis residing in the West Bank.¹³⁰ The HCJ ruled that a wide interpretation of the extension, necessary for charging the defendant with tax evasion, was legitimate under the rules on choice of law, given the settlers' expectation that tax law applies to them in all aspects.¹³¹ This ruling is at odds with the principle that criminal provisions should be interpreted narrowly, and with the fact that choice of law doctrine applies only in private law matters. The same notion of extraterritorial extension of Israeli law to Israelis in the West Bank was taken a step further in rulings that did not interpret an explicit extension provision as in *KPA Steel*, but determined that there was an implicit provision to that effect. In *Bitton v. Helman*, for example, the Jerusalem District Court extended the licensing regulation under the Real Estate Agents Law to Israeli business conducted in the West Bank.¹³² The court explained, *inter alia*, that the application of the Law to business in the West Bank was in line with the jurisprudence that "over the years, one step at a time, when confronted with a case that involves Israeli [citizens] living in Judea and Samaria, did everything possible to apply Israeli law to them and to view them as Israelis for all intents and purposes."¹³³ Of particular interest is the willingness of the courts to extend the application of Israeli public law on the basis of parties' expectations, a notion which belongs to the realm of private law. The laxness of the courts in applying established legal doctrines (such as the interpretation of criminal law or the distinction between public and private law) illustrates their disregard for legal mechanisms that a sovereign state should employ if it wishes to extend its law to an occupied territory. Such offhandedness in extending Israeli law to the settlements only reinforces the perception that the settlements are subject to Israeli law.

Applying the occupying power's domestic legislation to the occupied territory, whether expressly or by interpretation, is not without difficulty from an international legal perspective. In general, the occupant's civilian institutions are bound by the same constraints as the military commander, namely Article 43 of the Hague Regulations.¹³⁴ This includes the legislature, which is generally prohibited from legislating for occupied territory, because such legislation amounts to the unilateral annexation of an occupied territory. Nonetheless, Israeli courts have ruled that the power of the Knesset (Israel's parliament) to legislate for the occupied territory, at least for Israeli nationals, is not necessarily

130. CrimA (123/83 KPA Steel v. Israel 38(1) PD 813, ¶ 8 [1984] (Isr.).

131. *Id.*

132. CC (Jer.) 6718/05 Bitton v. Helman, 7 (2006), Nevo Legal Database (by subscription) (Isr.).

133. *Bitton*, CC (Jer) 6718/05 at 7 (citing CA (Jer.) 739/03; Gaoni v. Cohen, (Mar. 11, 2003) Nevo Legal Database (by subscription) (Isr.), in which the District Court confirmed the powers of the head of execution office in the West Bank).

134. BENVENISTI, *supra* note 18, at 20.

restricted by the law of occupation, for example with respect to taxation.¹³⁵ This practice seems, at first glance, to follow post-World War II jurisprudence that has recognized as valid the application of an occupant's national law to its own nationals in the occupied territory. However, post-World War II jurisprudence developed with respect to nationals who were members of the occupant's military forces or related to those forces.¹³⁶ The situation with regard to other nationals—such as civilian settlers—is not as clear. Benvenisti argues that from a law of occupation perspective, the test should be whether the application of the national law would, directly or indirectly, have adverse effects on the local public order and on short and long-term local interests.¹³⁷ For example, to the extent that personal extraterritorial application of the occupant's law results in encouraging its nationals to emigrate to the occupied territory, this might impinge on the local "public order and civil life" and would thus be prohibited by international law.¹³⁸ It would also run counter to the express prohibition in Article 49 of the Geneva Convention on the transfer by the occupants of parts of its own civilian population into the territory it occupies. Arguably, this is pertinent to Israel, where the legislation for nationals in the occupied territory was enacted precisely in order to allow civilians to live in the West Bank (and Gaza Strip) under a standard similar to (if not higher than) that to which they were accustomed within Israel's national borders, as part of the campaign to encourage relocation to the settlements.¹³⁹

A further difficulty in the extraterritorial application of Israeli law to Israelis is that it results in the differential application of legal regimes based on nationality within the West Bank territory. *Prima facie*, this is a discriminatory measure. One might argue that nationality-based discrimination exists whenever a state extends its law extraterritorially, and yet such a measure is not categorically prohibited under international law. However, the situation at hand is different from that of ordinary extraterritorial legislation, where the legislating state has no territorial control and can only prescribe for individuals related to it on a personal basis. In the present case, the state has territorial control and therefore bears the onus of proving that the distinction by nationality is justified with respect to each item of legislation, as it would with respect to legislation applicable within its own territory and even more. While a state may distinguish between nationals and non-nationals in particular instances (e.g., with respect to political rights), labor law is generally considered territorial, and distinctions on the basis of nationality are illegal.¹⁴⁰ Moreover, the preferential treatment of

135. *KPA Steel*, CrimA 123/83 at ¶ 9.

136. BENVENISTI, *supra* note 18, at 21–22.

137. *Id.*

138. Amir Paz-Fuchs & Alon Cohen-Lifshitz, *The Changing Character of Israel's Occupation: Planning and Civilian Control*, 81 TOWN PLANNING REV. 585 (2010).

139. *See id.*

140. Convention on the Elimination of All Forms of Racial Discrimination, art. 1, 660 U.N.T.S. 195 (1965).

nationals in occupied territory may suggest expansionist ambitions that contravene the right to self-determination of peoples.

C. Collective Agreements

As noted earlier, Annex 6 to the Code applies to the settlements' procedural sections of the Collective Agreements Law that are necessary for the application of extension orders.¹⁴¹ By inference, Annex 6 does not apply to those sections of the collective agreements that have not been extended by specific orders. How do these arrangements affect employers, subject to collective agreements (either by signing directly or through membership in an employer's union), operating in the West Bank? This question concerns relations not only between employers and Palestinian employees, but also between those employers and Israeli employees. The confusion stems from a peculiar state of affairs: a collective agreement law exists in Israel, which creates a binding normative structure for an Israeli employer who wishes to sign it (directly or through an employers' union). Counter to the differing employment conditions experienced by different employers and Palestinian workers, Israeli jurisprudence seeks to apply rights that derive from collective agreements to all workers within the firm. The following are the parameters governing collective agreements in Israeli labor law: first, unless explicitly stated,¹⁴² the collective agreement applies to *all* employees in the firm;¹⁴³ second, the workforce is viewed as a single business and as a single bargaining unit with distinctions between groups of employees permitted only as an exception to the rule¹⁴⁴ that views the workforce in a single business as a single bargaining unit; and third, certain distinctions between employees (e.g., on the basis of ethnic or national origin, gender, age, etc.) are prohibited.¹⁴⁵

And yet, the NLC reasoned, the Collective Agreements Law (1957) applies *only to Israeli employees* of an Israeli employer operating in the West Bank. In addition, the NLC stated, "as a matter of course, a collective agreement covers employees in a particular sector or business *who are represented by the representative union.*"¹⁴⁶ This outcome is in complete contravention of Israeli collective law principles. However, according to the Israeli Collective

141. Extension orders are ministerial edicts that extend collective agreements to employees and employers who were not bound by the collective agreement originally.

142. LaborA 202/08 Sotovsky v. General Health Services (2008), Nevo Legal Database (by subscription) (Isr.).

143. Collective Agreements Law, 1957-5717, SH No. 221 p. 57, art. 15(3) (Isr.); LaborA 42/2-5 Histadrut v. Senior Paz Workers, 14 Labor Judgments 367(1983), Nevo Legal Database (by subscription) (Isr.).

144. LaborA 55/4-28 Senior Research Staff in the Sec. Org. v. Histadrut, 31 Labor Judgments 54 (1998), Nevo Legal Database (by subscription) (Isr.).

145. LaborA 400024/98 Histadrut v. Tzim, Israeli Shipping Co., 36 Labor Judgments 97 (2000), Nevo Legal Database (by subscription) (Isr.).

146. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 46 (emphasis added).

Agreement Law, provisions of a collective agreement apply to *all* the employees in a business that is subject to a collective agreement, whether employees are members in the relevant union, members in a different union, or not members in any union at all.¹⁴⁷ Indeed, in Israeli law, “there is no legal connection between union membership and coverage of collective agreements.”¹⁴⁸ The HCJ made no mention of the collective agreements regime.

Under what conditions does a collective agreement apply extraterritorially? Harry Arthurs notes a 1967 transnational collective agreement purported to cover American and Canadian workers of Chrysler Corporation, despite the fact that each group was covered by the law of the jurisdiction in which it worked.¹⁴⁹ European labor law recognizes the possibility that a collective agreement applies to employees who are based outside the territory where the collective agreement was originally signed, solely by virtue of being employed by an employer who has signed the agreement.¹⁵⁰ This reflects the goal of the European Union to advance a single market. As such, the conclusion that collective agreements apply across borders within Europe is a natural extension of what may be termed European ‘economic jurisprudence.’ Even more relevant to the case at hand, the House of Lords analyzed the situation of an expatriate employee of a British employer operating “within what amounts for practical purposes to an extra-territorial British enclave in a foreign country.”¹⁵¹ In such a case, argued Lord Hoffman, “it would be unrealistic to regard him as having taken up employment in a foreign community in the same way as if [his employer] were providing security services for a hospital in Berlin.”¹⁵²

No similar ‘economic jurisprudence’ of integration is applicable with respect to the West Bank (at least not since the 1990s, when Israel recognized the economic interest of Palestine as separate from its own).¹⁵³ Therefore, one could plausibly argue, in contrast to the NLC’s ruling, that since the Collective Agreement Law has not been applied explicitly in the West Bank, collective agreements do not apply extraterritorially to Palestinians *or* to Israelis. The reality, of course, is that Israelis perceive life in the occupied territories as identical to life in Israel, and Israeli employers have yet to contest the

147. Collective Agreements Law, 1957-5717, SH No. 221 p. 57, arts. 15, 16 (Isr.).

148. MUNDLAK, *supra* note 33, at 79 (emphasis added).

149. Harry Arthurs, *Extraterritoriality by Other Means: How Labour Law Sneaks Across Borders, Conquers Minds and Controls Workplaces Abroad*, 21 STAN. L. & POL’Y REV. 527, 542–43 (2010). See David H. Blake, *Multi-National Corporation, International Union and International Collective Bargaining: A Case Study of the Political, Social and Economic Implications of the 1967 U.A.W- Chrysler Agreements*, in TRANSNATIONAL INDUSTRIAL RELATIONS: THE IMPACT OF MULTI-NATIONAL CORPORATIONS AND ECONOMIC REGIONALISM ON INDUSTRIAL RELATIONS 137–172 (Hands Günter ed., 1972).

150. ROGER BLANPAIN, EUROPEAN LABOUR LAW 433, sec. 789 (7th ed., 2000).

151. *Serco v. Lawson* [2006] UKHL 3, ¶ 39

152. *Id.*

153. Israeli-Palestinian Interim Agreement, *supra* note 22, at Annex X (Protocol on Economic Relations).

application of collective agreements to Israeli workers.

The attitude of Israeli employers may be changing, as seen in a recent case. An employer operating in the West Bank argued that he is not required to pay membership fees to the Israeli employer organization¹⁵⁴ on the grounds that an obligation that stems from the Collective Agreement Act (in this case payment of membership fees to the employers' union) does not apply to employers operating in the West Bank. His argument was rejected by the Jerusalem District Labor Court, which ruled that "the claim that Israeli law applies only in the territory of the state (unless otherwise stated) conflicts with the HCJ's ruling in *Worker's Hotline*."¹⁵⁵ The court held that in *Worker's Hotline* the HCJ had ruled that the "contact count" test requires applying Israeli labor law to labor relations between employees and employers situated in territories, despite the fact that Israel has avoided applying Israeli law to the West Bank and the vast majority of labor statutes do not explicitly apply to the territories.¹⁵⁶ This reading of *Worker's Hotline* is erroneous: while the HCJ applied Israeli law as a matter of contractual choice, the District Labor Court interpreted it as an extraterritorial application of Israeli labor law in general. The Jerusalem District Labor Court's decision demonstrates the insouciance of the courts towards the extension of Israeli law to the West Bank.

Moreover, in *Worker's Hotline* the HCJ did not discuss the matter of collective agreements in general, or the application of the Collective Agreements Law in particular. The Jerusalem District Labor Court's ruling suggests that the *Worker's Hotline* decision may reach much further than is implied by the HCJ's language. Another implication of the ruling is that an inquiry into the application of the relevant collective agreements should have been included in the judgment.

D. Private International Law Principles: Consent and Expectations

Israeli extraterritorial legislation does not include labor law rights and interests; a limited number of labor laws apply through the Code with respect only to Israelis (whether employers or employees). Thus, the bulk of labor law remains regulated by Jordanian law, which, as the territorial law of the West Bank, applies to both Palestinians and Israelis.

And yet, Israelis employed in the settlements enjoy significantly more generous employment terms than Palestinians. The reason for the disparity is that when Israelis employ Israelis in the settlements, they operate under the premise that Israeli labor law applies, including its statutes, collective agreements, extension orders, etc. This factual situation was alluded to in the

154. Labor Ct. (Jer.) 2879/06 Israeli Empl'r Union v. Better & Different (2009), Nevo Legal Database (by subscription) (Isr.).

155. *Id.* at ¶8.

156. *Id.*

HCJ's emphasis on "the legal character of the Israeli settlements as an 'enclave' which is not de facto subject to the general law that governs that [West Bank] territory,"¹⁵⁷ and in Justice Jubran's concurring opinion that "in practice the Israeli enclaves have the legal status of Israeli towns, at least for the purpose of application of Israeli law and especially employment law. Workers who have Israeli citizenship and who work in these enclaves are subject to Israeli employment law, with all that it implies."¹⁵⁸ *Prima facie*, these statements are erroneous. They imply that the whole of Israeli labor law has been made applicable to Israelis in the settlements on either a personal or territorial basis.

However, as Chief Justice Barak has noted in a different case, "the presumption is that Israel legislation applies in Israel and not in the territories (i.e., in the West Bank), unless it is stated in legislation (expressly or by implication)."¹⁵⁹ Since labor law has not been extended to the West Bank, it could not be presumed to apply, even to the settlements, in the absence of express extension. On a more charitable reading, emphasizing the term "in practice" rather than "legally," Justice Jubran's statements refer, not only to the formal applicability of Israeli law in the settlements, but to the ground-level reality that as a matter of *fact*, Israeli settlers enjoy rights, terms and conditions that are indistinguishable from those enjoyed by employees employed within Israel. The source for this arrangement lies in the consensual application of Israeli law when an Israeli employer contracts with an Israeli employee in the settlements.¹⁶⁰ This choice of law is within the prerogative of any two sides to a contractual relationship, as long as employees are protected from being disadvantaged by the employer's choice of law.¹⁶¹

This state of affairs is true with respect to labor law as well. For example, when transnational corporations enter into employment contracts with employees who work abroad, they may include provisions that the law of the home country, rather than the country where the work is performed, will apply to their contracts. Moreover, a law may be "exported *sub rosa* because its values, assumptions, or requirements become embedded in the HR policies and workplace practices of transnational corporations."¹⁶² Similarly, if Israeli employers and employees in the settlements agree that Israeli contract law applies to their relationships, they are well within their rights to make this

157. *Worker's Hotline*, HCJ 5666/03 at ¶ 25.

158. *Id.* at ¶ 11 (Jubran, J. concurring).

159. HCJ 8276/05 *Adalah v. Minister of Defense* Isr. L. Rep. 352, ¶ 22 (2006) (Isr.) (citing to A. BARAK, *LEGAL INTERPRETATION: STATUTORY INTERPRETATION* 579 (vol. 2, 1993)).

160. The NLC seems to have grasped this, seeing the empty half of the legislative cup. After describing the relatively few labor laws that have been applied through extraterritorial legislation or military orders to Israeli settlers, it stated that "from the positive we learn the negative. Israeli laws that were not applied through military orders do not apply." *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 14.

161. COLLINS, EWING & MCCOLGAN, *supra* note 37, at 42.

162. Arthurs, *supra* note 149, at 540.

choice. The problem, addressed in the following section, is that the agreements reached with Palestinian employees contained different substantive terms from those contained in the agreements reached with the Israeli employees. This matter should have been addressed by the NLC and HCJ, but it was ignored almost completely.

In the absence of express stipulation as to the law governing the employment relations, it is necessary to identify the law to which the contract is most closely connected.¹⁶³ In the case of Israelis employing Israelis in the West Bank, it is obvious that, even in the absence of an express manifestation of consent, both parties *expect* Israeli law to apply. Thus, in *Kiryat Arba*,¹⁶⁴ the HCJ dealt, for the first time, with a labor dispute between an Israeli employer (the Civil Administration, which is an arm of the military commander) and two Israeli employees in the occupied territories. The HCJ emphasized the identity of the particular employer in that case, and ruled that the Civil Administration “carries with it” Israeli law.¹⁶⁵ In a later case, an employee of the municipality of the Ariel settlement was dismissed during her pregnancy, in *prima facie* breach of Israeli law.¹⁶⁶ The municipality sought to distinguish the case from *Kiryat Arba*, arguing that unlike the Civil Administration, a municipality is not the “long arm” of the occupying power.¹⁶⁷ The NLC rejected the argument, accepting without deliberation the Regional Court’s ruling that since the municipality operated under the authority of the military commander, it was bound by Israeli labor law.¹⁶⁸ Given that the settlements and the Israeli industrial zones were also established by military decree, this rationale is presumably relevant for all employment relations in which the settlements (or their residents) and industrial zones are involved as employers.

Recently, in a situation that mirrors the facts presented in *Workers Hotline*, the NLC has gone one step further in applying Israeli law to the resolution of a dispute relating to work carried out in the West bank. The case, *Mahajneh v. Center for Democracy and Human Rights*, involved an Arab citizen of Israel who worked as an attorney for a West Bank-based Palestinian NGO that operated mainly in the occupied territories, but partly in Israel. His contract with the employer was written in Arabic and signed in Ramallah (in the West Bank), and he was paid in American dollars. Following his dismissal, Mahajneh charged that he was owed salaries and social benefits that had not been paid. The employer asked for summary dismissal of the claim on the ground that Israel was *forum non conveniens* and that the litigation should be held in

163. *Menora*, CA 419/71, 26(2) PD at 531.

164. *See* HCJ 663/78 *Kiryat Arba Adm. v. Nat’l Labor Ct.* 33(2) PD 398 [1979] (Isr.).

165. *See id.* at ¶ 5.

166. LaborA 45/42-3 *Efron v. Ariel*, 17 Labor Judgments 209 (1986), Nevo Legal Database (by subscription) (Isr.).

167. *Id.* at ¶ 3.

168. *Id.*

Palestinian courts, under Jordanian law. The regional court accepted the claim for summary dismissal, but the NLC reversed the decision, ruling that “an Israeli employee’s *reasonable expectation, as an Israeli citizen*, is that Israeli law will apply.”¹⁶⁹ This ruling has several implications. First, it appears that the employee’s Israeli citizenship is, in essence, sufficient to apply Israeli law to an employment relationship (presumably because of his expectations), even when the rest of the contacts pull in the other direction. Second, it appears that the employer’s status as a West Bank based company is not a decisive factor that would necessarily preclude the application of Israeli law. This is significant since it tempers an employer’s ability to manipulate the contact count simply by using a subcontractor.¹⁷⁰ And, third, the court, in its ability to reach a decision, seems almost uninhibited by the objective facts. In conclusion, the explicit, implied, or imputed expectation of parties has been used by the courts as a means for applying Israeli law to disputes that are closely connected with the West Bank but involve Israelis.

E. Conclusion

The previous sections discuss various layers of norms that together constitute the legal system applicable in the West Bank. Palestinians are governed by Jordanian law and military enactment, while Israelis resident in the settlements are subject, alongside some Jordanian law and military enactments, to norms from other sources, namely Israeli legislation applied extraterritorially and the law on collective agreements.

For Israeli residents in the West Bank, the myriad of legal regimes creates a legal environment that is very similar to that which exists in Israel. This environment has been achieved by acts of all three arms of government: express extraterritorial legislation by the legislature, military enactments by the executive, and expansive and lenient interpretations of law and doctrine by courts. Yet this application is not systematic, and, combined with the casuistic method of adjudication, it results in patchy coverage. Moreover, doctrines that could rationalize gaps in the resulting regime, such as the jurisprudence on collective agreements, have not been utilized even when abundantly relevant.

This state of affairs is both procedurally and substantively objectionable. Procedurally, it yields an overly complex legal system that is difficult to apply. Substantively, the almost casual manner in which domestic courts have extended Israeli law to the occupied territories, when even the executive and legislator had not done so, is an issue of concern. The problem is exacerbated when the unclear legal regime serves as a point of reference in determining the law applicable to Palestinians employed in the settlements. Unarticulated premises

169. LaborA 723/07 Mahajneh v. Ctr. for Democracy and Human Rights, ¶ 28 (2009) Nevo Legal Database (by subscription) (Isr.) (emphasis added).

170. See *supra* note 90 and accompanying text; Mundlak, *supra* note 11.

escape scrutiny, and pertinent rules are overlooked. The introduction of equality, itself a fundamental principle of the Israeli legal system, results in the entrenchment of disparities, as discussed in Part IV.

IV.

IMPLICATIONS FOR THE RIGHTS OF PALESTINIANS

Part III outlined the various components of the legal system that lead to the application of Israeli law to Israeli employees in Israeli-control occupied territory. We now consider the effect of this application on the employment of Palestinians, with respect to the securing of minimum standards, and to equality between Palestinians and Israelis, particularly in the terms and conditions of employment. This latter aspect of equality was not raised at all, let alone answered, by any of the courts dealing with the issue of the employment of Palestinians by Israelis in the West Bank.

A. Protective Legislation: Minimum Conditions

Notwithstanding the general rules on choice of law, the HCJ noted that the unique principles of labor law, derived from the disparity of powers between employer and employee, require applying mandatory rights and principles, even if those are not guaranteed under the legal system which the parties have purportedly agreed to apply.¹⁷¹ Indeed, notwithstanding the NLC's and the HCJ's cursory references to *equality* of terms and conditions, both courts actually focused on the question of whether Palestinians employees are entitled to *minimum* core rights under Israeli law. This minimum could have been guaranteed to the Palestinian employees without the sweeping application of Israeli law to their relations with Israeli employers, and thus without delving into a jurisprudential and political minefield.

The notion that choice of law rules should aim to protect a weak party is not uncontroversial. In theory, the classical choice of law rules only serve to indicate the applicable law, without regard to its content. The contents of foreign law only become relevant if, subsequent to the choice process, they turn out to conflict with fundamental principles of public policy or with mandatory laws of the forum. But neither source of conflict necessarily protects weaker parties in a particular case.¹⁷² However, partly under the influence of the American interest analysis approach, doctrine has evolved in a manner that directs attention to the laws competing for application¹⁷³ in order to protect discrete categories of parties, including employees. Thus, the Rome Convention recognizes the special nature of the contract of employment and contains special provisions intended to

171. *Worker's Hotline*, HCJ 5666/03 at ¶ 21.

172. Pocar, *supra* note 86, at 353–57.

173. NYGH, *supra* note 86, at 141.

protect the employee. Article 6(1) provides that a choice of law made by the parties shall not deprive the employee of the protection afforded to him or her by the mandatory rules of the law to which the contract is *most* closely connected.¹⁷⁴ This prevents the stronger party from abusing the freedom to choose the applicable law in order to evade the requirements of protective labor law. In addition, Article 7(1) provides that “effect may be given to the mandatory rules of the law of another country with which the situation has a close connection, if and in so far as, under the law of the latter country, those rules must be applied whatever the law applicable to the contract.”¹⁷⁵ This refers to mandatory rules under a legal system which is closely connected to the contract, but which is not necessarily the most closely related to it.¹⁷⁶ The legal system itself must apply these rules in the circumstances, regardless of the law generally applicable to the contract. These rules, sometimes referred to as ‘directly applicable’ (*lois d’application immédiate*) or ‘internationally mandatory’ rules, dispense with the need for a choice of law analysis with respect to the specific issues that they regulate, because it is not necessary to establish that the system from which they emanate is the one most closely connected to the contract. Under both Articles 6 and 7 of the Rome Convention, the contract would remain subject either to the law most closely connected to it or to the law chosen by the parties, except with respect to the issues addressed by either type of mandatory rules.¹⁷⁷ In essence, mandatory rules are similar to what the NLC referred to as “positive public policy.”¹⁷⁸ They allow the court to take account of public policy considerations and impose its own law as part of the contract, in addition to the applicable foreign law. Indeed, in at least one case, where the NLC refused to apply Israeli law to the Palestinian plaintiffs, the court accepted the applicability of Israel’s Minimum Wage Law on the basis of public policy.¹⁷⁹

The unique features of labor law offer another mechanism that enables the applicability of protective labor law to Palestinians employed by Israel settlers. It may be recalled that the Order on Municipal Councils, from which the Code derives, applies to residents of the councils (i.e., only to Israeli settlers).¹⁸⁰

174. Rome Convention, *supra* note 45, art. 6(1).

175. *Id.* at art. 7(1).

176. The term ‘close connection’ has been criticized as insufficiently precise and predictable, leading the UK to enter a reservation to the Convention. See David McCelan & Kisch Beevers, MORRIS’ THE CONFLICT OF LAWS 390 (7th ed. 2009); Mario Giuliano & Paul Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations*, 980 O.J. (C 282), 28-29. For present purposes this does not present a problem, since the mandatory rules in question are within the Israeli law, to which the contracts at issue are closely, if not most closely, connected.

177. Andrea Bonomi, *Mandatory Rules in Private International Law—The Quest for Uniformity of Decisions in a Global Environment*, 1 Y.B. PRIV. INT’ L. 215, 227 (1998).

178. See *Givat Ze’ev*, Labor Ct. (BS) 3000050/98 at ¶ 35 (author’s translation).

179. LaborA. (Jer.) 300480/95 Makdadi v. Civil Admin. in Judea and Samaria, 35 Labor Judgments 70, ¶ 24 [2000] (Isr.).

180. See *supra* note 114 and accompanying text; see *infra* Section (IV)(B)(ii)(a) Extraterritorial

However, it is possible to read the Order as establishing the platform not only for the rights of settlers, but also for their obligations. More precisely, the Code may be seen as applying to Israelis not only as employees but also as employers,¹⁸¹ and consequently to their Palestinian employees.

Employers' obligations may also be particularly apt objects of extraterritorial application. US courts have recognized Congress' authority to pass laws that have extraterritorial effects.¹⁸² In fact, US legislation contains provisions that explicitly expand statutes' extraterritorial reach to American employers who control companies incorporated and operating in foreign countries.¹⁸³ The same is true for some British laws.¹⁸⁴ This approach was also adopted judicially by the HCJ in a matter closely related to the one under investigation here. In *Kiryat Arba*¹⁸⁵ and in *Efron v. Ariel*,¹⁸⁶ the HCJ and NLC respectively inspected the rights of Israeli employees who were dismissed by their Israeli employer. The Courts concluded that Israeli law applied to the case based on the strong connection that the *employer* has to the Israeli government as the occupying power. The HCJ states that:¹⁸⁷

Israeli employees, employed by the regional commander . . . are subject to Israeli labor law . . . In other words, the drawing of administrative powers based on international law does not detach the authority from the sovereign that erected it.

Application of the Legal Right to Equality at Work.

181. Courts have expressly suggested, in the context of a tort case, that Israeli law should apply to the relations between an Israeli employer and a Palestinian employee in the settlements because it is directed at the employers. CC (Jer.) 1632/96 *Alsuf v. Ariel Metal and Another*, ¶ 6 (2002), Nevo Legal Database (by subscription) (Isr.).

182. James Mathieu, *The Supreme Court's Not So Clear Statement in Equal Employment Opportunity Comm'n v. Arabian American Oil Co.*, 21 BROOKLYN J. INT'L L. 939 (1996); Todd Keithley, *Does the National Labor Relations Act Extend to Americans Who are Temporarily Abroad?*, 105 COLUMBIA L. REV. 2135, 2144 (2005).

183. Age Discrimination in Employment Act, 29 U.S.C. §§ 623(f), (h) (1976); Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1(a), (c)(2) (1964) (*but cf.* EEOC v. Arabian Am. Oil Co., 499 U.S. 244 (1991) (offering a narrow interpretation)); Americans with Disabilities Act, 42 U.S.C. §§ 12111(4), 12112(c)(2)(B) (1994). These U.S. anti-discrimination laws reach outside the U.S., but only to the limited extent that they reach U.S. citizens working for U.S.-controlled employers. See Paul Secunda, *"The Longest Journey, With A First Step": Bringing Coherence to Sovereignty and Jurisdictional Issues in Global Employee Benefits Law*, 19 DUKE J. COMP. & INT'L L. 107 (2008).

184. See Employment Relations Act, 1999, c. 26 § 32 (U.K.); Equal Opportunities (Employment Legislation) (Territorial Limits) Regulations, 1999, S.I. 3163 (U.K.) (entitling those working outside Great Britain to equal treatment); Sex Discrimination Act, 1975, c. 65, § 10 (U.K.) (providing that employment is regarded as part of a British establishment if (a) the employee does his work at least partly in Great Britain; or (b) the employee does his work wholly outside Great Britain but the employer has a place of business in Great Britain, work is carried out for that establishment, and the employee is ordinarily a resident in Great Britain). The Posted Workers Directive motivated Britain to guarantee more rights to workers employed abroad. See Thomas Linden, *Employment Protection for Workers Working Abroad*, 35 INDUS. L. J. 186 at 187 (2000).

185. See *Kiryat Arba Adm.*, HCJ 663/78, 33(2) PD.

186. LaborA 45/42-3 *Efron v. Ariel*, 17 Labor Judgments 209 (1986), Nevo Legal Database (by subscription) (Isr.).

187. *Kiryat Arba Adm.*, HCJ 663/78, 33(2) PD at 403-04.

The military commander does not hover in air, detached from the source that launched him to battle and then to administration, but rather continues to absorb from it his status in the region.

The advantages and limits of applying minimum standards extraterritorially should be stated. On the one hand, the extraterritorial application of protective labor law is not subject to the contact analysis, thus avoiding the perceived ambiguity and subjectivity inherent in such a multifaceted criterion. This ambiguity is demonstrated in the opposing conclusions of the HCJ and NLC. In addition, extraterritorial application of protective labor law preempts manipulation of the contact count, as in the case of an Israeli employer enlisting a Palestinian intermediary so as to avoid the application of Israeli law. On the other hand, since extraterritorial application of law is an exceptional measure, the question arises as to how wide the interpretation of extraterritorially applicable labor law should be.¹⁸⁸ One indication that there might be hierarchy in labor rights, which would support a narrow extraterritorial application, is the International Labor Organization (ILO) 1998 Declaration on Fundamental Principles and Rights at Work.¹⁸⁹ The Declaration purports to reflect standards applicable to all states, regardless of individual conventional undertakings. It lists four “core labor standards,”¹⁹⁰ paving the way for arguments that rights outside the core standards, such as the right to limits on working hours, reasonable rest periods or to a safe and healthy workplace, let alone collective rights and rights originating from collective agreements, hold a more limited normative value¹⁹¹ and therefore would not be regarded as applicable extraterritorially.

188. The international human rights obligations of a state in the area of labor law apply outside its sovereign territory, including in territory under occupation. *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories*, Advisory Opinion, 2004 I.C.J. 163, ¶ 112 (July 9); *International Covenant on Economic, Social and Cultural Rights* arts. 7 & 8, Dec. 16, 1966, 993 U.N.T.S. 3 [hereinafter ICESCR]; *Al-Skeini v. United Kingdom*, 1093 Eur. Ct. H.R. ¶ 138 (2011). The discharge of such obligations, however, cannot be carried out through extraterritorial extension of domestic legislation.

189. International Labor Organization, *ILO Declaration on Fundamental Principles and Rights at Work and Annex*, art. 2, June 18, 1998, 37 I.L.M. 1233.

190. The four core labor standards are: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labor; the effective abolition of child labor; and the elimination of discrimination in respect of employment and occupation. *Id.*

191. Philip Alston, ‘*Core Labor Standards*’ and the Transformation of International Labour Law, 15 EUR. J. INT’L L. 457, 486 (2004). *But cf.* Brian Langille, *Core Labor Rights—The True Story*, 16 EUR. J. INT’L L. 409, 428 (2005); Guy Mundlak, *Changing Welfare Regimes*, in THE WELFARE STATE, GLOBALIZATION AND INTERNATIONAL LAW 231 (Eyal Benvenisti & Georg Nolte eds., 2004). The differentiation between rights (or principles) under the Declaration has been criticized both in principle, as a significant departure from the insistence within the international human rights regime on the indivisibility and equality of all rights, and on its merits, since the core itself is “not necessarily based on any coherent or compelling economic, philosophical or legal criteria, but rather reflects a pragmatic selection of what would be acceptable at the time.” Alston, *supra* note 191, at 459, 485.

To conclude, the courts could have applied Israeli law to the employment of the Palestinian employees as a matter of enforcing non-derogable minimum rights. This route would have been grounded in law, but might have been of limited value: first, because the range of minimum rights is too ambiguous, and second, because the application of these rights could be undermined with relative ease by changing the employment structure from a direct to a triangular form of employment. Of particular interest is whether the court could have included the right to equality among employees with respect to terms and conditions of work, itself a core right under Israeli labor law. Instead, the HCJ opted to rely directly on the principle of equality. The following section discusses the role of this principle in the NLC and HCJ's rulings and in addressing the employment of Palestinians in the Israeli settlements more generally.

B. Equality

The fundamental difference between the NLC's approach in *Givat Ze'ev* and the HCJ's reasoning in *Worker's Hotline* is the significance that they attached to equality as a rationale in choice of law issues. Before addressing each of their positions, it is useful to inquire whether we value equality, and if so, what kind of equality. In the context of labor relations and employment, arguably the priority should be the guarantee of minimum standards, such as a decent living wage, respect at work, and a proper work/life balance, rather than equality. Joseph Raz is probably the best-known expounder of the idea that equality has no *intrinsic* value, although "some equalities are sometimes instrumentally valuable, as they are useful for securing some valuable outcome."¹⁹² When discussing distributional goods designed to forestall hunger, Raz argues that "[w]hat matters is that the factor which made the distribution good or valuable was not that it was equal, but rather that it avoided hunger."¹⁹³

It is interesting that Raz chose hunger as an example for the irrelevance of equality considerations. As Amartya Sen's analysis of the Great Bengal famine of 1944 reveals, (lack of) equality may determine whether or not particular groups have access to particular goods in the free market. According to Sen, the Great Bengal famine was caused not by a shortage of food, but by a sudden drop in purchasing power following stratification of incomes among Bengalis.¹⁹⁴ Inequality in the distribution of an instrumental good affected the ability of people to satisfy their need for an end-use good, a need which itself is fixed, independent of how much of that good anyone else has.¹⁹⁵ Another lesson that

192. Joseph Raz, *On the Value of Distributional Equality* 3 (Oxford Legal Studies Research Papers, Paper No. 4, 2008).

193. *Id.* at 4–5.

194. See Amartya Sen, *Starvation and Exchange Entitlements: a General Approach and its Application to the Great Bengal Famine*, 1 CAMBRIDGE J. ECO. 33, 55–56 (1977).

195. Robert Goodin, *UTILITARIANISM AS A PUBLIC POLICY*, 244–265 (1995).

can be gleaned from Sen's analysis is that the notion and relevance of equality cannot be considered *in abstracto*. Instead, equality must be assessed in light of its interrelation with other objectives of legal regulation of the relevant sphere. In doing so, we must not only ask 'equality amongst whom' (Israelis and Palestinians? employers and employees?) but, even more importantly in our case, 'equality of what?'¹⁹⁶

The NLC clearly distinguished between prohibited discrimination in terms and conditions and justifiable distinction in the applicable law. The NLC continued that, while discrimination in the workplace on the basis of race or nationality is patently prohibited, "there may be special circumstances that justify this reality."¹⁹⁷ It concluded that the courts of lower instance should decide such factual matters.

The HCJ confused two very different objects of equality: equality of law and equality of conditions. Thus, Justice Rivlin mentioned that the contact count may be affected by the "principle of equality—equal pay and condition for equal work, or work of equal worth."¹⁹⁸ He was referring to equality in individuals' terms and conditions of employment. However, the judgment concludes by ruling that the petition is accepted, in the sense that Israeli law should apply equally to Israelis and Palestinians. Similarly, Justice Jubran quoted Article 1 of the ILO Discrimination (Employment and Occupation) Convention, which describes discrimination in "opportunity or treatment in employment or occupation" as including discriminatory "access to . . . employment and to particular occupations, and *terms and conditions of employment*."¹⁹⁹ However, Justice Jubran immediately clarified that the issue at hand is the distinction between Israeli and Palestinian employees with respect to the *law* that governs the employment relationship.²⁰⁰ The following subsection focuses on the matter that was seen by both courts to be central: whether Israelis and Palestinians should both be subject to Israeli law. It also offers a critique of the right of Palestinians to enjoy not only equal laws, but also equality in terms and conditions of employment. This is an important issue that neither the NLC nor the HCJ addressed.

196. Amartya Sen, *Equality Of What?*, Tanner Lecture on Human Values at Stanford University (May 22, 1979).

197. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 43.

198. *Workers' Hotline*, HCJ 5666/03 at ¶ 21

199. International Labor Organization, Discrimination (Employment and Occupation) Convention, art. 1(a), 3, July 5, 1958, I.L.O. No. 111, 362 U.N.T.S. 31.

200. *Workers' Hotline*, HCJ 5666/03 at ¶ 4 (Jubran, J., concurring). In a recent case, *Masad v. Kibbutz Galgal*, the Jerusalem District Labor Court explained that "the HCJ in *Givat Ze'ev* emphasized the importance of applying *equal law* to workers that are not dissimilar in any relevant fashion and that are carrying out equal work or work of equal worth." Labor Ct. (Jer) 1729/10 Masad v. Kibbutz Galgal, ¶ 26 (Aug. 11, 2011) Nevo Legal Database (by subscription) (Isr.) (emphasis added).

i. Equality of Law - Applicable Systems of Law

a. The Role of Equality in Choice of Labor Law

The HCJ assumed that the resolution of a labor dispute should be guided by the principle of equality in the applicable system of law between Palestinians and Israelis employed by the same employer in the settlements. The court expressed this ideal by noting that in the unlikely situation in which there are no “concrete” contacts, the court may have recourse to objective ones, such as the law applicable to similar contracts, in similar circumstances, between similar parties.²⁰¹ The HCJ explained that its conclusion on the contact count realized the principle of equality.²⁰²

The significance of equality as a principle in private international law jurisprudence should not be overstated. Fundamentally, the entire choice of law doctrine is based on the notion of different laws applicable to different people in different places.²⁰³ Mark Gergen makes a blunt case for “the irrelevance of equality” in such matters, stating “unequal treatment of people is unavoidable in the conflict of law.”²⁰⁴ In a manner that seems quite pertinent to the issue at hand, he argues that “[a]rguments about inequality in the conflict of laws often collapse back into the author’s preference for a territorial or personal order.”²⁰⁵

Indeed, neither the text of the Rome Convention nor its authoritative interpretation mentions equality. The explanatory preamble to the Rome I Regulation, which incorporates the Rome Convention into the law of the European Union, provides that, in determining the law most closely connected to a contract, “account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts.”²⁰⁶ Yet, rather than equality among contracts *per se*, this provision seems to aim at ensuring uniformity in governing law where such is required to guarantee the effectiveness of contracts. In practice, under the European approach and the presumption that labor contracts are governed by the law of the territory in which the work is performed, similar contracts are likely to be governed by the same law. On the other hand, under the system prevalent in some areas of the US, largely similar situations may be treated differently in terms of governing

201. *Workers’ Hotline*, HCJ 5666/03 ¶ 18.

202. *Id.* at ¶ 21.

203. In fact, in Israel different personal laws apply to Israeli citizens in the areas of marriage and divorce. This is even considered a liberal and multicultural approach (at least as far as the Arab minority is concerned). See Michael M. Karayanni, *Choice of Law Under Occupation: How Israeli Law Came to Serve Palestinian Plaintiffs*, 5 J. PRIVATE INT’L L. 1, 40–41 (2009).

204. Mark P. Gergen, *Equality and the Conflict of Laws*, 73 IOWA L. REV. 893, 902 (1998). See also Wengler, *supra* note 95, at 822–23, 858.

205. Gergen, *supra* note 204, at 903.

206. Rome I Regulation 593/2008 ¶ 20 2008 O.J. (L 177) 6 (EC).

law.²⁰⁷

The different rulings of the NLC and of the HCJ are, in part, a result of the different perspective taken by the courts on the significance of equal treatment of people. The HCJ attached importance to the like treatment of like people, stating that Palestinians working in the settlements should be treated as Palestinians working in Israel.²⁰⁸ The NLC saw no fault in the fact that, in principle, different people are employed under different laws. It relied, *inter alia*, on its own jurisprudence that distinguished between Israeli nationals serving in an embassy abroad and local employees of the same embassy, and between an Israeli policeman serving in the West Bank and a local policeman.²⁰⁹ In both cases, the Israeli nationals benefited from the terms of Israeli law, which dovetails with the power structure in the area, while local employees benefited only from the terms of local law.²¹⁰

It is true that the NLC's approach is more in line with private international law principles, under which the application of different law to different individuals is not, in and of itself, discriminatory.²¹¹ And yet, the NLC's judgment is not free from difficulty in its juxtaposition of private international law jurisprudence, which is founded on the neutral precept of respecting equality of states, at times at the expense of equality of people, with a situation that is anything but neutral. Gergen, for example, rejected the introduction of equality considerations into choice of law deliberations, instead arguing forcefully for territorial choice of law rules based on a territorial nexus, which he hails for their neutrality.²¹² The legitimacy of choice of law rules depends on the laws not advantaging or disadvantaging any group in a predictable way. Territorial rules satisfy this requirement since "[e]veryone has a roughly equal chance of losing or winning under a territorial approach."²¹³ However, in the case of Palestinians employed by Israelis in the settlements, the neutrality of the territorial approach in this case fails on two grounds. First, Israel controls the law of both territories. Second, within the territory of the West Bank, the law applies on a personal basis that is anything but neutral. To the contrary, the NLC has set the choice of law rules in a manner that denies Palestinian, but not

207. See e.g., *Tooker v. Lopez*, 249 N.E. 2d 394 (1969); *Neumeier v. Kuehner*, 286 N.E. 2d 454 (1972). But see *Neumeier v. Kuehner*, 286 N.E. 2d 454 (1972) (Bergan, J. dissenting) (rejecting any distinction between plaintiffs on the basis of their residence—granted, equality between workers might be more significant than between torts plaintiffs).

208. *Workers' Hotline*, HCJ 5666/03 ¶ 26.

209. *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 38.

210. LaborA 48/4-7 *Abu Tir v. Israeli Police*, 21 Labor Judgments 28 (1989) Nevo Legal Database (by subscription) (Isr.).

211. See Wengler, *supra* note 95, at 854-55; *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶¶ 620-21.

212. Gergen, *supra* note 204, at 918-19.

213. *Id.* at 919. See also Wengler, *supra* note 95, at 830.

Israeli, employees the benefits of Israeli law.²¹⁴ When the territorial law is skewed in favor of one kind of employee, and does not guarantee an equal chance, it presents a strong case for the application of the principle of equality to mitigate the harm caused by reference to territorial law.²¹⁵

It is not surprising that both the HCJ and the NLC avoided the politically loaded questions related to the status of the settlements and of Israeli law applicable to them, but rather took the existing situation as a baseline. And yet, this avoidance means ignoring the wider reality of Israeli and Palestinian economic existence in the West Bank.

*b. Self-determination and the Law of Occupation as
Constraints on Equality in Law*

One of the arguments put before the HCJ as to why it should refrain from subordinating the contracts of Palestinians to Israeli labor law was that choice of law rulings should not serve as a backdoor for achieving what the Israeli parliament and executive (through the military commander) would not: a blanket application of Israeli law to the settlements.²¹⁶ The court replied that a choice of law ruling applying Israeli law to a contract made in the West Bank, or to which a resident of the West Bank is party, does not affect that sovereign status of the West Bank.²¹⁷ While generally true, this principle does not mean that choice of law rules do not have any implications for the international legal order. Indeed, the Second Restatement of the Conflict of Laws lists “needs of the interstate and international system” first among the factors that a court should examine in any policy analysis,²¹⁸ indicating that such implications are not only possible but

214. See Aeyal Gross, *Human Proportions: Are Human Rights the Emperor's New Clothes of the International Law of Occupation?*, 18 EUR. J. INT'L L. 1, 8 (2007).

215. Mundlak, *supra* note 11, at 216; Wengler, *supra* note 95, at 825.

216. Brief of the Attorney General, *supra* note 32, at ¶ 9.

217. *Id.* at ¶ 12. Ironically, the authority quoted by the Court has nothing to do with choice of law rules, and in fact establishes the opposite of the Court's assertion. The Court quoted the *Abu Salah* case, which concerned the extension of Israel's “law, adjudication and administration” to the Golan Heights in the Golan Heights Law. Golan Heights Law, 5741-1981, 36 LSI 7 (Isr.). In that case the HCJ said that the extraterritorial application of an Israeli norm to an area outside Israel's territory does not, under Israeli law, automatically render that area part of Israel. With the benefit of thirty years' hindsight, there are few who would argue that this was precisely the intended effect of the Golan Heights Law, and that the *Abu Salah* ruling was a less than successful attempt to avoid acknowledging that Israel had purported to annex the Golan. The Attorney General's supplementary brief in *Givat Ze'ev* provides: “. . . the regions of Judea, Samaria and Gaza are not part of the State of Israel, since it was not declared that ‘the law, adjudication and administration of the State’ would apply in them.” Brief of the Attorney General, *supra* note 32, at ¶ 11. This is an acknowledgement that the State regards the Golan Heights Law (1981), which contains such a declaration, as annexing the Golan Heights to Israel. On the Status of the Golan Heights, see Leon Sheleff, *Application of Israeli Law to the Golan Heights is Not Annexation*, 20 BROOKLYN J. INT'L L. 333 (1994) and Asher Maoz, *Application of Israeli Law to the Golan Heights is Annexation*, 20 BROOKLYN J. INT'L L. 355 (1994).

218. RESTATEMENT (SECOND) OF CONFLICT OF LAWS §6(2)(a) (1971). This factor has been

should be taken into account.

The engagement of states with choice of law rules is a reflection of comity and reciprocity as guiding principles of the international legal order.²¹⁹ These principles provide a strong basis for applying territoriality, rather than equality, as a fundamental theory of choice of law rules. More specifically, in the context of labor law, territoriality is actually a means of advancing equality between employees.²²⁰ Yet, in terms of the law applicable in the occupied territories, Israeli courts have not given much deference to the needs and interests of other sovereigns. This attitude was not based on an appreciation of the dispute over the sovereignty of the West Bank and Gaza Strip. Rather, unlike ordinary situations involving choice of law questions, in the occupied territories no other state entity enforces local law. *Kaplan v. Gabay*, for example, concerned a tort action between Israeli parties with respect to a boating accident that had taken place in the Sinai, which was at the time under Israeli occupation.²²¹ The then-existing Israeli law required the plaintiff to show a cause of action under both Israeli law and the *lex loci delicti*, namely Egyptian law. The Israeli district court ruled that the requirement to show a claim under Egyptian law could be exceptionally dismissed, because the area was “under foreign sovereignty only *de jure*, but under Israeli control in practice.”²²² Since no Egyptian parties were involved, the disregard for Egyptian law was uncontroversial. In *KPA Steel*, the court applied the same rationale to justify an expansive interpretation of Israeli legislation so that it applied extraterritorially in the West Bank. In court noted that application of Israeli law in occupied territory “does not infringe in practice on the sovereignty of any other state.”²²³ Arguably, if the constraint of respecting a foreign sovereign is removed, greater weight can be attached to the principle of equality among employees through the application of the same system of law.

At first glance, the Court’s reasoning runs diametrically counter to the premise of the law of occupation, which, we argue, is that any legal act by the

labeled “largely irrelevant,” and “silly.” *Shasta Livestock Auction Yard Inc. v. Evans Corp.*, 375 F. Supp. 1027,1033 (1974); W. A. Reepy, *Eclecticism in Choice of Law: Hybrid Method or Mish-mash*, 34 MERCER L. REV. 645, 663 (1983). No case has ever turned on it. Lea Brilmayer, Jack Goldsmith, and Erin O’Hara O’Connor, CONFLICT OF LAW: CASES AND MATERIALS 239 (6th ed. 2011). However, it has been suggested as a means of introducing public order considerations, such as refraining from applying the law of a country if it falls below the level of law of civilized nations. Luther L. McDougal III, *Toward the Increased Use of Interstate and International Policies in Choice-of-Law Analysis in Tort Cases under the Second Restatement and Leflar’s Choice-Influencing Considerations*, 70 TUL. L. REV. 2465, 2484 (1996). As pointed out above, under the U.S. approach, such considerations figure in the determination of the law most closely connected to the contract rather than as a break on its application, as they do under the European System.

219. Eugene F. Scoles et al., CONFLICT OF LAWS 19-20 (4th ed. 2004).

220. Mundlak, *supra* note 11, at 211.

221. Misc. requests (TA) 151/80 *Kaplan v. Gabai*, 1982(2) PM 290 [1982] (Isr.)

222. *Id.* at 298 (following *Chaplin v. Boys*, (1969) (A.C.) 1085 All E.R. at 2 (Eng.)).

223. *KPA Steel*, CrimA 123/83 at ¶ 8.

occupant infringes upon the interests of the ousted sovereign, and therefore, must be limited to the absolutely necessary minimum. If in 1983 courts could maintain that sovereignty in the West Bank was not vested in any particular body, they would be hard pressed to repeat such a decision today; it is widely agreed that it is not sovereignty as such that ought to be preserved, but the ability to exercise the right to self-determination. Accordingly, the interests of the Palestinian people in the West Bank and Gaza Strip, whose right to self-determination Israel has recognized in 1978, and again in 1993, cannot be entirely ignored.²²⁴ The situation is nonetheless complicated by the fact that no state claims sovereignty in the West Bank or Gaza Strip. Thus, although pre-1967 Jordanian law is applicable territorial law, it is a hollow representation of sovereignty. A choice of law rule that would respect the modern form of sovereignty, namely the right to self-determination of the Palestinians, requires taking account of Palestinian labor law. However, the legislative powers of the Palestinians under the Interim Agreement²²⁵ do not extend to the settlements. Consequently, the courts are correct in their assertion that there is little that stands in the way of applying Israeli law to the exclusion of other laws.

Iris Kanor argues that by a variety of choice of law tactics, Israeli courts no longer regard the occupied territories as held in trust. Instead, they assist in the gradual incorporation of these territories under Israeli governance.²²⁶ This, she asserts, is in line with a trend identified over twenty years ago by Amnon Rubinstein and Michael Shalev, who posited that the gradual erasure of the legal separation between Israel and the territories amounts to a “creeping annexation,”²²⁷ such that speaking of the area as outside Israel becomes disingenuous.²²⁸ Michael Karayanni’s study on Israel’s personal jurisdiction²²⁹ complements this insight in regards to the personal jurisdiction of the courts. Karayanni demonstrates that Israeli jurisdiction was extended to the West Bank in order to serve the Israeli settlers, as part of establishing total control over the West Bank. This extension had the inadvertent effect of bringing under the jurisdiction of Israeli courts not only Israeli settlers, but also Palestinians. When the Palestinian population of the West Bank became a burden on the courts, a personal jurisdiction doctrine evolved to exclude disputes in which both parties

224. Camp David Framework for Peace in the Middle East, 17 I.L.M. 1466, sect. A(c) (1978); Declaration of Principles on Interim Self-Government Arrangements preamble, Sept. 13, 1993, 32 I.L.M. 1525.

225. Israeli-Palestinian Interim Agreement, *supra* note 22 at Annex III, Appendix 1, art. 21(1).

226. Iris Kanor, *Israel and the Territories: the Interplay between Private International Law and Public International Law*, 8 MISHPAT UMIMSHAL 551, 599 (2005) (in Hebrew).

227. Michael Shalev, *LABOUR AND THE POLITICAL ECONOMY IN ISRAEL* 58 (1992).

228. Kanor, *supra* note 226, at 599 (citing Rubinstein, *supra* note 113, at 440).

229. Michael Karayanni, *The Quest For Creative Jurisdiction: The Evolution of Personal Jurisdiction Doctrine of Israeli Courts toward the Palestinian Territories*, 29 MICHIGAN J. INT’L L. 666 (2008).

were Palestinian from the Israeli courts.²³⁰ *Worker's Hotline* demonstrates that insofar as territorial control of the settlements' areas is concerned, the Israeli grasp continues. The Court's ruling was based not on a pure choice of law claim, but also on the application of Israeli law through the unarticulated basis of an expectation imputed to the parties. What both the Israeli legislature and military failed to achieve, the Court ultimately accomplished: it extended the application of Israeli labor law to the *territory* of settlements, with the exception of consent-based instances where all of the employees are Palestinians. Admirable as it may be for this law to apply uniformly to all employees in the occupied territories, this judicial activism is in contravention of the law of occupation, which prohibits the territorial extension of the occupant's law to the occupied territory, regardless of the domestic doctrine that leads to such an outcome.

One could also point out that it was the Palestinian employees who argued for, and who benefit from, the application of Israeli law rather than Jordanian law.²³¹ This argument, however, does not exempt the Court from its obligation to act in accordance with Israel's international legal obligations. These obligations may include taking account of the implications of the right to self-determination of the Palestinian people, even if they run counter to the personal interests of the individuals before the court. Individuals may contract out of their self-determination interest, and had there been an express stipulation in employment contracts that Israeli law should govern, the Court might have been correct to give effect to such a stipulation. However, when determining the *principles* governing its choice of applicable law, the Court should not disregard international legal principles, even if they do not *a priori* tip the balance one way or the other.²³² On balance, despite the fact that the petitioners were Palestinians, the right to self-determination of the Palestinian people should probably not have guided the Court to a different conclusion than the one it reached. Unfortunately, the failure of the Court to appreciate the significance of the territorial law applicable to the settlements as a factor in a weighted contacts count is disturbing. Of course, one cannot disregard the fact that, given Israel's extensive control over the West Bank (which in many ways amounts to *de facto* annexation) an argument that the Court should refrain from applying Israeli labor law—lest it would undermine Palestinian self-determination or entrench the *de facto* annexation—might appear somewhat hypocritical.

In conclusion, as the NLC has stated, equality is not ordinarily a guiding principle in choice of law in labor disputes. However, equality may have a remedial role when the neutrality of law, which underlies the common rule that a contract be governed by the law of the territory where the work is performed, is undermined. At the same time, the HCJ's approach of demanding equality in terms of the applicable legal system does not provide the necessary safeguards

230. *Id.* at 680; Rubinstein, *supra* note 113, at 449-50.

231. For more on this dilemma, see Karayanni, *supra* note 203; Sfar, *supra* note 18, at 169.

232. Gross, *supra* note 214, at 7; Karayanni, *supra* note 203, at 29.

against employee exploitation because it disregards the political context in which the employment relationship takes place, namely the fundamental inequality inherent in a situation of occupation. While this inequality is a factor that a court would find difficult to take into account when resolving a specific dispute, it is an important one to consider when analyzing the situation from a detached perspective. An alternative, and in our opinion preferable, type of equality could have been invoked: equality in the terms and conditions of work. This type of equality is explored in the following subsection.

ii. Equality of Conditions

As noted earlier, the plaintiffs did not demand, and the courts did not address, the more ambitious goal: equality of the terms and conditions of work between Israeli and Palestinian employees. This gap between the right to equal treatment and the right to minimum conditions through core rights plagues the treatment of various weak employee groups. In regard to contract employees, for example, one can identify an agenda advocating equal treatment in relation to fulltime employees, alongside much more modest calls for joint employer-subcontractor responsibility for minimum standards.²³³ This gap is far from trivial. At least in the present context, it is surprising as a matter of both policy and law that the courts permitted it to persist. As a matter of policy, as noted above, the differences between Israeli and Jordanian core rights, although not completely inconsequential, are relatively minor.²³⁴ The same cannot be said of the differences between core rights, Jordanian or even Israeli, and those rights that some Israeli employees in the West Bank enjoy in practice. Therefore, a discourse that is limited to core rights obfuscates the disparity in working conditions between Palestinians and Israelis that would be evident if equality, rather than minimum conditions, was pursued. Legally, it is difficult to understand how the general application of Israeli labor law does *not* include the right to equal terms and conditions, given that equality is explicitly guaranteed in Israeli legislation and in collective agreements. The following sections develop this argument.

a. Extraterritorial Application of the Legal Right to Equality at Work

Like most developed nations, Israeli labor law includes statutes that explicitly prohibit discrimination on a variety of grounds including sex, race, nationality and ethnicity.²³⁵ Ordinarily, such legislation only applies

233. See, e.g., Fudge, *supra* note 90, at 302, 306; Deakin, *supra* note 90, at 75, 77.

234. See *supra* text adjacent to note 25. In a dissenting opinion, Justice Cohen even added: “and if one were to claim that the [Palestinian] population in the occupied territories are entitled to enjoy the same arrangements and public life that the state grants its citizens in its territories, . . . I would answer him that, to our great shame, we in Israel are still far from the . . . arrangements that the Jordanian is trying to regulate.” *Almakdassa*, HCJ 337/71 at 585 (Cohen, J. dissenting).

235. See, e.g., Equal Rights for Women Law, 5711-1951(Israel); Equal Retirement Age for Male

territorially. Both in the US and in Europe, courts have traditionally rejected the extraterritorial applicability of a constitutional right to equality.²³⁶ However, whether under the influence of international human rights law,²³⁷ or other mechanisms of pressure,²³⁸ the notion of such extraterritorial applicability is gaining ground.

However, at least with regard to labor law, there are suggestions that this position should be revisited. The House of Lords stated that “Employment is a complex and *sui generis* relationship, contractual in origin but, once created, having elements of status and capable of having consecutive or simultaneous points of contact with different jurisdictions. So the question of territorial scope is not straightforward.”²³⁹ Specifically, Guy Mundlak argues that the unique nature of labor law demands “[l]ooking for the substantive economic beneficiary” in the employment relationship, and “determining the applicable law [as] a matter of matching the appropriate legal system with the identification of economic reliance (or subordination).”²⁴⁰ Mundlak suggests that this argument was the rationale underlying the HCJ’s *Workers’ Hotline* judgment: “Israel (state, employers, economy, and public) benefits from the activities of the Israeli employers in the territories, despite the fact that these territories are not part of Israel itself.”²⁴¹ And he concludes: “Labor law is generally applied

and Female Workers 5747-1987 (Isr.); Equality of Opportunity in Work Law, 5748-1988 (Isr.); Equal Rights for People with Disabilities Law 5758-1998 (Isr.).

236. For the US see Gould, *supra* note 11, at 502 (and references there). A certain exception is the European Directive 96/71 EC concerning the posting of workers in the framework of the provision of services, which guarantees a “posted” worker—who is sent from a home state to work temporarily in a “host state”—the right to enjoy the core labor rights (minimum wage, working time and paid holidays, health and safety, discrimination law, pregnancy and maternity protection; in the construction industry workers are also entitled to rights stemming from collective agreements which have been declared universally applicable—see Sec. 3(1) of the Directive) of the host’s labor law. Directive 96/71 of the European Parliament and the Council of 16 December 1996, on the Posting of Workers in the Framework of the Provisions of Services, 1996 O.J. (L18) 1 (EC). Beyond those core rights, employers are not obligated to offer more favorable working conditions, identical to those applicable to their own workers (although there is nothing to stop the employer from doing so). For a discussion of the Directive, see Paul Davies, *The Posted Workers Directive and the EC Treaty*, 31 *INDUS. L. J.* 298, 303 (2002). However, the E.C.J. case of *Laval* is viewed as significantly limiting the impact of the directive. Case C-341/05, *Laval un Partneri Ltd. v. Svenska Byggnad sarbetareförbundet*, 2007 E.C.R. I-11767. More importantly, the analogy between the cases is only partial, at best: in the “posted workers” scenario—the worker is sent by her employer from her home country to a host country; in the case under analysis here, it is the home country which extends the application of its laws to its citizens.

237. With respect to the UK, see jurisprudence on the extraterritorial applicability of the Human Rights Act, drawing on the extraterritorial application of international human rights obligations (e.g., *Al-Skeini v. Secretary of State for Defence*, [2007] UKHL 26, [2008] 1 A.C. (H.L.) [153] (appeal taken from Eng.)).

238. On the extraterritorial application of U.S. constitutional law, see *Boumediene v. Bush*, 553 U.S. 723 (2008).

239. *Serco v. Lawson* [2006] UKHL 3, ¶ 6.

240. Mundlak, *supra* note 11 at 205.

241. *Id.* at 204.

equally to all the workers in the territory who are affected by the nature of the labor market *within which the state intervenes*. . . . If the application of labor law within the territory is merited by considerations of equality, then stopping at the state's border is intrinsically unequal."²⁴²

During the 1991 war in Iraq, in preparation for a chemical attack, the Israeli Ministry of Defense decided to distribute gas masks to citizens in Israel and to settlers residing in the occupied territories but not to Palestinians. The HCJ, however, ordered the ministry to issue gas masks to Palestinians living in the occupied territories. The HCJ stated, without citing any specific source, that "the military commander must treat individuals in the region equally, and must not discriminate between them."²⁴³

And yet, in the context of labor law, the courts have only partially provided labor rights to Palestinians under the principle of equality. Israel's Equal Opportunities in Employment Law (1988) ("Equal Opportunity Law"), which applies not only to public employers but also to private employers of over five persons, was not mentioned at all by the NLC. It was mentioned only once, in passing, by the HCJ in *Workers' Hotline*. In the context of the NLC's ruling, this exclusion is no surprise. Since the NLC ruled that Palestinians working in the occupied territories are not entitled to rights under Israeli labor law, its working paradigm required no referral to the Equal Opportunity Law.²⁴⁴ The refusal of the HCJ to rely on the Equal Opportunity Law, however, is curious. The HCJ's ruling would seem to call for extending the full scope of Israeli labor law to the employment relationship between an Israeli establishment and a Palestinian employee. This would include the relevant statutes mandating non-discrimination. Moreover, even on a narrower reading of the judgment, if Israeli labor law as a whole does not extend to the West Bank, at a minimum, core protective clauses must be extended.²⁴⁵ And since Israeli courts have repeatedly noted the *jus cogens* character of principles of non-discrimination in employment,²⁴⁶ these principles should be considered as falling within the core rights that apply directly to Palestinians.

242. *Id.* at 211 (emphasis added).

243. HCJ 168/91 Miladi Morcus v. Minister of Defense 45(1) PD 467, 470 [1991] (Isr.) (author's translation).

244. As noted, the NLC distinguishes the few cases that reached a different conclusion as based on the employer being a public entity. The rationale, therefore, is that the Israeli state and its organs are bound by Israeli law wherever they operate. Naturally, this rationale falls short of a wholesale application of Israeli (labor) law.

245. *See supra* Section A. Protective Legislation: Minimum Conditions.

246. *See, e.g.*, HCJ 6845/00 Eitana Neve v. Nat'l Labor Ct. 56(6) PD 663 ¶ 50 [2002] (Isr.) (a female employee's "agreement" to waive her right to equal conditions for early retirement is void). *See also* discussion adjacent to note 2529 *infra*.

b. Equality under international human rights obligations

The notion of extraterritorial application of rights where the state exercises control is entrenched in international human rights law. While constitutional law may extend only territorially, the international human rights obligations of states extend wherever they exercise effective control.²⁴⁷ This extension includes, first and foremost, areas under occupation. With respect to Israel and the West Bank, this obligation has been stated expressly by the International Court of Justice in an advisory opinion on Legal Consequences of the Construction of the Wall in the Occupied Palestinian Territory,²⁴⁸ as well as by several human rights treaty bodies.²⁴⁹ Thus, to the extent that equality in work is an international human rights norm, Israel is bound to guarantee this norm within the West Bank. The International Covenant on Economic, Social and Cultural Rights, to which Israel is party, recognizes the right of remuneration. The right of remuneration provides all employees with fair wages and equal compensation for work of equal value²⁵⁰ without distinction of any kind. Under the Convention on the Elimination of Racial Discrimination (to which Israel has been party since 1966), states undertake to guarantee the right of any individual, without qualifications regarding national or ethnic origin, to equality before the law, notably in the enjoyment of certain rights including: the right to protection against unemployment, to equal pay for equal work, and to just and favorable remuneration. The state is also obligated to provide effective protection and remedies against any acts of racial discrimination, as well as a forum to seek reparation or satisfaction for any damage suffered as a result of such discrimination.²⁵¹ This enables state institutions to prosecute discrimination by private employers. At the same time, a distinction may be called for between states' obligation to respect rights, which extend extraterritorially, and their obligation to ensure the same rights. The latter obligation entails a greater intervention in private relations, constituting a greater burden on the state, which may be less appropriate for extraterritorial extension. In *Workers' Hotline*, the

247. Human Rights Comm., Sergio Euben Lopez Burgos v. Uruguay, Communication No. R.12/52, U.N. Doc. Supp. No. 40 (A/36/40), 176 (1981); Human Rights Comm., Montero v. Uruguay, U.N. Doc. CCPR/C/18/D/106/1981 (Mar. 31, 1983); Al-Skeini v. United Kingdom, 1093 Eur. Ct. H.R. ¶ 138 (2011).

248. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territories, Advisory Opinion, 2004 I.C.J. 163, ¶ 109, 134-36 (July 9).

249. Human Rights Comm., Concluding Observations, ¶ 11, U.N. Doc. CCPR/CO/78/ISR (Aug. 21, 2003); Committee on the Elimination of Discrimination against Women, Concluding Comments, Israel, ¶ 23, U.N. Doc. CEDAW/C/ISR/CO/3 (July 22, 2005); Committee on the Elimination of Discrimination against Women, Concluding Comments, Israel, ¶ 23, U.N. Doc. CEDAW/C/ISR/CO/3 (July 22, 2005).

250. ICESCR, *supra* note 188, art. 7.

251. Convention on the Elimination of All Forms of Racial Discrimination, art. 6, 660 U.N.T.S. 195, Dec. 21, 1965.

present case, this would imply distinguishing between the municipality of Givat Ze'ev, which is a state authority, and other, private employers.

c. The right to equality under collective agreements

It is somewhat puzzling that the NLC and the HCJ did not conduct a serious inquiry into the possibility of applying collective agreements to Palestinian employees. The NLC addressed the matter in an almost dismissive fashion, dedicating only the last paragraph of a fifty-page judgment to the analysis of this issue. The court stated, without elaborating, that “unless an explicit provision exists in the collective agreement to suggest its application on employees who reside in the West Bank but are not Israeli citizens—an ‘Israeli’ collective agreement will not apply to a resident of the region.”²⁵² Arguably, however, the opposite should serve as the default position. More specifically, if no explicit provision exists, the collective agreement should apply to all employees in the firm, regardless of their national origin. Even more dumbfounding is the fact that the HCJ did not discuss the issue at all.

Otto Kahn-Freund has noted that individual labor law is easier than collective labor law to apply across national borders.²⁵³ Perhaps this discrepancy explains—but does not excuse—the reluctance of the courts to delve into the latter. Within the European context, for example, the Posted Workers Directive recognizes, albeit to a limited extent, the applicability of collective agreements across borders.²⁵⁴ Since at least one of the employers before the court (Givat Ze'ev, a municipal council) is bound by a collective agreement, it seems pertinent to address the true range of rights held by the Palestinian employees of that employer. The absence of any such discussion has concrete implications for two reasons. First, the rights guaranteed by collective agreements are more generous than those guaranteed by protective labor law. Second, since collective agreements are voluntarily signed by the parties, and are not the result of extraterritorial extension of laws, the application of such agreements is a significantly less politically charged matter than the application of Israeli laws. If the HCJ had concluded that the collective agreements were binding, this admission would have made the analysis regarding the extraterritorial application of protective labor law redundant.

The courts' reluctance to consider this avenue reaffirms Arthurs' conclusion that “[u]nions . . . have not been particularly successful as agents of extraterritoriality.”²⁵⁵ Addressing the matter through the prism of collective

252. See *Givat Ze'ev*, Labor Ct. (BS) 3000050/98 at ¶ 46. Interestingly, in the early 1970s, the Civil Administration included a clause in its contracts of employment with Palestinian residents of East Jerusalem, discussed in Makdadi, *supra* note 1799.

253. Otto Kahn-Freund, *Uses and Misuses of Comparative Law*, 37 MODERN L. REV. 1, 21 (1974).

254. See *supra* note 236.

255. Arthurs, *supra* note 149, at 548.

agreements would have permitted the courts to promote justice, by preventing Palestinian employees' discriminatory exclusion from protection under labor law, while avoiding prejudice in terms of collective interests through generalized statements incompatible with the laws of occupation.

d. Expectations, Equality and the Juxtaposition of Power Disparities

The HCJ's insight regarding the Palestinian employees' expectations is noteworthy. The Court notes "an expectation that certain employees would not be deprived of rights, compared with colleagues performing the same work, on the ground that different laws apply to these and to those."²⁵⁶ The Court simply assumed that employees expect similar laws to apply to Israeli and Palestinian employees. At least as plausible, however, is the supposition that employees expect similar terms and conditions to apply. A possible counterargument is that plaintiffs did not even raise this demand, which suggests that they had no expectation of receiving equal terms and conditions as their Israeli co-workers.²⁵⁷

The problem in relying on the expectations of employees is that these develop within a social and economic background that is rarely egalitarian, and expectations often reflect an acceptance of unequal treatment. For this reason, courts have looked beyond the actual expectations of individual employees as reflected in their bargaining positions. For example, US and UK courts have ruled that the fact that an employer's bargaining power is greater with respect to women than with respect to men is not a sufficiently justifiable reason for wage disparities.²⁵⁸ Lower rates for women cannot be justified "simply because the market will bear it."²⁵⁹ The same doctrine was also adopted by the Israeli NLC, which ruled that even if a female employee demanded significantly lower pay than a male employee, it does not justify different wages under the Equal Pay for Male and Female Employees Law.²⁶⁰

In excluding certain extrinsic economic factors from justifiable consideration so as to prevent the Equal Pay Law from becoming a 'dead letter,' the courts follow the path drawn by Kahn-Freund, who noted that "[t]he main object of labour law has been, and we venture to say will always be, to be a

256. *Worker's Hotline*, HCJ 5666/03 at ¶ 25.

257. For a reservation on the relevance of expectations in determining the law applicable to the contract and the inconsistency of Israeli case law, see Schuz, *supra* note 63, at 399–401.

258. See, e.g., *Hodgson v. Brookhaven*, 436 F.2d 719, 726 (5th Cir. 1970). For the UK, see *Clay Cross (Quarry Services) Ltd. v. Fletcher*, [1979] 1 All E.R. 474 (A.C.) (UK). See also Paul Schofield, *A Material Factor: Defences to Claim for Equal Pay*, 47 MODERN L. REV. 740, 742 (1984).

259. *Brennan v. City Stores, Inc.*, 479 F.2d 235 (5th Cir. 1973); *Corning Glass Works v. Brennan*, 417 U.S. 188, 205 (1974).

260. LaborA 1156/04 Orit Goren v. Home Center, ¶ 13 (2007), Nevo Legal Database (by subscription) (Isr.).

countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.”²⁶¹

But while the doctrine seems relatively clear, it is still necessary to identify legitimate and legal expectations in negotiations. This matter is especially important if we are to assess the expectation, noted above, of Israeli employers to pay Palestinian employees lower wages, which is in a way the *raison d'être* for their employment. The English Employment Tribunal noted that for differentiated pay between men and women to be legitimate it must be “reasonably necessary in order to obtain some result (*other than cheap female labor*) which the employer desires for economic or other reasons.”²⁶² Such a reason must not only be a material factor, but also one that “right thinking people would think of . . . as a sound and tolerable basis.”²⁶³ If this dictum is accepted when the supply of cheap (female) labor is not attributable to any specific actor, it should be all the more so when factors well beyond ‘neutral’ economic forces create disparities in bargaining power, as in the case of Israeli and Palestinian employees.

If this conclusion is true in a domestic context, it seems to be strengthened in a global one, where forces and institutions are much less discernible.²⁶⁴ Indeed, the disparity in bargaining power between Israelis and Palestinians is not an ordinary case of cliques and social milieus. The Palestinian employees are residents of territory under occupation, and belong to a community that is legally regarded as inimical to that of the employer. The Israeli employees are nationals of the occupying power, and compatriots of the employer. Consequently, in addition to being handicapped as employees bargaining with employers, Palestinians are disadvantaged in bargaining with Israelis as a result of a situation which is formally recognized and legally regulated through the law of occupation—a law which generally protects residents of the occupied territory from the occupant. But the law of occupation, discussion of which is noticeably absent from both the NLC’s and HCJ’s judgments, does not directly address negotiations over terms of employment: under the law of occupation, civilian nationals of the occupant are not expected to live side by side with nationals of the occupied continually for any extended period of time.

The weakness of the Palestinian employees in negotiating with Israeli employers is directly linked to the dependence of the Palestinian economy on the Israeli market, which the 1995 Interim Agreement has not diminished. This dependence is the result of Israeli policies, which have had a formidable impact on the development, or rather lack thereof, of the Palestinian economy and labor sector. Within the occupied territories, Israel took steps to limit the viability of

261. DAVIES & FREEDLAND, *supra* note 85, at 18.

262. Jenkins v. Kingsgate (No. 2) [1981] I.R.L.R. 388, at 394 (emphasis added).

263. Ojutiko v. M.S.C. [1982] I.R.L.R. 418, 421 (cited in STEPHAN HARDY, LABOUR LAW IN GREAT BRITAIN 214 (2011)).

264. Arthurs, *supra* note 149, at 537 (emphasis added).

Palestinian agriculture and industry, while employing Palestinian employees in the construction of settlements and their connecting roads. These policies can only be sketched here briefly. First, Israel has not only refrained from investing its own funds in the civil infrastructure needed for the economic development of the occupied territories, but has also prevented others from doing so.²⁶⁵ Second, Israel regulated the economy within the occupied territories in a manner unfamiliar to Western democracies. For example, only a week after the 1967 war ended, on June 18, 1967, Israel issued a military order in the territories that made it illegal to conduct business transactions involving land or property,²⁶⁶ to conduct electricity work or connect a generator, to plant new citrus trees, or to replace old nonproductive trees without a permit.²⁶⁷ Second, Israel initiated “New Deal” or “public works” schemes, ostensibly to prevent despair and avoid social upheaval, but also to advance security projects, such as the building of settlements.²⁶⁸ Indeed, one might surmise that Israel intentionally obstructed the development of independent Palestinian industry so as to restrict the development of a potential economic competitor,²⁶⁹ and in order to guarantee a regular supply of cheap labor.²⁷⁰ As already noted,²⁷¹ this assessment is less conspiratorial than it may seem at first sight.

Israel’s policy of “anti-planning”²⁷² and “de-development”²⁷³ has led Palestinians to rely on Israel for their livelihood, resulting in the integration of the Palestinian economy into the Israeli economy. Thus, in the first two decades following the occupation of the West Bank and the Gaza strip, the Palestinian workforce has increasingly relied on work in Israel. During that period, Palestinians working in Israel received wages that were significantly lower than those of Israelis in comparable work, and in many cases were segregated into distinct low paying sectors.²⁷⁴ This disparity was achieved, *inter alia*, through the exclusion of Palestinians from the highly dominant Israeli trade union, the *Histadrut*, thus significantly facilitating the confinement of non-citizen workers

265. GORDON, *supra* note 2, at 74.

266. Military Order, 5727-1967, No. 25 art. 2 (Isr.); Military Order regarding Occupation in Electricity (Regulation and Operation) (Judea and Samaria), 5731-1971, No. 427 (Isr.).

267. GORDON, *supra* note 2, at 35.

268. *Id.* at 78.

269. SHALEV, *supra* note 227, at 60.

270. GORDON, *supra* note 2, at 90. This is itself a violation of article 52 of the Fourth Geneva Convention, which prohibits “[a]ll measures aiming at creating unemployment or at restricting the opportunities offered to workers in an occupied territory, in order to induce them to work for the Occupying Power.” Geneva Convention (IV), *supra* note 15, at art. 52.

271. *See* text adjacent to note 65 *supra*.

272. EYAL WEIZMAN, HOLLOW LAND: ISRAEL’S ARCHITECTURE OF OCCUPATION 97 (2007).

273. SARA ROY, THE GAZA STRIP: THE POLITICAL ECONOMY OF DE-DEVELOPMENT 4, 128 (2001); NEVE GORDON, FROM COLONIZATION TO SEPARATION: EXPLORING THE STRUCTURE OF ISRAEL’S OCCUPATION, IN THE POWER OF INCLUSIVE EXCLUSION TERRITORIES 239, 247 (Adi Ophir, Michal Givoni & Sari Hanafi eds., 2009).

274. *See* Mundlak, *supra* note 1 at 588.

to the secondary labor market.²⁷⁵

Following the two intifadas, and the ensuing drop in the number of permits granted to Palestinians for entry into Israel, their reliance on the Israeli economy changed in character. The reliance went from an inter-territorial (Israel-occupied territories), to an intra-territorial (occupied territories) dependence. According to the Palestinian Bureau of Statistics, in 2010, 14.2% of the Palestinian labor force, including both employed and unemployed individuals in the West Bank, were regularly employed in settlements and in industrial zones.²⁷⁶ To appreciate this figure, two additional factors should be considered. First, agriculture is probably the most labor-intensive sector in the West Bank and is seasonal in character. For example, 5,000 Palestinians are employed by Israelis in the Jordan valley on a permanent basis, but in the date harvest season, their numbers climb to 20,000, in that area and that sector alone.²⁷⁷ These workers are not accounted for in the figure cited. Second, of those within the labor force, 23.6% are unemployed, a rate among the highest in the world.²⁷⁸ Accordingly, among those Palestinians in actual employment, the rate of those employed by Israelis is much higher, reaching close to 20%. Despite reports of a thriving Palestinian economy, this trend is not changing. In fact, a recent United Nations Relief and Works Agency (UNRWA) briefing on the Palestinian labor market concluded, somewhat strikingly, that “[t]otal West Bank employment [in 2008] increased by 4,400, but all net growth occurred in Israel and Israeli settlements.”²⁷⁹

Although this Article deals primarily with the legal state of affairs, the economic and political dependence leads to exploitation that is even more severe than the legal analysis may indicate. Thus, although it is unambiguously clear that Palestinians working in settlements and in industrial zones are formally entitled to minimum wage, reports by NGOs,²⁸⁰ in the press,²⁸¹ and in a UN briefing paper²⁸² suggest that the reality of Palestinians actually receiving such wages is the exception, rather than the norm.

Palestinians have become even more dependent on the settlements for their livelihood as a result of the restrictions on movement within the West Bank

275. SHALEV, *supra* note 227, at 59.

276. Palestinian Central Bureau of Statistics, *Labor Force Survey 2010* at 159, 160 (Aug. 17, 2010), available at http://www.pcbs.gov.ps/Portals/_pcbs/PressRelease/LabourForce_2010Q2_E.pdf.

277. B’Tzelem, *Dispossession and Exploitation: Israel’s Policy in the Jordan Valley & Northern Dead Sea* 59 (2011), available at http://www.btselem.org/sites/default/files/201105_dispossession_and_exploitation_eng.pdf

278. UNRWA, *supra* note 5, at 2; Palestinian Central Bureau of Statistics, *supra* note 2766, at 160.

279. UNRWA, *supra* note 5, at 3 (emphasis added).

280. See, e.g., Kav LaOved, *supra* note 92.

281. Gitit Ginat, *Dates of Infamy*, KAV LAOVED—WORKER’S HOTLINE (Sept. 17, 2006), http://www.kavlaoved.org.il/media-view_eng.asp?id=193.

282. UNRWA, *supra* note 5.

since the early 2000s. Israel has imposed permanent and temporary checkpoints, physical obstructions, the Separation Barrier, forbidden roads, roads with restrictions on Palestinian use, and the movement-permit regime.²⁸³ These restrictions, “unprecedented in the history of the occupation”²⁸⁴ in their scope, duration and severity, have dismantled Palestinian sources of livelihood, led to soaring unemployment and poverty rates, and, consequently, have had a clear impact on the ability of Palestinians to maintain a significant bargaining position vis-à-vis potential or current employers. Many Palestinians cannot maintain their own businesses, since movement of goods has become expensive and even close to impossible; tourism has become non-existent; employees cannot commute and are forced to seek work close to home.²⁸⁵ The outcome resembles a phenomenon that in recent years has been the target of criticism by scholars of transnational labor, namely the ability of corporations to move beyond national boundaries, while taking advantage of local employees’ immobility.²⁸⁶ Global corporations and their local suppliers are depicted as agents of exploitation, taking advantage of developing countries’ low wages and weak social and environmental regulations to produce low-cost goods at the expense of local employees’ welfare.²⁸⁷

Another aspect of the juxtaposition of power disparities between Palestinian employees and Israeli employers lies in the fact that Palestinians who wish to work for Israelis in the settlements must receive a three-month renewable permit from the Israeli Civil Administration. The permit is given to the employer on behalf of the worker for whom the permit is issued. Permits allow workers to pass checkpoints and to enter industrial zones. The immediate consequence is a severe inhibition on the Palestinian employees’ freedom of contract. Their decision to leave a particular employer, for example, results in an immediate annulment of their permits to work in the settlement altogether and thus constitutes an obvious threat to their livelihoods. Evidence gathered by Workers’ Hotline reveals that Israeli employers use work permits as a means of extortion against workers who demand their salary, minimum wage, vacation pay, pay slips, or improvements in health and safety conditions.²⁸⁸ The permit regime was declared illegal by the Israeli Supreme Court, insofar as it pertains to

283. B’Tzelem—The Israeli Information Center for Human Rights in the Occupied Territories, *Ground to a Halt: Denial of Palestinians’ Freedom of Movement in the West Bank* 94 (August 2007), http://www.btselem.org/download/200708_ground_to_a_halt_eng.pdf [hereinafter B’Tzelem]. For the relevance of freedom of movement to workers, see GOULD, *supra* note 11.

284. B’Tzelem, *supra* note 277283, at 12-20.

285. *Id.* at 73-78. See also World Bank Group, *West Bank and Gaza Climate Assessment: Unlocking the Potential of the Private Sector*, Report No. 39109 – GZ, 13 – 20 (Mar. 20, 2007).

286. See, e.g., Karen Bravo, *Free Labor! A Labor Liberalization Solution to Modern Trafficking in Humans*, 18 *TRANSNAT’L L. & CONTEMP. PROBS.* 545 (2009).

287. Richard Locke, Fei Qin, & Alberto Brause, *Does Monitoring Improve Labor Standards?: Lessons from Nike, Corporate Social Responsibility Initiative*, 1 (John F. Kennedy Sch. of Gov’t, Harvard Univ., Working Paper No. 24, 2006).

288. Kav LaOved, *supra* note 92.

foreign (migrant) employees.²⁸⁹ The Court ruled that the “binding agreement” policy deprives a party who is already the weaker side of the labor relations of economic bargaining power,²⁹⁰ and that it “creates a form of modern slavery.”²⁹¹ The employee’s basic freedom—to end an employment relationship—is impeded, and extensive documents reveal the widespread exploitation of Palestinians working for Israelis. However, as noted, an equivalent policy still holds for Palestinian employees in the settlements and in Israel.²⁹²

Finally, the political power of settlers over the Israeli political process, including the ability to secure decisions that may have direct and indirect consequences on economic relations between settlers and Palestinians, has been well documented.²⁹³ Needless to say, the power of Palestinian employees does not even come close.

Regrettably, the courts completely ignored these unique circumstances. In rejecting the nexus of the contracts to Israeli law, the NLC stated that the employment relationship is a “local relationship for performance of employment in the region, and *the only international element is the identity of the employer, i.e. his being Israeli.*”²⁹⁴ Yet the fact that the employer holds the nationality of the occupying power is an ‘international element’ that should bear on the analysis. Even when the NLC addressed the ‘unique reality in the region,’ it was content to state that the close connection between the two labor markets justifies limiting the disparities between the two systems. The Court suggested that Israeli law should apply only if Jordanian law demonstrates an “extremely unreasonable” deviation from the standards of the law of Israel and other “culturally developed nations.”²⁹⁵ This standard for comparison is appropriate in conflicts between the laws of sovereign, culturally similar societies. However, it seems less appropriate in a case of complete domination by one state and its population over another population that is politically and culturally distinct. Instead, the court could have employed *extra caution* to create disincentives for additional exploitation, in a manner similar to the legislative approach regarding employment of foreign employees. Moreover, as has been reiterated throughout this Article, limiting ‘the disparities between the two *systems*’ is of less interest. When addressing exploitation, the courts should have focused on limiting, if not eliminating, the disparities between work *terms and conditions* for employees.

Furthermore, the NLC acknowledged that, while there may be gaps in work

289. HCJ 4542/02 Worker’s Hotline v. Israel (2006), Takdin Database (by subscription) (Isr.).

290. *Id.* at ¶ 29.

291. *Id.* at ¶ 4 (Cheshin, J. concurring).

292. Minutes of the Knesset, *supra* note 36, at 16-17.

293. AKIVA ELDAR & IDIT ZERTAL, LORDS OF THE LAND: THE WAR OVER ISRAEL’S SETTLEMENTS IN THE OCCUPIED TERRITORIES, 1967-2007 (Vivian Eden trans., 2007).

294. *Giv’at Ze’ev*, Labor Ct. (BS) 3000050/98 at ¶ 26 (emphasis added).

295. *Id.* at ¶ 36(g).

conditions between Israelis and Palestinians, such gaps may be justified due to particular ‘circumstances.’ As mentioned, it sent the cases back to the district labor courts to determine the applicable rights on their merits case by case. Its comment may be interpreted in two different manners. First, it might be an implicit effort to justify inferior terms and conditions of employment through reference to the lower cost of living of the Palestinian employees. Strikingly, this reasoning also appeared in the Attorney General’s brief.²⁹⁶ The idea that the background standard of living is a relevant consideration to the detriment of the plaintiff is a dangerous one. To give a trivial example, it would suggest that employees who live with their parents and whose accommodation expenses are completely covered are not entitled to minimum wage. In addition, such reasoning undermines the role that equality plays, in the broader sense, in social, economic and legal relationships. It means that the law has an authoritative role, not in reducing inequalities and tempering their consequences, but in reflecting and preserving the status quo and even exacerbating the implications. From a labor law perspective, such a strategy suggests a change in the delicate balance between the ‘status’ that shields the employees and the commercial ties that envelop them (the contract).²⁹⁷ Labor law jurisprudence increasingly views background information (nationality of persons involved, marital status, political affiliation, etc.) as irrelevant to the determination of employment rights. The cost of living may be a legitimate ground for preferential treatment if an employer wishes to provide incentives to employees to reside in a more costly location, where the standard terms of employment are insufficient. However, this scenario is distinct from the one considered here on two counts. First, this Article is concerned not with incentives, but with equality with respect to minimum conditions. Second, preferential treatment would be permissible where the employer has a legitimate interest in employees residing in a costly location, and if all employees can choose to benefit from the incentive. Not only can Israeli employers not be said to have an interest in their employees residing within the settlements, but, more importantly, given that the Palestinian employees do not have that choice, they may not be denied the corresponding benefits.

A different way of understanding the NLC’s dictum is to suggest that the Palestinians are bound by different responsibilities (national insurance, taxes, etc.), and therefore are entitled to different rights. This is also a problematic path to follow. Beyond the general argument against a blanket conditioning of rights on responsibilities, it is logically flawed in labor relations. For while the relevant employee’s rights should be realized by their employers, the employees’ responsibilities are owed to the government. The rights A has against B cannot be dependent upon the duties that A owes to C.

296. Brief of the Attorney General, *supra* note 32, at ¶ 124.

297. Otto Kahn Freund, *A Note on Status and Contract in British Labour Law*, 30 MODERN L. REV. 635 (1967); Frances Raday, *Status and Contract in the Employment Relationship*, 23 ISR. L. REV. 77 (1989).

V.

CONCLUSION

This Article examines the reasoning of the Israeli National Labor Court and High Court of Justice in determining the law applicable to the employment of Palestinians in the Israeli settlements in the West Bank. Both courts applied choice of law rules, but reached opposite conclusions because of a different weighing of the contacts. Of particular interest is the HCJ's conclusion, based on the contact count, that Israeli law should apply. This conclusion sits well with the principle of equality as a fundamental principle of labor law.

We argue that the reference to equality is far from straightforward. In particular, we focus on the choice of the HCJ to consider equality of laws, rather than equality in terms and conditions of employment. This choice resulted in the Court's failure to guarantee the rights of the Palestinian employees both in the short term and in the long term. We also have reservations as to the recourse to equality, whether in the applicable law or even in terms and conditions of work, as a guide in a situation of extreme power disparities. We suggest that a blanket invocation of the term, without considering its wider implications when applied in occupied territory, may conflict with the long-term interests of the population concerned, helping to create a myth of a benign occupation in a context where rights are routinely denied.²⁹⁸

The courts' choice to disregard the contents of the employment agreements and to limit themselves to questions of the applicable law is both regrettable and confusing. It is regrettable because remaining within the parameters of contractual relationships, namely examining whether there are serious reasons to distinguish the contractual entitlements of Palestinian from those of Israeli employees, regardless of the law that applies territorially, might have allowed the court to avoid the pitfalls related to the law of occupation. It is confusing because despite the centrality of equality in the HCJ's reasoning, equality in employment terms was not, in effect, the axis of the deliberations. Instead, *Worker's Hotline* focused on equality in the applicable law.

To be sure, we do not object to the reference to equality. Rather, we argue that the Court should have taken into account the effect of different courses of action on the right of employees to equality. If the Court had referred to equality in terms and conditions rather than to equality in the applicable law, its judgment would have carried greater benefits for Palestinians as a weak employee population.

The analysis above should assist in responding to two central objections to the focus on equality. One possible objection is that the principle of equality guarantees beneficial terms and conditions to Palestinians only when they work

298. KRETZMER, *supra* note 105, at 198; Gross, *supra* note 214, at 8; Sfarid, *supra* note 18, at 166.

for Israelis, and not when they work for Palestinians.²⁹⁹ This may increase the dependence of Palestinian labor on Israeli capital. However, it cannot be ignored that the recourse to equality is meant to mitigate a particular type of exploitation that only applies when Israelis employ Palestinians. The alignment of Israeli employees (against whose rights the Court examines the rights of Palestinians) characterizes the many cases involving the Israeli government as an employer (via the Civil Administration or municipal councils) and as a holder of military and legal power (through the military commander), as well as cases involving Israeli private businesses. Such an alignment demands a judicial safeguarding of the rights of those who are in danger of severe economic exploitation, who are politically disenfranchised, and who, unlike citizens, are unable to convert their political capital to economic gains.³⁰⁰ Needless to say, this scenario does not take place in the parallel situation, that of Palestinians being employed by Palestinians, and therefore does not require a similar measure.

Lastly, one could argue that equating the terms and conditions of Palestinian labor with those of Israeli employees might undermine the incentive for Israeli business to operate in the occupied territories. As a result, the livelihood of the Palestinians would be put at a detriment. In other words, if Israeli businesses operating in the occupied territories are denied the economic advantages they were accustomed to, they may opt to return to Israel or to move elsewhere in search of cheaper labor. This, of course, is a common argument that fuels the notorious ‘race to the bottom.’ It is not only morally suspect (being an effective ‘allow me to offer you sub-standard conditions or I’ll leave’), it has also been proven to be overinflated: businesses (especially those owned by settlers who reside in the occupied territories, and those that rely on the territories’ natural resources) do not relocate with such ease. Israeli government employers operating in the occupied territories certainly cannot relocate. Furthermore, the relocation of Israeli businesses back to Israel would not necessarily be to the detriment of Palestinians. In effect, this dynamic may counteract the crawling annexation. If Israeli businesses relocate from the occupied territories, the economic vacuum may well be filled by Palestinian businesses, thereby benefiting the Palestinian economy directly.

The critique in this Article is offered in full appreciation of the genuine attempt by the courts to impose a rule of law in the face of an anomalous situation. It has been asked in the past whether the attempt to offer legal redress in an anomalous situation should be abandoned altogether, as it perpetuates the anomaly. We do not necessarily ascribe to this position. Indeed, the laws of armed conflict, on which the entire situation rests, signify the abandonment of the ‘progress through catastrophe’ approach, suggesting that progress requires

299. Such as might be the case of Palestinians employed by Palestinians in the Occupied Territories, where there is no Israeli involvement, such that complaints are unlikely to reach Israeli courts because of *forum non conveniens*.

300. For a discussion of the parallels between political and labor citizenship, see Gordon, *supra* note 11.

rule of law. At the same time, the shaping of that law must not be carried out in the abstract. While the courts should steer away from high politics, they must take cognizance of politics in their deliberations. Where political forces affect their rulings, they must be realistic about the prospective consequences of such rulings. This is essential if they are to offer redress in either the immediate or long term.

The focus of this Article is on the law governing the employment relationship between Israeli employers and Palestinian employees in industries operating in the West Bank. The length of the Israeli occupation, and the social and economic entanglement that derives from it, have consequences for a wide variety of relationships, including employment relationships, and we hope that our analysis may shed some light on the concrete legal, political and social implications. Despite the idiosyncrasies of the Israeli-Palestinian situation, parallels may already be drawn to other, perhaps less severe and certainly less lengthy, situations. American and European companies have been operating in Iraq and Afghanistan, taking advantage of the needs of the military operating there along with its significant *de facto* control of decisions being made. Not enough attention is directed to the terms and conditions of local workers employed by these corporations, and perhaps it would be judicious to pay such attention sooner rather than later.

2012

Review of *From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1981-1949* by Victor Kattan

Elliot Shackelford

Recommended Citation

Elliot Shackelford, *Review of From Coexistence to Conquest: International Law and the Origins of the Arab-Israeli Conflict, 1981-1949* by Victor Kattan, 30 BERKELEY J. INT'L LAW. 638 (2012).

Available at: <http://scholarship.law.berkeley.edu/bjil/vol30/iss2/8>

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Review of *From Coexistence to Conquest:
International Law and the Origins of the
Arab-Israeli Conflict, 1891-1949* by Victor
Kattan

By
Elliot Shackelford*

I.
INTRODUCTION

As one of the central geo-political dilemmas of the last century, the Arab-Israeli conflict has been an ongoing challenge within international politics, testing the universality and applicability of international law. At its core, the conflict, which is grounded in a disagreement over the land of Palestine, has been characterized as an irresolvable struggle between two competing nationalisms.¹ While complicated by religious and political diversity, this dispute between peoples involves first and foremost competing claims to land, albeit a very significant land. For international law, establishing the identity of the first occupants is less relevant than who was sovereign at a critical moment. Yet determination of the validity of competing claims to Palestine is complicated, reflecting the complexities of Jewish and Arab history in the region.

Since sources of custom, treaty, and precedent guide the foundation of international law, an accurate historical perspective is essential in understanding and interpreting the legal elements of actions taken by a state or by a people. The fundamental disagreements underlying the conflict over Palestine may not have had their bases in disputes within international law, but the means with which legal norms have been used as a tool of resolution, political motivation, or claims to fairness has heavily influenced the conflict's current standing. For many, the ultimate solution to the Arab-Israeli struggle depends on the

* U.C. Berkeley School of Law, J.D. Candidate, 2014.

1. VICTOR KATTAN, *FROM COEXISTENCE TO CONQUEST: INTERNATIONAL LAW AND THE ORIGINS OF THE ARAB-ISRAELI CONFLICT, 1891-1949* 1 (Pluto Press 2009).

capability of global legal mechanisms to discern and engender justice, even if such an “ideal” outcome has been elusive in Palestine’s previous record. Extrapolation from the past does not, of course, inherently dictate future certainties. However, the origins of the seemingly intractable conflict—the period between 1891 to the end of the Arab-Israeli War in 1949—could prove instructive, if not critical, in examining the applicability and effectiveness of international law in determining an eventual resolution.

Examining this critical period of transition for Palestine in his book *From Coexistence to Conquest*, Victor Kattan contrasts the realities in political thought and action that led to the region as it exists today with the evolving principles of international law that were applied as critical decisions were made.² While international law and global politics saw continuous transformation during this period, the decision-making Great Powers, Britain, France, and the United States, consistently invoked ideals and customary norms throughout the negotiations to create Israel from land that formerly was a province of the Ottoman Empire. Set against a temporal backdrop that included tremendous global socio-political change, Kattan’s book brings a critical and incisive legal focus to bear as he challenges familiar accounts and viewpoints of Palestine’s transformation.

For Kattan, an investigation into the legal status and foundation for the creation and development of Palestine is no mere academic exercise. While his credentials as a teaching fellow at the Centre for International Studies and Diplomacy in London demonstrate an exceptional academic background from which to approach this study, he also holds a personal connection to the region through his family heritage. Kattan’s experience in Palestine as a young man connected him to the land and to the period in which his father’s family lived in the region. These geographic, temporal, and ancestral associations serve to deeply enhance and enrich his academic interest in understanding the sources of the Arab-Israeli conflict within the international legal and historic context from which it evolved.

II.

SUMMARY

Kattan’s detailed and well-researched work proposes two broad perspectives of the role of international law during the five-decade process that resulted in Palestine’s current geo-political arrangement.³ First, the Zionist objective in Palestine possessed a colonialist element, one that the Palestinian Arabs recognized and opposed throughout international legal maneuverings and

2. *Id.* at xvii.

3. Richard A. Falk presents a similar conception of the book in his forward, emphasizing the importance of the work as acknowledging the historical contexts and realities in which the conflicts of international law arose. *Id.* at ix.

political negotiations. The international political order gradually moved away from the colonialist mindset during the period as modern international law developed. However, the Zionists' effective use of international pressure, including legal policies and approaches, led to an imbalance in the application of international norms while determining the geopolitical outcome in the Middle East. Second, as the Great Powers put in place the governing structures that enabled the region's transformation, they systematically ignored the rights of the indigenous Arabs under international law. The resulting disparity of law and rights in the decision-making process produced an environment that led to the current configuration, putting the interests of the Israeli state against those of the Palestinian Arabs.

In laying the foundation with which he contrasts later developments in the region, Kattan contends that the application of international law should have been weighed against the geopolitical circumstances as they stood between Arabs and Jews in Palestine at the outset. The "Arab-Israeli conflict is not old," he writes, but rather emerged from the rise of a Jewish nationalism that had not existed in the region prior to Zionist activism.⁴ In fact, under the Ottoman Empire, the relations between Palestine's ethnic populations could be characterized as coexistence, a portrayal in stark contrast to the later conflict. Neither population bears the true liability for the escalation of nationalist contention, which Kattan argues resulted from a confluence of anti-Semitism, colonialism, and Zionism, despite that international humanitarian norms were then developing.⁵ Therefore, prejudice and the last remnants of colonialism gave Zionism a foundation, motivation, and process through which to pursue the goals of a Jewish home in Palestine. The result, according to Kattan, is that despite inconsistent or imprecise application of the law as large-scale Jewish immigration began, "international law was pivotal to the development of the Jewish national home," and "without it, Israel would not exist today."⁶ Although the process took place over five decades, the connection to international law gave the Zionist movement legitimacy on the world stage that bore results as the international norms started changing more rapidly following World War I.

The post-war uncertainties inherent in the region in 1919 are evident in Kattan's characterization of the period as a "scramble" for Palestine. As an area of strategic importance, the Middle East went through a radical transformation when the Great Powers divided it into separate territories at the Paris Peace Conference of 1919. Regarding Palestine, the difficulties in implementation of the Conference's solutions arose due to the conflict between promises made by the British to the Arabs during the war, the structure of the mandate outlining provisional British governance, and the Balfour Declaration pledging a Jewish

4. *Id.* at 1.

5. *Id.* at 8.

6. *Id.* at 22.

homeland.⁷ Kattan asserts that the Mandate system was very different than the *conquest* of Palestine that occurred through England's particular application of its governance in the region. Within conflicting pledges, the Arab population saw the Zionists as "settler-colonialists."⁸ Saddled with these inconsistencies, the British regime faced the steep challenge of governance in a situation where it became nearly impossible to ensure legal protection of Zionists and Arab interests alike. Sovereignty was one of many difficulties with the Mandate upon which the Great Powers could not reach agreement.⁹ The international community's legal objections to England's actions in interpretation of its agreements was an international response to the problematic Mandate system, a level of disapproval that was likewise pragmatically reflected in the active resistance of the Palestinian Arabs.

According to Kattan, Arab opposition to Jewish immigration in Palestine emerged as early as 1891, years before the first Zionist Congress. As British administration under the Mandate formally began in 1922, the question of how and in whom Palestinian sovereignty would eventually vest remained uncertain, particularly since England was merely the occupying power. No traditional modes of sovereign acquisition were available to the Zionists, and legitimate acquisition under international law would have required cession of land by the Palestinian people.¹⁰ However, continued Jewish immigration and the perception of a British policy favorable to Zionists led to Arab riots, a situation unusual in the prior eight decades. Despite studies like the Hope-Simpson report, which found that Arab standard of living would decline with continued Jewish immigration, the lack of political parity in British decisions caused Arabs to lose faith in the political process.¹¹ As a result, England's Peel Commission recommended the Partition of Palestine in response to the escalating violence. With Arab opposition to the concept of a Jewish national home continuing as the basis of unrest over an extended period, the comparative strength of international ties and the activity sanctioned as a result placed the two sides in relative relationships with the international community that were perhaps decisive in the outcome of the eventual war.

To illustrate the importance of both the Allied promises to the Arabs and communications that occurred between Western and Arab leaders, Kattan uses a novel approach in highlighting the correspondence between King Hussein, the

7. The Mandate resulted from the League of Nations system, and included the terms of the British governing presence in Palestine. Britain's Foreign Secretary, A.J. Balfour, is responsible for the Declaration that promised a national home for the Jews on the condition that it would not contravene the rights of existing Palestinians. Kattan questions the interpretation of both agreements in the years prior to the formation of the Israeli state, but the Balfour declaration had a particular influence on British foreign policy and international law in the region. *Id.* at 42.

8. *Id.* at 45.

9. *Id.* at 56.

10. *Id.* at 78.

11. *Id.* at 90, 93.

Sherif of Mecca, and British High Commissioner Sir Henry McMahon during WWI. The “Hussein-McMahon Correspondence” indicates to Kattan strong evidence that England promised Palestine to the Arabs through diplomatic communications that rose to the level of a secret treaty.¹² Because of differences in the handling of international treaty negotiations, the customary rule that only states could conclude treaties made possible legitimate exceptions that became common in British-Arab relations. Although disputes arose over whether the promises made to the Arabs had occurred, and to what extent they existed, the British government did not argue any lack of legal capacity by Hussein or that any agreement would not have been legally binding. When the correspondence was made public in 1939, many viewed it as a legal rather than a diplomatic document, among them the Chief Justice of Palestine’s Supreme Court.¹³ Such interpretations quickly became problematic for England’s foreign office, since they posed potential contradictions to the Balfour Declaration’s pledges to the Jews. The legal question ultimately raised, therefore, became how to combine the concurrent but opposing national aspirations of Palestinian Arabs and Zionists into a single Palestinian state.¹⁴

The concept of self-determination was among the international norms gaining support during the period, particularly in the post-World War I era. Measured against a self-determinative standard, the resolution of the conflict over Palestine as of 1948 came at the end of a process that included multiple decisions in stark variance with international law. Zionism was, in many ways, innately “at odds with twentieth-century notions of self-determination,” particularly since Jews “had no territory to claim as their own . . . and never formed the majority of Palestine’s population” prior to their conquest of the Arab population.¹⁵ In fact, Kattan contests that such “re-colonization” was at odds with the ongoing decolonization of the period, because British leadership recognized that implementing such policies would lead “unquestionably” to an unfavorable verdict for the Zionists.¹⁶ Apparently, even at that time, the British recognized that such a position was both politically and morally weak.

While Kattan concedes the difficulty of relating the concept of self-determination to a territory encompassing multiple ethnic groups, he submits simply that the Palestinian Arab majority should have been more determinative in the region’s formulation, at the very least during the critical period of post-World War II Partition. One of the most widely contested areas of international law, the right of self-determination is “customarily invoked by all sides to a

12. *Id.* at 98.

13. The Chief Justice, Sir Henry McDonnell, wrote that the documents were consistent and clear, reducing the validity of Britain’s claim that there was no intention to include Palestine in the territories promised to Hussein. *Id.* at 107-08.

14. *Id.* at 116.

15. *Id.* at 117.

16. *Id.* at 122

conflict,” a reality reflected in the incongruent characterizations of whether the population of Palestine was allowed to exercise it.”¹⁷ The British acknowledged that the policies emanating from the Balfour Declaration and the application of the mandate, among many other governing instruments, were counter to the principle, but justified it on the basis that Palestine was a unique and special case. However, as of 1919, there was “no obligation in customary international law to consult the inhabitants of a particular territory on their political development,” a deficiency in policy that continued to characterize the entire period leading to Partition.¹⁸ Therefore, the basis for the argument that self-determination should have inherently led to a different outcome is not as solid as it could be.

Kattan also points out logical inconsistencies that existed in the Great Powers’ invocation of international law. “If the Jewish people were not a ‘people’ for the purposes of international law in 1917,” he asks, “how could they assert a claim to self-determination in Palestine?”¹⁹ At the base of this question is the fact that, to some extent, the Great Powers indeed used self-determination as a policy rationale for Partition as well as the decisions that led up to and followed it. But if the principle as a legal norm applies to one population, it must apply to another. Under the doctrine of self-determination, the only way the Balfour Declaration could be aligned with the Mandate within the League of Nations was to accept that both Jews and Arabs had a claim to Palestine. However, this seeming impossibility has never been resolved, and it continues to present a source of controversy.²⁰ An indication of the prevailing thought is found in one British Foreign Office memorandum, which stated that because the Jewish population was entitled to greater influence than just numbers, the “problem of Palestine could not be *exclusively* solved on the principle of self-determination.”²¹ This conception, however, directly contradicts the Mandate’s notion that the British were holding the land in sacred trust until its population could more effectively exercise the principle of self-determination. According to Kattan, “it would be wrong to argue that, because self-determination was not a right in customary international law . . . the Palestinian people were not allowed to rely on it.”²²

Kattan finds it interesting that nearly all of Palestine’s neighbors were among those opposing Partition during the UN vote on November 29, 1947, although he perhaps places too much emphasis on geo-political reasons for that outcome. As the international community moved toward the decision to partition Palestine into separate Arab and Jewish states, the United Nation’s special

17. *Id.* at 118.

18. *Id.* at 121.

19. *Id.* at 125.

20. *Id.* at 126.

21. *Id.* at 129.

22. *Id.* at 143.

committee on Palestine paradoxically accepted an Arab predominance in population while concluding that self-determination did not apply to that population. Numerous instances of international jockeying on the subject of Partition, including a close (but failed) vote on submitting the question to the International Court of Justice for an advisory opinion, reflect the politicization of the situation rather than its grounding in international legal principles. At the Partition vote on November 20, 1947, Jews were awarded fifty-seven percent of Palestine albeit constituting thirty-three percent of the population.²³ The legal questions surrounding the vote, however, remain contested today: a) whether the United Nation's General Assembly "has the competence to partition mandated territory," and b) "whether the Plan was binding under international law."²⁴ Arguably, a UN Security Council vote is required in order for a vote to be binding, leading some to claim that the Partition vote was merely a resolution rather than a legally legitimate determination.

Although the two-state solution could be seen as adopting self-determination in reflecting the existence of two separate peoples, the implementation of Partition against the wishes of a two-thirds Arab majority might seem counter to international legal rights. Even if one accepts the 1947 UN Partition decision as binding, numerous conflicts of international law appear to remain. Land ownership does not equal sovereignty under international law. In establishing the boundary, the UN commission took little consideration of which population owned which land. Kattan provides prior examples of Armenia, Turkey, Ireland, Poland, and Czechoslovakia in asserting that the outcome contravened established international legal custom.²⁵ Success, or the perceived chances of success, should not be as much of an authority in applying international law as a simple acknowledgement of accepted norms. Unfortunately, the Partition's chances of future success influenced US support, among other nations. The Partition Plan may additionally have been at odds with the terms of the Mandate, especially since the Great Powers could have implemented such a solution in 1919 had they so desired. In terms of the Plan's success, rather than as merely a matter of law, Kattan asserts that accounting for Palestine's stability and peace would have been wise. He also proposes that, in its ideal conception of the ultimate outcome, the United Nations may in reality have contributed to the conflict by providing Palestinians with a cause to fight.²⁶

The application of international law to the Arab-Israeli conflict extends beyond the interactions preceding Partition in 1948. Specifically relating to the formation of the state of Israel, Kattan claims that legal scholars treat Israel's emergence as a legal entity as a question of fact without regard for the

23. *Id.* at 151-52.

24. *Id.* at 153.

25. *Id.* at 159.

26. *Id.* at 160.

lawfulness of the state's creation.²⁷ This oversight should be filled, he says, by examining the circumstances through the lens of international law. Rather controversially, Kattan uses words like "expulsion" to describe the Arab departure from Palestine and "revisionist history" in characterizing the prevailing Israeli characterizations of the process. He also cites abundant evidence designed to rebut the notions that the departure was voluntary, that the Arab states attacked Israel rather than acting to protect the indigenous Palestinians, and that the Arabs were intransigent in their political stance towards Israel.²⁸

According to Kattan, the true record of the state of Israel's emergence in 1948 includes events that could constitute multiple violations of international law, even if they occurred prior to the formal establishment of the state. An "insurrectional movement" that assumes administration of the national government can be considered "an act of that state under international law," a definition that Kattan applies to Zionist efforts toward formulation of the Israeli government.²⁹ While to some in the international legal community Israel's actions were inherently defensive, Kattan argues that the 1948 Arab-Israeli War and the atrocities committed by the Israelis throughout the open conflict, exhibit that the Arabs were not the aggressors. Instead, the states surrounding Israel were entitled to come to the defense of the Palestinians, and could even be said to have been acting in their own self-defense within the UN Charter.³⁰ Even if the Arab states accepted Partition as a legitimate concept, under international law they could still justifiably question the right of the Zionists to create a Jewish state. Some international lawyers have contended that the sovereignty vested in the state of Israel is valid due to the Jewish people's superior title to Palestine as the Mandate expired. Kattan responds to this assertion with the perspective that circumstances surrounding the war and the Mandate should have led to sovereignty vested in the people of Palestine themselves.³¹ However, through numerous acts of questionable legality under international norms, acts that Kattan enumerates in detail, the population demographics of Palestine radically shifted as the Arabs departed.

The former Arab residents must be acknowledged as a unique population, Kattan argues, because the concept of refugees under international law implies those who have fled their own country *with* the possibility of return.³² The deportation, or "expulsion," of Palestinian Arabs was not only contrary to customary international law, but also to the safeguards within the Balfour Declaration. Many tactics implemented against Arab civilians contravened

27. *Id.* at 169.

28. *Id.* at 171-72.

29. *Id.* at 173.

30. *Id.* at 179-80, 186.

31. *Id.* at 189.

32. *Id.* at 209.

international humanitarian legal norms that had obtained some principled support in the nineteenth century, but which had become customary by the 1947-49 conflict.³³ While the 1949 Geneva Convention codified many norms not explicitly prohibited by any previous legal instrument, many of Israel's actions during the war arguably contravened provisions of the 1907 Hague Convention. If the expulsion of Palestinian Arabs was unlawful at the time, Kattan asks, what does international law offer this displaced people in terms of their rights to return and restitution?

Some international legal scholars have based Israel's legitimacy on the Zionist claim to Palestine within an ancient right of return, claiming that right as a people displaced by the Romans. Those who make this assertion do not accept similar claims by Palestinian Arabs, although the latter claims are only 60 years old and the United Nations reaffirms them each year.³⁴ Kattan characterizes the Arab departure as a "population exchange," even though most such instances possess some agreement that could exhibit validity under international law. Kattan cites International Law Commission (ILC) standards in arguing that the Israeli expulsion of Arabs is an ongoing violation of international norms rather than a historic event, and, as such, the obligation to allow repatriation is stronger due to current law.³⁵ According to some states and international legal organizations, the Israeli stance toward the displaced Palestinians is to a large extent an invasion of the sovereignty and territorial integrity of the states to which the Arabs escaped. Despite widespread international disapproval exemplified by UN resolutions and ILC findings, Israel has repeatedly refused to relinquish its hold on the land. Such a failure to compromise, Kattan suggests, resulted in missed opportunities to end the conflict.³⁶ Whether such a simplification could have resulted in a viable solution is questionable, but the issue remains one of the critical components of the conflict both on the ground and in the international legal regime.

In sum, Kattan forcefully argues that the process that led to Israel's emergence was not within international legal standards, but rather was "quite simply one of the twentieth century's last examples of a successful *conquest*."³⁷ This powerful and controversial conclusion summarizes the core of the book's argument, placing the historical realities in a very different context within international law. The creation and formalization of the Israeli state present additional questions of law quite different from those raised by the active

33. *Id.* at 203.

34. *Id.* at 211.

35. The International Law Commission's Articles on Responsibility of State for Internationally Wrongful Acts states in Article 14 that "the breach of an international obligation by an act of a State having a continuing character extends over the entire period during which the act continues and remains not in conformity with the international obligation". *Id.* at 213.

36. *Id.* at 230.

37. *Id.* at 232.

conflict. One perspective contends that the formalization of the state of Israel had “as much to do with Great Power politics as with international law.”³⁸ Among those concerned were the US State Department's legal advisors, who believed that premature recognition of Israel could violate international legal standards. Despite similar reluctance by other governments to recognize Israel, the United Nations accepted Israel subject to pledges regarding Partition and refugee return. However, Kattan characterizes Israel's position that the refugee problem was “not of its own making” as “patent nonsense” because the Israeli state “cannot unilaterally interpret its obligations under international law.”³⁹ The difficulties in interpreting international norms in an era that included not only the codification of many elements of international law, but a changing international order and the advent of the United Nations, extended not only to challenges to Israel's existence, but to the formulation of its government and borders. Kattan concludes by citing multiple examples of the means by which a modern state evolves into legitimacy, none of which, he argues, fit Israel's path.

III. DISCUSSION

Among the strengths of Kattan's analysis is his representative inclusion of the vast array of communications that took place between leaders, diplomats, and key figures serving the Great Powers, the governing entities of the Arab world, and the advocates of Zionism. Through the words of those whose decisions were critical, the inconsistencies in application of relevant international legal principles that he argues to have existed become more clearly accessible. Kattan supplements pertinent letters and agreements with substantial text and quotes from international agreements, treaties, and declarations, some of which the parties negotiated publicly and were widely known and understood, and some which individual leaders concluded in bilateral secrecy. These sources are certainly not new nor are they just becoming available for academic analysis. One of the strengths of the book, therefore, lies in its application of international law in combination with these primary sources in advocating a perspective of the conflict that international law scholars and practitioners have not widely considered. By contrasting such evidence of the intentions of leaders and the written instruments of legal international norms with often-detailed historical accounts of the events occurring during the period, Kattan effectively supports his proposition that the Great Powers applied international law asymmetrically to Arabs and Jews throughout the process that determined Palestine's future and through which Israel emerged.

Exploring the confluence of history, religion, international law, and political realities while retaining the ability to ask difficult and, in some

38. *Id.* at 232.

39. *Id.* at 237.

instances, rarely-addressed questions, Kattan presents a legal perspective of the ongoing conflict that, according to him, many scholars of international law have avoided.⁴⁰ He challenges his reader with alternative perspectives on the decisions and instruments that influenced the Zionist predominance in Palestine at the expense, he argues, of the indigenous Palestinian Arabs. The abundance of evidence he marshals in support of the contention that the international legal regime, if properly applied, would have led to a different outcome, does not resolve the debate—although it seems at times that he believes his argument to be so convincing as to leave no room for counterargument. When Kattan does include an opposing perspective of an event or a historical circumstance, or where he cites a reading of international law that diverges from his own, he often characterizes it as simply mistaken rather than creating an opportunity for a balanced weighing of the analysis. Greater credence given to conflicting conceptualizations of Palestine’s evolution could lend increased legitimacy to the originality of his argument. As a result, the book’s acknowledgement of contrary views is lacking at times, leading one to wonder whether the prevailing view is sufficiently well-known so as to balance the dialogue and, if not, how the evidence Kattan presents has not gained a wider recognition.

Given Kattan’s acknowledgement that modern international law was still developing throughout the period, it is difficult to accept the argument that there existed a regime of international law that, if properly applied, could have greatly changed the way the situation unfolded. The book contends that possession and sovereignty in Palestine should follow established international law based first on the situation as it stood prior to the Zionist efforts. But a potential counterargument exists that the constantly-changing situation in the region created an environment in which the likewise-evolving legal norms could not be definitively applied. In asserting that full and correct application of international law could or would have resulted in a different outcome, Kattan also acknowledges that the Great Powers had received their designation for a reason: their inherent strength allowed them to interpret legal norms through their own political goals. Of course, this would imply that international law was merely a veil obscuring a powerful state’s individual objectives, a perspective that Kattan does not articulate. His argument seems rather that, despite radical changes in the global legal environment during the period, sufficient law existed through international custom and treaty to have been legitimately applied to both sides. He claims that, through such legal regimes, an alternative to the present circumstances and structure of both Palestine and the attendant conflict could have been determined. However, Kattan does not fully address the dichotomy between his assertions of alternate outcomes and the reality of an underdeveloped and still-evolving set of coherent international norms.

There are undoubtedly readers who will find Kattan’s work biased to a fault. In response to those holding opposing views or seeking a more balanced

40. *Id.* at 169.

perspective of the conflict over Palestine, Kattan would likely argue that his work is itself an attempt to balance against a prevailing view of the region's transition. Among his critiques of international legal scholarship is that the international community unquestioningly accepts certain elements of the conflict's progression, such as the circumstances surrounding the organization of the state of Israel, rather than giving them the intensity of examination that a more thorough application of international law would apply. Kattan's book is designed to remedy this perceived oversight, bringing together a variety and depth of resources that pertain to the history of Palestine's transition. In addressing the arguably incomplete international legal scholarship pertaining to the long history of the Arab-Israeli conflict, *From Coexistence to Conquest* delves deeply into the historical context of the struggle for Palestine while posing thought-provoking and sometimes difficult questions about prevailing perspectives of the region's transition and the historical effectiveness of international law. As he attempts to enhance the reader's understanding of the Arab-Israeli conflict, a conflict with roots in a struggle now more than a century old, Kattan illuminates how the role and application of international law transitioned into its modern form just as Palestine too was transitioning.

2012

Review of Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India by Professor Gopika Solanki

Sylvia DeTar

Recommended Citation

Sylvia DeTar, *Review of Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India* by Professor Gopika Solanki, 30 BERKELEY J. INT'L LAW. 650 (2012).
Available at: <http://scholarship.law.berkeley.edu/bjil/vol30/iss2/9>

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*Review of Adjudication in Religious Family
Laws: Cultural Accommodation, Legal
Pluralism, and Gender Equality in India* by
Professor Gopika Solanki

By
Sylvia DeTar*

I.
INTRODUCTION

A Muslim woman had filed for divorce under the Dissolution of Muslim Marriage Act 1939. Her husband fled to Mumbai with her dowry worth 900,000 rupees and some jewelry. He refused to accept a summons to the Family Court and did not attend the court date. While the woman might have applied for an ex parte divorce from the Family Court, the lawyer advised the family to “seek other means.” The woman’s brother managed to trace the husband and “recovered the dowry and jewelry by hiring local strongmen.”¹

Contemporary India is multi-layered, diverse, complex, and undergoing rapid changes that implicate people of all faiths and social classes. The subcontinent of India hosts some of the world’s oldest anthropological sites; however, India achieved independence from England as recently as 1947. Since partition, the densely populated country has negotiated unifying and diversifying identities, histories, and modernity concerns. One element of India’s complexity and transience manifests itself in the legal pluralism elucidated in Professor Gopika Solanki’s book, which enables individuals to take advantage of varied forums in search of judicial remedies. The agency of subordinate actors works behind the scenes and in tandem with legal pluralism in India. These actors’ freedom to change, adopt new models of existence, and seek new strategies of relating to family, society, and the world, all contribute to Indian society’s pronounced mobility. Solanki’s work reflects Indian society’s particular legal

* U.C. Berkeley School of Law, J.D. Candidate, 2014.

1. Gopika Solanki, *ADJUDICATION IN FAMILY LAWS: CULTURAL ACCOMMODATION, LEGAL PLURALISM, AND GENDER EQUALITY IN INDIA* 274 n.21 (Cambridge University Press 2011) (quoting interview by Gopika Solanki with RA, Mumbai (July 11, 2003)).

pluralism with her “shared adjudication” model, in which she aims to engage with available legal forums, respect diversity, and make steps toward equality. The shared adjudication model recognizes unique paths, which Indian nationals may utilize to take advantage of the forum best suited for their needs.

The rapid pace of change in India must meet the challenges of accommodating a rich social history, and thereby contributes to a sometimes violent ambivalence between valuing cultural diversity and ensuring gender equality. In *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India*, Solanki argues that India’s unique legal pluralism, in which adjudicative authority exists in the state as well as with religious groups and other societal organizations, provides diversity and a potential for equal justice in family law. These various sources of legal authority both communicate and construct the diversity of conceptions of gender roles, the conjugal family, and religious membership in Indian society. Individuals’ manipulation of the legal systems “creates fissures in ossified group boundaries,” fractures hierarchies, and provides a space for dialogue. Solanki contends such mobilization “spurs law reform and paves the way toward formal and substantive gender equality.”²

II. SUMMARY

Solanki interviewed 120 respondents selected from state governed, family court judgments decided between June 2002 and January 2003, eighty-nine respondents from cases adjudicated under Muslim religious law, and sixty-five respondents from cases adjudicated in informal Hindu forums. She utilizes these interviews in addition to field research that she conducted during her Masters and Doctoral studies to tell the stories of families in Mumbai from the perspective of the shared adjudication model, with particular focus on the experiences of women. Solanki begins *Adjudication in Religious Family Laws* with an introduction to India and an explanation of her ethnographic methodology. She then expounds her theoretical framework and the scholarship influencing her shared adjudication model, including theories of state-society interactions, legal flexibility, women’s agency, and gender justice. Solanki next focuses on state law and the adjudication process in Hindu and Muslim family law, and she follows this analysis with chapters addressing informal law in Hindu and Muslim societies. She concludes with an effective summary of how the shared adjudication model may potentially facilitate gender equality while also promoting rich cultural diversity.

This book review first focuses on Solanki’s strong message of agency in a complex legal system. Second, it explores the strengths of Solanki’s

2. *Id.* at back cover.

conceptualizations of power dynamics in India. Finally, it offers a critique of the book's accessibility, perhaps the most challenging aspect of an ambitious reconciliation of cultural accommodation and gender equality in such an elaborate context.

III.

SOLANKI PROPOSES A FOCUS ON AGENCY

Solanki offers a message of agency unique to the majority of feminist Indian scholarship.³ Rather than focusing on inequality, she chronicles a humanistic perspective, highlighting instances of empowerment and functionality.⁴ Solanki provides strong voices of experience and examples that focus on the capacity of legal pluralism to facilitate positive change. For example, during her fieldwork, Solanki discovered that many women's organizations and lawyers were unaware of a Supreme Court ruling that required strict criteria to validate divorce under Muslim law.⁵ After Solanki spoke with

3. *Id.* at 6. See, e.g., Abdullahi An-Na'im, CULTURAL TRANSFORMATIONS AND HUMAN RIGHTS IN AFRICA (Zed Books 2002); HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca J. Cook ed., University of Pennsylvania Press 1994); Vasudha Dhagamwar, LAW, POWER AND JUSTICE: PROTECTION OF PERSONAL RIGHTS UNDER THE INDIAN PENAL CODE (M. N. Tripathy 1974); Vasudha Dhagamwar, LAW, POWER AND JUSTICE (Sage 1992); Niraja Gopal Jayal, DEMOCRACY AND THE STATE: WELFARE, SECULARISM AND DEVELOPMENT IN CONTEMPORARY INDIA (Oxford University Press 2001); Suad Joseph, *The Public/Private: The Imagined Boundary in the Imagined Nation/State/Community, The Lebanese Case*, 57(1) FEMINIST REVIEW 73-92 (1997); Chandran Kukathas, *Are There Any Cultural Rights?* 20(1) POLITICAL THEORY 105-139 (1992); Gurpreet Mahajan, *Can Intra-group Equality Co-exist With Cultural Diversity? Re-examining Multicultural Frameworks of Accommodation*, MINORITIES WITHIN MINORITIES: EQUALITY, RIGHTS AND DIVERSITY 90-113 (Avigail Eisenberg & Jeff Spinner-Halev, eds., Cambridge University Press 2005); IDENTITY POLITICS AND WOMEN: CULTURAL REASSERTIONS AND FEMINISM IN INTERNATIONAL PERSPECTIVE (Valentine M. Moghadam ed., Westview Press 1994); Martha C. Nussbaum, *Religion and Women's Human Rights*, RELIGION AND CONTEMPORARY LIBERALISM 93-137 (Paul J. Weithman, ed., University of Notre Dame Press 1995); Martha C. Nussbaum, SEX AND SOCIAL JUSTICE (Oxford University Press 2000); Susan Okin, *Is Multiculturalism Bad for Women?* 22(5) BOSTON REVIEW 25-28 (1997); Susan Okin, *Multiculturalism and Feminism: No Simple Questions, No Simple Answers*, Minorities Within Minorities: Equality, Rights and Diversity 67-89 (Avigail Eisenberg and Jeff Spinner-Halev, eds., Cambridge University Press 2005); Archana Parashar, WOMEN AND FAMILY LAW REFORM IN INDIA: UNIFORM CIVIL CODE AND GENDER EQUALITY (Sage 1992); Anne Phillips, *When Culture Means Gender: Issues of Cultural Defence in the English Courts*, 66(4) MODERN LAW REVIEW 510-531 (2003); Anne Phillips and Moira Dustin, *UK Initiatives on Forced Marriage: Regulation, Dialogue and Exit*, 52(3) POLITICAL STUDIES 531-551 (2004); Kumkum Sangari, *Politics of Diversity: Religious Community and Multiple Patriarchies*, 30(52) ECONOMIC AND POLITICAL WEEKLY 3381-3389 (1995); Kumkum Sangari, *Politics of Diversity: Religious Communities and Multiple Patriarchies*, COMMUNAL IDENTITY IN INDIA: ITS CONSTRUCTION AND ARTICULATION IN THE TWENTIETH CENTURY 181-213 (Bidyut Chakrabarty, ed., Oxford University Press 2003); WOMEN'S RIGHTS AND ISLAMIC FAMILY LAW: PERSPECTIVES ON REFORM (Lynn Welchman ed., Zed Books 2004).

4. *Id.*

5. SOLANKI, *supra* note 1, at 133; (Shamim Ara v. State of UP and Another, 2002 AIR SCW

lawyer Niloufer Akhtar about this judgment, he said, “until now, I had fewer tools to negotiate a written divorce if a *qazi* [an Islamic law judge] delivered a divorce to a woman who had signed that letter, proving divorce. But with this judgment, almost any divorce can be seen as invalid—women have been given unprecedented leverage.”⁶ Akhtar’s epiphany exemplifies the potential power of Solanki’s agency message, which emphasizes possibilities for adjudicative justice in the current system that may empower women.

In contrast to Solanki’s work, much literature on law in India critiques chaos and inequality in the country and posits solutions which may prove prohibitively idealistic.⁷ Solanki’s proposal offers a refreshing perspective of contemporary Indian law that lacks obvious bias, emphasizes methods and examples of women’s empowerment, and comprehends formidable requirements for change. For example, she illuminates how grassroots groups “trickle-up” and attack issues of gender justice from multiple standpoints. Most effectively, Solanki provides an important tool in facilitating change—an exposition of precedent on which to build.

1. Actors Worked Creatively and Extensively to Receive Judicial Remedies

In order to achieve reconciliation, separation, or maintenance such as alimony, arrears, or child support, judicial remedies required many of the women portrayed in *Adjudication in Religious Family Laws* to expend considerable effort by creatively traversing multiple systems. For example, many women engaged in forum shopping, such as selecting between a state family court, informal religious adjudication, or caste-based doorstep courts.⁸ Women dealt with the historical residues of patriarchal and religious values that trump individual rights alongside competing desires for modernity, such as ambivalence surrounding the secondary status of women and *triple talak*, a husband’s three time repetition enabling divorce by written or spoken word.⁹ Because of this patriarchy, the legal world often proved confusing and unfriendly. Women had to contend with different lawyers offering conflicting advice,¹⁰ the challenge of self-adjudication with scarce financial resources or education,¹¹ and the Muslim Women’s Act 1986 requirement that women litigate under multiple courts for one case.

Both men and women faced extrajudicial coercion by families,

4162).

6. *Id.* at 137 (quoting interview by Gopika Solanki with Niloufer Akhtar, Mumbai lawyer (June 23, 2003)).

7. *Id.* at 6; AN-NA’IM ET AL., *supra* note 3, at 3-4.

8. SOLANKI, *supra* note 1, at 53, 102, 218, 232, 313.

9. *Id.* at 70, 77, 244.

10. *Id.* at 148.

11. *Id.* at 157.

communities, strongmen, and women's organizations in order to reconcile, complete divorce, or negotiate maintenance.¹² While women's organizations often effectively assisted women's traversal of the complex legal world,¹³ some women's organization proved destructive for women when men utilized them. For example, some men have taken advantage of the *Mahila Aghadi*, the Hindu right wing party's aggressive women's faction, in order to publicly shame women who attempted to assert their rights in family law.¹⁴ In addition, Solanki exposes state law's affirmation of women as objects by, for instance, allowing a Meghwal woman to elope only if she left behind her savings and *stridhan*, or gifts given to a woman during her wedding and marriage.¹⁵ Finally, Solanki illustrates how police frequently appeared unwilling to help women without the leverage of a women's organization.¹⁶ The justice system occasionally pushed women to bargain for justice, such as foregoing filing criminal cases against abusive husbands in order to ensure maintenance for themselves and their children.¹⁷

Despite sometimes shocking stories, Solanki avoids emotional appeal. On one hand, the stories illustrate women's need for extreme craftiness, the subversive nature of their justice seeking, and the system's requirement that they expend a disproportionate amount of effort. On the other hand, these stories illustrate a method of success enabled by legal pluralism in India. Solanki's respondents managed to take advantage of the multiple resources available to them, including the family court, Hindu law, Muslim law, women's organizations, alternative dispute resolutions, doorstep organizations, and strongmen to secure restitution of maintenance, *stridhan*, and *mehar*, or dower.

Solanki does not palliate the process. In order for her shared adjudication model to enable justice, women must build connections to women's organizations or obtain access to knowledge permitting them to help themselves.¹⁸ Further, their methods must not work against them. For example, just as women may shop for the forum best suited to them, so too may their husbands. Women may resort to strongmen or the *Mahila Aghadi* to pressure their husbands into accepting or denying a divorce or providing restitution but, as addressed above, men have also used these resources to coerce their wives to stay, leave, or waive payment.

12. *Id.* at 52, 138.

13. *Id.* at 170, 257.

14. *Id.* at 276.

15. *Id.* at 208.

16. *Id.* at 257.

17. *Id.* at 118, 248.

18. *Id.* at 314.

2. *Downplaying Structural Disparities May Impede Goals of Future Equality*

Solanki implements her shared adjudication model to focus on the ways in which women have found the capacity to achieve legal remedies in decentralized family law, rather than lamenting disparities in formal law. She acknowledges various inequalities working against women in terms of economics, legal customs, and rules. For example, women may own nothing and thus require maintenance payments for living expenses, they may collect inadequate maintenance and therefore need to find paying work, or they may earn too much to receive maintenance. However, while Solanki's tendency to downplay structural disparity in light of practiced equality provides a fresh perspective, her focus may not offer an effective long-term solution, as inequalities in centralized structure may serve to impede a future trajectory toward fairness.¹⁹

For example, Solanki illustrates that, because polygyny remains legal for Muslims but criminalized for Hindus, many assume that a divorced, polygynous Muslim woman will more likely receive maintenance than a separated, polygynous Hindu woman.²⁰ However, in practice, state family courts frequently treat divorced or separated polygynous women in the same way. As a result of pressure from societal groups or extra-legal decisions made by progressive judges, the two women will receive the same maintenance. For example, despite the Hindu woman's lack of married status and, therefore, lack of legal standing, the "reformist judiciary has awarded them relief."²¹ In another case, a Hindu woman did not file a criminal case against her husband although a local non-governmental organization gave evidence of the husband's second marriage, because "it was more important for her to strategize to secure her economic rights."²² Still, divorced Hindu polygynous women may not receive the same long-term benefits as Muslim polygynous women because written formal law treats the two differently, criminalizing Hindu polygyny while honoring Muslim polygyny. Extra-legal decisions providing relief to polygynous Hindu women, while a welcome immediate solution, may lack lasting security. The case-by-case nature of family law in India may work against Hindu women in the future if their post-separation rights remain uncodified.

Solanki articulates that, despite the shared adjudication model's present insufficiency to quickly fix inequalities, it enables necessary first steps toward positive change in India. Her account demonstrates the pathways women may take today, providing hope for current judicial remedies as well as for future

19. *Id.* at 6.

20. I say separated, polygynous Hindu woman here because the law does not recognize the polygynous Hindu marriage, and therefore members of polygynous, Hindu relationships cannot legally divorce.

21. SOLANKI, *supra* note 1, at 67.

22. *Id.* at 119.

change. In the process, Solanki respects the importance of cultural accommodation while applying her shared adjudication model, thereby subversively and gradually widening cracks in hierarchies. Such a posture may prove more effective than radical change for the sake of future gender equality.

IV.

SOLANKI DISCUSSES TRICKLE UP POWER AND MOBILITY OF MINORITY GROUPS

Solanki offers a compelling discussion of interpenetrations of various powers and mobility of minority groups. In part, this interpenetration exemplifies the strength of shared adjudication: the ability of minorities to move through political cracks available to them in order to meet their needs and secure otherwise unavailable rights. Solanki first recognizes contributing powers, such as customary, religious, state, local, national, and global laws. She then offers a conceptualization of the relationship between state law and societal law, recognizing a fiction or imagination of state autonomy to best analyze the simultaneous interpenetrations and independences of the two.²³

Solanki provides a convincing summary of interpenetration:

[T]he trickle-down of judicial precedent is only a partial explanation for changes at lower courts. The presence of capable, sympathetic, and proactive judges, interlinkages and interactions between legal personnel and civil society in the adjudication process in state courts, legal innovation and the use of social legislation by lawyers in lower courts, and the individual and collective agency of women explain the gradual shift toward gender equality in lower courts. The different ideas of conjugal family trickle up and percolate in court through individual cases as well as due to interactions between ethnic groups, legal personnel, and civil society, and reformist judges are able to enforce change at local levels.²⁴

Solanki highlights this trickle-up mobility with a remarkable story of members of the lower-caste Meghwals' process of facilitating change. Members wrote to Mahatma Gandhi in an attempt to change their deficiencies in schools, including educating women. Despite his distinguished status, Gandhi responded to this request from "below" by impelling volunteers from the Servants of India Society to begin teaching there, and intervening to secure students' eventual admission to high school; a true exposition of "trickle up."²⁵

Further, Solanki indirectly reveals how a reputedly less-privileged group—such as women or Meghwals—may actually enjoy greater freedom and flexibility than an historically privileged strata. For example, she writes about the Meghwal democratic participatory justice system and how the caste laws

23. *Id.* at 47. However, Solanki does not cite Dr. Benedict Anderson, the scholar who first developed the concept of imagined communities. Especially in the context of Indian post-colonialism and nation building through law, Anderson remains a key source.

24. *Id.* at 76.

25. *Id.* at 181, n. 16.

practiced within this group award more rights to women than do state courts and higher-tiered castes.²⁶ Later, Solanki illustrates how the Meghwal leaders have expressly included women and beggars in community politics, introducing new topics into the political dialogue: “[t]he women’s meetings prioritized the issue of women’s economic rights in the context of elopement and divorce.”²⁷ The committee “self-consciously” included women in order to ensure representation, voice, and participation in constitution building.²⁸ The committee saw women’s involvement as impacting the Meghwals’ overall education, capacity as mothers, and influence on new generations. Further, the committee saw women as sources of votes most likely to consent to changing patriarchal residues, since women held much to gain from modernization.²⁹ Although not mentioned in the book, the Meghwals may have expansively included women and beggars in group membership because society already viewed the caste as downtrodden; members therefore enjoyed fewer hierarchical concerns, and the group may have wished to bring up their marginalized members to better compete as a whole in the modern world.³⁰

Historically lower-caste groups may therefore enjoy greater legal freedom than historically higher-caste groups, which self-impose more legal restrictions. For example, members of the Meghwal caste, previously relegated to menial labor, now hold a wide range of positions from cleaners to doctors, lawyers, and government officials.³¹ Members have become relatively uninhibited with regard to divorce, marrying outside of the caste, and changing religions. This contrasts with Solanki’s representation of a higher caste, the Kuchi Visa Oswals (“KVO”), which frowns upon freedoms such as inter-caste marriage and divorce.³² Once primarily employed in agricultural business, KVO members now tend to hold positions of traders and professionals or assistants in businesses owned by fellow caste members, and rarely work in government.³³ Solanki’s comparison between Meghwals and KVOs demonstrates greater freedom, choice, and the potential for ample power among a lower caste group.³⁴

26. *Id.* at 53.

27. *Id.* at 187-88.

28. *Id.*

29. *Id.*

30. See, e.g., Dirk van der Elst, *CULTURE AS GIVEN, CULTURE AS CHOICE passim* (Waveland Press 2003).

31. SOLANKI, *supra* note 1, at 193.

32. *Id.* at 237.

33. *Id.* at 239.

34. Solanki’s “Trickle up” further relates to anthropologist Dr. Clarke Speed’s reference to the greater ability of freedom and mobility in a subdominant group as “shadow hegemony.” Speed argues that women’s counter-hegemonies, even in resistance, generally imply cultural consent to patriarchal asymmetry. He calls women’s most powerful asset “shadow hegemony:” the underrepresented abilities of “second class” enhancing perceptions of reality and ability to

V.

A CRITIQUE: *ADJUDICATION IN RELIGIOUS FAMILY LAWS* MAY PROVE
INACCESSIBLE TO THE UNINITIATED

Making a book called *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in India* accessible to readers is an undeniably difficult challenge. However, the book's analytical delineation and contextualization appears sparse, and Solanki often leaves terms undefined. An early and well-organized emphasis on context and defined terms would make Solanki's book much more accessible to a wider audience without specialized knowledge in the field.

1. *Adjudication in Religious Family Laws Provides Only Minimal Historical and Geographical Context*

Solanki begins her account with an adequate historical background of India, although she pays little attention to changing attitudes of the caste system and to women's history. She provides a brief summary of caste but fails to distinguish between *varna*, large scale caste organization, and *jati*, fine divisions of caste, and scarcely relates the caste system's historical condemnation despite continued practice. Further, it seems surprising that a book concerning gender equality in India does not mention Indira Gandhi, Indian Prime Minister from 1966-77 and 1980-84, and only the second woman to serve as head of state in the world. Although Prime Minister Gandhi has received strong criticism, she represents an important female role model. Nor does Solanki mention the historically important role of the "mother" in India and the fetishization of women's chastity. Including a broader vignette of caste would help those unfamiliar with the complicated power dynamics in India, and providing more women's history would enable a richer understanding of the paradoxes women face in their relationships, families, and society.

Further, the book offers limited geographical context. Solanki outlines India broadly and then focuses in on Mumbai, utilizing the city to represent the rest of the country. Her need to focus on a smaller area makes sense; however, Mumbai may not epitomize a convincing or accurate generalization of India. The city indeed receives influence and in turn impacts many regions in India. But Mumbai also embodies its own unique cosmopolitanism, urbanity, and Maharashtran culture. To overcome this complication, Solanki might simply change the book's title to *Adjudication in Religious Family Laws: Cultural Accommodation, Legal Pluralism, and Gender Equality in Mumbai*.

The book also lacks legal context. For example, Solanki does not actually

sustainably transform their choices and capabilities (Speed, Clarke. "Cultural Anthropology." University of Washington. Seattle. June 4, 2009). Solanki's exposition of the often subversive mobility of women and untouchables in India reflects Speed's examinations of the greater freedom of lower-class individuals.

include the codes with which litigants must work, instead leaving legal requirements for marriage, divorce, and maintenance in these various systems up to the reader to research. In addition to more legal explanation, readers would benefit from a simple timeline of acts, laws, procedures, diverging customs, and changing perceptions.

Solanki offers minimal delineation of the structure of Indian law. When she refers to “state” law, at first it remains unclear whether she means Maharashtran, Indian, or formal governmental law. Further, a reader may not know whether India’s system as influenced by England includes both state (or provincial) and federal levels, such as those in the United States and Canada.

Ultimately, that Solanki did not simply compare India’s procedural system with Canada’s or the United States’ positively reduces the danger of unintentionally feeding the fictions of North America as the center of the legal world and India as a country whose legal system does not stand on its own. Comparison also potentially implies a placeholder for India along some evolutionary trajectory of legal development, a conceptualization which could diminish India’s stand-alone strengths. However, more procedural explanation could help situate the reader. Clarifying comparisons may answer questions such as why one woman could not recover in the absence of her husband’s appearance in court and why another woman received a default judgment when her husband failed to attend.³⁵ At the very least, Solanki could provide a small civil procedure lesson to contextualize where family law lies in India.

Solanki does compare other post-colonial or quasi-post-colonial countries along a spectrum of centralization and decentralized legal pluralism. The uninitiated reader may wonder whether federalism constitutes legal pluralism as well. Solanki herself resides in Canada, she wrote the book in English and provides a glossary of Hindu and Urdu terms, and the University of Cambridge Press published the book. Therefore, some comparison to English, Canadian, or US law would help to provide some context to a presumably large portion of Solanki’s audience.

2. *Adjudication in Religious Family Laws Minimally Defines Terminology*

Solanki’s glossary of terms proves extremely helpful, but it remains noncomprehensive. Many terms do not appear in the glossary and stay undefined throughout the book.³⁶ More importantly, Solanki infrequently defines her particular utilization of terms. For example, she does not explain the difference between societal law and customary law or whether she uses the terms interchangeably. Furthermore, when Solanki compares state and society, it

35. *Id.* at 169.

36. Undefined words include but are not limited to *Ulema*, *madrasa*, cultural pluralization, maintenance and how it contrasts from economic rights, alimony, arrears, and other remedies, caste, *Dalit*, *Harijan*, *Meghwal*, and communalism.

remains unclear whether she compares Maharashtra, India, or government with society. The term society could include everything, but Solanki seemed to utilize it in a narrower sense and never explains why.

Solanki probably does not diligently define her terms or provide extensive historical, geographic, and legal context because doing so would undoubtedly expand her book. However, more context and definition could appear concisely, and it would prove helpful enough to warrant the space. If required, Solanki could further condense some of the main text by, for instance, focusing on representative castes rather than mentioning many varied groups briefly, and avoiding repetition by eliminating the occasional duplication of rules in text and footnotes.³⁷

Amelioration of these critiques would add muscle and accessibility to an already strong book. Solanki writes in an articulate, engaging fashion about complex topics many consider exceedingly challenging. She effectively presents a message which holds ample potential for positively affecting the future of litigation in India.

VI. CONCLUSION

Adjudication in Religious Family Laws provides valuable inspiration to those concerned with the future of gender equality and justice in India. In particular, the sheer volume of work women's organizations accomplished in traversing the systems and enabling women's justice in India proved astonishing. Solanki briefly touches upon a few areas that have a lot of potential for further expansion. For example, media has a strong influence on the conversation between cultural accommodation and women's rights and equality.³⁸ Solanki quickly addresses the fiction that people actually know the law and questions to what extent police and courts really enforce it.³⁹ Further, she briefly alludes to the interplay between procedure and substantive laws between the various political bodies.⁴⁰

Adjudication in Religious Family Laws sets out to apply the shared adjudication model to India's unique legal pluralism. It acknowledges the importance of cultural diversity, makes steps toward gender equality, and elucidates a path for positive change. The example of Mumbai may prove useful to the whole of India as well as to other legally pluralistic states. Solanki provides a strong theoretical framework in addition to her examinations of state-

37. SOLANKI, *supra* note 1. at 108, 216 (such as in the case of Solanki's explanations of eloping regulations).

38. *Id.* at 204 (touched upon briefly).

39. *Id.* at 78.

40. *Id.* at 337.

society interactions, legal flexibility, agency, and gender justice. Her compelling stories of the interplay between state and societal law among Hindus and Muslims situate and engage her audience. Most of all, Solanki develops an impressive arsenal of strategies, such as religious, state, and street based methods available for marginalized groups in India, while maintaining a firm respect for cultural history.