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INTRODUCTION

The development of international law is entwined with the colonial project. The colonial and postcolonial connection is evident in several international legal concepts.¹ Sovereignty,² international trade,³ and hu-

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man rights are areas where colonial and postcolonial laws are interlinked. The deep structure of international law is still colonial even where the ties between colonial and postcolonial laws are no longer visible. The colonial structure is a European sense of entitlement to international law as essentially European. This underlying structure reveals itself where Europe guards the boundaries of international law against the dissents of postcolonial States. I have come to this conclusion by making an in-depth case study of the lawmaking process of the U.N. Convention on the Rights of the Child ("CRC" or "Convention"). The CRC is the most ratified human rights treaty in the world. In fact, there are more parties to the CRC than Member States in the United Nations.


5. The argument of this Article builds on the scholarship of Third World approaches to international law (commonly abbreviated “TWAIL”), which often assert that international law is inherently colonial in both form and substance. See, e.g., Anghie, supra note 2, at 195. With this Article, I hope to add that, in addition to the more visible links between colonial and postcolonial international law, there is a link between European colonial sentiments and postcolonial European sentiments—a commitment to international law as fundamentally European.

6. The term “postcolonial States,” as used in this Article, refers to mostly non-Western States, many of which were former European colonies. In this Article, I do not refer to “postcolonial” as a school of theoretical thought as the term is used by Bhabha or Spivak, among others, in subaltern studies. See generally Homi K. Bhabha, The Location of Culture (2004); Gayatri Chakravorty Spivak, Can the Subaltern Speak?, in Marxism and the Interpretation of Culture (Cary Nelson & Lawrence Grossberg eds., 1988).


Every country is a party to this treaty except the United States of America and Somalia.

A detailed examination of States parties’ objections to other States parties’ reservations uncovers a colonial dynamic. The colonial legacy of international law is not simply a matter of inclusion or exclusion. Nor is it only a matter of neutrality or non-neutrality. Even though the CRC was drafted, adopted, and ratified with the possibility of the inclusion and involvement of almost every country in the world, the colonial structure is still present, not in the substantive legal outcome, but in the legislative process itself.

The CRC appears to be neutral: participation in the drafting process was almost universal, and dissent, in the form of parties’ reservations against specific provisions, was spread more or less evenly among regions. Despite all this, the colonial past is carried through in the stage of objections. International law reveals its colonial structure in the law-

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10. See CRC Ratifications, Reservations, and Objections, supra note 8. With 185 States parties, the Convention on the Elimination of All Forms of Discrimination against Women (“CEDAW”) is also a widely ratified human rights treaty and is similar in spirit to the CRC. See Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 513 [hereinafter CEDAW]; Office of the U.N. High Commissioner for Human Rights, Ratifications, Declarations, Reservations, Objections, and Notes to the Convention on the Elimination of All Forms of Discrimination Against Women, http://www2.ohchr.org/english/bodies/ratification/8.htm [hereinafter CEDAW Ratifications, Reservations, and Objections] (last visited Oct. 30, 2008). However, the CEDAW was adopted in 1979, before the last wave of decolonization and during the height of the Cold War; therefore, unlike the CRC, the CEDAW is neither a postcolonial nor a post-Cold War treaty under the strict meanings of these terms.

11. See CRC Ratifications, Reservations, and Objections, supra note 8. The reservations and objections at the signing and ratification of the CEDAW followed a similar pattern as the CRC. See CEDAW Ratifications, Reservations, and Objections, supra note 10.

12. Evidence of a persistent colonial dynamic is apparent in the geographic patterns of reservations and objections. Whereas reservations are quite evenly distributed among regions—Europe, twenty-six; Asia, nineteen, the Middle East, ten; Africa, ten; the Americas, seven; and the Caribbean, two—the objections to reservations are clearly lopsided: all twelve parties making objections are European, and of the twenty-three parties whose reservations received objections, only two are European. See CRC Ratifications, Reservations, and Objections, supra note 8.

13. See supra note 12 and accompanying text.
making process at the moment objections are made against reservations.

Theories based solely on exclusion and non-neutrality cannot explain the colonial structure of postcolonial and post-Cold War international law. Exclusion and non-neutrality are no longer as obvious as they were during formal colonialism. The CRC, for example, is a model of inclusion and neutrality, and the presence of a colonial structure is difficult to demonstrate through theories that focus on the substantive results of exclusion and non-neutrality. This Article adds a new argument to the postcolonial critique of international law: that international law is colonial within the legal method itself. Even when both the substance of the law and the procedural rules can be seen as neutral, a deep colonial structure remains.

14. See supra note 12 and accompanying text.
15. K.J. Keith mentions the principle of “sovereign equality” as an example of a “neutral” principle of international law that also finds support in the legal tradition of the postcolonial State. See K.J. Keith, Asian Attitudes to International Law, Austl. Y.B. Int’l L., 1, 4 (1967).
16. There is an abundant supply of publications and articles addressing the substance of the CRC. The United Nations Children’s Fund and Save the Children are major publishers in this area. However, what is generally lacking is a thorough legal analysis of the CRC and, particularly, a postcolonial analysis. For a critical analysis of child rights, see Maria Grahn-Farley, A Theory of Child Rights, 57 U. Miami L. Rev 867 (2003). Sonia Harris-Short has offered a postcolonial analysis of the use of the “cultural distinctiveness” claim in the reporting to the U.N. Committee, concluding that this claim was seldom a justification for the noncompliance of States parties that appeared before the Committee. Sonia Harris-Short, International Human Rights Law: Imperialist, Inept and Ineffective?: Cultural Relativism and the U.N. Convention on the Rights of the Child, 25 Hum. Rts. Q. 130, 163–64 (2003). Thoko Kaime has undertaken a cultural analysis of both African cultural practices and the cultural values that the CRC represents, contending that once the legitimacy of common values is established, the CRC can be used to challenge certain African cultural practices harmful to children, such as female genital mutilation. Thoko Kaime, The Convention on the Rights of the Child and the Cultural Legitimacy of Children’s Rights in Africa: Some Reflections, 5 Afr. Rts. L.J. 221, 233–34 (2005). Several scholars have examined the implementation of the CRC in developing countries, and there have been a few postcolonial analyses of specific provisions in the CRC. See, e.g., id. at 231–33 (analyzing Articles 6 and 3 of the CRC); Bart Rwezaura, Competing “Images” of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa, 12 Int’l J. L. Pol. & Fam. 253, 265–66 (1998) (highlighting legal developments in Ghana, Kenya, Tanzania, and Uganda towards implementing the CRC). Nonetheless, there has been no comprehensive postcolonial legal analysis of the legislative process of the CRC.
17. R.P. Anand describes this “belatedness” of the postcolonial State as follows:

[It is not surprising to find Asian-African countries protesting against some of the old treaties and several so-called ‘established principles of international
Part I of this Article provides an overview of the CRC, its guiding principles, and its unique status as both a postcolonial and post-Cold War treaty. Examining the reservations made by States parties upon signing and ratifying the CRC, Part II suggests that it is possible for international law not to be colonial. As dissent from the CRC’s values is evenly distributed across issues and across the world, the Convention can be considered neutral law. Part III analyzes the objections offered in response to the reservations and notes a significant trend: only European States made such objections and all but two of these objections were directed against the reservations of postcolonial States. This Article concludes from this case study that international law continues to link colonialism and postcolonialism, and that this connection is reflected in Europe’s investment in international law as a Western construct and in its continuing disregard for postcolonial challenges.

I. THE U.N. CONVENTION ON THE RIGHTS OF THE CHILD

A. The CRC and Its Guiding Principles

The CRC was adopted unanimously by the U.N. General Assembly on November 20, 1989 and entered into force in September 1990, pursuant to Article 49. The U.N. Committee on the Rights of the Child (“U.N. Committee”), the monitoring body of the CRC as provided in Article 43, consists of eighteen members elected by the States parties

find several treaties signed during the colonial period, when they had no choice . . . they challenge them and demand their modification. . . . The newly independent States also rebelled against some of the economic and political rights acquired by their former colonial masters . . . which they have felt and still feel are unreasonable and, although accepted by the present international legal order, inequitable.


18. The CEDAW, while similar to the CRC in spirit and universality, is not properly a “postcolonial” or post-Cold War human rights treaty because it was adopted in 1979. See supra note 10 and accompanying text.

19. See CRC Ratifications, Reservations, and Objections, supra note 8.

20. CRC, supra note 7.

21. Id. art. 49(1) (“The present Convention shall enter into force on the thirtieth day following the date of deposit with the Secretary-General of the United Nations of the twentieth instrument of ratification or accession.”).

22. Id. art. 43(1) (“For the purpose of examining the progress made by States Parties in achieving the realization of the obligations undertaken in the present Convention, there shall be established a Committee on the Rights of the Child . . . .”).
based on their expertise in child rights.\textsuperscript{24} The Convention covers every person under the age of eighteen.\textsuperscript{25} To avoid a controversial debate over abortion, the CRC is silent on when life, and therefore childhood, begin.\textsuperscript{26}

There are four guiding principles of the CRC.\textsuperscript{27} The first principle, articulated in Article 2, is the right not to be discriminated against.\textsuperscript{28} In addition to the traditional minority protections of race, ethnicity, religion, and class, the CRC includes “legal status” as a protected category.\textsuperscript{29} Thus, the Convention does not allow for distinctions between legal and illegal residents within a country.\textsuperscript{30} Providing that a State party shall not

\begin{itemize}
\item 23. As of October 30, 2008, the current members of the U.N. Committee are Alya Ahmed Bin Saif Al-Thani (Qatar); Agnes Akosua Aidoo, Vice-Chair (Ghana); Joyce Aluoch (Kenya); Luigi Citarella (Italy); Kamel Filali, Vice-Chair (Algeria); Maria Herczog (Hungary); Moushira Khattab (Egypt); Hatem Kotrane (Tunisia); Lothar Friedrich Krappmann, Rapporteur (Germany); Yanghee Lee, Chairperson (Republic of Korea); Rosa Maria Ortiz, Vice-Chair (Paraguay); David Brent Parfitt (Canada); Awich Pollar (Uganda); Dainius Puras (Lithuania); Kamal Siddiqui (Bangladesh); Lucy Smith (Norway); Nevena Vuckovic-Sahovic (Serbia); and Jean Zermatten, Vice-Chair (Switzerland. Office of the U.N. High Commissioner for Human Rights, Committee on the Rights of the Child: Members, http://www2.ohchr.org/english/bodies/crc/members.htm (last visited Oct. 30, 2008).
\item 24. See CRC, supra note 7, art. 43(2) (“The Committee shall consist of ten experts of high moral standing and recognized competence in the field covered by this Convention.”).
\item 25. See id. art. 1.
\item 28. CRC, supra note 7, art. 2.
\item 29. Id.
\item 30. Norway initiated the inclusion of nonlegal residents for protection under the CRC. See ECOSOC, Comm’n on Human Rights, Report of the Working Group to Consider the Question of a Convention on the Rights of a Child: Considerations, U.N. Doc. E/CN.4/WG.1/WP.10 (1981) [hereinafter ECOSOC, 1981 Report of the Working Group], as reprinted in Legislative History I, supra note 9, at 320 (indicating Norway’s proposal to the 1981 Working Group to have each State party apply the Convention “irrespective of the legality of their parents’ stay”). The United States, which is not a State party to the CRC, was nevertheless an active participant in the drafting of the CRC and initially insisted on excluding illegal immigrant children. See Legislative History I, supra note 9.
only “respect,” but also “ensure” the right to nondiscrimination. Article 2 secures a positive right. To “ensure” a right, a State party must take active steps against discrimination. For example, there is an argument for States parties to actively disseminate the Convention’s principles through affirmative action following the interpretation of the nondiscrimination provision of the International Covenant on Civil and Political Rights (“ICCPR”).

“The best interest of the child” constitutes the second guiding principle. Article 3 of the CRC states that a government shall in all matters concerning the child consider his or her best interest, an obligation that has been interpreted expansively in international child rights. In its official national budget, the Swedish government, for instance, provides for a child-impact analysis and lists the budget’s consequences for children.

The third guiding principle, delineated in Article 12 of the CRC, is the child’s right to be heard in all matters regarding the child. Through the right to be heard, the CRC establishes the child as a legal subject, a bearer rather than an object of rights.

Finally, set forth in Article 6 of the CRC, the child’s right to life is the fourth guiding principle. However, this right is not a negative right as

(indicating the U.S. proposal to the 1981 Working Group to have each State party apply the Convention “to all children lawfully in its territory”) (emphasis added).

31. CRC, supra note 7, art. 2.
32. See ECOSOC, Comm’n on Human Rights, General Comment 18, ¶ 10, U.N. Doc. HRI/GEN/1/Rev. 1 (1989), as reprinted in RACHEL HODGKIN & PETER NEWELL, IMPLEMENTATION HANDBOOK FOR THE CONVENTION ON THE RIGHTS OF THE CHILD 22 (4th ed. 2002) (“The principle of equality sometimes requires States Parties ‘to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the’ [ICCPR].”); U.N. Committee on the Rights of the Child, General Guidelines Regarding the Form and Content of Initial Reports to be Submitted by States Parties Under Article 44, Paragraph 1(a), of the Convention, ¶ 10, U.N. Doc. CRC/C/5 (Oct. 30, 1991) (“States parties are requested to describe the measures that have been taken or are foreseen, pursuant to article 42 of the Convention, to make the principles and provisions of the Convention widely known, by appropriate and active means, to adults and children alike.”).
33. CRC, supra note 7, art. 3.
34. The Swedish Initial Report to the U.N. Committee interprets the “best interest” provision to include children as a group as well, for example, when budgetary decisions are being made. See U.N. Committee on the Rights of the Child, Initial Reports of States Parties Due in 1992: Sweden, ¶¶ 50–52, U.N. Doc. CRC/C/3/Add.1 (Sept. 23, 1992).
35. See id. ¶ 14.
36. CRC, supra note 7, art. 12.
37. Id. art. 6.
in the ICCPR, which proscribes a party from taking a person’s life.\textsuperscript{38} The right to life in the CRC is positive, as the right to survival is one of the preconditions of the right to life, and it encompasses, \textit{inter alia}, the rights to education, healthcare, and an adequate living. Furthermore, the CRC prohibits subjecting the child to capital punishment or a life sentence without the possibility of parole.\textsuperscript{39} According to Article 4, a State party shall use the “maximum extent of available resources” towards implementing the CRC.\textsuperscript{40} If a country is poor, it is to seek assistance within the framework of international cooperation in order to fulfill its commitments under the Convention.\textsuperscript{41}

\textbf{B. The CRC as Both a Postcolonial and Post-Cold War Treaty}

The postcolonial critique that international law is inherently colonial and a representation of European values\textsuperscript{42} will be examined in this Section. One version of this critique focuses on the fact that a minority of States created the laws that bind the majority of today’s States.\textsuperscript{43} When the United Nations was founded in 1945, there were fifty-one Member States; today there are 192 Member States.\textsuperscript{44} Obviously, the majority of today’s States were not represented in 1648, the other founding moment in mainstream international law.\textsuperscript{45} This is not the case with the CRC,

\begin{itemize}
  \item \textsuperscript{38} See International Covenant on Civil and Political Rights art. 6(1), Dec. 16, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR].
  \item \textsuperscript{39} CRC, supra note 7, art. 37(a).
  \item \textsuperscript{40} Id. art. 4.
  \item \textsuperscript{41} For example, the comments of Brazil, Colombia, and Norway stress the importance of international solidarity between developed and developing countries. See ECOSOC, 1980 Report of the Working Group, supra note 26, ¶ 60, as reprinted in Legislative History I, supra note 9, at 351 (Brazil’s proposal invoking “the framework of international cooperation”); ECOSOC, Comm. on Human Rights, Colombia, Question of a Convention on the Rights of the Child, ¶ 10, U.N. Doc. E/CN.4/1324/Add.2 (Feb. 14, 1979); Legislative History I, supra note 9 at 350 (citing Norway’s proposal at the 1981 Working Group).
  \item \textsuperscript{42} See, e.g., Gathii, \textit{Eurocentricity}, supra note 1, at 185–86; Goonesekere, supra note 1; Kenneth B. Nunn, \textit{Law as a Eurocentric Enterprise}, 15 LAW & INEQ. 323 (1997).
  \item \textsuperscript{43} The notion that international law is universal is a relatively new idea that came about with the establishment of the United Nations. Before the creation of the United Nations, international law was the law of European and Christian nations. See R.P. Anand, \textit{Family of “Civilized” States and Japan: A Story of Humiliation, Assimilation, Defiance and Confrontation}, 5 J. Hist. Int’l L. 1, 20 (2003). Non-European nations had to “qualify” for international law by proving they were sufficiently “Western.” See id. at 22.
  \item \textsuperscript{44} See List of U.N. Member States, supra note 8.
  \item \textsuperscript{45} Mainstream international legal theorists recognize 1648 and 1945 as dates marking the origins of international law. Often, a distinction is drawn between the origin of
however. With 193 States parties, the CRC has a near-unanimous representation. Scholars like Anghie have connected the origin of international law to the colonial project. The last major wave of decolonization resulted in the independence of Zimbabwe (1980), Antigua and Barbuda (1981), Belize (1981), and Brunei (1984). In short, the CRC is a postcolonial treaty because the formal period of colonialism had, on the whole, come to an end by 1989, the vast majority of States parties having attained independence by the time of the CRC’s adoption.

The cultural values argument also criticizes international law as Eurocentric. Specifically, this argument asserts that the values of the International Bill of Rights are rooted in Western liberal ideology and that this body of law places a priority on civil and political rights over social,

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international law in 1648 and the origin of modern international law in 1945. See Angie, supra note 2, 182–90; Shaw, supra note 1, at 25, 30–31.

46. CRC Ratifications, Reservations, and Objections, supra note 8.

47. See, e.g., Angie, supra note 2, 182–90.


53. See CRC Ratifications, Reservations, and Objections, supra note 8 (indicating that the CRC was opened for signature on Nov. 20, 1989).


economic, and cultural rights. The U.N. Committee insists on a holistic view of the CRC and on the interdependency of all the rights in the Convention. This approach mediates colonial tensions by emphasizing the interconnectedness of different generations of human rights, including the right to one’s culture. Article 4 of the CRC acknowledges the economic disparities between the Global North and the Global South, requiring wealthy countries to provide resources to help poorer countries comply with the CRC.

A persistent point of contention during the Cold War was which set of rights should take primacy. Whereas the Marxist-Leninist Eastern Block argued that collective socio-economic and cultural rights are a precondition for the fulfillment of individual civil and political rights, the countries of the West maintained that the former are grounded in the latter. At the adoption of the Universal Declaration, for example, communist Yugoslavia’s U.N. representative articulated the Eastern Block’s position, expressing concerns that the Universal Declaration only focuses on the individual, not on the need for a social structure and community within which the individual could enjoy individual rights. Representatives of many African countries, which recognize collective rights in their regional human rights treaty, have also levied similar criticisms.

The CRC is a post-Cold War treaty. The U.N. General Assembly adopted the CRC just a few weeks after the fall of the Berlin Wall on November 9, 1989, and this historic event figured prominently in the

59. See CRC, supra note 7, art. 4 (“States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.”) (emphasis added).
62. See 183d Plenary Meeting, supra note 57.
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completion of the drafting of the CRC. The *travaux préparatoires*\(^{65}\) reveal that a virtual deadlock took place from the time Poland submitted its “draft resolution” in 1978\(^{66}\) all the way to 1988. The end of the Cold War had been anticipated for about a year before the CRC drafting process was completed. During this period, most of the disputed issues between the two Blocks were resolved. The most salient breakthrough was the agreement to adopt an interdependent view of civil and political rights, and social-economic and cultural rights.\(^{67}\) And, in brief—as will become clear when I analyze the reservations to the CRC in Part II—the schism between East and West so often reflected in reservations or abstentions is nowhere to be found.\(^{68}\)

II. DISSENT EXPRESSED IN RESERVATIONS

While it is possible to point to provisions in the CRC that are vulnerable to a postcolonial critique, there are ample examples in the drafting process of efforts to be as inclusive as possible towards the postcolonial States, for instance, through the Working Group to the Commission on Human Rights (“Working Group”).\(^{69}\) Compared to the Universal Declaration, the ICCPR, and the ICESCR, which were adopted when most contemporary postcolonial States were still under colonial rule, it is more difficult to make a clear argument that the values of the CRC exclude postcolonial States’ values. However, this is not to say that postcolonial States did not raise objections to certain CRC provisions. One key indicator of such dissent is States parties’ reservations made at the signing and ratification of the CRC.

The CRC has a two-step process for States to become parties to the Convention: Article 46 opens up the CRC “for signature by all States,” and Article 47 notes that the CRC “is subject to ratification.”\(^{70}\) Signing

\(^{65}\) See generally DETRICK, *supra* note 26.


\(^{67}\) See DETRICK *supra* note 26, at 27.

\(^{68}\) The split over the two covenants—the ICCPR and the ICESCR—is an example of how the Cold War divide was reflected in General Assembly voting: the Eastern Block abstained from voting for the ICCPR, and the Western nations abstained from voting for the ICESCR.

\(^{69}\) See DETRICK *supra* note 26, at 21–22 (“The ‘open-ended’ nature of the Working Group meant that any of the forty-three states represented on the [U.N. Commission on Human Rights] could participate. All other Member States of the United Nations could send ‘observers’ (with the right to take the floor), as could intergovernmental organizations.”).

\(^{70}\) CRC, *supra* note 7, arts. 46–47.
indicates the intention of a State to become a party to the treaty, and rati- 
fication indicates that a State has become a party to the treaty. A State 
party can express its dissent from a treaty provision by making declara-
tions and reservations in connection with the signing and/or ratification 
of the treaty.71 Regardless of whether state representatives refer to their 
unilateral statement as a “reservation” or as a “declaration,” treaty law 
provides that any unilateral statement functions as a reservation when the 
statement has an effect on how the State party would be bound by the 
treaty.72 And when a State makes a reservation against a treaty provision, 
the specific treaty provision binds neither the particular State that made 
the reservation, nor any other State in relation to this State.73 

However, a reservation does not undo the binding effect of the provision 
in relation to other States.74 In short, a reservation is a unilateral expres-
sion of a State party’s dissenting position regarding a particular provision 
in a treaty. States parties need not ask the organizational body for per-
mission or obtain an agreement with other States to make the reservation, 
extcept where specifically required to do so by a given treaty.75 The posi-
tion the International Court of Justice took in the Reservations case—that 
is, if the reservation is incompatible with the object and purpose of the 
treaty, the State making the reservation is not considered a party to the 

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71. The Vienna Convention on the Law of Treaties (“Vienna Convention”) defines 
“reservation” as “a unilateral statement, however phrased or named, made by a State, 
when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports 
to exclude or to modify the legal effect of certain provisions of the treaty in their appli-
cation to that State.” Vienna Convention on the Law of Treaties art. 2(d), May 23, 1969, 
1155 U.N.T.S. 331 [hereinafter Vienna Convention]. This provision interprets reserva-
tions as normative and as expressions of specific values, but it does not take a position on 
the general strategic value of reservations and objections within treaty law. For an exami-
nation of the doctrinal role of CRC reservations and the Vienna Convention, see 
Lawrence J. Leblanc, Reservations to the Convention on the Rights of the Child: A Ma-
that allowing reservations likely facilitated a greater number of States parties ratifying the 
CRC, but the reservations, many of which were of a general character, make it difficult to 
assess the CRC’s impact in specific countries. Id. at 380. Further, Leblanc finds that the 
objections made against reservations were, as a group, internally inconsistent; objections 
were directed to the reservations of some States, but not to others with the same reserva-
tion, and there were some general reservations to which no State objected. Id. Leblanc’s 
ultimate conclusion is that such anomalies are to be expected under current treaty law. 
See id. 
72. See Vienna Convention, supra note 71, art. 2(d). 
73. See id. art. 21(a). 
74. See id. art. 21(b)(2). 
75. See id. art. 19.
treaty—was not followed regarding the CRC. Here, each of the States parties objecting to reservations based on the understanding that they were incompatible with and against the object and the purpose of the CRC nonetheless noted that it still considered the reserving State to be a party to the Convention.

A. Reservations by Geographic Regions

Of the 193 States parties to the CRC, 119 made no reservations upon signing and ratifying the CRC. A plurality of the remaining seventy-four States that submitted reservations are European. According to region, the following are the total numbers of reservations: Europe, twenty-six; Asia, nineteen; the Middle East, ten; Africa, ten; the Americas, seven; and the Caribbean, two. This empirical evidence suggests that Europe, as a region, was most dissatisfied with the substance of the CRC, followed by Asia.

76. See Reservations to Convention on Prevention and Punishment of the Crime of Genocide, Advisory Opinion, 1951 I.C.J. 15, 24 (May 28, 1951) [hereinafter ICJ Advisory Opinion] (“It has . . . been argued that any State entitled to become a party to the Genocide Convention may do so while making any reservation it chooses by virtue of its sovereignty. The Court cannot share this view. It is obvious that so extreme an application of the idea of State sovereignty could lead to a complete disregard of the object and purpose of the Convention.”).

77. See CRC Ratifications, Reservations, and Objections, supra note 8.

78. See id.

79. See id.

80. See id. (Andorra, Austria, Belgium, Bosnia-Herzegovina, Croatia, Czech Republic, Denmark, France, Germany, the Holy See, Iceland, Ireland, Liechtenstein, Luxembourg, Malta, Monaco, the Netherlands, Norway, Poland, Serbia-Montenegro, Slovakia, Slovenia, Spain, Switzerland, the United Kingdom, and Yugoslavia).

81. See id. (Australia, Bangladesh, Brunei, China, the Cook Islands, India, Indonesia, Japan, Kiribati, Malaysia, Maldives, Myanmar (Burma), New Zealand, Pakistan, Qatar, Republic of Korea, Samoa, Singapore, and Thailand).

82. See id. (Afghanistan, Iran, Iraq, Jordan, Kuwait, Oman, Saudi Arabia, Syria, Turkey, and the United Arab Emirates).

83. See id. (Algeria, Botswana, Djibouti, Egypt, Mali, Mauritania, Mauritius, Morocco, Swaziland, and Tunisia).

84. See id. (Argentina, Canada, Colombia, Ecuador, Guatemala, Uruguay, and Venezuela). Note that the United States is not a party to the CRC and has therefore not made any reservations. See id.

85. See id. (Bahamas and Cuba).

86. The classification of reserving States into geographic regions is not statistically adjusted for how many States parties to the CRC are in each region. Consequently, such categorization should be regarded only as an indicator of regional patterns.
B. The Substance of the Reservations

Examining the reservations’ substance reveals that most are clustered around specific issues. There are eight areas into which the majority of reservations can be grouped: child soldiers; the definition of the child; freedom of religion; appeals and legal representation; children in the custody of the State; adoption; minority protection (identity); and general reservations.

1. Child Soldiers

Article 38 of the CRC establishes fifteen, instead of eighteen, as the minimum age for recruitment to armed forces and participation in direct hostilities. In a surprising turn during the drafting process, the United States, though ultimately not a State party to the CRC, and the Union of Soviet Socialist Republics (“U.S.S.R.”) both actively lobbied to promote this minimum age of fifteen. They argued that the Working Group did not have the mandate “to review existing standards in international law.” Although the U.S.S.R. dissolved prior to the signing and ratification of the CRC, Russia succeeded the U.S.S.R. as a State party to the CRC. Many other States, however, championed a minimum age of eighteen, and the tensions over this issue during the drafting of the CRC ran so high as to threaten consensus adoption by the General Assembly.

Finally, a compromise was reached: stipulate the age of fifteen in the CRC, but offer an Optional Protocol setting eighteen as the age for both

87. The following countries made reservations in connection with Article 38 of the CRC: Andorra, Argentina, Austria, Colombia, Ecuador, Germany, the Netherlands, Poland, Serbia-Montenegro, Spain, Switzerland, and Uruguay. CRC Ratifications, Reservations, and Objections, supra note 8.

88. CRC, supra note 7, art. 38(2) (“States Parties shall take all feasible measures to ensure that persons who have not attained the age of fifteen years do not take a direct part in hostilities.”); id. art. 38(3) (“States Parties shall refrain from recruiting any person who has not attained the age of fifteen years into their armed forces.”).


90. Id. ¶ 604, as reprinted in DETRICK, supra note 26, at 514.

91. Russia became a State party to the CRC in August 1990. CRC Ratifications, Reservations, and Objections, supra note 8.


recruitment to armed forces and direct participation in hostilities.94 Reservations made in response to Article 38 grew in number as States unilaterally bound themselves not to militarily recruit children under the age of eighteen, instead of those under fifteen.95 The other reservations in connection with Article 38 were made in the form of declarations where-in the State party notes its regret and disappointment with the inclusion of the age of fifteen as the minimum age.96 In total, twelve States made reservations with respect to Article 38, all favoring the age of eighteen for military recruitment.97 Eight of the countries are from Europe, and four represent the Americas.98

2. The Definition of the Child99

As previously noted, the CRC drafters deliberately abstained100 from setting forth in Article 1 when life begins.101 Notwithstanding this obvious attempt to avoid embroilment in the debate on abortion, several reservations regarding Article 1 and its definition of the child were made

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95. See CRC Ratifications, Reservations, and Objections, supra note 8.
96. Argentina’s declaration, for example, reads as follows:

Concerning [A]rticle 38 of the Convention, the Argentine Republic declares that it would have liked the Convention categorically to prohibit the use of children in armed conflicts. Such a prohibition exists in its domestic law which, by virtue of [A]rticle 41 of the Convention, it shall continue to apply in this regard.

Id.
97. See id.
98. See supra note 88 and accompanying text.
99. The following countries made reservations regarding Article 1 of the CRC: Argentina, Botswana, Cuba, Guatemala, the Holy See, Indonesia, Liechtenstein, Malaysia, and the United Kingdom. See CRC Ratifications, Reservations, and Objections, supra note 8.
100. Morocco suggested a compromise between the States parties that see life as beginning at conception and those that see life as beginning at birth, delineating childhood with reference to its termination—the eighteenth birthday (a suggestion the Working Group adopted). See ECOSOC, 1980 Report of the Working Group, supra note 26, ¶¶ 29–30, 32–36 (discussing the beginning of life and the termination of childhood).
101. CRC, supra note 7, art. 1 (“For the purposes of the present Convention, a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier.”).
with domestic abortion policies in mind. The reservations are of three types. Regarding the first, the State party makes an affirmative assertion that the CRC does not cover the unborn child, only the live-born child. The United Kingdom and Cuba made this kind of reservation. The second type involves an overt claim that life begins at conception, a position taken by Argentina, Guatemala, and the Holy See. The representatives of these countries argue that the CRC therefore covers the rights of the unborn child. The third type of reservation, made by Botswana and Indonesia, claims that Article 1 conflicts with national law, but does not further elaborate.

3. Freedom of Religion

The cultural values critique charges that international law, especially as regards human rights, favors Christian values over those of other religions, especially Islam. As the freedom of religion includes the right to

102. See CRC Ratifications, Reservations, and Objections, supra note 8 (Argentina, Botswana, Cuba, Guatemala, the Holy See, Indonesia, Liechtenstein, Malaysia, and the United Kingdom).
103. Liechtenstein’s reservation, which asserts that the age of majority is twenty, is outside of the traditional abortion debate. See id.
104. See id. (“The United Kingdom interprets the Convention as applicable only following a live birth.”).
105. See id.
106. For example, Guatemala made the following reservation regarding the beginning of life:

   With reference to [A]rticle 1 of the Convention, and with the aim of giving legal definition to its signing of the Convention, the Government of Guatemala declares that [A]rticle 3 of its Political Constitution establishes that: ‘[t]he State guarantees and protects human life from the time of its conception, as well as the integrity and security of the individual.’

Id.
107. See id.
108. Reservations to Article 14 of the CRC were made by Algeria, Bangladesh, Djibouti, Indonesia, Iran, Iraq, Jordan, Malaysia, Morocco, the Netherlands, Oman, Poland, Qatar, Singapore, Syria, and the United Arab Emirates. See id.
109. See, e.g., ANGHE, supra note 2, at 13–31 (discussing Francisco de Vitoria and the colonial origins of international law); MARTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870–1960, at 131 (2002) (discussing the “Christian” underpinnings of the “universalism” of early international law theorists such as Grotius and Vattel); SHAW, supra note 1, at 22–23 (describing the development of international law in the middle of the seventeenth century as a Christian and European institution).
adopt a new religion,110 it may clash with Islamic views. Since the drafting of the Universal Declaration in 1948, a number of Islamic States have not dissented from the right to belong to any religion, or the right not to be discriminated against because of one’s religious beliefs or membership in a minority religion.111 Rather, several of these States have objected to allowing people to convert to another religion,112 contending that because Islam is the “right” religion it would be irresponsible for a government to permit people to abandon it.113

Another argument against the provision granting the right to change religions is that the colonial project was partly realized through Christian missionaries persuading or compelling people to convert.114 Indeed, the role of missionaries in the colonial project, in part, explains why the

110. ICCPR, supra note 38, art. 18 (“Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or to adopt a religion or belief of his choice, and freedom, either individually or in community with others and in public or private, to manifest his religion or belief in worship, observance, practice and teaching.”) (emphasis added).
111. See, e.g., 183d Plenary Meeting, supra note 57. The Author prefers to use the term “Islamic States” because it is commonly employed in scholarship. It should be noted, though, that these States’ commitments to Islam and Shariah law vary in key respects. See, e.g., Tad Stahake & Robert C. Blitt, The Religion-State Relationship and the Right to Freedom of Religion or Belief: A Comparative Textual Analysis of the Constitutions of Predominantly Muslim States, 36 GEO. J. INT’L L. 947, 951 (2005) (assessing the constitutions of “predominantly Muslim states” and finding a “broad assortment of constitutional views—ranging from Islamic republics with Islam as the official state religion to secular states with strict separation of religion and state”).
113. See, e.g., 183d Plenary Meeting, supra note 57 (setting forth the Egyptian representative’s comment exemplifying the positions of certain Islamic States).
freedom of religion provisions remain contested. 115 This argument was made during the drafting of the CRC, 116 and, consequently, the CRC uses modified language compared to the ICCPR. For example, the CRC does not explicitly use the word “adopt” relative to religion. 117

Many States made reservations regarding the freedom of religion provisions, which can be grouped as follows: 118 Algeria, Djibouti (withdrawn reservation), Iran, Iraq, Jordan, Morocco, 119 Oman, Qatar (withdrawn reservation), Syria, and the United Arab Emirates all point to Shariah law. 120 Bangladesh, Poland, 121 and Singapore reference maintaining parental authority over a child’s religious affiliation. 122 Indonesia and Malaysia exhibit concern with Article 14 and how it bears upon their domestic legislation. 123 And the Netherlands expressly construes Article 14 as including a child’s right to change his or her religion and notes that this is in accordance with Article 18 of the ICCPR. 124

115. Cf. 183d Plenary Meeting, supra note 57 (the comment of the Egyptian representative being an example of early controversy surrounding the freedom of religion provisions in human rights instruments).
116. See Bangladesh Statement I, supra note 114.
117. Compare CRC, supra note 7, art. 14(1) (providing that “States Parties shall respect the right of the child to freedom of thought, conscience and religion”), with ICCPR, supra note 38, art. 18 (providing that the right to freedom of religion “shall include freedom to have or to adopt a religion or belief of his choice”).
118. See CRC Ratifications, Reservations, and Objections, supra note 8 (Algeria, Bangladesh, Djibouti, Indonesia, Iran, Iraq, Jordan, Malaysia, Morocco, the Netherlands, Oman, Poland, Qatar, Singapore, Syria, and the United Arab Emirates).
119. Morocco’s reservation is typical: “[t]he Kingdom of Morocco, whose Constitution guarantees to all the freedom to pursue his religious affairs, makes a reservation to the provisions of [A]rticle 14, which accords children freedom of religion, in view of the fact that Islam is the State religion.” Id.
120. See id.
121. See, e.g., id. (“The rights . . . shall be exercised with respect for parental authority, in accordance with Polish customs and traditions regarding the place of the child within and outside the family.”).
122. See CRC Ratifications, Reservations, and Objections, supra note 8.
123. See id.
124. Id. (“It is the understanding of the Government of the Kingdom of the Netherlands that [A]rticle 14 of the Convention is in accordance with the provisions of [A]rticle 18 of the International Covenant on Civil and Political Rights of 19 December 1966 and that this [A]rticle shall include the freedom of a child to have or adopt a religion or belief of his or her choice as soon as the child is capable of making such choice in view of his or her age or maturity.”).
4. The Rights to Legal Representation and to Appeal

The rights to a fair trial and to counsel in a criminal trial are cornerstones of civil and political rights. The CRC extends these rights to the child within the juvenile justice system. The two provisions in Article 40 that provoked the most reservations are the child’s right to “legal or other appropriate assistance in . . . his or her defense,” and the right to appeal a decision when it is “considered to have infringed the penal law.” Differences among the reservations made by States parties are minor. Germany and Switzerland made reservations to both the right to legal representation in Article 40(2)(v) and the right to appeal in Article 40(2)(ii). Belgium, Denmark, France, Korea, and Monaco made reservations against the latter provision.

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125. Belgium, Denmark, France, Germany, Korea, Monaco, and Switzerland made reservations to the provisions regarding the child’s rights to legal representation and to appeal. See id.

126. CRC, supra note 7, art. 40 (“States Parties recognize the right of every child alleged as, accused of, or recognized as having infringed the penal law to be treated in a manner consistent with the promotion of the child’s sense of dignity and worth, which reinforces the child’s respect for the human rights and fundamental freedoms of others and which takes into account the child’s age and the desirability of promoting the child’s reintegration and the child’s assuming a constructive role in society.”).

127. A related provision protects the child’s right “[t]o be informed promptly and directly of the charges against him or her, and, if appropriate, through his or her parents or legal guardians, and to have legal or other appropriate assistance in the preparation and presentation of his or her defense.” Id. art. 40(2)(b)(ii).

128. The child’s right to appeal a criminal conviction is protected: “[i]f considered to have infringed the penal law, [a child is entitled] to have this decision and any measures imposed in consequence thereof reviewed by a higher competent, independent and impartial authority or judicial body according to law.” Id. art. 40(2)(b)(v).

129. Regarding the right to counsel, Switzerland’s reservation is typical: “the Swiss penal procedure applicable to children, which does not guarantee either the unconditional right to assistance or separation, where personnel or organization is concerned, between the examining authority and the sentencing authority, is unaffected.” See CRC Ratifications, Reservations, and Objections, supra note 8. Regarding the right to appeal, Monaco’s reservation is typical:

The Principality of Monaco interprets Article 40, paragraph 2(b)(v) as stating a general principle which has a number of statutory exceptions. Such, for example, is the case with respect to certain criminal offences. In any event, in all matters the Judicial Review Court rules definitively on appeals against all decisions of last resort.

Id.

130. Id.

131. Id.
5. The Child in the Custody of the State

The CRC bans giving children the death penalty or life imprisonment without possibility of parole. Malaysia and Singapore made reservations against the provision that bans corporal punishment, which falls under inhumane or degrading treatment or punishment. However, the provision in Article 37 responsible for the most reservations is the demand that juveniles in the custody of the State be separated from adults. Australia, Canada, the Cook Islands, Iceland, Japan, and New Zealand objected to this obligation. The justification commonly cited for such reservations is a lack of resources needed to create and maintain separate facilities for adults and children. Australia’s reservation invokes the country’s geographic and demographic constraints.

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132. Australia, Canada, the Cook Islands, Iceland, Japan, Malaysia, the Netherlands, New Zealand, Singapore, Switzerland, and the United Kingdom made reservations to the provision on the punishment of children. See id.

133. CRC, supra note 7, art. 37(a) (“No child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment. Neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age . . . .”).

134. Singapore’s reservation to these provisions reads as follows: “[t]he Republic of Singapore considers that [A]rticles 19 and 37 of the Convention do not prohibit the judicious application of corporal punishment in the best interest of the child.” CRC Ratifications, Reservations, and Objections, supra note 8.

135. CRC, supra note 7, art. 37(c) (“In particular, every child deprived of liberty shall be separated from adults unless it is considered in the child’s best interest not to do so and shall have the right to maintain contact with his or her family through correspondence and visits, save in exceptional circumstances.”).

136. CRC Ratifications, Reservations, and Objections, supra note 8.

137. New Zealand’s reservation, for example, provides:

The Government of New Zealand reserves the right not to apply [A]rticle 37(c) in circumstances where the shortage of suitable facilities makes the mixing of juveniles and adults unavoidable; and further reserves the right not to apply [A]rticle 37(c) where the interests of other juveniles in an establishment require the removal of a particular juvenile offender or where mixing is considered to be of benefit to the persons concerned.

Id.

138. Id. (“Australia accepts the general principles of [A]rticle 37. In relation to the second sentence of paragraph (c), the obligation to separate children from adults in prison is accepted only to the extent that such imprisonment is considered by the responsible authorities to be feasible and consistent with the obligation that children be able to maintain contact with their families, having regard to the geography and demography of Australia. Australia, therefore, ratifies the Convention to the extent that it is unable to comply with the obligation imposed by [A]rticle 37(c).”).
6. Adoption

Located in Article 21, the CRC’s adoption provision was added on the initiative of Barbados and Germany. The reservations against this provision exhibit two main strands, one concerning internal secular matters and the other involving Shariah law.

Argentina, Bangladesh, Canada, Indonesia, the Republic of Korea, and Venezuela made reservations against Article 21 that are secular in nature. Argentina stresses the need “to prevent trafficking in and the sale of children,” for example, and Canada references practices among its aboriginal peoples. Bangladesh simply notes that “Article 21 would apply subject to the existing laws and practices in Bangladesh.”

139. The States parties that made reservations regarding adoption are Argentina, Bangladesh, Brunei, Canada, Egypt, Indonesia, Jordan, Kuwait, Maldives, Oman, Republic of Korea, Spain, Syria, the United Arab Emirates, and Venezuela. Id.
140. CRC, supra note 7, art. 21 (“States Parties that recognize and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration.”).
143. See CRC Ratifications, Reservations, and Objections, supra note 8.
144. Id. (“The Argentine Republic enters a reservation to subparagraphs (b), (c), (d) and (e) of [A]rticle 21 of the Convention on the Rights of the Child and declares that those subparagraphs shall not apply in areas within its jurisdiction because, in its view, before they can be applied, a strict mechanism must exist for the legal protection of children in matters of inter-country adoption, in order to prevent trafficking in and the sale of children.”).
145. Id.
Regarding the second type of reservation, several Islamic States outlaw adoption because it is viewed as inconsistent with Shariah law. For example, Kuwait’s reservation seems to equate adoption with the abandonment of Islam. Instead of formal adoption, many Islamic States practice kafalah, which does not obscure the original blood relations of the child, but is a permanent change of guardianship.

7. Minority Rights: Identity and Culture

The identity and culture reservations cover both the right not to be discriminated against, as well as the right to belong to and participate in minority cultures. The United States originally opposed the inclusion of illegal immigrants in any elements of the CRC. However, the Unit-

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147. See CRC Ratifications, Reservations, and Objections, supra note 8.
148. See id. (“The State of Kuwait, as it adheres to the provisions of the Islamic Shariah as the main source of legislation, strictly bans abandoning the Islamic religion and does not therefore approve adoption.”).
149. Article 20 of the CRC regulating the situation concerning children deprived of their families directly addresses kafalah as an option if the child is deprived of his or her family. See CRC, supra note 7, art. 20. The kafalah system is well-described by Syria in an official note sent to the Secretary General regarding Germany’s objection to Syria’s reservation:

The laws in effect in the Syrian Arab Republic do not recognize the system of adoption, although they do require that protection and assistance should be provided to those for whatever reason permanently or temporarily deprived of their family environment and that alternative care should be assured them through foster placement and kafalah, in care centers and special institutions and, without assimilation to their blood lineage (nasab), by foster families, in accordance with the legislation in force based on the principles of the Islamic Shariah.

CRC Ratifications, Reservations, and Objections, supra note 8.
150. The Bahamas, Belgium, New Zealand, and the United Kingdom made reservations to the general applicability or coverage of the CRC, and limited the coverage to legal residents in their reservations; France and Oman made a reservation to the minority rights in article 30; Venezuela’s reservation links Article 30 with Article 2. See CRC Ratifications, Reservations, and Objections, supra note 8.
151. Articles 2 and 30 of the CRC both establish the right to practice a minority culture. See CRC, supra note 7, arts. 2, 30.
152. The drafting process shows a split between countries that wanted to include every child and the countries that only wanted to include legal residents. Consider, for example, the comments of Norway and the United States. Norway’s comment during the drafting process was that the CRC should cover all children “irrespective of the legality of their parents’ stay.” See Legislative History I, supra note 30, at 320. The comment the United States made during the drafting process reads as follows: “[e]ach State Party to the present Convention shall respect and extend all the rights set forth in this Convention to all children lawfully in its territory . . . .” U.N. Doc. E/CN.4/1981/WP.1/WP.7 (1981), as reprinted in Legislative History I, supra note 30, at 320.
ed States withdrew its suggestion to distinguish between legal and illegal residents after a general debate in the Working Group. The CRC thus does not differentiate between the two. Its goal is to cover all children, regardless of their legal status, in order to eliminate gaps in protection.

Nevertheless, the Bahamas, Belgium, New Zealand, and the United Kingdom made reservations that seek to preserve the right to make a distinction between legal and illegal immigrants, especially with regard to accessing the public benefits of the welfare state. France and Oman made reservations against connecting the right to exercise one’s minority culture, as articulated in Article 30 of the CRC, with the anti-discrimination provision in Article 2, whereas Venezuela made a reservation linking Article 30 with Article 2.

153. See CRC, supra note 7, art. 2.
154. See id.
155. New Zealand’s reservation with respect to legal status is representative:

Nothing in this Convention shall affect the right of the Government of New Zealand to continue to distinguish as it considers appropriate in its law and practice between persons according to the nature of their authority to be in New Zealand including but not limited to their entitlement to benefits and other protections described in the Convention, and the Government of New Zealand reserves the right to interpret and apply the Convention accordingly.

156. France’s reservation suggests a contradiction between Article 2, grounding the right not to be discriminated against, and Article 30, establishing the right to exercise one’s cultural rights: “[t]he Government of the Republic declares that, in the light of Article 2 of the Constitution of the French Republic, Article 30 is not applicable so far as the Republic is concerned.” Id.
157. Id. (“The Sultanate [of Oman] does not consider itself to be bound by those provisions of Article 30 that allow a child belonging to a religious minority to profess his or her own religion.”).
158. CRC, supra note 7, art. 30 (“In those States in which ethnic, religious or linguistic minorities or persons of indigenous origin exist, a child belonging to such a minority or who is indigenous shall not be denied the right, in community with other members of his or her group, to enjoy his or her own culture, to profess and practice his or her own religion, or to use his or her own language.”).
159. CRC Ratifications, Reservations, and Objections, supra note 8.
8. General Reservations

The many general reservations constitute one of the most controversial consequences of the near-universal ratification of the CRC. Their paramount concern is that the CRC should be subject to religious and/or constitutional constraints. The States parties whose reservations concern religious and moral constraints are the following: Djibouti, which cites religion and tradition; Afghanistan, Brunei, Iran, Kuwait, Mauritania, Qatar, Saudi Arabia, and Syria, all of which cite Shariah law; and the Holy See, which cites Catholic doctrine. The Cook Islands, Indonesia, Singapore, and Tunisia give secular justifications for their general reservations, most commonly invoking their national constitutions.

160. Afghanistan, Brunei, the Cook Islands, Djibouti, the Holy See, Indonesia, Iran, Ireland, Kuwait, Mauritania, Qatar, Saudi Arabia, Singapore, Switzerland, Syria, and Tunisia made general reservations. See id. The reservations of the Cook Islands and Singapore reference their constitutions, whereas the reservation of the Holy See references to the Catholic religion and morals. Id.

161. The United States and Somalia are the only nonparties to the CRC. See id.

162. This approach—of broad-reaching general reservations—echoes certain reservations to the CEDAW. See Madhavi Sunder, Piercing the Veil, 112 Yale L.J. 1399, 1426 (2003).

163. CRC Ratifications, Reservations, and Objections, supra note 8 (“In signing this important Convention, the Islamic Republic of Mauritania is making reservations to articles or provisions which may be contrary to the beliefs and values of Islam, the religion of the Mauritania People and State.”).

164. Id. (“[The Holy See declares] that the application of the Convention be compatible in practice with the particular nature of the Vatican City State and of the sources of its objective law (art. 1, Law of 7 June 1929, n.11) and, in consideration of its limited extent, with its legislation in the matters of citizenship, access and residence.”).

165. Id.

166. See id.

167. Singapore’s reservation, for instance, reads:

The Constitution and the laws of the Republic of Singapore provide adequate protection and fundamental rights and liberties in the best interests of the child. The accession to the Convention by the Republic of Singapore does not imply the acceptance of obligations going beyond the limits prescribed by the Constitution of the Republic of Singapore nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution.

Id.
C. Summary of the Cultural Values Critique

The reservations States parties submitted do not reveal an overarching disapproval of the CRC or its goals. However, even within the clusters of reservations, States parties were motivated by different concerns covering a wide variety of reasons. Notably, Western countries made reservations to provisions embodying core civil and political rights, including the rights to a fair trial, to appeal, to legal representation, to culture, and to nondiscrimination. The reservations of Islamic States center around the freedom of religion, referencing a disjuncture between Shariah law and the CRC’s provisions regarding the freedom of conscience and adoption. Another significant religious divide is between Catholic countries, which insist that life begins at conception, and States parties that fix the legal entitlement to human rights at birth.

In sum, the apparent disagreements can be traced to competing cultural values, but these disagreements are quite evenly spread among States parties and across the CRC. Some points of contention, such as the freedom of religion and certain aspects of the issue of adoption, may partly originate from a colonial context, but do not exclusively have colonialism as their origin and reason.

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168. There is a distinction between claiming that the CRC process does not represent a general bias against specific cultures and arguing that the CRC process does not indicate any biases at all. My argument is not that the process of drafting, signing, and ratifying the CRC was without bias, but, rather, that the biases evident in the process were not limited to a single region or culture. In fact, the biases evident in the process were directed at, or apparent in, the actions of representatives of many regions and cultures. Bonny Ibhawoh has written about the danger of taking a static view of culture, which would undercut the cultural legitimacy of human rights. See Bonny Ibhawoh, *Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State*, HUM. RTS. Q. 838, 841–42 (2000).

169. For example, in the reservations to the CRC’s provision on adoption, some States parties made religiously motivated reservations, and others made reservations with reference to internal administration of the matter. See supra notes 139–49 and accompanying text.

170. See CRC Ratifications, Reservations, and Objections, supra note 8.

171. See id.

172. See id.

III. Europe’s Reaction to Postcolonial Dissent

The postcolonial critique is not as easily applied to the CRC as to human rights instruments adopted before the final stages of colonialism. It is daunting to levy a postcolonial critique against the CRC, given its almost universal ratification and the inclusion of postcolonial States in the drafting of the Convention. While the remains of a colonial legacy may be found in both the context of the CRC and parties’ reservations, it would be a struggle to argue that postcolonial States disapproved of the very treaty that they ratified, especially when the reservations are relatively balanced geographically.174 This Article now proceeds to analyze the objections made against reservations, where the deep colonial structure of international law becomes strikingly clear.

If a State party does not want to be bound by or indeed does not agree with a reservation made by another State party, it may communicate an objection to the reservation. Objections to reservations are regulated by Article 51 of the CRC and Article 19(c) of the Vienna Convention, both of which provide that a State party may object to a reservation that is “incompatible with the object and purpose” of the Convention.175 The Vienna Convention also states, “A reservation incompatible with the object and purpose of the present Convention shall not be permitted.”176 However, in contrast to the parties that made objections in connection with the Genocide Convention, each State objecting in connection with the CRC insisted on the reserving State still being bound by the Convention, even when the reservation in question was perceived as being incompatible with the object and purpose of the treaty itself.177

Unlike the more fragmented patterns apparent in the reservations, a unified theme emerges after analysis of the objections to reservations. All twelve States parties objecting to reservations made at the signing and ratification of the CRC are European: Austria, Belgium, Denmark, Finland, Germany, Ireland, Italy, the Netherlands, Norway, Portugal, Slovakia, and Sweden.178 Twenty-three States parties’ reservations received objections, and of these countries, only two are European.179 Mul-

174. See supra notes 78–86 and accompanying text.
175. Vienna Convention, supra note 71, art. 19(c).
176. Id.
177. Compare CRC Ratifications, Reservations, and Objections, supra note 8, with ICJ Advisory Opinion, supra note 76, at 24.
178. See CRC Ratifications, Reservations, and Objections, supra note 8.
179. The remaining States parties whose reservations received objections are Bangladesh, Botswana, Brunei, Djibouti, Indonesia, Iran, Jordan, Kiribati, Kuwait, Malaysia, Myanmar (Burma), Oman, Pakistan, Qatar, Saudi Arabia, Singapore, Syria, Thailand, Tunisia, Turkey, and the United Arab Emirates. See id.
tiple States parties can object to the same reservation, and each State party can deliver multiple objections; there were a total of eighty-nine objections.\textsuperscript{180} Again, only two objections are directed towards reservations of European countries; the Netherlands directed objections to the reservations of Andorra and Liechtenstein. The remaining eighty-seven are against the reservations of non-Western countries.\textsuperscript{181}

\textbf{A. Objections to Reservations}

In the legislative process, the objection phase is the first occasion where the States parties relate directly to each other rather than to the document. That is, before the objection phase, all discussions and negotiations are focused on the treaty itself, either through drafting or through dissent to the material outcome of the drafting process in the form of reservations. By the time that States parties make objections, the treaty text is complete.

Regarding the CRC, the general reservations prompted the majority of objections. With the exception of the Holy See, non-European countries made the general reservations, all of which are either normative (i.e., based on religious and/or moral premises) or legalistic (i.e., grounded in the supremacy of national legislation relative to the CRC).\textsuperscript{182} With the exception of Afghanistan and the Holy See, States parties that made general reservations in reference to religion met with objections.\textsuperscript{183} Afghanistan made a general reservation upon signing the CRC, but its representatives did not follow up with a specific reservation at the moment of ratification.\textsuperscript{184} Of the States parties whose general reservations invoke national legislation, Indonesia, Singapore, and Tunisia received objections, while the Cook Islands did not receive any.\textsuperscript{185}

The reservation of the Holy See, to which no State party objected, reads: “[t]he Holy See, in acceding to this Convention, does not intend to

\begin{footnotesize}
180. See id.
181. See id.
182. Again, the reservations of Afghanistan, Brunei, Djibouti, the Holy See, Iran, Kuwait, Mauritania, Qatar, Saudi Arabia, and Syria refer to religious and/or moral constraints, whereas the reservations of the Cook Islands, Indonesia, Singapore, and Tunisia refer to the limiting effect of national legislation. See id.
183. Madhavi Sunder describes the role of religion relative to international law thus: “[s]imply put, religion is the ‘other’ of international law.” Sunder, supra note 162, at 1402. Sunder argues that international law treats religion as something irrational and primitive and, further, that the view of religion as a private matter obscures many human rights violations against women that take place in the name of religion. See id. at 1403–04.
184. See CRC Ratifications, Reservations, and Objections, supra note 8.
185. See id.
\end{footnotesize}
prescind in any way from its specific mission which is of a religious and moral character.”186 Compare this reservation made by the Holy See with the reservations of Iran and Indonesia, which prompted objections. Iran’s reservation states: “[t]he Government of the Islamic Republic of Iran reserves the right not to apply any provisions or articles of the Convention that are incompatible with Islamic Laws and the international legislation in effect.”187 And Indonesia’s reservation notes: “[t]he ratification of the [CRC] by the Republic of Indonesia does not imply the acceptance of obligations going beyond the Constitutional limits nor the acceptance of any obligation to introduce any right beyond those prescribed under the Constitution.”188 Austria’s objection to the reservations of Brunei, Kiribati, Malaysia, and Saudi Arabia is framed as follows: “Austria could not consider the reservation[s] . . . as compatible with the provisions essential for the implementation of the object and purpose of the [CRC].”189

It is understandable that, on legal and child rights grounds, so many countries objected to the general reservations, which could sharply limit the rights of children in these reserving countries. It is puzzling, however, that the general reservations made by the non-Western States were the only reservations that prompted reservations from European States parties. The reservations against the antidiscrimination requirements in Article 2 of the CRC and the holding of nonsovereign territories are just as sweeping as the other general reservations. They withhold human rights protections from large populations of children, but, strangely, they passed without objections.

B. The Reservations Against the Universal Applicability of the CRC

The goal of the CRC was to secure universal coverage of children’s rights through two steps: achieving universal ratification, and certifying that every child within each jurisdiction was covered by the Convention. As noted previously, full coverage within the jurisdictions of States parties is established by Article 2 of the CRC, which does not distinguish between legal and illegal residents.190 However, the Bahamas, Belgium,

186. Id.
187. Id.
188. Id.
189. Id.
190. See CRC, supra note 7, art. 2 (“States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child’s or his or her parent’s or legal guardian’s race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status.”) (emphases added).
New Zealand, and the United Kingdom made reservations to the general
applicability of the CRC and limited its coverage to legal residents.\textsuperscript{191}
Despite the fact that these reservations compromise the core intent and
purpose of the CRC, there were no objections to these reservations.

\textbf{C. The Invisibility of Colonialism During the Ratification of the CRC}

The legal status of children within the remaining nonsovereign territo-
ries, most of which are formerly colonial islands, was never an issue un-
der public discussion,\textsuperscript{192} from the drafting and adoption process all the
way through to ratification. The status of these children vis-à-vis the
CRC was communicated postratification in the form of an exchange of
notes between States parties.\textsuperscript{193} With the exception of arguments between
the United Kingdom and Argentina concerning which country held
rightful dominion over the Falkland Islands, the legitimacy of these hold-
ings was never questioned.\textsuperscript{194}

Argentina, China, Denmark, the Netherlands, and the United Kingdom
communicated their positions regarding the applicability of the CRC in
territories outside national boundaries under their control.\textsuperscript{195} At no point
during the signing, ratification, waging of objections, or exchanging of
notes was the legitimacy of external control over these territories ques-
tioned.

\textbf{D. Summary of Europe’s Reactions to Postcolonial Dissent}

International law’s origin in the colonial encounter is significant and
affects even postcolonial legislation such as the CRC. The very concept
of sovereignty serves as an example. Much was made of the reference to
Islamic law in the general reservations. Judge Sir M. Zafrulla Khan of
the International Court of Justice explains that, for those who follow Is-
lamic law, it is impossible to place any law higher than the law of Allah:
“[i]n Islam the concept of the Sovereign is entirely different (from in Eu-

\textsuperscript{191} See supra note 155 and accompanying text.
\textsuperscript{192} These nonsovereign territories include Anguilla, Aruba, Bermuda, the British
Virgin Islands, the Cayman Islands, the Ducie and Oeno Islands, the Falkland Islands
(Malvinas), the Fore Island, Greenland, Henderson, Hong Kong, the Isle of Man, Macao,
Montserrat, the Netherlands Antilles, Pitcairn, St. Helena, the St. Helena Dependencies,
South Georgia and the South Sandwich Islands, the Turks and Caicos Islands, and Tokelau.
See CRC Ratifications, Reservations, and Objections, supra note 8.
\textsuperscript{193} See id.
\textsuperscript{194} See id.
\textsuperscript{195} See id.
rope) [sic]. Absolute sovereignty pertains to Allah alone.\textsuperscript{196} It is this aspect of the general reservations that gave rise to Europe’s uniform response as manifested in its objections.\textsuperscript{197}

However, in her article examining the role of cultural relativism in the interactions between the U.N. Committee on Human Rights and States parties, Sonia Harris-Short shows that the Islamic States’ general reservations do not serve to avoid CRC-mandated obligations, as European objectors had feared.\textsuperscript{198} The facts that Europe reacted to non-European concepts of sovereignty, that Europe did not take issue with the holding of nonsovereign territories, which could jeopardize coverage of the full Convention to large populations of children, and that Europe made reservations to exclude illegal immigrant children from the entire Convention are evidence of Europe’s sense of entitlement to international law and its investment in keeping international law Eurocentric. In short, European States were more concerned that Islamic States parties had declared international law to be limited by Islamic law than with ensuring that all children were granted rights.

CONCLUSION

The colonial structure of international law does not derive solely from the law itself. My argument is that the deep colonial structure is a European sense of prerogative to international law as essentially European. The deep colonial structure of international law is present through direct links between colonial and postcolonial laws in legal concepts and areas such as sovereignty, international trade, and human rights. A full postcolonial critique, however, is difficult to impose upon the CRC, as the drafting process was inclusive of postcolonial States, and the Convention has been ratified by every country, except the United States and Somalia. Postcolonial States have wholeheartedly embraced the CRC through their ratifications.

For this reason, the CRC provides such an interesting case study of what role colonialism might have in an international law that is considered postcolonial—postcolonial in the sense that formal colonialism had ended by the time of its making. This case study of the CRC shows that while the deep colonial structure transcends law made during colonial times and transcends legal concepts originating in colonial times, the co-


\textsuperscript{198} See Harris-Short, supra note 16, at 135–36.
 Colonial structure endures in the legislative process of international law, underlying treaty-making procedure even when the treaty is facially neutral.

The CRC was drafted with the intention of avoiding some obvious controversies such as abortion,\footnote{See CRC, supra note 7, art. 1 (defining a “child” as “every human being below the age of eighteen years”).} freedom of religion,\footnote{Id. art. 14 (deliberately abstaining from using the word “adopt” with reference to religion).} and the economic disparity between the Global North and the Global South.\footnote{Id. art. 4 (suggesting that compliance with the CRC by poor countries may be achieved through “the framework of international co-operation”).} Despite these efforts for consensus, many States made reservations.\footnote{See CRC Ratifications, Reservations, and Objections, supra note 8.} The States that lodged these reservations are geographically diverse, and the provisions with which these reservations took issue are varied, thereby suggesting that the CRC embodies neutral, if not quite universal, values.\footnote{Id.}

In contrast, the objections against reservations share two striking features. All the objections were made by European countries, and the recipients are overwhelmingly non-European countries.\footnote{Id.} Moreover, the reservations that received the most objections are those challenging the boundaries of international law by asserting alternatives to European interpretations, alternatives that refer to Shariah law or to national constitutions.\footnote{Id.}

It is difficult to deny the European sense of privilege when the only States parties to object to reservations are European, and twenty-one of the twenty-three parties against whom these objections were directed are postcolonial States. Moreover, no States parties objected to European reservations that are equally broad in scope, such as excluding a noncitizen child from the CRC or constraining a child’s right to exercise his or her culture, reservations that seem to undercut the CRC’s express goal of universal coverage. Similarly, States parties that hold jurisdiction outside of their main territories stipulated in reservations that they retain the ability to decide whether the CRC applies to children living in these territories, and these reservations failed to generate any objections. A study of representative postcolonial legislation reveals that even if it is possible to legislate “neutral” international law, such law does not operate in a vacuum, but rather in an international community in which European na-
tions continue to proceed as if they were entitled to a Eurocentric international law.
THE PRINCIPLE OF DEMOCRATIC TELEOLOGY IN INTERNATIONAL LAW

Niels Petersen*

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INTRODUCTION

For a long time, democracy was a non-issue in international law. In 1986, the International Court of Justice declared:

However the regime in Nicaragua be defined, adherence by a State to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of State sovereignty, on which the whole of international law rests, and the freedom of choice of the political, social, economic and cultural system of a State.¹

This perspective changed dramatically in the 1990s following the end of the ideological dichotomy of the Cold War. A new interventionist U.N. Security Council and a large number of newly emerging democracies in Latin America, Africa, and Asia led to a widespread euphoria about democracy. In response, Francis Fukuyama predicted the “end of history,”² and legal scholars started discussing an emerging right to democratic governance.³

The first major international document addressing this issue was the Vienna Declaration of the World Conference on Human Rights (“Vienna Declaration”), which recognized that “[d]emocracy, development and respect for human rights and fundamental freedoms are interdependent and mutually reinforcing.”⁴ The Vienna Declaration not only promotes democracy as a form of government, but also emphasizes the beneficial impact of democracy on development.⁵ This statement runs against the traditional assumption of modernization theory⁶ that the stability of a democracy depends on a State’s level of socio-economic development.⁷ It promotes democracy as a universal cure for poverty and assumes that democracy can be established at almost any stage in the developmental process and in any society.

5. Id.
6. For an account of modernization theory, see infra Part I.B.2.
The purpose of this Article is to examine these underlying assumptions and to reconsider democratic entitlement theory in light of democratization theory in order to redefine the claim to democracy by making a more modest proposal. Instead of finding evidence supporting the emergence of an unequivocal right to democratic governance, the practices of regional bodies and treaty obligations suggest the existence of a principle of democratic teleology, according to which States are obligated to develop towards democracy. Part I of the Article sets forth an analytical framework that clarifies the definition of democracy and assesses the principal approaches conceptualizing democratization processes. It will show that there is much uncertainty within the social sciences on what constitutes an ideal path to democracy. There is consensus that democracy cannot be introduced overnight, but is, rather, a complex and long-term process. Part II addresses approaches to democratic entitlement and proposes a more differentiated approach that focuses on the process of democratization rather than the existence of democratic governance. The subsequent analysis will show that there is no right to democratic governance in international law. Instead, States have an obligation to develop towards democracy.

I. THEORETICAL FRAMEWORK

Section A of this portion of the Article establishes a working definition of democracy. After locating two intertwined aspects to the concept—a binary classification and a gradation—this section argues that the definition of “democracy” should be grounded in the former and should be minimalist: democracy can be said to exist when a government has been chosen through periodic and contested elections. In contrast, the gradual dimension of the concept takes into account normative components to democracy. These two dimensions will be the basis for the analysis that follows on democracy in international law.

Section B further develops the theoretical framework of this Article by critically evaluating three major theories of democratization: cultural prerequisites theory, modernization theory, and social homogeneity theory. We will see that democratization is too multifaceted and complex to be fully captured in any one theory. As various internal as well as external factors interdependently influence democratization, it is difficult to predict precisely what facilitates transitions to democracy. Instead, democratization, as demonstrated in this Article, is a complex process, which can take different forms and shapes.
A. Definition of Democracy

Democracy is a contested concept. Although it seems to be “nonnegotiable” in the Western Hemisphere, there remains little consensus on what “democracy” actually means. Scholars flesh out the term with different content. Some propose “thin” or “minimalist” models of democracy, while others advocate “thick” or demanding conceptions. The search for a definition of democracy is complicated by the fact that there is disagreement on whether democracy is a question of kind or one of degree. The former interpretation is a simple binary one—a political system is either a democracy or not. The latter, in contrast, is gradual—democracy is a question of degree. Both conceptions, however, are complementary and not mutually exclusive. Conceiving democracy in a gradual way presupposes that an anterior classification has been made because it would deprive the concept of every heuristic value to qualify authoritarian or totalitarian regimes as democratic to a certain degree. Once a binary classification has been made, it may be valuable to distinguish different types of democracy on a gradual scale, as long as democracy is not solely perceived to be an ideal concept. The notion of democracy, thus, has two dimensions: a binary classification, which differentiates between democracies and nondemocracies, and a graduation, which distinguishes between democracies of different quality.

Regarding the binary approach, there are two ways to address the issue of defining democracy. On the one hand, one can look at whether relevant sources either explicitly or implicitly provide a definition. On the other hand, one can establish a proper definition of democracy and analyze whether such a concept exists in international law, notwithstanding whether it is actually called democracy. Although, at first glance, the first approach seems to be appealing, its application is deceptive. The term

“democracy” is used very rarely in international legal documents—perhaps precisely because of its vagueness. Where it can be found, its meaning is unspecified.\textsuperscript{14} The aforementioned Vienna Declaration\textsuperscript{15} and the U.N. Secretary General’s Agenda for Peace, for example,\textsuperscript{16} only allude to democracy’s positive effects on human rights, development, and peace. International human rights instruments reference notions of democratic society in savings clauses, yet fail to elucidate the meaning of the word.\textsuperscript{17}

There is one prominent exception, however. In 2000, the U.N. General Assembly adopted a resolution entitled “Promoting and Consolidating Democracy.”\textsuperscript{18} According to the resolution, democracy consists of a number of different elements: the promotion of pluralism, the protection of human rights, a separation of powers, the rule of law, elections, the development of civil society, good governance, sustainable development, solidarity, and social cohesion.\textsuperscript{19} Nonetheless, this appears to be more of a wish list than an attempt to propose a coherent definition of democracy. It mingles substantive and procedural issues without saying anything about their interrelation. In addition, the resolution fails to distinguish between the institutional framework of government and certain programmatic issues, such as sustainable development or social cohesion.\textsuperscript{20}

Turning to political science literature, several definitions of democracy can be found. Some are minimalist, focusing primarily on elections,\textsuperscript{21} while others incorporate additional elements, for example, the rule of

\begin{itemize}
  \item \textsuperscript{14} But cf. STEVEN WHEATLEY, DEMOCRACY, MINORITIES AND INTERNATIONAL LAW 128–34 (2005) (noting that democracy is defined by international legal documents as a political system in which power is based on the will of the people). However, the concept of the will of the people is as abstract as the concept of democracy, making Wheatley’s definition just as unspecific.
  \item \textsuperscript{15} Vienna Declaration, supra note 4.
  \item \textsuperscript{16} The Secretary-General, Report of the Secretary-General on an Agenda for Peace, Preventive Diplomacy, Peacemaking and Peace-keeping, U.N. Doc. S/24111, A/47/277 (June 17, 1992).
  \item \textsuperscript{19} Id.
  \item \textsuperscript{20} See SARTORI, supra note 12, at 90 (explaining this distinction).
  \item \textsuperscript{21} Przeworski, supra note 10.
\end{itemize}
law, 22 the preservation of civil and political rights, 23 minority protec-
tion, 24 or the existence of social rights. 25 Defining democracy is such a
difficult task because the debates on what democracy is and what democ-
archy should be are often intermingled. 26 As its definition is highly con-
tested and malleable at its borders, 27 this analysis will concentrate on the
core of democracy: the legitimation of public power through elections. A
political system may be deemed a democracy when its government is
designated through periodic and contested elections. 28 Elections are con-
tested when their outcomes are uncertain ex ante and irreversible ex
post. 29

This definition is meant to be purely descriptive, not normative. It does
not ignore that there are good reasons for more demanding concepts of
democracy. However, because the implementation of the rule of law or
the protection of human rights, for example, are separate institutions,
distinguishable from the establishment of democracy, they should be
subject to independent analyses. 30 It is possible to imagine an autocratic
regime observing the rule of law or complying with human rights obliga-
tions. An autocracy in which the government is appointed through con-
tested elections, however, is a contradictio in adjecto.

As previously mentioned, democracy also has a second, qualitative
dimension. Recently, Susan Marks cautioned against adopting a mini-
malist concept of democracy in international law. 31 If States have

22. See, e.g., Armin von Bogdandy, Globalization and Europe: How to Square De-
23. ROBERT ALAN DAHL, POLYARCHY: PARTICIPATION AND OPPOSITION 3 (1971) (in-
cluding freedom of expression, information, and association, as well as an inclusive status
of citizenship in his definition of democracy).
24. Steven Wheatley, Democracy in International Law: A European Perspective, 51
25. See generally DAVID BEETHAM, DEMOCRACY AND HUMAN RIGHTS (1999) (advo-
cating a democracy theory based on social rights).
26. In particular, theorists proposing a “thick” concept of democracy often take an
idealist position, allowing their vision of an ideal political system to influence their defi-
nition of democracy.
27. WHITEHEAD, supra note 9, at 15.
28. See ADAM PRZEWORSKI ET AL., DEMOCRACY AND DEVELOPMENT: POLITICAL
this definition).
29. Id. at 16.
30. Manfred G. Schmidt, Ist die Demokratie wirklich die beste Staatsverfassung? [Is
Democracy Really the Best Form of Government?], 28 Österreichische Zeitschrift
reached a certain minimum threshold, they would become immune from further critique, which is an undesirable consequence, given the tendency in international relations to idealize democracy. Marks, therefore, proposes a gradual definition of democracy. Nevertheless gradual conceptualizations are not a substitute for classificatory ones. Instead of incorporating normative concerns into the definition of democracy itself, this Article addresses this critique by including a gradual dimension in the concept of democracy, supplementing the proposed binary definition, which centers upon the role of elections.

B. Theories of Democratization

The transition from an authoritarian regime to a democratic system is not simply a shift in political status, but a social process influenced by various external factors. When the debate on democratization started in the late 1950s, it addressed the issue by analyzing the “prerequisites of democracy.” In its strict sense, the term suggests that democracy has certain requirements, without which democracy is unable to function. Still today, there are authors who promote such a strict approach and argue that certain cultural environments are hostile to democracy. The majority of scholars, however, pursue a more moderate approach. They try to identify socio-economic factors that may be favorable to the establishment of democracy. The earliest and most influential school is that of modernization theory, which seeks to establish a correlation between economic development and democracy. Other scholars inquire into the relationship between ethnic, social, or religious homogeneity and the prospects for democracy.

1. Cultural Prerequisites

The theory of cultural prerequisites argues that the establishment of democracy depends on the cultural environment of a State. Samuel Huntington, the most prominent proponent of this theory, divides the world into eight major civilizations: Japanese, Latin American, Western, African, Buddhist, Orthodox, Confucian, and Islamic. Among these, only the first three cultures are regarded as favorable for democracy. Confu-

32. Marks, supra note 11, at 81–82.
33. Id. at 87.
ician and Islamic civilizations are seen as hostile to democracy, while the remaining three are viewed as neutral.\(^{36}\) There is some empirical evidence supporting Huntington’s thesis,\(^ {37}\) but his argument is unconvincing. Experience shows that Confucianism and Islam are not per se inimical to democracy.\(^ {38}\) Although a lack of separation between belief systems and politics may present an obstacle to the establishment of a democratic society, such fluidity is not particular to Confucianism or Islam, but rather an expression of socio-economic progression.\(^ {39}\) Religious or cultural patterns are subject to change during the course of social development.\(^ {40}\) An example in this respect is the development of Catholic societies. Although Catholicism was regarded as a major obstacle to democratization a few decades ago,\(^ {41}\) many states with predominantly Catholic populations have since developed into stable democracies. Therefore, religion or culture is not an absolute impediment to, but at most a surmountable difficulty in, the process of democratization.

However, the question of the cultural prerequisites of democracy is not purely empirical. It also has a normative dimension. If the preconditions for democratization are established in a certain society, these necessarily

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37. According to the IMF, Brunei Darussalam, Hong Kong, Kuwait, Qatar, Singapore, and the United Arab Emirates are among the thirty most developed States based on their per capita incomes of more than 20,000 USD. These States, which could be classified under Huntington’s political and cultural taxonomy as Confucian or Islamic, do not qualify as electoral democracies according to Freedom House’s Annual Global Survey of Political Rights and Civil Liberties. Compare **INT’L MONETARY FUND, WORLD ECONOMIC OUTLOOK DATABASE** (Apr. 2007), http://www.imf.org/external/pubs/ft/weo/2007/01/data/index.aspx (providing GDP data for 2004), with **FREEDOM HOUSE, SELECTED DATA FROM FREEDOM HOUSE’S ANNUAL GLOBAL SURVEY OF POLITICAL RIGHTS AND CIVIL LIBERTIES** (2007), http://www.freedomhouse.org/uploads/press_release/fiw07_charts.pdf.

38. Japan, South Korea, and Taiwan, as well as Indonesia can be considered electoral democracies. The first three countries are influenced by Confucianism, while Indonesia is home to the largest Muslim population in the world.


41. Cf., e.g., Kenneth A. Bollen, *Political Democracy and the Timing of Development*, 44 AM. SOC’y REV. 572, 584 (1979) (noting support for the view that “the greater the extent to which a culture is Protestant-based, the greater the level of political democracy”); Pierre Elliott Trudeau, *Some Obstacles to Democracy in Quebec, in CANADIAN DUALISM* 241, 245 (Mason Wade & Jean-C. Falardeau eds., 1960).
lead to cultural changes. From a normative perspective, this raises some problems. In the 1990s, some Asian governmental leaders, such as Malaysia’s former Prime Minister, Mahathir bin Mohamed, and Singapore’s former Head of State, Lee Kuan Yew, engaged in a debate on Asian values. They argued that Western democracy should not be imposed on Asian societies because it conflicts with certain Asian traditions. While Western democracy is a system of rights, according to these leaders, Asian societies perceive political communities to be embedded in a system of obligations and emphasize community-oriented values.42

Significant weight, however, should not be afforded to the assertion that cultural values exempt a State from pursuing democracy. Politicians may be strategically seeking to preserve the status quo from which they benefit. Moreover, making appeals to culture-based exceptions assumes an authority to define a given set of values.43 Furthermore, cultural relativism fails to answer the question of who determines the composition of the group whose cultural tradition shall be relevant. It is not imperative to take the collectivity of citizens as the point of reference because a population can be very heterogeneous.44 If the argument referring to Asian values is not of a purely strategic nature, its main purpose is to reinforce collective values.45 As long as we understand democracy as a procedural framework, though, the concept has sufficient flexibility to realize a wide range of different value systems. Consequently, cultural diversity does not per se discredit the universal promotion of democratic rules.

2. Modernization Theory and its Modifications

Modernization theory attempts to establish a relationship between the development of a State and its degree of democratization.46 In 1959, Martin Seymour Lipset made the groundbreaking claim that “the more well-to-do a nation, the greater the chances that it will sustain democra-

46. See Larry Diamond, Economic Development and Democracy Reconsidered, in REEXAMINING DEMOCRACY: ESSAYS IN HONOR OF SEYMOUR MARTIN LIPSET 93, 93 (Gary Marks & Larry Diamond eds., 1992); Lipset, Some Social Requisites, supra note 34.
Lipset argued that economic development leads to higher levels of urbanization and education, and to the establishment of a middle class with increased socio-economic mobility. This mobility deprives the underclass of its revolutionary potential and thus supports the stability of a democratic system. Political elites are also less likely to be disadvantaged during periods of governmental change because the relative effect of a policy change is stronger in poorer countries.

Since the publication of Lipset’s theory, several empirical studies have confirmed a correlation between economic development and democratization, showing that higher economic prosperity increases the probability that a State will have a stable democratic system. However, there is no causal relationship between both factors. Economic development is neither a necessary nor a sufficient precondition for democracy. There are important examples that disprove a determinist relationship. India, for example, has been a relatively stable democracy for several decades notwithstanding its per capita GDP, which has remained below 1000 USD. In contrast, several Arab States with higher per capita incomes have yet to develop democratic structures. Furthermore, data suggests that economic development is not the principle cause for transitions to democracy. Economic prosperity merely stabilizes democratic institutions once they have developed. Poor democracies also face a high probability of collapsing; only after reaching a certain stage of development are democracies sufficiently stable to survive economic crises. However, economic development is not the only factor that influences the democratization process. All political systems have informal rules and

47. Lipset, Some Social Requisites, supra note 34, at 75.
48. Id. at 78.
50. Lipset, Some Social Requisites, supra note 34, at 83.
51. Id. at 84.
52. PHILIP COULTER, SOCIAL MOBILIZATION AND LIBERAL DEMOCRACY (1975); Kenneth A. Bollen & Robert W. Jackman, Economic and Noneconomic Determinants of Political Democracy in the 1960s, 1 RES. POL. SOC. 27, 42 (1985); Diamond, supra note 46, at 93–96; Lipset, et al., supra note 49.
54. See INT’L MONETARY FUND, supra note 37.
56. Id. at 169–70.
arrangements that support political processes. While such mechanisms may ideally complement formal constitutional institutions and increase their flexibility, informal networks can be used to pervert democratic rules if the democratic system is unstable or defective. This involves political actors strengthening their power by relying on exclusive networks outside of constitutional institutions. Such defective democracies are thus likely to breakdown in social or economic crises or to transform into open autocracies.

How do defective democracies differ from functional ones? Tatu Vanhanen suggests a rational approach, positing a relationship between the degree of democratization and the degree to which social power resources are distributed. If power resources are widely dispersed, it is difficult for a specific group within a society to oppress other social groups by establishing and maintaining hegemonic structures. The degree of distribution is related to other socio-economic factors, including economic development and level of education. Vanhanen’s approach thus supplements rather than modifies modernization theory.

Charles Tilly offers another decisive factor, state institutional capacity. According to Tilly, strong civil and political institutions increase the prospects for a successful democratization process, as these institutions can offset one of the most significant obstacles to this process, “autonomous power centers.” Of course, there are limits: if a State is too strong, political actors have incentives to claim exclusive power and undermine democratization. Thus, informal “trust networks” have to be integrated into the public political space. While power dispersion continues to serve an important function, it must take place within state institutions, rather than in opposition to them.


60. VANHANEN, supra note 59, at 5.


62. TILLY, supra note 57, at 161–85.

63. Id. at 164.

64. Id. at 80–105.
Turning to cultural scholarship, commentators have argued that democratization depends on citizens and political elites internalizing similar understandings of democratic values. Certainly, democratic values are not embraced overnight. These values must be learned, accumulated, and assimilated as social capital. Forming them requires education and experience with democratic institutions. Furthermore, socio-economic change may lead to a transformation of political values.

In summary, the following conclusions can be drawn. First, the functioning and stability of democracy depend on several interdependent factors: socio-economic development, the diffusion of power resources, stable civil and political institutions, and a democratic culture. Accordingly, democratization rarely takes place abruptly: it is usually a gradual process.

3. Cultural and Ethnic Homogeneity

The debate on cultural, religious, and ethnic homogeneity as a precondition for a stable democracy dates back to John Stuart Mill, according to whom:

Free institutions are next to impossible in a country made up of different nationalities. Among a people without fellow-feeling, especially if they read and speak different languages, the united public opinion necessary to the working of representative government cannot exist.

As belonging to a particular cultural, religious, or ethnic group heavily influences identity, in many pluralistic societies, voting often follows

65. Gabriel Abraham Almond & Sidney Verba, The Civic Culture: Political Attitudes and Democracy in Five Nations 498 (1963); Larry Diamond & Juan José Linz, Introduction: Politics, Society, and Democracy in Latin America, in 4 Democracy in Developing Countries: Latin America 1, 10 (Larry Diamond et al. eds., 1989).


67. Almond & Verba, supra note 65, at 501. In this context, it is interesting to note that former British colonies had far more success with the installation of democracy than the former colonies of other European nations. See also Lipset, Democracy Revisited, supra note 40, at 5 (comparing the practice of the British with that of other colonial powers in introducing certain democratic institutions in their colonies). See Bollen & Jackman, supra note 52; Myron Weiner, Empirical Democratic Theory, in Competitive Elections in Developing Countries 3, 19 (Myron Weiner & Ergun Özbudun eds., 1987).

68. Diamond & Linz, supra note 65, at 12.

69. Lipset, Democracy Revisited, supra note 40, at 4.

social affiliations. It is thus barely surprising that empirical studies suggest that the probability of establishing democracy in homogeneous societies is twice as high as in segmented societies.

Scholars have proposed various remedies to overcome problems associated with diverse societies. The most widely recognized proposal is Arend Lijphart’s model of consociational democracy. Lijphart seeks to describe a system in which every major social group is represented, identifying four fundamental characteristics: government created by “grand coalition”; mutual veto rights to protect minority interests; proportional representation in politics and civil service, as well as proportional distribution of public funds; and a federal structure that gives each social group significant autonomy.

However, consociationalism implicitly assumes that human identity is unalterable. Identity is not an inherent characteristic of human beings, but a social construct. Although identity is not infinitely alterable, it can change with time and circumstance. Research in social psychology also shows that the interaction among different social groups can enhance the possibility of forming a common superordinate identity. Consociationalist models thus run the risk of deepening rather than overcoming divisions in society. This does not mean, though, that democracy is impossible in pluralistic societies. One solution is to put in place voting procedures that discourage incentives to vote according to cultural, religious, or ethnic cleavages.

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74. Lijphart, Democracy in Plural Societies, supra note 73, at 25.


76. Shapiro, supra note 8, at 95.


78. See Horowitz, supra note 75, at 628–52 (offering proposals for overcoming political divides along ethnic lines, including mechanisms whereby parties must obtain a certain minimum number of votes from more than one social group in order to be elected).
Nevertheless, attempts to unify through incentive-based voting mechanisms carry certain risks. Without a consensus on the fundamental rules of the political game, they cannot surmount social divisions.\(^{79}\) The remedy in these circumstances is to promote socio-economic development. States with highly segmented societies often have weak institutional structures.\(^ {80}\) Thus, formal institutions have to be strengthened, and trust in these institutions must be developed, while a common identity is concurrently established. Consequently, in the ideal case, nation- and capacity-building precede the transition to democracy.\(^ {81}\)

4. Conclusions

The different theories explaining democratization present a complex picture. The approaches are not mutually exclusive, but rather highlight different aspects of the process of democratization. Transition to and consolidation of democracy are dependent on a variety of factors, defying moncausal explanations.\(^ {82}\) Therefore, democracy has no necessary or sufficient prerequisites, meaning that neither low levels of economic development nor significant cultural, religious, or ethnic heterogeneity preclude the establishment of a relatively stable democracy.\(^ {83}\) Conversely, significant economic prosperity or social homogeneity do not lead to an automatic transition to democracy.

Despite the lack of causal explanations, there still remain significant correlations between economic development and social cohesion, and democratization. Low economic development or weak social homogeneity can endanger the consolidation of democracy. These obstacles are malleable,\(^ {84}\) but they are subject to long-term processes that are not necessarily steady.\(^ {85}\) As a result, sometimes it may be more effective to compromise short-term successes in order to pursue long-term goals.\(^ {86}\) Furthermore, in certain circumstances, it may be advisable to engage in nation- and capacity-building preceding transition to democracy.

\(^{79}\) Andrew Reynolds, *Constitutional Medicine*, 16 J. Dem. 54, 57 (2005).

\(^{80}\) Tilly, *supra* note 57, at 176–77.


\(^{82}\) Merkel & Puhle, *supra* note 40, 62; Shapiro, *supra* note 8, at 80.


\(^{86}\) Javier Santiso, *À la recherche des temporalités de la democratization [In Search of the Temporalities of Democratization]* 44 Revue Franchise de Science Politique 1079, 1082 (1994) (Fr.).
identity-building before fostering the establishment of institutions. Because there is no universally valid formula for success, many political scientists stress the unpredictable character of democratization, describing it as a “complex, long-term, dynamic and open-ended process.”87 Although elections are typically a step in the overall process, they are not necessarily the first step.88 Democratization is thus a teleological process,89 and its final objective is the establishment of a legitimate form of government. This process, though, does not necessarily have to be democratic itself.90

II. DEMOCRATIC TELEOLOGY IN POSITIVE INTERNATIONAL LAW

Given the process-like character of democratization, Part II of this Article examines how this understanding of democracy is reflected in positive international law, while paying particular attention to how our working definition of democracy, which centers upon the role of elections, is represented in institutional and regional practice. Towards this end, this section critically reviews two approaches to identifying customary norms: deductive and inductive. The first relies on an interpretative methodology in identifying customary norms.91 According to this approach, some scholars try to deduce customary norms from more abstract principles. Based on the assumption that the legal system is holistic and without internal contradictions, a rule must be considered customary law if it follows necessarily from a more general principle that has already been accepted.92 Section A considers the attempts of some scholars to employ this interpretative approach in order to deduce a right to democratic governance from the principle of self-determination.

87. WHITEHEAD, supra note 9, at 27.
88. Marks, supra note 11, at 87.
89. Andreas Schedler, What is Democratic Consolidation?, 9 J. DEM. 91, 95 (1998). When Whitehead emphasizes the open-endedness of the process, he does not want to contest the teleological character of democratization. See WHITEHEAD, supra note 9, at 28 (observing that democracy is a concept that is, to a certain extent, indeterminate and can be implemented in a variety of different ways).
90. See Schmitter & Santiso, supra note 81, at 79 (discussing the undemocratic nature of many democratization processes).
According to the inductive approach, customary norms are identified by inducing them from state practice and opinio juris. In Section B, we will thus analyze the relevant international practice on democracy, such as different U.N. resolutions, regional mechanisms designed to preserve democracy, and the reactions of the international community to coups against elected regimes. This analysis will show that international law does not contain a right to democratic governance. Instead, it will identify a principle of democratic teleology, that is, States are legally obliged to develop towards democracy.

A. Self-Determination

Scholars have used the deductive approach in an attempt to derive a right to democratic governance from the principle of self-determination. There are two strands to this argument, one contextual and the other logical. This Section argues that both fall short. Although there is a textual relationship between democracy and self-determination within the International Covenant on Civil and Political Rights (“ICCPR” or “Covenant”), it does not translate into a customary principle of self-determination. The logical argument fails because it does not take into account the difference between establishing a political system and the content of the political system itself. Instead, this Section proposes that self-determination only requires a government to be representative, not democratic.

1. Democracy as Mandatory Consequence of Self-Determination

Originally, self-determination had a primarily external direction, its strongest impact occurring in the context of decolonization. However, through its incorporation into Common Article 1 of the ICCPR and the International Covenant on Economic, Social and Cultural Rights, it also gained an internal dimension. According to this provision, the principle of self-determination grants every people, inter alia, the right to determine their political status freely. The U.N. General Assembly soon after affirmed this interpretation in its Declaration on Principles of International Law Concerning Friendly Relations ("Friendly Relations Declaration").

Two main arguments attempt to deduce a democratic principle from the right to self-determination. The first argument is contextual and interprets Article 1 of the ICCPR in the context of the Covenant’s other provisions, in particular in conjunction with the right to democratic elections, as prescribed in Article 25. According to this argument, the right to participate in elections informs how the right to determine political status is exercised. However, it seems more convincing to interpret Articles 1 and 25 in a way that affords them independent normative

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99. See ICCPR, supra note 17, art. 25.
100. Id.
If the guarantees of self-determination, as shaped by Article 25 of the ICCPR, do not exceed the right to democratic elections, then the linkage is unnecessary. In order to ensure elections, Article 25 offers a sufficient normative basis. If one wants to draw further conclusions, a mere connection between and abstraction from essentially independent principles is not enough. If we interpret, for instance, the customary principle of self-determination outside the ICCPR’s framework and in light of Article 25, then the scope of the electoral guarantee would extend impermissibly beyond the limits of the Covenant.

The second argument is more fundamental. Instead of focusing on the normative context, it seeks to establish a logical relationship between self-determination and democracy. The right to choose a political system belongs to the people, not their government. It has been argued that this decision must be effectuated through democratic mechanisms, as non-democratic means are not attributable to a people. However, this “logical” relationship is based on a problematic premise. It fails to distinguish between the act of creating a political system, and the actual content and structure of government, namely, the *pouvoir constituant* and the *pouvoir constitué*. The right to self-determination involves the former, but not necessarily the latter. History provides several examples where citizens opted through electoral means to delegate power to political elites who then established authoritarian rule.

One solution to this dilemma is to distinguish formally between the act of establishing a political system and the political system itself. The participation of citizens is limited to the former. If they choose a system other than democracy, they have, by this act, exhausted their right to self-determination. However, this view cannot explain why the act of self-

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107. Karl Doehring, *Demokratie und Völkerrecht* [Democracy and International Law], in *TRADITION UND WELTOFFENHEIT DES RECHTS. FESTSCHRIFT FÜR HELMUT STEINBERGER*
determination should be irreversible. Electoral outcomes depend on specific historical circumstances, and these circumstances may change over time, just as citizens’ preferences or the very composition of a population itself. Therefore, it is difficult to justify why the citizenry of one historical moment should have the power to bind future generations.

Gregory Fox and Georg Nolte set forth another solution in their contribution on “intolerant democracies.” Addressing whether democracies should be allowed to fight political tendencies directed against the system itself, they propose a substantive concept of democracy. According to their concept, electoral results may be disregarded in order to prevent an undemocratic opposition from coming to power, thereby protecting democracy as such. This argument, though, exhibits a predisposition towards democracy. Democracy, or even a specific type of substantive democracy, is considered to be an absolute value a priori. It has been shown, however, that the value of democracy always depends on socio-economic circumstances. Thus, Alberto Asor Rosa’s statement is quite astute:

[D]emocracy, precisely because it is a system of mediocrity that cannot make itself out to be an absolute or an end in itself . . . is a game whose defining feature is that it allows its own rules to be called into question. If it does not, it is already something else.

2. Representation and Self-Determination

Nevertheless, this observation does not lead to the conclusion that the right to self-determination does not impose any restrictions on the power of political elites to choose a form of government. With regard to the principle of self-determination, the United Nations stated in its Friendly Relations Declaration:

Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or

110. See supra Part I.B.
111. Alberto Asor Rosa, La felicità e la politica [Happiness and Politics], LABORATORIO POLITICO Mar./Apr. 1981, at 10, 30–31 (Italy) (“[L]a democrazia, proprio in quanto sistema delle mediocrità, che non si assolutizza e non si erige esso stesso a fine . . . è quel tale gioco che accetta di rimettere in discussione le proprie regole. Se non lo fa, è già un’altra cosa.”) (author’s translation).
in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or colour.  

Consequently, not every form of government is compatible with self-determination. To conform, a government must be representative. A further argument supports this observation. If a government could exclusively determine the content of self-determination, then the principle of self-determination would not differ from the principle of state sovereignty and thus lose any independent value.  

However, representation does not necessarily have to be realized through elections. It may be realized by a government acting in the public interest, functioning as a government for the people. In this circumstance, the problem is determining what form of government should be recognized as representative. Unlike democracy, representativeness cannot be determined by the sole existence of certain institutions. Offering a helpful, substantive proposal, Georg Sørensen distinguishes among development-oriented regimes, growth-oriented regimes, and self-enriching regimes. While development-oriented regimes strive to promote economic development as well as individual well-being, growth-oriented regimes focus on fostering economic growth without taking into account its effects on society. Of the three, self-enriching regimes are incompatible with the right to self-determination. A second indicator of a representative government is its human rights record. Not every human rights violation renders a government illegitimate, as such violations occur even in the most advanced political systems. However, where systematic violations of core human rights take place within its borders, a State is not representative of its citizens. It is illegitimate and, as a result, infringes upon the right of its population to self-determination.

112. Friendly Relations Declaration, supra note 98, pmbl. (emphasis added).
113. Crawford, supra note 95, at 56.
115. Id.
116. Certainly, a State remains responsible for its human rights violations even if the violations do not directly undermine the legitimacy of the State.
B. International Practice: Establishing Democratic Teleology

The inductive approach relies on the practice of international institutions. This Section examines the approach to democracy in international law through the lens of democratization theory. It argues that international law does not contain a strict right to democratic governance, but rather a principle of democratic teleology. This principle has two dimensions. States are not required to transition to democracy right away, but rather, must to develop towards democracy. Similarly, they are also obligated to prevent regressions in the process of democratization.

Evidence supporting these two dimensions can be found in various fields of international law. The following analysis concentrates on three areas of especial importance. First it focuses on universal human rights instruments and the practice of international institutions, including the U.N. General Assembly. This appraisal reveals that the relevant documents predominantly employ process-oriented language that focuses on democratization instead of democracy. Moreover, the practices of regional bodies in the Americas, Europe, and Africa will be considered. Instead


118. See Schedler, supra note 94, at 98.

119. Id.

120. The following analysis omits a detailed account on Asia. This is due to the fact that commitments to democracy are at best embryonic. Nevertheless, some positive trends can be observed in the framework of the Association of South East Asian Nations (“ASEAN”). Democracy is first mentioned in the ASEAN’s Vientiane Action Program
of dealing with positive progress, these bodies focus on enforcement mechanisms meant to prevent setbacks once democracy has been introduced. The Section concludes by looking at military interventions in the name of democracy. Implicitly condemning the ousting of elected heads of state, these interventions also emphasize the need to prevent setbacks in the process of democratization.

1. International Institutions

(a) Right to Democratic Elections Under the ICCPR

Universal treaties are a well-recognized indicator for the existence of customary norms. When States enter into treaty obligations, they express their intent to be bound by its norms and thus manifest a corresponding \textit{opinio juris}.\footnote{North Sea Continental Shelf (F.R.G. v. Den.), 1969 I.C.J. 3, 42 (Feb. 20). For additional commentary on the issue of treaties as indicators of customary law, see generally Richard R. Baxter, \textit{Treaties and Custom}, 129 \textit{Recueil des Cours} 25 (1970).} The most important treaty norm in this context is Article 25 of the ICCPR. It ensures the right to genuine, periodic elections, which thereby guarantees the free expression of the electorate’s will.\footnote{ ICCPR, \textit{supra} note 17, art. 25.} Although socialist States originally argued—based on the \textit{travaux préparatoires}—that one-party systems could conform to Article 25, there is now consensus among international legal scholars that voters must have a more “meaningful choice” in order for a State to meet the Covenant’s requirements.\footnote{ Sara Joseph \textit{et al.}, \textit{The International Covenant on Civil and Political Rights: Cases, Materials and Commentary} ¶ 22.31 (2d ed. 2004); Gregory H. Fox, \textit{The Right to Political Participation in International Law}, in \textit{Democratic Governance and International Law} 48, 57–59 (Gregory H. Fox & Brad R. Roth eds., 2000); Karl Josef Partsch, \textit{Freedom of Conscience and Expression, and Political Freedoms}, in \textit{The International Bill of Rights: The Covenant on Civil and Political Rights}, \textit{supra} note 94, at 209, 240; Niels Petersen, \textit{Elections, Right to Participate in, International Protection}, in \textit{Max Planck Encyclopedia of Pub. Int’l L.} ¶ 3, available at http://www.mpepl.} A “free expression of the will of the electors”\footnote{VAP”). Under Title II of the VAP, the enhancement of democracy is listed as one of the goals of ASEAN. The declaration employs process-oriented language, stating that democracy should be enhanced and presenting democracy as a goal, not a strict obligation. Vientiane Action Program Title II (1), Nov. 29, 2004, available at http://www. aseansec.org/VAP-10th%20ASEAN%20Summit.pdf. For more detailed accounts of democracy in the context of ASEAN, see Amitav Acharya, \textit{Democratization and the Prospects for Participatory Regionalism in Southeast Asia}, 24 \textit{Third World Q.} 375, 378 (2003); Richard Burchill, \textit{Regional Integration and the Promotion and Protection of Democracy and Human Rights in Asia: Lessons from ASEAN} (Working, Paper), http://law. nus.edu.sg/aslasi/workingpapers/2007/doc/Mr%0D%0ARichard%0DBurchill.pdf (last visited Oct. 20, 2008).} and
“[participation] in the conduct of public affairs”\textsuperscript{125} are only possible when voters have a choice between not only different persons, but also different political agendas.\textsuperscript{126}

Thus far, 160 States have ratified the ICCPR.\textsuperscript{127} More than eighty percent of the international community has agreed to select their governments through free and fair elections. However, there are notable exceptions. China and Pakistan, two of the ten most populous States in the world, have failed to ratify the ICCPR.\textsuperscript{128} Furthermore, the list of abstaining countries shows patterns of regional concentration. Especially in East and Southeast Asia,\textsuperscript{129} a considerable number of States have not committed themselves to holding periodic elections. Moreover, the number of States parties becomes less impressive when actual state practice is considered. Many of the States that have ratified the ICCPR do not actually practice electoral democracy. According to a 2007 survey of Freedom House, only two-thirds of the signatory States qualify as electoral democracies.\textsuperscript{130} Mere commitment to Article 25 without accompanying state practice is insufficient to establish a customary principle of democracy.\textsuperscript{131}
The U.N. General Assembly has put forth a more modest approach. Since 1988, it has been issuing resolutions in a series entitled “Enhancing the Effectiveness of the Principle of Periodic and Genuine Elections.”\textsuperscript{132} The first resolution does not contain an explicit affirmation of a right to democratic elections. Instead, in the resolution, the General Assembly

2. [s]tresses its conviction that periodic and genuine elections are a necessary and indispensable element of sustained efforts to protect the rights and interests of the governed and that, as a matter of practical experience, the right of everyone to take part in the government of his or her country is a crucial factor in the effective enjoyment by all of a wide range of other human rights and fundamental freedoms, including political, economic, social, and cultural rights;

3. [d]eclares that determining the will of the people requires an electoral process which accommodates distinct alternatives, and this process should provide an equal opportunity for all citizens to become candidates and put forward their political views, individually and in cooperation with others.\textsuperscript{133}


\textsuperscript{133} G.A. Res. 43/157, \textit{supra} note 132, ¶¶ 1–2 (emphasis added).
Instead of imposing a strict obligation, the resolution stresses the importance of elections. Paragraph 2 emphasizes that elections are a necessary precondition for output legitimacy, while also invoking an empirical justification.134 In contrast, Paragraph 3 is of a normative nature, referring to the “will of the people” and highlighting the necessity of implementing their will through an electoral process.135

This resolution was slightly amended in following years. The successive versions contain reservations underlining the autonomy of States to develop their own political systems. Adopted in 1991, Resolution 46/137, for example,

[recogniz] that there is no single political system or electoral method that is equally suited to all nations and their people and that the efforts of the international community to enhance the effectiveness of the principle of periodic and genuine elections should not call into question each State’s sovereign right, in accordance with the will of its people, freely to choose and develop its political, social, economic and cultural systems, whether or not they conform to the preferences of other States.136

Furthermore, in the operative part, this Resolution

[underscores the duty of each Member State, in accordance with the provisions of the Charter of the United Nations, to respect the decisions taken by other States, in accordance with the will of their people, in freely choosing and developing their electoral institutions.137

Concurrently, in 1989 the General Assembly adopted a counter-resolution series, “Respect for the Principles of National Sovereignty and Non-interference in the Internal Affairs of States in their Electoral Processes,”138 which stresses the right of peoples to determine their polit-

134. Id.
135. Id.
136. G.A. Res. 46/137, supra note 132, ¶ 5 (emphasis added). The two resolutions passed in 1989 and 1990 include this paragraph in the operative part instead of the preamble. G.A. Res. 45/150, supra note 132; G.A. Res. 44/146, supra note 132.
137. Id. (emphasis added).
ical, economic, and social systems. In this Resolution, the General Assembly

1. [r]eiterates that, by virtue of the principle of equal rights and self-determination of peoples enshrined in the Charter of the United Nations, all peoples have the right, freely and without external interference, to determine their political status and to pursue their economic, social and cultural development, and that every State has the duty to respect that right in accordance with the provisions of the Charter;

2. Affirms that it is the concern solely of peoples to determine methods and to establish institutions regarding the electoral process, as well as to determine the ways for its implementation according to their constitution and national legislation;

[...]

4. Urges all States to respect the principle of non-interference in the internal affairs of States and the sovereign right of peoples to determine their political, economic and social system.139

At first glance, the two strands in these series appear to contradict each other.140 While one praises the advantages of an electoral system of government, the other emphasizes the importance of national autonomy as well as a people’s authority to choose a proper political, economic, and social system without external interference. However, any seeming contradiction is not as great as some scholars maintain. Even if a people have the right to determine their political system, the choice is not unlimited. As discussed in the previous section, a legitimate government must be representative.141 Paragraph 5 of Resolution 46/137 expresses this point by emphasizing that the choice has to be made “in accordance with the will of the people.”142 Considering the difficulties of consolidat-

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139. G.A. Res. 44/147, supra note 138 (emphasis added).
141. See supra Part II.A.2.
142. G.A. Res. 46/137, supra note 132, ¶ 5.
ing the *pouvoir constituant* and *pouvoir constitué*,
though, this right to choose does not amount to an automatic right to democracy.

The resolutions, rather, suggest a teleological view of elections and democracy, upholding the desirability of electoral institutions without imposing a strict obligation to establish and honor them. In the above analysis of democratization theories, it has been shown that democratization is a long-term process, not a simple shift from one status to another. By using the terms “developing” and “enhancing” to discuss electoral institutions, the language of these resolutions stresses this process-like character of democratization.

In addition, several other resolutions and declarations of the international community support this understanding of democratization. A prime example is General Assembly Resolution 55/96, which was adopted in 2000. Its central purpose is to “call upon states to promote and consolidate democracy.” Thus, the Resolution also uses process-oriented terminology by employing the words “promoting” and “consolidating.” The latter is often used in the social sciences to describe the teleological nature of democratization processes. Similarly, the term “consolidation” bolsters the point that in international law democracy is both a classificatory and a gradual concept. Democratization not only involves the process leading to a transition to democracy, but also requires subsequent consolidation.

The aforementioned Vienna Declaration of Human Rights also includes a paragraph dedicated to democratization:

> The World Conference on Human Rights reaffirms that least developed countries committed to the process of democratization and economic reforms, many of which are in Africa, should be supported by the international community in order to succeed in their transition to democracy and economic development.

Again, the language focuses on the process of realizing rather than the status of democracy. Finally, in the U.N. Millennium Declaration, one can find two statements championing the promotion of democracy or advocating the development of U.N. Member States’ capacity for democratization.

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143. See supra Part II.A.1.
144. See supra Part I.B.4.
146. Id. ¶ 1.
147. Schedler, supra note 89, at 95.
149. G.A. Res. 55/2, ¶¶ 24–25 U.N. Doc. A/RES/55/2 (Sept. 8, 2000) (“We will spare no effort to promote democracy and strengthen the rule of law . . . . We resolve therefore
2. Regional Developments

(a) The Americas

Some of the most extensive guarantees concerning democracy can be found in the context of the Organization of American States (“OAS”). Article 23 of the American Convention on Human Rights prescribes the right to participate in democratic elections. Furthermore, according to Article 2(b) of the OAS Charter, the promotion of democracy is one of the Organization’s principal objectives. At the start of the 1990s, the OAS established a mechanism to implement this objective. In June 1991, the General Assembly of the OAS adopted Resolution 1080, which authorized the OAS Permanent Council to employ coercive measures against a Member State whose democracy was compromised.

One year later, the Washington Protocol modified the founding charter. Revised Article 9 of the Charter provides for suspending a State’s membership rights if its elected government has been overthrown by force. The mechanism governing this suspension is now outlined in greater detail in Articles 17 through 22 in the Inter-American Democratic Charter, which was adopted in 2001.

The OAS has applied this sanction mechanism several times. In September 1991, shortly after the adoption of Resolution 1080, it was first employed in response to Haiti’s president, Jean-Bertrand Aristide, being
ousted in a coup. The OAS Permanent Council convened immediately and condemned the coup, demanding that Aristide be reinstated. Three days later, the OAS suspended trade relations with Haiti and all forms of non-humanitarian aid. Subsequently, the United Nations assumed the case, and two years after the coup, it finally authorized the United States to intervene militarily to force the military junta to step down.

In April 1992, the President of Peru, Alberto Fujimori, staged an auto-coup, in which he dissolved the parliament and arrested several opposition members. The OAS Permanent Council expressly condemned this action, and the international community suspended loans to Peru. The international pressure prompted Fujimori to concede the election of a constitutional assembly in November 1992. Nevertheless, the effectiveness of these international measures was limited, as in the end Fujimori won the elections and maintained power.

One year later, Guatemala’s president, Serrano Elías, also initiated an auto-coup, dissolving the parliament, suspending several constitutional rights, and dismissing the constitutional court. In this case, the OAS initiated sanctions severer than those used against Fujimori. The Permanent Council unanimously condemned Serrano’s coup and ultimately forced him to step down.

Peru again became the focus of international attention in 2000 when the OAS sent a mission to Peru to monitor presidential elections. The monitoring mission found itself unable to guarantee the technical minimum standards for counting the votes in the decisive ballot between

158. See infra Part II.B.3.b (referring to the case of Haiti in more detail).
159. Picado, supra note 155, at 29.
161. Picado, supra note 155, at 29.
164. See id. at 116 (noting that the reason for the different treatment was probably the fact that the Peruvian people supported Fujimori more than the Guatemalan people supported Serrano).
165. Id. at 105.
Fujimori and his contender, Alejandro Toledo. The OAS thus cancelled the mission.\textsuperscript{167} In its report, the delegation stated that the elections failed to meet international standards.\textsuperscript{169} Despite this report, OAS Member States could not agree to condemn Peru on the basis of Resolution 1080.\textsuperscript{170} The Permanent Council, adopting a compromise, sent a mission to Peru to investigate the situation in more detail.\textsuperscript{171} The mission, however, was not completed because Fujimori stumbled into a corruption scandal and had to cede power.\textsuperscript{172}

In February 2004, Haiti’s President Aristide was toppled for a second time.\textsuperscript{173} Following brief hostilities, Aristide was forced to step down and flee the country.\textsuperscript{174} The president of the supreme court, Boniface Alexandre, succeeded Aristide as transitional president.\textsuperscript{175} The reaction of the international community was much more lukewarm compared to thirteen years earlier. Although the OAS General Assembly reacted four months later, adopting a resolution that called upon Haiti to return to democracy and condemned the acts of violence since the coup,\textsuperscript{176} the OAS failed to authorize formal sanctions or suspend Haiti’s membership rights.\textsuperscript{177} Most probably, this mild international reaction was due to Aristide’s weak legitimacy, considering he won elections in 2000 that were subject to irregularities.\textsuperscript{178} Furthermore, many human rights organizations blamed Aristide for the deteriorating human rights situation and political violence in the country.\textsuperscript{179} This case suggests that the OAS treats coups d’état differently. Rather than automatically condemning every coup, the OAS considers the perceived legitimacy of an ousted head of state to be a decisive factor.

References to democracy are not limited to the OAS. Legal documents addressing democracy and elections can also be found in the framework

\begin{itemize}
\item \textsuperscript{168} Id.
\item \textsuperscript{169} Toledo Withdraws from Peru Election, BBC NEWS, May 22, 2000, http://news.bbc.co.uk/2/hi/americas/759691.stm.
\item \textsuperscript{170} OAS Mission for Peru, supra note 166.
\item \textsuperscript{171} Id.
\item \textsuperscript{172} Michele Wucker, Haiti: So Many Missteps, 21 WORLD POL’Y J. 41, 41–42 (2004).
\item \textsuperscript{173} Id.
\item \textsuperscript{174} Id.
\item \textsuperscript{175} David S. Berry, Non-Democratic Transitions: Reactions of the OAS and CARICOM to Aristide’s Departure, 33 SYRACUSE J. INT’L L. & COM. 249, 256 (2005).
\item \textsuperscript{176} O.A.S. Doc. AG/RES. 2058 (XXXIV-O/04) (June 8, 2004).
\item \textsuperscript{177} Berry, supra note 175.
\item \textsuperscript{178} Wucker, supra note 172, at 41, 45.
\item \textsuperscript{179} Id. at 47.
\end{itemize}
of some Latin American regional organizations. In 1998, the Member States of the Andean Community (“CAN”) adopted the Andean Community Commitment to Democracy as a legally binding additional protocol to the founding statute of the CAN, the Cartagena Agreement. In addition to expressing a commitment to democracy in Article 1, the protocol sets up a sanction mechanism in Article 4. If the democratic order is disrupted in violation of Article 2, this mechanism provides for coercive measures ranging from the suspension of membership rights to ineligibility for loans from the financial institutions of the CAN. Furthermore, Article 13 of the Human Rights Charter of the CAN prescribes a right to democracy, which is further specified in Articles 14 through 18.

A similar mechanism was included in the framework of the Mercado Común del Sur (“MERCOSUR”). In 1996, the Member States adopted a declaration on democracy stating that the establishment and maintenance of democratic institutions are fundamental preconditions for cooperation with the MERCOSUR. Violations may lead to the suspension of membership rights. With the Protocol of Ushuaia, this mechanism has been transformed into an international treaty, applying to Bolivia and Chile in addition to the member signatories.

Article 3 of the Protocol of Tegucigalpa, the founding statute of the System of Central American Integration (“SICA”), identifies the promotion and strengthening of democracy as one of the organization’s principal objectives. In 1995, this objective was reaffirmed in the

182. Additional Protocol to the Cartagena Agreement, supra note 180, arts. 1, 4.
183. Id. art. 4.
186. Id. ¶ 4.
188. Sistema de Integración Centroamericana.
Framework Treaty on Democratic Security in Central America. In addition to noting that the SICA is based on the principles of democracy and the rule of law, Article 1 of the Treaty obligates States to elect governments through universal and free elections.

(b) Europe

As in the Americas, the institutional design of European international organizations shows a strong commitment to democracy. Article 3 of the first additional protocol to the European Convention on Human Rights prescribes a right to participate in democratic elections. In contrast to the OAS, however, the principle of democracy has not been enshrined in the founding Statute of the Council of Europe ("Statute"). Rather, Article 3 of the Statute provides that Member States "must accept the principles of the rule of law and of the enjoyment by all persons within its jurisdiction of human rights and fundamental freedoms, and collaborate sincerely and effectively in the realisation of the objective of the Council as specified in Chapter I." Although missing in the operative part of the Statute, democracy is mentioned in the preamble. There, democracy is described as originating from the "spiritual and moral values which are the common heritage of the [European] peoples." According to Article 1(a) of the Statute, fulfilling these values is one of the main objectives of the Council.

In practice, a State’s level of democratization has had an influence on its membership in the Council of Europe. When the parliamentary democracy in Greece was succeeded by a military dictatorship in 1967, the European Council’s Parliamentary Assembly recommended the exclusion of Greece to the Committee of Ministers. Greece responded by withdrawing from the Council of Europe on December 12, 1969. Similarly, the Council only admitted Portugal and Spain as members after each

191. Id. art. 1.
194. Id. art. 3
195. Id. pmbl.
196. Id. art. 1(a).
country reinstated democratic governments. And after the dissolution of the Soviet Union, Russia’s admission to the Council was delayed for several years because, *inter alia*, a report of experts testified that Russia had failed to meet “the Council of Europe’s standards.”

In the Charter of Paris, enacted during the Conference for Security and Cooperation in Europe in 1990, European heads of state declared that democracy is the only admissible form of government. Although the Charter of Paris does not have immediate binding force, consistent with Article 31 of the Vienna Convention on the Law of Treaties, it can be used as a tool to interpret existing obligations such as those of the Council of Europe.

The supranational institution in which the democracy principle is the most developed, but also the most widely criticized, is the European Union. According to Article 6(1) of the Treaty on the European Union, democracy is one of the EU’s fundamental principles. It is part of the *acquis communautaire*, which every potential member must observe in order to be admitted to the European Union. Moreover, Article 7 of the

202. See supra note 155.
206. Id. art. 49.
Treaty provides for a sanction mechanism whereby certain membership rights may be suspended if Article 6(1) of the Treaty is violated.\footnote{Id. art. 7. For a detailed discussion of the sanction mechanisms established by Article 7 of the EU Treaty, see \textsc{Amaryllis Verhoeven, The European Union in Search of a Democratic and Constitutional Theory} 349–54 (2002).}

\textit{(c) Africa}

Regarding the African Union ("AU"), Article 13 of the African Charter on Human and Peoples’ Rights ("Banjul Charter") does not explicitly mention a right to elections.\footnote{Organization of African Unity: Banjul Charter of Human and Peoples’ Rights, Jun. 27, 1981, 21 I.L.M. 58, \textit{available at} http://www.africa-union.org/root/au/Documents/Treaties/Text/Banjul%20Charter.pdf [hereinafter Banjul Charter]. However, it should be noted that Article 13 discusses the right of every citizen to "participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provision of the law." Id. art. 13.} It does, however, guarantee a right to participate in public affairs.\footnote{Id.} According to the African Commission on Human Rights ("African Commission"), this participation involves legitimating a sovereign power through elections.\footnote{Constitutional Rights Project and Civil Liberties Organisation/Nigeria ¶¶ 49–50, Doc. ACHPR/102/93 (Oct. 31, 2008), \textit{reprinted in} African Commission on Human Rights and Peoples’ Rights, \textit{Twelfth Annual Activity Report of the African Commission on Human and Peoples’ Rights} (1998–1999) 45, Doc. AHG/215 (XXV) (1998), \textit{available at} http://www.achpr.org/english/activity_reports/activity12_en.pdf.} Articles 3(g) and 4(m) of the AU Charter also identify the promotion of and respect for democratic principles and institutions as fundamental objectives of the AU.\footnote{Constitutive Act of the African Union arts. 3(g), 4(m), O.A.U. Doc. CAB/LEG/2315 (July 11, 2000), \textit{available at} http://www.au2002.gov.za/docs/key_oau/au_act.htm [hereinafter Act of the AU].} Moreover, the AU as well as its predecessor, the Organization of African Unity ("OAU"), have established protection mechanisms against coups d’état. The starting point was a 1994 resolution of the African Commission, which condemned military overthrows of government and appealed to military regimes to transfer their power to elected governments.\footnote{Resolution on the Military, OAU Doc. ACHPR/Res.10(XVI)94 (Nov. 3, 1994), \textit{available at} http://www.achpr.org/english/_doc_target/documentation.html?..../resolutions/resolution15_en.html.}

In practice, the turning point was the ousting of Ahmed Kabbah in Sierra Leone in 1997.\footnote{Paul D. Williams, \textit{From Non-Intervention to Non-Indifference: The Origins and Development of the African Unions Security Culture}, 106 AFR. AFF. 253, 272 (2007).} The OAU supported the military intervention of the Economic Community of West African States ("ECOWAS")\footnote{See infra Part II.B.3.b for a discussion of this intervention.} and
called upon the international community not to recognize the junta of Paul Koroma.\textsuperscript{215} The OAU reacted similarly towards military coups in the Comoros, Ivory Coast, and Niger, refusing to acknowledge the legitimacy of rebel governments in these states.\textsuperscript{216}

This position was translated into a formal legal rule during the foundation of the AU. Article 4 of the AU Charter condemns unconstitutional changes of government.\textsuperscript{217} Correspondingly, Article 30 of the AU Charter allows a State’s membership rights to be suspended where the government has come to power by “unconstitutional means.”\textsuperscript{218} Reading Article 4 in conjunction with Article 30 suggests that the latter permits such sanctions only when an elected regime has been ousted.

In a 2000 declaration (“Declaration”), AU Member States further elaborated upon this sanction mechanism.\textsuperscript{219} The Declaration provides for a six-month period in which the implicated State has the opportunity to restore its constitutional order, and during this time, the AU can suspend its right to participate in the policy-making organs of the AU.\textsuperscript{220} If it does not comply with this obligation, the AU may then institute sanctions against the noncompliant State.\textsuperscript{221} The Declaration contains a nonexhaustive list of possible sanctions, ranging from denying visas for illegitimate government officials, to limiting government-to-government contacts, to restricting trade with other AU countries.\textsuperscript{222}

This mechanism has been applied in several cases. In 2003, the AU barred the Central African Republic from taking part in its organs after military forces overthrew the elected president, Ange-Félix Patassé.\textsuperscript{223} The AU allowed the country to resume its participation following presidential elections held in 2005.\textsuperscript{224} Likewise, when Faure Gnassingbé captured power in Togo by military force after the death of his father in

\begin{footnotes}
\item[217.] \textit{Act of the AU, supra} note 211, art. 4.
\item[218.] \textit{Id.}
\item[220.] \textit{Id.}
\item[221.] \textit{Id.}
\item[222.] \textit{Id.}
\end{footnotes}

This last example indicates that the current practice of the AU is problematic in two respects: on the one hand, its sanctions are too far-reaching, and on the other hand, as in the case of Togo, they are not inclusive enough.\footnote{Williams, supra note 213, at 274.} Regarding the over-inclusiveness of sanctions, military coups have been condemned, notwithstanding the legitimacy of ousted regimes. There is thus a danger that the mechanism is a reinforcer of the status quo rather than a catalyst for democratization.\footnote{Djacoba Liva Tehindrazanariveló, Les sanctions de l’union africaine contre les coups d’état et autres changements anticonstitutionnels de gouvernement: potentialités et mesures de renforcement [The African Union’s Sanctions Against Coups d’État and Other Unconstitutional Changes of Government: Efficacy and Enforcement Strategies], 12 AFR. Y.B. INT’L L. 255, 280 (2004) (Neth.).} Mauritania’s President, Maaouya Sid Ahmed Ould Taya, for example, whose legitimacy was questionable at best, was overthrown in a bloodless coup in August 2005.\footnote{Mauritania Officers “Seize Power,” BBC NEWS, Aug. 4, 2005, http://news.bbc.co.uk/2/hi/africa/4741243.stm.} Although the military government announced that it would hold elections within two years and exclude its own participation, the AU condemned the coup and subjected Mauritania to sanctions.\footnote{A.U. Doc. PSC/PR/Stat. (XXXVI)-(ii) (Aug. 4, 2005), available at http://www.africa-union.org/psc/36th/36th%20Stat%20Mauritania%20PSC%20Eng.pdf.} However, some African politicians voiced dissent. The South African Ambassador to Mauritania, for example, declared: “[although] the principle of the AU is not to agree with coups . . . we believe we shall not have one policy to fit every situation.”\footnote{AU Seeks Mauritanian Junta Talks, BBC NEWS, Aug. 9, 2005, http://news.bbc.co.uk/1/hi/world/africa/4135350.stm.}
nia were nonetheless lifted only after presidential elections were held in the spring of 2007.234

However, there are also positive signs. In two other cases, the AU issued formal condemnations without further sanctions in response to coups against regimes of doubtful legitimacy. The December 1999 military coup against a corrupt regime in the Ivory Coast was publicly criticized, but the transitional government was recognized shortly thereafter.235 When President Kumba Yalla was ousted in Guinea-Bissau in 2003, after dissolving the parliament and adopting several dictatorial decrees, the AU only denounced the coup.236

At the same time, the AU has been very reluctant to act when it comes to other constitutional infringements such as falsifying elections, amending constitutions to consolidate more power, or permitting additional terms in office.237 A recent example is the March 2008 presidential election in Zimbabwe. Although the legitimacy of the reelection of Robert Mugabe was questionable at best, the AU General Assembly only adopted a resolution encouraging the opposing parties to enter into a constructive dialogue and failed to impose any sanctions.238

Some regional organizations in Africa have established mechanisms similar to those of the AU. The 1991 Declaration of Political Principles of the Economic Community of West African States asserts:

We believe in the liberty of the individual and in his inalienable right to participate by means of free and democratic processes in the framing of the society in which he lives. We will therefore strive to encourage and promote in each of our countries, political pluralism and those representative institutions and guarantees for personal safety and freedom under the law that are our common heritage.239


237. Hartmann, supra note 235, at 219–20; Williams, supra note 213, at 274–75.


The essence of this declaration was incorporated into the 1993 Treaty of ECOWAS. Subsections (h) and (j) of Article 4 provide that the right to participate in the conduct of government and promote democracy is one of the organization’s fundamental principles. Moreover, in accordance with Article 58(2)(g), the organization is to offer its support in the holding of elections upon a Member State’s request. The ECOWAS reaffirmed these principles in the Protocol on Democracy and Good Governance, which explicitly emphasizes the obligation to hold free, fair, and transparent elections.

Furthermore, in Article 4(c) of the Charter of the South African Development Community (“SADC”), the promotion of democracy is enshrined as one of the SADC’s guiding principles. According to Article 5(1), the organization’s objectives feature, inter alia, the promotion of common political values “transmitted through institutions which are democratic, legitimate and effective,” as well as the “consolidation, defense and maintenance of democracy.” The SADC Principles and Guidelines Governing Democratic Elections, adopted in August 2004 during the organization’s summit in Mauritius, also support these principles.

(d) Evaluation

The analysis of emerging regional commitments to democracy presents a heterogeneous picture. In the Americas and Europe, a democracy principle has been established under regional customary law. Both human
rights treaties and documents of the regional political organizations contain extensive electoral and democratic guarantees. American and European regional bodies have also developed effective sanction mechanisms against States that fail to meet democratic standards. In Europe especially, these sanctions not only concentrate on the central element of democracy—elections—but also strive to implement a more substantive vision of democracy.

With regard to Africa, locating a coherent democratic principle is more difficult. Although the AU Charter has deemed democracy one of its vital objectives, and the Banjul Charter prescribes a right to participate in public affairs, many governments in Africa remain undemocratic. However, instead of actively promoting democracy, the established sanction mechanisms exclusively address regressions in the process of democratization, which supports the argument that the democracy principle must be read in a teleological manner rather than in a strict sense.

3. Democracy and the Use of Force

Military intervention in the name of democracy has attracted the most attention in the literature on democracy in international law. The following analysis focuses on five possible precedents for the use of force to promote democracy. In doing so, this section compares the unilateral military interventions of the United States in Grenada, Panama, and Iraq with the U.N. Security Council-backed interventions in Haiti and Sierra Leone.

(a) Unilateral Interventions in Grenada, Panama, and Iraq

In response to a coup d’état against the government of Maurice Bishop, U.S. troops invaded Grenada on October 25, 1983, with the support of neighboring Caribbean States. Three days after the invasion, the U.S. military succeeded in overthrowing the military council, which had come to power after the coup. In the ensuing debate among legal scholars on the legality of the U.S. intervention, some argued that restoring democracy was a sufficient legal justification. However, there are several facts

250. Act of the AU, supra note 211, art. 3.
254. ROTH, supra note 131, at 309 (noting positive developments following the invasion of Grenada and suggesting that the case of Grenada serves as a positive precedent). See also FERNANDO R. TESÓN, HUMANITARIAN INTERVENTION: AN INQUIRY INTO LAW
that undercut this position. First, Bishop himself attained power not by
democratic means, but through a coup d’État in 1979. Second, the U.S.
administration did not attempt to justify the intervention on the grounds
of restoring democratic order. The opinions of academic commentators
alone are insufficient for an *opinio juris*. Finally, and most importantly,
the U.N. General Assembly condemned the intervention as illegal by an
overwhelming majority. While resolutions of the General Assembly
are certainly not directly binding, they are an expression of *opinio juris*
that the U.S. invasion cannot be regarded as a precedent for a right to
pro-democratic intervention.

The U.S. offensive in Panama is a second possible precedent for the
idea that democracy may justify military intervention. On December
20, 1989, the U.S. army invaded Panama in order to overthrow the re-
gime of Manuel Noriega and capture the head of state himself. This time,
President George H.W. Bush explicitly justified the action on the basis
of protecting democracy, in addition to citing the need to protect U.S. citi-
zens, combat drug trafficking, and secure implementation of the Panama Canal treaties. However, the U.N. General Assembly again condemned

AND MORALITY 258 (3rd ed. 2005); William Michael Reisman, Editorial, Coercion and
defending unilateral intervention by arguing that restrictions of Article 2(4) are possible
because of the U.N. Security Council’s lack of effectiveness in many circumstances).

255. L. Doswald-Beck, The Legality of the United States Intervention in Grenada, 24
256. Michael Byers & Simon Chesterman, “You, the People”: Pro-Democratic Inter-
vention in International Law, in DEMOCRATIC GOVERNANCE AND INTERNATIONAL LAW,
*supra* note 123, at 259, 273; Oscar Schachter, The Legality of Pro-Democratic Invasion,


the armed intervention in Grenada, which constitutes a flagrant violation of international
law and of the independence, sovereignty and territorial integrity of that [s]tate”). The
vote was 108-9-27. Byers & Chesterman, *supra* note 256, at 273 n.64.

259. SCOTT DAVIDSON, GRENADA: A STUDY IN POLITICS AND THE LIMITS

260. Tesón, *supra* note 254, at 269; William Michael Reisman, Humanitarian Inter-
vention and Fledging Democracies, 19 FORDHAM INT’L L.J. 794, 800-01 (1995); Abra-
ham D. Sofaer, The Legality of the United States Action in Panama, 29 COLUM. J.
Was a Lawful Response to Tyranny, 84 AM. J. INT’L L. 516, 519 (1990) (referring to the
human rights violations of the Noriega regime and explicitly rejecting the possibility of a
pro-democratic intervention).

261. George Bush, President, Address to the Nation Announcing U.S. Military Action in
the intervention by a clear majority.\textsuperscript{262} Therefore, the intervention in Panama should likewise not serve as evidence of a right to democracy in international law.\textsuperscript{263}

The U.S.-led invasion of Iraq in March 2003 is the most recent case in which regime change was invoked as a justification for war.\textsuperscript{264} In his State of the Union address on January 28, 2003, President George W. Bush declared: “And tonight I have a message for the brave and oppressed people of Iraq: Your enemy is not surrounding your country—your enemy is ruling your country. And the day he and his regime are removed from power will be the day of your liberation.”\textsuperscript{265} Among the political considerations that finally led to the war, Iraq’s democratization was a major factor.\textsuperscript{266} It is telling, though, that in official legal justifications for the war, neither the United States nor Great Britain mentioned regime change as the principle reason.\textsuperscript{267} Instead, they justified the intervention by interpreting Resolutions 678, \textsuperscript{268} 687, \textsuperscript{269} and 1441\textsuperscript{270} of the

\begin{itemize}
\item \textsuperscript{262} G.A. Res. 44/240, ¶ 1, U.N. Doc. A/RES/44/240 (Dec. 29, 1989) (“Strongly deplo\textsuperscript{rloring} the intervention in Panama by the armed forces of the United States of America, which constitutes a flagrant violation of international law and of the independence, sovereignty and territorial integrity of states”). The vote was 75-20-40. Byers & Chesterman, supra note 256, at 275 n.79.
\item \textsuperscript{264} See TESÓN, supra note 254, at 392 (considering humanitarian intervention as the primary justification of the invasion for Iraq); Davis Brown, Iraq and the 800-Pound Gorilla Revisited: Good and Bad Faith, and Humanitarian Intervention, 28 HASTINGS INT’L & COMP. L. REV. 1 (2004); Robert F. Turner, Operation Iraqi Freedom: Legal and Policy Considerations, 27 HARV. J. L. & PUBL. POL’Y 765, 778 (2004). However, all the above authors emphasize the human rights violations of Saddam Hussein’s regime. Implicit is the position that the totalitarian form of government alone is not sufficient to justify an intervention.
\item \textsuperscript{265} Press Release, President George W. Bush, President Delivers “State of the Union” (Jan. 28, 2003).
\item \textsuperscript{266} James Kurth, Humanitarian Intervention After Iraq, 50 ORBIS 87, 97 (2005).
\end{itemize}
U.N. Security Council respectively. Nonetheless, a considerable part of the international community condemned the intervention. Among its opponents were Belgium, Canada, China, France, Germany, and Russia. Accordingly, the Iraq War also cannot be regarded as support for the emergence of an international democracy principle.

(b) Collective Interventions in Haiti and Sierra Leone

In the search for precedents that ground such a norm, collective interventions authorized by international institutions are more promising indicators than the unilateral interventions examined thus far. Many legal scholars argue that the 1991 intervention in Haiti, which was authorized by the U.N. Security Council, serves as a paradigmatic precedent. In 1990, Jean-Bertrand Aristide was elected as Haiti’s president with sixty-seven percent of the votes. The United Nations and the OAS

monitored this election at Haiti’s request. On September 29, 1991, the military overthrew Aristide. Though not responding immediately, in June 1993, the U.N. Security Council adopted Resolution 841, which imposed economic sanctions on Haiti. As a result, Haiti’s military regime concluded the so-called Governors Islands Agreement, in which it conceded the reinstatement of Aristide to power. However, the implementation of the Agreement failed when members of the junta exercised force against Aristide partisans in the autumn of 1993. In response, the Security Council set up a naval blockade and continued the economic sanctions.

On July 31, 1994, it adopted Resolution 940, which permitted all U.N. Member States to use force to reinstall the legitimate government in Haiti. On September 18, 1994, just hours before a multinational troop under U.S. leadership was scheduled to land in Haiti, former U.S. President Jimmy Carter, with the support of Senator Sam Nunn and General Colin Powell, convinced the junta to cede power to Aristide and leave the country.

Several authors have refused to recognize this case as setting a precedent for collective pro-democratic intervention, arguing that through its actions, the Security Council was primarily addressing the protection of peace and security in the region. The response of the United Nations, however, should be examined within the context of the Security Council’s new activism during the 1990s. In a series of resolutions, the body broadly interpreted the notion of peace and security in Chapter VII of the U.N. Charter. The Security Council held that peace and security do not simply mean the absence of the use of military force. According to the Council, these two terms may be invoked in the case of

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internal crises, such as those in Rwanda and Somalia. While formally respecting the text of the U.N. Charter, the Security Council, with overwhelming support from the legal literature, expanded its authority to cope with the new world order that emerged after the end of the Cold War. Thus, despite the reference to peace and security in the region, Resolution 940 was clearly focused on restoring internal order in Haiti.

Moreover, some scholars have doubted the competence of the U.N. Security Council to intervene for the purpose of reinstating democratic order, while others have argued that the case of Haiti cannot be generalized because of the specific regional context. Some commentators have even maintained that the general human rights situation in Haiti or the violation of the Governors Islands Agreement justified the Security Council resolution. However, these objections cannot account for the fact that the restoration of democracy was the explicit objective of Resolution 940. This objective is expressed in its preamble: “[r]eaffirming that the goal of the international community remains the


290. Olivier Corten, La résolution 940 du Conseil de sécurité autorisant une intervention militaire en Haïti: L’émergence d’un principe de légitimité démocratique en droit international? [Security Council Resolution 940 Authorizing a Military Intervention in Haiti: The Emergence of a Democratic Legitimacy Principle in International Law?], 6 EUR. J. INT’L L. 116, 129 (1995); Leininger, supra note 278, at 489 (arguing that the intervention in Haiti should not serve as a global precedent because of the specific regional context).


292. Corten, supra note 290, at 126.
restoration of democracy in Haiti and the prompt return of the legitimately elected President, Jean-Bertrand Aristide, within the framework of the Governors Island Agreement.”293 Also, supporting the legitimate government of Haiti plays an important role in its operative part:

1. [The Security Council welcomes] the report of the Secretary-General of 15 July 1994 (S/1994/828) and takes note of his support for action under Chapter VII of the Charter of the United Nations in order to assist the legitimate Government of Haiti in the maintenance of public order;

[…]

4. Acting under Chapter VII of the Charter of the United Nations, [the Security Council] authorizes Member States to form a multinational force under unified command and control and, in this framework, to use all necessary means to facilitate the departure from Haiti of the military leadership, consistent with the Governors Island Agreement, the prompt return of the legitimately elected President and the restoration of the legitimate authorities of the Government of Haiti, and to establish and maintain a secure and stable environment that will permit implementation of the Governors Island Agreement, on the understanding that the cost of implementing this temporary operation will be borne by the participating Member States . . . .294

Although the preamble also refers to the human rights situation in Haiti,295 human rights violations are not the focus of the operative part of the Resolution, as it concentrates on re-establishing the legitimate order.296 Furthermore, the reference to the Governors Islands Agreement itself is inessential. It is implausible that the Security Council would have implemented an agreement between a de facto regime and a de jure government irrespective of the latter’s content. The Governors Islands Agreement was only implemented because the goals of the Agreement were to restore democratic order to the country. Finally, with regard to the competence of the Security Council, normative concerns are irrele-

293. S.C. Res. 940, supra note 283.
294. Id. (emphasis added).
295. Id. (“Gravely concerned by the significant further deterioration of the humanitarian situation in Haiti, in particular the continuing escalation by the illegal de facto regime of systematic violations of civil liberties, the desperate plight of Haitian refugees and the recent expulsion of the staff of the International Civilian Mission, which was condemned in its Presidential statement of July 12, 1994.”) (internal parentheses omitted).
296. See, e.g., Corten, supra note 290, at 127 (emphasizing that, in terms of gravity and intensity, the atrocities in Haiti cannot be compared to those committed in Bosnia, Rwanda, or Somalia).
vant when examining practice and opinio juris concerning democracy. The crucial point here is that the Security Council Resolution is an indicator of the international community’s reception of the intervention.

Nevertheless, the scope of the Haiti precedent is limited. The intervention addressed the restoration of a disrupted, preexisting constitutional order. It cannot be regarded, therefore, as an indicator of a universal democracy principle. However, it does fit into the patterns already observed in the context of General Assembly resolutions. If the democracy principle in international law is teleological and process-oriented, then countries are indeed not obliged to turn into democracies overnight. Teleology, though, prohibits setbacks in the process of democratization. If collective interventions, such as the intervention in Haiti, occur after coups d’état against elected governments, this practice confirms the principle of democratic teleology.

The intervention of Nigeria and ECOWAS in Sierra Leone further supports this argument. In Sierra Leone, a country plagued by civil war, the parties to the conflict signed peace accords following the 1996 presidential elections. In these elections, Ahmad Tejan Kabbah was voted president. As the Rebel Unity Front were militarily weak and lost the elections, it signed the Abidjan Accord in November 1996, in which the parties consented to an immediate ceasefire and the disarmament of the combatants. This agreement did not, however, contribute to a détente. On the contrary, on May 25, 1997, the President of Sierra Leone was

300. Id.
overthrown.\textsuperscript{302} This prompted Nigerian troops of the ECOWAS Monitoring Group ("ECOMOG") to intervene. In June 1997, Nigerian forces invaded Sierra Leone and helped to reinstate Kabbah as president in March 1998. The U.N. Security Council only retroactively approved the intervention. In October 1997, it expressed support for the ECOWAS action,\textsuperscript{303} and on March 16, 1998, it welcomed President Kabbah’s return to office.\textsuperscript{304}

The legal scholarship identifies several justifications for the ECOMOG intervention, including pro-democratic intervention,\textsuperscript{305} humanitarian intervention,\textsuperscript{306} and invitation by the \textit{de jure} government.\textsuperscript{307} Some authors have raised doubts concerning the democratic intentions of the intervening States, noting that Nigeria, the leader of the intervention, was itself ruled by an autocratic government.\textsuperscript{308} However, in evaluating the intervention as a precedent for the emergence of a democracy principle, the reception of the international community is more significant than the intentions of the intervening parties or the legality of the intervention itself. The Security Council resolutions on Sierra Leone stress the importance of restoring democratic order. Resolution 1132 requests the military junta

\begin{itemize}
\item \textsuperscript{302} Id.
\item \textsuperscript{303} S.C. Res. 1132, ¶ 3, U.N. Doc. S/RES/1132 (Oct. 8, 1997) ("Express[ing] its strong support for the efforts of the ECOWAS Committee to resolve the crisis in Sierra Leone and encourag[ing] it to continue to work for the peaceful restoration of the constitutional order, including through the resumption of negotiations").
\item \textsuperscript{304} S.C. Res. 1156, S/RES/1156 (Mar. 16, 1998) ("Welcom[ing] the return to Sierra Leone of its democratically elected president on 10 March 1998").
\item \textsuperscript{308} Byers & Chesterman, \textit{supra} note 256, at 290; Goldmann, \textit{supra} note 307, at 473–74.
\end{itemize}
to reinstate democratic order,\textsuperscript{309} while Resolution 1156 welcomes the country’s return to democracy.\textsuperscript{310} Therefore, the case of Sierra Leone, confirms the patterns already observed with regard to Haiti. The international community views the overthrow of an elected government as a violation of international law,\textsuperscript{311} and this supports the existence of a principle of democratic teleology in international law.

4. Resume

International law does not provide for a strict right to democratic governance, as international documents and corresponding practice emphasize the process-oriented character of democratization. Democracy, rather, is perceived as a teleological principle, according to which States and societies are obliged to develop towards democracy. This principle has two dimensions. First, it is directed against regressions in the process of democratization. Obvious setbacks are military coups. This is underlined by the practice of the U.N. Security Council, which endorsed military action after elected governments were overthrown in Haiti and Sierra Leone and by the sanction mechanisms of the OAS and the AU.

Regressions, though, are not limited to coups d’état. They also encompass other setbacks in the process towards and consolidation of democracy, such as increased centralization of power by heads of state or the cession of political control to the military. Examples include the 1992 autogolpe of Alberto Fujimori in Peru and the 1995 “constitutional referendum” of Alexander Lukashenko in Belarus.\textsuperscript{312} In particular, this is reflected in the sanctioning practice of the OAS and, to a certain extent, in that of the AU. Both organizations have the power to impose sanctions not only for military coups, but also for other efforts to erode democracy. Regional institutions have shown reluctance to act in cases where formal elections have been held, but election results have been falsified by undue influence. In theory, such cases should constitute setbacks in the process of democratization, which run counter to the principle of democratic teleology.

Democratic teleology is not merely concerned with avoiding setbacks and regressions. It also imposes a second obligation whereby States must

\begin{itemize}
  \item[\textsuperscript{309}] S.C. Res. 1132, supra note 303, ¶ 1 (“Demand[ing] that the military junta take immediate steps to relinquish power in Sierra Leone and make way for the restoration of the democratically-elected Government and a return to constitutional order”).
  \item[\textsuperscript{310}] See supra note 304.
  \item[\textsuperscript{311}] See ROTH, supra note 131, at 393.
  \item[\textsuperscript{312}] See Laurence Whitehead, The Consolidation of Fragile Democracies: A Discussion with Illustrations, in DEMOCRACY IN THE AMERICAS: STOPPING THE PENDULUM 76, 76–95 (Robert A. Pastor ed., 1989) (providing further examples from Latin America).
\end{itemize}
actively develop towards democracy and then consolidate democratic institutions. As an ideal type of democracy as well as an ideal method of democratization are lacking, this duty does not require specific performance. Governments have a certain margin of flexibility, and only clearly defective strategies can be regarded as illegal. In order to assess strategies, the same classification proposed in the context of the principle of self-determination may be used. According to this proposal, regimes that are not self-enriching and that observe core human rights principles should be considered legal and legitimate.

CONCLUSION

Nearly two decades after the fall of the Berlin Wall, the euphoria surrounding democracy has cooled down considerably. Democracy is not the cure-all it was widely considered to be. Moreover, the third wave of democratization in the early 1990s was much weaker in the end than many observers had predicted. Although there is near consensus in philosophy and political sciences that, in the long run, there can be no suitable alternative to democracy as a form of government, democratization is not a simple change of the political status. Instead, it is a long-term, complex, social process, and its preconditions are still very much debated in social science research.

This contribution attempts to address these concerns by framing democracy as a teleological principle. In international law, democracy is neither an absolute right nor a strict obligation. The identified norm, rather, focuses on the process-like character of democratization. States are merely obliged to develop towards democracy. This understanding of the democratic principle in international law better comports with existing legal documents, which use process-oriented rather than prescriptive language. What constitutes concrete development in the process of democratization is, to a considerable extent, subject to a State’s own discretion.

Due to the binary character of legal norms, though, lawyers prefer clear standards. Karl-Heinz Ladeur once offered a metaphor where he compared the law to a blind man who uses “a stick to test the stability of the ground on which he walks.” Throughout this process, the man distinguishes between stable and unstable ground. In so doing, he creates a system of orientation without being able to evaluate the world in its

313. See supra Part II.A.2.
314. HUNTINGTON, supra note 36, at 280.
316. Id.
entire complexity. Lawyers act in a similar fashion when they merely ask about the legality or illegality of actions or conditions. In this context, they need standards that allow them to make clear binary distinctions. The stricter the legal standards are, the higher the determinacy of the legal norms. Against this background, the principle of democratic teleology fails to meet the standards most legal scholars favor. Whether a State has held elections or not is a question of fact that can be answered quite easily. In contrast, whether a government acts in the interests of its population requires difficult normative evaluations.

Nonetheless, strict normative standards do not always take into account the complexity of reality. Martti Koskenniemi has argued that the “indeterminacy” of norms is inherent to international legal principles. According to Koskenniemi, absolute legal standards are always over- or under-inclusive. International law thus suffers from an inherent tension between determinacy and justice. The more determinate the legal standards are, the less apt they are to take into account the complexity of reality. Alternatively the more they adjust to complexity, the less determinate they are. In particular, as the effectiveness of international law depends upon its level of acceptance in the international community, international law cannot afford to impose strict standards. It must apply to circumstances and strategies as diverse as global democratization itself.

Francis Fukuyama’s diagnosis of “the end of history” is premature. Democracy still has a long way to go, and this is reflected by the present state of international law. In the legal debate of the 1990s, even those authors who favored democratic entitlement did not claim the existence of an unconditional right to democratic governance. Instead, most of them identified a democratic trend, or most famously, an “emerging...
right to democratic governance.” As the present Article has argued, this position should be reformulated: international law contains a principle of democratic teleology, namely, a right to the emergence of democratic governance.

324. Franck, supra note 3.
CIVIL SOCIETY AND THE LEGITIMACY OF THE WTO DISPUTE SETTLEMENT SYSTEM

Yuka Fukunaga*

INTRODUCTION

The legitimacy of a rule or an institution is important because it may encourage voluntary compliance with the rule or the institution’s decisions, while the lack of legitimacy may be used as an excuse for noncompliance.1 Legitimacy is especially critical within the context of international law, as the international community lacks effective enforcement tools.2 This Article focuses on the legitimacy of the World Trade Organization’s (“WTO”) dispute settlement system.3 As the coverage of the WTO Agreement4 expands and its enforcement intensifies, its impact on the lives of citizens becomes more extensive and profound. The dispute settlement system has been criticized for enforcing the WTO Agreement without due regard to the nontrade interests and values of civil society.5 Given that citizens have become important stakeholders in international trade disputes, critics demand that the dispute settlement system reflect the concerns of not only States and businesses, but also civil society.

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3. The WTO was established in 1995 as a result of the Uruguay Round, the last round of trade negotiations under the General Agreement on Tariffs and Trade. WORLD TRADE ORG., THE WORLD TRADE ORGANIZATION IN BRIEF 3 (2007), http://www.wto.org/english/res_e/dload_e/inbr_e.pdf. The WTO has 153 member nations, and this accounts for approximately 97% of world trade. Id. at 7. The WTO’s dispute settlement system, the WTO’s procedure for resolving trade quarrels, is instrumental in enforcing WTO rules and “ensuring that trade flows smoothly.” Id. at 5. Nearly 400 disputes have been brought before the dispute settlement system, and almost 300 rulings (including panel and Appellate Body reports and arbitration awards) have been issued. WTO Dispute Settlement: Basic Facts and Figures, http://www.worldtradelaw.net/dse/database/basicfigures.asp. (last visited Nov. 18, 2008).
5. See infra note 80 and accompanying text.

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There are many existing proposals on how to legitimize the dispute settlement system in civil society. Some proposals introduce innovative concepts such as “constitutionalism,” 6 “democracy,” 7 and “governance,” 8 while others focus on specific revisions to the dispute settlement system, such as the acceptance of unsolicited amicus curiae briefs and the incorporation of nontrade values. 9 Despite the divergence of views, most of the proposals maintain that the dispute settlement system should directly reflect the diverse interests and values of citizens so as to be perceived legitimate by civil society.

While the primary question scholars have asked is how this can be accomplished, in the author’s view, there are more fundamental questions to be addressed. In the first place, why does the dispute settlement system, an intergovernmental trade tribunal, need to respond to civil society’s demand for legitimacy? Does enhanced legitimacy as perceived by civil society also improve the overall legitimacy of the system? Furthermore, even if such legitimacy needs to be taken into account, is the dispute settlement system suitable for and capable of directly representing and coordinating the various concerns of civil society?

Responding to these questions, this Article is organized as follows: Part I analyzes several key sources of legitimacy in the dispute settlement system and demonstrates that there is a conflicting relationship

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7. See, e.g., Jeffery Atik, Democratizing the WTO, 33 GEO. WASH. INT’L L. REV. 451 (2001); Robert Howse, Democracy, Science, and Free Trade: Risk Regulation on Trial at the World Trade Organization, 98 MICH. L. REV. 2329 (2000); Americo Beviglia Zampetti, Democratic Legitimacy in the World Trade Organization: The Justice Dimension, 37 J. WORLD TRADE 105 (2003). Without defining the terms, this Article discusses the substance of constitutionalism and democracy to the extent that these concepts are relevant. It should be noted that these terms have been developed in the domestic sphere and that there is always a risk of incorporating such terms into the international sphere. J.H.H. WEILER, THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS ON EUROPEAN INTEGRATION 270 (1999).


among the various sources of legitimacy. Part II examines civil society’s demand for legitimacy and discusses various proposals that seek to set forth how this demand can be fulfilled in the dispute settlement system. While recognizing the growing significance of civil society in the context of international trade, this section criticizes these proposals and shows how they might impair the overall legitimacy of the system. Part III discusses alternative ways of legitimizing the dispute settlement system as perceived by civil society. Underscoring that the dispute settlement system is merely part of the plural international and domestic legal orders, this section argues that the interests and values of civil society should be considered and reflected in different domains, both WTO and non-WTO, and at international, regional, national, and local levels.

I. SOURCES OF LEGITIMACY IN THE DISPUTE SETTLEMENT SYSTEM

In defining legitimacy, it is helpful to distinguish between two different types of legitimacy—objective and subjective. Objective legitimacy follows from the actual properties of a rule or institution. For example, an international treaty is objectively legitimate when its text clearly articulates what the contracting States have agreed to. Likewise, an international institution is objectively legitimate when its structure effectively helps to achieve its goals. Subjective legitimacy arises from the perceptions of a rule or institution by those affected by the rule or institution. In particular, the perceptions by States, expressed by their consent (or the lack thereof) to a rule or institution, determine the subjective legitimacy of the rule or institution. Although objective and subjective legitimacy spring from different sources, these two types of legitimacy may affect one another. For example, if a rule or institution is ineffective, a State may refuse to consent to the rule or institution.

What confers legitimacy, either in an objective or subjective sense, varies across areas of international law and over the course of time. State

11. See FRANCK, supra note 2, at 24 (discussing legitimacy as a property of an institution’s rules or rulemaking process that pulls actors towards compliance).
12. See FRANCK, supra note 2, at 25 (noting that an actor’s perception of a rule’s or institution’s legitimacy will dictate the extent to which the actor complies).
14. For example, scientific expertise is an essential source of legitimacy in making and enforcing regulations on whaling. David Caron, The International Whaling Commission and the North Atlantic Marine Mammal Commission: The Institutional Risks of Coercion in Consensual Structures, 89 AM. J. INT’L L. 154, 159–63 (1995). However, the legitimacy argument once demanded the universal participation of the interested States
consent is a primary, though implicit, source of legitimacy in international law. Under the principle of pacta sunt servanda, when States consent to an international rule, they accept its legitimacy and agree to comply with it. As state consent was traditionally viewed as the exclusive source of legitimacy in international law, legitimacy was not explicitly discussed as distinct from state consent until recently. Despite the continuing importance of state consent, there is a growing belief in the international community that state consent is insufficient to persuade States of the legitimacy of an international rule or institution. There are several explanations for this new trend.

First, the structure of international law is changing to include not only the law of coexistence, but also the law of cooperation. Consequently, an international law rule or institution must address new situations in a manner that differs from the texts of the treaties and agreements to which States have consented. Something in addition to state consent is necessary to legitimize the subsequent evolution of an international law rule or

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in the Antarctic Treaty System. Richard Falk, The Antarctic Treaty System: Are There Viable Alternatives?, in THE ANTARCTIC TREATY SYSTEM IN WORLD POLITICS 399, 412 (Arnfinn Jorgensen-Dahl & Willy Ostreng eds., 1991). In the context of the European community, one scholar has suggested that in the process of European integration, the sources of legitimacy have been expanded to include not only a democratic foundation, but also a “broad, empirically determined societal acceptance.” J.H.H. Weiler, The Transformation of Europe, 100 YALE L.J. 2403, 2468–74 (1991) [hereinafter Weiler, Transformation].


institution. Second, the coverage of international law has expanded to include nonstate actors. A State may be prevented from complying with an international law rule if its people do not consider the rule legitimate.\textsuperscript{20} Thus, legitimacy needs to be ensured from the perspective of nonstate actors within the State.\textsuperscript{21} Finally, international tribunals have begun to play a more important role in interpreting international law rules, a role that in the past was fulfilled by States alone.\textsuperscript{22} These tribunals may be remote from the control of state consent, and this raises concerns about the legitimacy of their interpretations as well as the tribunals themselves.

Having recognized the significance of legitimacy in international law, it remains to be examined what, in addition to state consent, confers legitimacy to international law. The composition of additional sources of legitimacy and the significance of each may even vary within a single institution.\textsuperscript{23} The following subsections examine major sources of objective and subjective legitimacy in the dispute settlement system.\textsuperscript{24} The chief purpose of this Section is not to create an exhaustive list of legiti-

\begin{itemize}
\item \textsuperscript{21} Bodansky, \textit{supra} note 15, at 610–11.
\item \textsuperscript{23} Such variety exists within the WTO as well. In trade liberalization negotiations, the involvement of every Member State is strongly preferred in order to ensure the legitimacy of the negotiations. For example, developing countries are encouraged to participate in the current services negotiations through the submission of any kind of liberalization requests and offers. Special Session of the Council for Trade in Services, \textit{Guidelines and Procedures for the Negotiations on Trade in Services}, ¶¶ 1–2, S/L/93 (Mar. 29, 2001). What matters here is not the substance of liberalization commitments, but rather the fact that all the members are involved in the liberalization process. \textit{Id.} On the other hand, in the Trade Policy Review Mechanism (“TPRM”), the completeness and accuracy of information is more critical than the attendance and remarks of every member at TPRM meetings. Julien Chaisse & Debashis Chakraborty, \textit{Implementing WTO Rules Through Negotiations and Sanctions: The Role of Trade Policy Review Mechanism and Dispute Settlement System}, 28 U. PA. J. INT’L ECON. L. 153, 158–63 (2007). The most remarkable example of such variety can be illustrated by the difference between the decision-making procedure in the negotiations and that in the dispute settlement system. The former adopts the consensus approach, whereas the latter adopts the negative consensus approach, and not without reason. \textit{See} WORLD TRADE ORG., \textit{UNDERSTANDING THE WTO} 57, 101 (2007), http://www.wto.org/english/tratop_e/whatis_e/whatis_e.htm [hereinafter UNDERSTANDING THE WTO].
\item \textsuperscript{24} Bodansky, \textit{supra} note 15, at 601–02.
\end{itemize}
macy sources, but rather to reveal the relative value of each. This analysis will show that the overall legitimacy of the dispute settlement system is achieved through a delicate balance among its various legitimacy sources.

A. Objective Legitimacy

There are four indispensable factors that confer objective legitimacy to the dispute settlement system: independence, transparency, authority, and effectiveness. Regarding the first, impartial rulings made by independent tribunal members help ensure that no political or special interest groups prejudice rulings in favor of one party. Transparency, also an essential source of objective legitimacy in the dispute settlement system, fosters its impartiality by enabling the public to monitor the adjudication of disputes. The third source is the authority of the system. Unless


27. These sources of objective legitimacy are merely illustrative. There can be other sources of objective legitimacy in the dispute settlement system, although this Article does not discuss them.


30. Bodansky, supra note 15, at 605–06 (discussing authority in terms of legality and legitimacy). In this Article, “authority” signifies the legal validity of the jurisdictional basis and findings of the panels and the Appellate Body.
panel and Appellate Body reports are based on a valid jurisdictional basis and legally sound findings, the reports will lack the power to induce the responding party to comply. Finally, the dispute settlement system cannot be objectively legitimate unless it is effective in achieving its institutional goals, the most primary of which is the resolution of disputes. These sources of objective legitimacy may conflict with one another, and each source contributes to the overall legitimacy of the system to a different degree. Placing greater emphasis on one legitimacy source could conflict with another source and thus lower the overall legitimacy of the system. Thus, we need to be aware of the different importance of each source when we emphasize or de-emphasize one source over others. A fine balance among these sources of legitimacy bestows overall objective legitimacy to the dispute settlement system.

This can be illustrated by the relationship between independence and transparency. The WTO Understanding on Rules and Procedures Governing the Settlement of Disputes (“DSU”) sets forth detailed provisions regarding the independence of the tribunals’ composition and deliberations. The DSU thereby ensures that the proceedings of the dispute settlement system are free from any undue influence of interested parties or WTO political divisions, such as the Dispute Settlement Body (“DSB”). However, the dispute settlement system has often been criti-

31. Ian Johnstone, Legislation and Adjudication in the UN Security Council: Bringing Down the Deliberative Deficit, 102 Am. J. Int’l L. 275, 277–78 (2008) (discussing deliberation as a means to achieve legitimacy). There is an interdependent relationship between the effectiveness of a rule or institution and the legitimacy of a rule or institution. While the effective resolution of disputes is a fundamental source of legitimacy in the dispute settlement system, the legitimacy of the system helps ensure effective dispute resolution. Caron, supra note 13, at 558–61 (“[P]erceptions of illegitimacy may work against the effectiveness of the Security Council.”).


33. There is an exception wherein the parties are allowed to oppose the composition of panelists proposed by the WTO Secretariat if they have “compelling reasons” to do so. DSU, supra note 32, art. 8.6. In this manner, the parties can exert some influence over the selection of panelists. This frequently invoked exception is justified in order to make the selection legitimate from the perspective of the parties.

34. The DSB, comprised of all WTO member governments, is authorized to decide to establish a panel and adopt a panel report. DSU, supra note 32, art. 6.1 (regarding the establishment of panels); id. art. 16 (regarding the adoption of reports). Under the negative consensus approach, such decisions are made automatically and the authority of the DSB is nominal. See UNDERSTANDING THE WTO, supra note 23, at 56. The influence of member governments would grow if their authority was made effective. Special Session
cized for its serious lack of transparency. The DSU states that the deliberations of the tribunals shall be kept confidential and that unless a party to a dispute decides to disclose its submissions to the public, written submissions to the tribunals shall remain confidential. While critics have suggested that the legitimacy of the dispute settlement system should be improved by enhancing its transparency, this suggestion overlooks how transparency and independence may conflict with each other.

In some cases, the system’s transparency may enhance its independence. For example, the publication of party submissions may prevent the tribunals from considering exogenous factors, such as political factors, that are not included in the submissions. Nevertheless, the transparency of the dispute settlement system may clash with its independence. For example, transparency might open the way for various actors to influence dispute settlement proceedings. Public attendance and media coverage of tribunal meetings might sway panelists and Appellate Body members in favor of one of the parties and could thereby impair their independence. In addition, the requirement to publicize all party submissions might encourage the disputing parties to settle a dispute outside the dispute settlement system. Thus, there is a conflicting relationship between the transparency and independence of the dispute settlement system, and these two sources must be balanced to achieve greater objective legitimacy.

A similar relationship exists between the system’s authority and effectiveness. The jurisdictional basis of a panel to adjudicate disputes is es-
tablished at a DSB meeting upon a request filed by the complaining party and the scope of the panel’s jurisdiction is limited to the specific facts and WTO provisions explicitly mentioned in the request.\(^{40}\) On the one hand, this restraint on the panel’s authority may be justified because it enables the panel and the parties to focus on specifically defined issues, and to develop and refine factual and legal arguments. On the other hand, limited jurisdiction may prevent the panel from considering changes in circumstances subsequent to a panel request,\(^ {41}\) or the broader context of a dispute.\(^ {42}\) As a result, a panel may fail to provide an effective solution to the overall dispute between the parties. In practice, when defining its jurisdictional scope, a panel must attain a balance between the need to restrain its authority and the need to resolve a dispute effectively.

**B. Subjective Legitimacy**

Subjective legitimacy arises from the views of stakeholders in trade disputes.\(^{43}\) Most importantly, it refers to legitimacy as perceived by governments, particularly those of disputing parties.\(^{44}\) The WTO Agreement expressly provides for the rights and obligations of governments, and it is the governments of the disputing parties that owe obligations resulting from the settlement of disputes.\(^ {45}\) Thus, a government may refuse to comply with a dispute settlement decision if it considers the decision or the dispute settlement system itself to be illegitimate.\(^ {46}\)

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\(^{40}\) DSU, * supra* note 32, arts. 6–7.

\(^{41}\) According to the Appellate Body, factual developments subsequent to the panel establishment can fall within the panel’s jurisdiction provided the developments did not change the essence of the original measure identified in the panel request. Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, ¶¶ 135–44, WT/DS207/AB/R (Sept. 23, 2002). See also Panel Report, *India—Measure Affecting the Automotive Sector*, ¶¶ 7.23–37, 8.14–30, WT/DS146/R, WT/DS175/R (Dec 21, 2001).

\(^{42}\) In a recent WTO dispute, the Appellate Body refused to adjudicate non-WTO issues even though the issues before the Appellate Body were only a part of the broader dispute between the parties. Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 78, WT/DS308/AB/R (Mar. 6, 2006) [hereinafter *Mexico—Soft Drinks*].

\(^{43}\) As actors in the WTO’s dispute settlement system, the views of the stakeholders will determine the degree of legitimacy conferred on the institution. See Hurd, * supra* note 16, at 7 (discussing the subjective facet of legitimacy, generally, as “an actor’s normative belief that a rule or institution ought to be obeyed”).

\(^{44}\) See id. (examining how an actor’s “perception” of an institution and its rules will affect behavior).

\(^{45}\) See, e.g., DSU, * supra* note 32, arts. 3.2, 19.1.

The subjective legitimacy of the system also depends upon the perceptions of businesses. Although they do not have immediate legal obligations under the dispute settlement system, businesses are deeply affected by the economic effects of trade disputes. However, unlike the subjective legitimacy on the part of governments, legitimacy as perceived by businesses is not directly reflected in the structure of the dispute settlement system. For example, businesses are not allowed to bring a case directly to the dispute settlement system. If they wish to file a complaint against a WTO member, they need to persuade their government to do so. In addition, businesses cannot attend panel and Appellate Body meetings, even if their vital interests are involved in a dispute. While the intergovernmental nature of the WTO may explain the exclusion of businesses from dispute settlement proceedings, it may appear to businesses that the statist approach deprives them of the right to advance their economic interests directly before the WTO. Nevertheless, busi-


49. *See id.* at 31–50 (describing the “public-private collaboration” that allows the interests of private firms a point of entry into the DSB).

50. DSU, *supra* note 32, app. 3 (“The panel shall meet in closed session. The parties to the dispute, and interested parties, shall be present at the meetings only when invited by the panel to appear before it.”).

nesses often have a close connection with their government, which enables them to exert influence over trade policy. In fact, governments participating in dispute settlement proceedings often act as faithful agents of businesses, and a government’s decision to file a complaint with the dispute settlement system is often a response to the demands of businesses. Thus, the lack of legitimacy as perceived by businesses is supplemented by their partnership with governments in the domestic sphere.

While in some cases subjective legitimacy is derived from objective legitimacy, in others, these two types of legitimacy may be incompatible. This relationship may be illustrated by the former decision-making procedures in the General Agreement on Tariffs and Trade (“GATT”), the consensus approach. Under the consensus approach, a panel could not be established and a panel report could not be adopted unless all the contracting parties to the GATT reached a consensus to that effect.

This approach had both positive and negative effects on the overall legitimacy of the GATT dispute settlement system. On the one hand, the consensus approach weakened the dispute settlement system’s indepen-

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54. One of the typical examples is Japan—Measures Affecting Consumer Photographic Film and Paper, a WTO dispute between Japan and the United States, which was triggered by the struggle between the private film companies Fuji and Kodak. Barringer & Durling, supra note 53.

55. See generally Shaffer, supra note 48 (evaluating how private companies collaborate with governmental authorities in the domestic sphere to challenge foreign trade barriers before the WTO).


57. Id. at 231–33.
dence and effectiveness, sources of objective legitimacy. It gave *de facto* veto power to every contracting party, and this occasionally interrupted the flow of the dispute settlement proceedings.58 On the other hand, the government parties perceived the dispute settlement system’s proceedings and decisions to be legitimate because the unanimous consent of contracting parties was required.59 At the time the GATT was adopted, it was not backed by strong political support.60 Thus, although the consensus approach interfered with the GATT’s objective legitimacy, this approach was favored because it increased the GATT’s legitimacy as perceived by the governments of the contracting parties.61

However, as trade relations expanded and trade disputes increased, the contracting parties gradually became frustrated by the ineffectiveness of the GATT dispute settlement system, which eventually led the United States to pursue unilateralism.62 The U.S. response persuaded the contracting parties to tackle the system’s inefficiency. Consequently, the Uruguay Round adopted the negative consensus approach, which allows for the automatic establishment of a panel and the automatic adoption of a panel report.63

While the negative consensus approach improved the effectiveness of the dispute settlement system by giving it *de facto* compulsory jurisdic-

58. For example, in the GATT disputes between the United States and the European Community in the 1980s, the adoption of panel reports was either blocked or significantly delayed by the refusal of one or some of the contracting parties. Id. at 145–64.


60. After World War II, there was a major need for international economic institutions, and although the GATT was originally intended to serve as a multilateral treaty, and not an organization, the GATT began to apply provisionally in the deadlock of the negotiation of the International Trade Organization. JOHN H. JACKSON, *THE WORLD TRADING SYSTEM: LAW AND POLICY OF INTERNATIONAL ECONOMIC RELATIONS* 35–41 (1989).

61. HUDEC, supra note 56, at 8.


63. Under the negative consensus approach, the DSB establishes a panel and adopts a panel report automatically unless it decides otherwise by consensus. HUDEC, supra note 56, at 237 (stating that “the only plausible explanation” for the inclusion of the negative consensus approach is the U.S. unilateral legal policy). *See also* Pauwelyn, *Transformation*, supra note 26, at 29–32 (“[S]urrender of the veto occurred through [an] . . . incremental process, closing off a major exit route, while injecting new levels of voice” in the political decision-making process.).
tion, it also reduced governments’ control over proceedings, thereby threatening to impair the subjective legitimacy of the system. Thus, complementary measures were introduced to compensate for the diminished role of state consent. For example, in order to enhance the overall legitimacy of the system, the Uruguay Round adopted improvements such as the creation of the Appellate Body, the unification of dispute settlement procedures, and the clarification of the standard of review. In short, the former decision-making procedure in the GATT demonstrates how the structure of the dispute settlement system strikes a balance between objective and subjective legitimacy.

II. LEGITIMACY AS PERCEIVED BY CIVIL SOCIETY

A. Background and Criticism

Recently, the dispute settlement system has been criticized for disregarding the nontrade interests and values of citizens, such as the environment, human rights, and health. This criticism adds a new dimension to establishing the overall legitimacy of the system. In the past, citizens were relatively indifferent to international trade rules because these rules tended to be very technical and appeared to have no visible impact on them. Accordingly, the GATT dispute settlement system was created without considering civil society’s concerns. Citizens attributed little significance to the system, which seemed most relevant for governments and large businesses. However, the situation is now chang-
Civil society is becoming increasingly conscious of and concerned about international trade rules and dispute settlements.

One of the major reasons for this change is the development of international trade rules. Since the GATT, the WTO rules have expanded substantially and now cover every aspect of the trade in goods, services, intellectual property rights, and investments. The WTO Agreement may even occasionally have a detrimental affect on nontrade-related domestic regulation, such as the regulation of food safety and environmental protection. Moreover, improved enforcement through the WTO’s dispute settlement system reinforces the impact of the WTO Agreement’s expansive rules.

Concurrent with the development of international trade rules, the flow of international trade and investments has been increasing at an unprecedented rate, thereby furthering not only economic, but also social and cultural globalization. As a result, even citizens who were unconcerned with trade rules have been forced to face the challenges of globalization. Recognizing that they are critical stakeholders in international trade disputes, citizens are demanding a say in the dispute settlement system, which they have criticized as statist and trade-biased.

In part, the position of citizens in international trade disputes is similar to that of businesses, as citizens’ interests and values are also not directly
represented. However, unlike businesses, citizens are unorganized and tend to lack close connections with their governments, making it difficult for them to influence their policies. Moreover, foreign policy, an area known for its high politics, is normally subject to only limited democratic control, which has been further eroded as the forces of globalization shift decision-making fora from the domestic to the international sphere. What supplements the lack of legitimacy as perceived by businesses (i.e., close connections with governments) is insufficiently available to citizens. The lack of subjective legitimacy on the part of citizens is exacerbated by the absence or weakness of domestic channels, which would allow them to better realize their preferences.

Therefore, critics argue that the dispute settlement system should directly consider and reflect the diverse concerns of civil society without relying on the intermediation of national governments. They have offered several specific ways in which this can be achieved. First, critics have suggested opening panel and Appellate Body meetings to the public. Second, some have proposed the acceptance and consideration of unsolicited amicus curiae briefs submitted by the public. Finally, oth-


79. See Eric Stein, supra note 76, at 489–91.


82. See, e.g., Charnovitz, supra note 9, at 348–57; Esty, Non-Governmental Organizations, supra note 9, 125–26.
ers have maintained that trade tribunals should reflect nontrade concerns in their interpretations of international trade rules.\(^8\)

Given the growing impact of trade rules and trade disputes on civil society, the interests and values of citizens cannot be neglected in the settlement of international trade disputes. Unless citizens perceive the dispute settlement system and its rulings as legitimate, governments of responding parties will meet strong resistance from their citizens when implementing the dispute settlement rulings and may fail to internalize these rulings into their domestic legal orders. Nevertheless, the critics’ proposals may disturb the balance among sources of legitimacy.

**B. Effects of the Critics’ Proposals on Legitimacy**

1. Open Panel and Appellate Body Meetings

Critics assert that opening panel and Appellate Body meetings to the public will enhance the transparency of the dispute settlement system and thereby improve its legitimacy as perceived by civil society.\(^8\) However, this proposal may also have harmful effects on the system’s overall legitimacy. For example, the presence of citizens at meetings could prevent governments of the disputing parties from reaching an effective solution to the dispute.\(^5\) Open meetings could also impair the independence of panel and Appellate Body reviews\(^6\) and interfere with governments’ control over proceedings. Special precautions would need to be taken in order to avoid such results. A few recent cases illustrate the type of precautions that may be used. In US—Continued Suspension and Canada—Continued Suspension, the disputing parties agreed to open the panel

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83. See, e.g., Howse, supra note 25, at 62–68; Howse & Tuerk, supra note 66, 300–06 (pointing out that the Appellate Body did consider nontrade values in interpreting Article III of GATT 1994); Nichols, *Values*, supra note 66, at 709–18. There is also a proposal to take legislative measures, instead of adjudicative measures, in order to incorporate the nontrade concerns of citizens into the WTO. Guzman, *supra* note 8, at 309–28.


85. Article 3.7 of the DSU provides that a solution mutually acceptable to the parties is clearly preferred. DSU, *supra* note 32, art. 3.7. In practice, the parties to a dispute occasionally continue talks in order to reach an amicable solution to the dispute even after a panel review has begun. E.g., Panel Report, *Japan—Import Quotas on Dried Laver and Seasoned Laver*, ¶¶ 14–17, WT/DS323/R (Feb. 1, 2006) (noting that the parties reached a mutually agreed solution after establishment of the panel).

86. As discussed above, the DSU prioritizes independence over the transparency of the system. *See supra* note 38 and accompanying text.
meetings to the public. 87 Citizens observed the meetings through closed-circuit television broadcasts, but they were not allowed to sit in the meeting rooms. 88 This method was subsequently adopted in other meetings because of its practical value in furthering transparency without impairing the independence of the proceedings. 89

2. The Acceptance and Consideration of Amicus Curiae Briefs

Another proposal offers that unsolicited amicus curiae briefs should be accepted and considered in order to facilitate citizens’ participation in the dispute settlement system. This proposal, though, may impair rather than improve legitimacy as perceived by civil society. First, amicus curiae briefs may not be sufficiently representative of civil society as a whole.90 Only a handful of citizens have the resources or expertise to submit them, and there is no assurance that these citizens represent the collective views of civil society.91

87. Communication from the Chairman of the Panels, United States—Continued Suspension of Obligations in the EC-Hormones Dispute, Canada—Continued Suspension of Obligations in the EC-Hormones Dispute, WT/DS320/8, WT/DS321/8 (Aug. 2, 2005). In these cases, the Appellate Body’s oral hearing was also opened to the public. WTO Trade Topics Section: Dispute Settlement, http://www.wto.org/english/tratop_e/dispu_e/public_hearing_july08_e.htm (last visited Nov. 10, 2008).


89. After US—Continued Suspension and Canada—Continued Suspension, for cases in which panel meetings were opened to the public at the request of the parties, see Panel Report, United States—Continued Existence and Application of Zeroing Methodology, ¶ 1.9, WT/DS350/R (Oct. 1, 2008); Panel Report, European Communities—Regime for the Importation, Sale, and Distribution of Bananas—Recourse to Article 21.5 of the DSU by the United States, ¶ 1.11, WT/DS27/RW/USA (May 19, 2008); WORLD TRADE ORGANIZATION, WTO: 2008 News Items—WTO Meeting on “Zeroing” Dispute Opened to the Public, Oct. 10, 2008, http://www.wto.org/english/news_e/news08_e/dispu322_10oct08_e.htm (a decision for the dispute United States—Measures Relating to Zeroing and Sunset Reviews has yet to be published); WORLD TRADE ORGANIZATION, WTO: 2008 News Items—WTO Hearings on Apple Dispute Opened to the Public, Aug. 11, 2008 (a decision for the dispute Australia—Measures Affecting the Importation of Apples from New Zealand has yet to be published).


91. Although it is uncertain whether the proposed criteria can successfully sort out the eligible amici curiae, some criteria are proposed to assess if amici curiae are suitably representative. See, e.g., Hervé Ascensio, L’Amicus curiae devant les juridic-
In addition, it would be difficult for panelists and Appellate Body members to reconcile conflicting interests and values in amicus curiae briefs. Critics seem to assume that these briefs would enable all trade stakeholders to engage in a deliberative dialogue and to reach a rational and persuasive outcome for the entire society. However, such a deliberative dialogue can only succeed in a polity in which citizens share a common identity and common interests. At this point, the most common form of polity is the nation-state. A polity that transcends national boundaries has not emerged and is not likely to do so in the near future.


93. Esty, Good Governance, supra note 25, at 1520–21 (“In the international policy arena, a transparent decision-making process that provides opportunities for debate and political dialogue, with participation by those representing a broad range of views, is a key to legitimacy, substituting for the missing democratic legitimacy and accountability that elections provide.”); Robert Howse, From Politics to Technocracy—and Back Again: The Fate of the Multilateral Trading Regime, 96 AM. J. INT’L L. 94, 114–16 (2002) (“[P]roviding participatory opportunities for NGOs is not simply a matter of addressing the problem of agency costs of representative democracy—it is also a question of seizing on the potential for deliberative democracy at the transnational level.”) (emphasis removed). For a discussion of deliberative democracy in general, see, for example, JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 107–09, 118 (William Rehg trans., 1996).

94. BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM 6–7 (1991); Will Kymlicka & Christine Strathle, Cosmopolitanism, Nation-States, and Minority Nationalism: A Critical Review of Recent Literature, 7 EUR. J. PHIL. 65, 68–72, 82–83 (1999). Anderson describes this type of polity as follows:

[The nation] is an imagined political community and imagined as both inherently limited and sovereign. . . . [I]t is imagined as a community, because, regardless of the actual inequality and exploitation that may prevail in each, the nation is always conceived as a deep, horizontal comradeship. Ultimately it is this fraternity that makes it possible, over the past two centuries, for so many millions, not so much to kill, as willingly to die for such limited imaginings.

ANDERSON, supra, at 6–7.

95. ANTHONY D. SMITH, NATIONAL IDENTITY 8–18 (1991) (discussing the elements of national identity).

96. See, e.g., id. at 175 (“[T]he chances of transcending the nation and superseding nationalism are at present slim. . . . A growing cosmopolitanism does not in itself entail the decline of nationalism.”); Bodansky, supra note 15, at 615–17 (“[A] demos—a shared sense of community . . . is absent at the global level.”). See also Weiler, supra note 14, at 2466–74 (stating that even in the European Union, a collective polity has not emerged).
A deliberative dialogue might therefore be regarded as the unilateral imposition of a foreign value by foreign citizens.\textsuperscript{97} Given these circumstances, even if panels and the Appellate Body make rulings with full awareness of all the interests and values represented by amicus curiae briefs, the citizens adversely affected by the rulings may only consider their concerns to have been illegitimately discounted in favor of others.

Second, the acceptance and consideration of amicus curiae briefs may also harm the dispute settlement system’s legitimacy as perceived by governments. Trade disputes often involve a direct conflict of economic interests between disputing parties, and arguments of amicus curiae briefs tend to favor the interests of one party to the detriment of the other.\textsuperscript{98} Moreover, even if the arguments in a brief are consistent with those that a government would like to make in a given case, the government may consider them to have adverse implications for future cases. In fact, many developing countries, whose interests are more likely to clash with those of amici curiae, are opposed to the acceptance and consideration of unsolicited briefs.\textsuperscript{99}

Finally, instituting the proposal in question may also damage the objective legitimacy of the dispute settlement system. Consideration of amicus curiae briefs would allow a few select interest groups to influence dispute settlement proceedings considerably and may call into question the independence of the system. A small number of protectionist interest groups often exert disproportionate pressure to restrict trade despite the benefits of free trade for the rest of the world.\textsuperscript{100} In addition to protec-
tionist groups, an empirical study shows that major businesses have been active in submitting unsolicited amicus curiae briefs to the panels and Appellate Body. One of the challenges for the multilateral trading system has been to insulate trade policy from such protectionist pressure, and the acceptance and consideration of amicus curiae briefs may conflict with this objective.

Additionally, it is unclear if the panels and the Appellate Body even have the legal authority to accept and consider amicus curiae briefs. Although the Appellate Body has asserted its authority to do so, the text of the DSU neither confirms nor denies this right.

3. The Interpretative Approach to Reflect Nontrade Values

Reflecting nontrade values in the interpretation of the WTO Agreement has long been the subject of scholarly debate. This issue arises in two different situations, when a nontrade value is embodied in non-WTO international law rules, and when it is not. While in the former case the issue concerns how these non-WTO rules relate to the rules of the WTO Agreement, in the latter it is whether panels and the Appellate Body are justified in reflecting the non-law, nontrade value in their interpretations of the WTO Agreement. Critics claim that in both situations the interpretative approach incorporating nontrade values would reduce the trade bias of the dispute settlement system and improve legitimacy as perceived by civil society. However, if taken too far, this approach could

domestic politics, and their lobbies are often able to secure import restrictions, even though the overall citizenry suffers.

101. Fukunaga, Participation, supra note 90, at 120.
104. See supra note 80 and accompanying text.
105. Howse, supra note 25, at 62.
have harmful consequences on the balance of legitimacy. The following discussion considers each situation separately.

(a) Nontrade Values Embodied in Rules of International Law

The interpretive approach incorporating nontrade international law rules may be helpful in resolving trade disputes if the non-WTO rule does not conflict with the WTO Agreement. For example, the WTO Agreement may explicitly or implicitly recognize the relevance of a non-WTO international law rule. In this case, the WTO members have agreed that the panels and Appellate Body are required to rely on the non-WTO rule in resolving the trade dispute. If the WTO Agreement does not implicitly or explicitly recognize the non-WTO rule, the interpretive approach may still be helpful in resolving trade disputes. Even if its relevance is not recognized in the text of the WTO Agreement, the nontrade rule may help clarify the meaning of the rules of the WTO Agreement. For example, in *US—Shrimp*, to clarify the meaning of Article XX of the GATT, the Appellate Body cited non-WTO international law, such as the Convention on International Trade in Endangered Species of Wild Fauna and Flora and the doctrine of *abus de droit*.

Referencing non-WTO rules may also generally improve the subjective and objective legitimacy of the dispute settlement system. The interests of civil society are more likely to be embodied in non-WTO rules, for example, international human rights law, and governments expect the panels and the Appellate Body to reflect other international agreements in adjudicating disputes. In addition, recognizing non-WTO rules may strengthen the objective legitimacy of the system. Article 31(c) of the

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Vienna Convention on the Law on Treaties ("Vienna Convention") provides that “any relevant rules of international law applicable in the relations between the parties” 110 shall be taken into account in interpreting international law rules. 111 Similarly, the Appellate Body has stated that the WTO Agreement “is not to be read in clinical isolation from public international law.” 112 In fact, the panels and Appellate Body have been referencing non-WTO international law rules in interpreting the WTO Agreement when members have accepted these rules. 113 Nonetheless, when there is a conflict between non-WTO international law rules and the WTO Agreement, the application 114 of the former may

110. It is unclear whether the term “parties” refers to the parties to a dispute or to the parties to the treaty being interpreted. In the case of the latter, a non-WTO international law rule cannot be taken into account under this provision unless the rule under consideration is applicable to all WTO members. One panel took this approach. Panel Report, European Communities—Measures Affecting the Approval and Marketing of Biotech Products, ¶¶ 7.65–.71, WT/DS291/R, WT/DS292/R, WT/DS293/R (Sept. 29, 2006) ("[T]he rules of international law applicable in the relations between ‘the parties’ are the rules of international law applicable in the relations between the States which have consented to be bound by the treaty which is being interpreted, and for which that treaty is in force"). On the other hand, the Appellate Body might have a slightly broader view as long as environmental issues are concerned. US—Shrimp, supra note 103, ¶¶ 130–31 (referring to several international legal instruments on environmental issues in the light of “the recent acknowledgement by the international community of the importance of concerted bilateral or multilateral action to protect living natural resources, and recalling the explicit recognition by WTO Members of the objective of sustainable development in the preamble of the WTO Agreement”). See also U.N. Int’l Law Comm’n [ILC], Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, para. 472, U.N. Doc. A/CN.4/L.682 (Apr. 13, 2006) [hereinafter ILC, Fragmentation] (finalized by Martti Koskenniemi). While the report states that “it might also be useful to take into account the extent to which that other treaty relied upon can be said to have been ‘implicitly’ accepted or at least tolerated by” all the parties to the treaty being interpreted, it proposes “permit[ting] reference to another treaty provided that the parties in dispute are also parties to that other treaty . . . .” Id.

111. The second sentence of Article 3.2 of the DSU provides that the WTO Agreement shall be clarified “in accordance with customary rules of interpretation of public international law.” DSU, supra note 32, art. 3.2. The Appellate Body repeatedly found that such customary rules are codified in the Vienna Convention, in particular Articles 31 and 32. See supra note 123.

112. US—Gasoline, supra note 106.


114. In this Article, “reference” to a non-WTO rule means that the non-WTO rule is consulted in the course of applying the WTO rules. On the other hand, “application” of a
undermine the dispute settlement system’s overall legitimacy. For example, a direct conflict may occur when a non-WTO rule requires the adoption of a specific measure that constitutes a violation of the WTO Agreement, or when a violation of the WTO Agreement is justifiable under a non-WTO rule. There may also be subtler conflicts between the WTO Agreement and nontrade rules. For example, a matter deliberately left open in the WTO Agreement may be articulated in non-WTO rules. When there is a conflict between the international non-WTO rules and the WTO Agreement, may the tribunals apply the former to modify or supersede the latter? If so, will this enrich the dispute settlement system’s legitimacy? In the author’s view, both questions must be answered in the negative.

Regarding the first, the panels and the Appellate Body lack the legal authority to apply non-WTO international law rules when they conflict with the WTO Agreement. Although the DSU does not prohibit the application of a non-WTO rule means that the non-WTO rule is directly relied upon in the absence of relevant WTO rules. Although the distinction between the two is a matter of degree, reliance on a non-WTO rule that is in conflict with the WTO rules is plainly not a “reference,” but rather an “application.”


116. For analysis on the notion of conflict, see PAUWELYN, supra note 113, at 161–200 (“Essentially, two norms are . . . in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other.”); Wilfred Jenks, The Conflict of Law-Making Treaties, 30 BRIT. Y.B. INT’L L. 401, 425–27 (1953) (“A conflict in the strict sense of direct incompatibility arises only where a party to the two treaties cannot simultaneously comply with its obligations under both treaties.”).

117. See, e.g., World Trade Organization, Comm. on Trade and Environment, Subparagraph 31(i) of the Doha Declaration, TN/TE/W/20 (Feb. 10, 2003); World Trade Organization, Comm. on Trade and Environment, Multilateral Environmental Agreements (MEAs): Implementation of the Doha Development Agenda, ¶ 31(i), TN/TE/W/1 (Mar. 21, 2002).

118. Conflicts of laws are not new phenomena in international law, which lacks centralized lawmaker authorities. Recently, however, there has been an increasing likelihood of conflicts among international law rules partly due to the functionalist approach to international law. See, e.g., Douglas M. Johnston, Functionalism in the Theory of International Law, 26 CAN. Y.B. INT’L L. 3, 29–59 (1988). Under this approach, international law is functionally differentiated into several subareas such as trade, environment, and human rights. Id. In these subareas, international law rules have been developed rather autonomously through specialized institutions and tribunals. Id. As a result, international law has become more fragmented, and conflicts among the rules are more likely to arise. Id.
lication of such rules, certain provisions of the DSU, such as Articles 7 and 11, suggest that the panels and Appellate Body should only apply the rules of the WTO Agreement. Moreover, if the application of non-WTO rules results in the modification of the WTO Agreement, this violates Article 3(2) of the DSU, which stipulates that the dispute settlement system shall not “add to or diminish the rights and obligations” under the WTO Agreement. In addition, nothing in the Vienna Convention justifies the panels and the Appellate Body modifying the WTO Agreement by applying conflicting non-WTO international law rules.


120. DSU, supra note 32, arts. 7, 11; Yūji Iwasawa, WTO hō to hi WTO hō no kōsaku [The Interaction Between WTO Law and Non-WTO Law], 1254 JURISUTO 20, 21–22 (2003); Gabrielle Marceau, Conflicts of Norms and Conflicts of Jurisdictions: The Relationship Between the WTO Agreement and MEAs and Other Treaties, 35 J. WORLD TRADE 1081, 1102–05, 1116 (2001); Trachtman, supra note 113, at 342–43.

121. DSU, supra note 32, art. 3.2.

122. ILC, Fragmentation, supra note 110, at 248–56 (admitting that the Vienna Convention fails to provide complete rules to resolve conflicts among international law rules). See also Martti Koskenniemi, Global Legal Pluralism: Multiple Regimes and Multiple Modes of Thought, Keynote Speech at Harvard University (Mar. 5, 2005). For criticism of the ILC report, see Benedetto Conforti, Unité et fragmentation du droit international: “Glissez, mortels, n’appuyez pas!” 111 REVUE GÉNÉRALE DE DROIT INTERNATIONAL PUBLIC 1 (2007). In this regard, at least one scholar suggests that, on the contrary, Articles 30(4)(A), 41, and 58 of the Vienna Convention require panels and the Appellate Body to acknowledge that two or more WTO members may modify or suspend the WTO rules as between the members by adopting environmental or human rights rules. PAUWELYN, supra note 113, at 315–24.

However, this suggestion is not convincing for the following reasons. First, the WTO rules, such as Articles XX and XXIV of the GATT and the last sentence of Article 3.2 of the DSU, appear to contract out of the conflict of laws rules of the Vienna Convention. GATT Agreement, supra note 56, arts. XX(d), XXIV(12); DSU, supra note 32, art. 3.2. Moreover, it is questionable that the Vienna Convention, which was drafted decades ago, provides a suitable solution to the current fragmentation of international law. Second, assuming that the Vienna Convention is applied in this context, Articles 41 and 58 of the Vienna Convention merely allow “the parties to a multilateral treaty” to modify or suspend the treaty under certain conditions, but neither authorize nor oblige a treaty body to modify or suspend the treaty, or to acknowledge the modification or the suspension among parties. Vienna Convention, supra note 15, arts. 41, 58. Therefore, while Articles 41 and 58 might allow two or more WTO members to conclude an agreement to modify or suspend the WTO Agreement as between themselves, these provisions do not justify panels or the Appellate Body acknowledging and validating such modifications or suspensions of the WTO Agreement. See id. Third, the modification or the suspension of the
Thus, the DSU requires that the panels and the Appellate Body resolve disputes by exclusively applying the provisions of the WTO Agreement, even if these rules conflict with non-WTO rules.123

Even if the panels and the Appellate Body had the legal authority under the DSU to apply conflicting non-WTO rules, which they arguably do not, both substantive and institutional issues remain concerning how to address conflicts among international law rules. The substantive concern is whether it is necessary to resolve conflicts between the WTO Agreement and non-WTO international law rules. Conflicts among international law rules, often referred to as fragmentation, are a natural consequence of how international law is developed. Specialized rules and institutions have been created to respond to diverse needs and concerns.

WTO Agreement is unlikely to meet the conditions set forth in Articles 41 and 58 of the Vienna Convention, which establish that the modification or the suspension shall not affect the right of other parties to the treaty and shall not contradict the object and purpose of the treaty. See, e.g., Panel Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas, ¶ 7.50, WT/DS27/R/USA (May 22, 1997) (observing that, per the DSU, parties need not have a “legal interest” to request a Panel, rather it is only necessary for the complaint to assert a potential “infringement” on the complaining party’s rights under the WTO Agreement by an ancillary agreement among other members). See also, e.g., Appellate Body Report, European Communities—Regime for the Importation, Sale and Distribution of Bananas, ¶ 136, WT/DS27/AB/R (Sept. 9, 1997) (reinforcing the aforementioned view of the Panel and noting specifically the justification for the U.S. claim against the E.C. banana regime).

It should be recalled that the WTO Agreement reflects the balance of rights and obligations of WTO members and that one of the primary goals of the dispute settlement system is to preserve this balance. DSU, supra note 32, art. 3.2. The modification or the suspension of the WTO rules between some members would inevitably distort the balance in the WTO Agreement and, consequently, affect the rights and obligations of other WTO members. Yuka Fukunaga, Securing Compliance Through the WTO Dispute Settlement System: Implementation of DSB Recommendations, 9 J. INT’L ECON. L. 383, 389–95 (2006) [hereinafter Fukunaga, Compliance].

123. One concern might be that the rulings of panels and the Appellate Body may be incompatible with non-WTO rules or the rulings of other non-WTO tribunals. Thus, it is suggested that panels and the Appellate Body should pronounce a non liquet and refrain from making rulings when they face unresolvable conflicts of international law rules. PAUWELYN, supra note 113, at 419–22. Nothing in the DSU, though, authorizes them to abstain from exercising the established jurisdiction. Mexico—Soft Drinks, supra note 42, ¶ 49. On the contrary, the abstention of jurisdiction would diminish the right of members under the DSU to bring disputes to the dispute settlement system. Id. ¶ 49 (A panel has no discretion “to decline to exercise its jurisdiction even in a case that is properly before it.”). The situation here is different from the one justifying the principle of judicial economy in Mexico—Soft Drinks because the exercise of jurisdiction is not considered necessary to resolve a dispute.
across different areas of law.\textsuperscript{124} When efforts are made to maximize rationality, understandably, they result in conflicting rules.\textsuperscript{125} Resolving conflicts would negate such efforts. Conflicts cannot be resolved without developing a hegemonic hierarchy of different rationalities, which is incompatible with the relativity of most international law rules.\textsuperscript{126}

There is also a fundamental institutional issue involved, that is, the capacity and eligibility of panels and the Appellate Body to apply conflicting non-WTO international law rules. First, panelists and Appellate Body members may lack expertise in such rules. The application of conflicting non-WTO rules raises the issue of power allocation within the WTO. Political bodies composed of WTO member governments, not the dispute settlement system, are better suited to make decisions regarding the coordination of conflicts among WTO and non-WTO rules.\textsuperscript{127} Otherwise, the power to make policy decisions which is reserved to governments would be eroded, and the legitimacy of the dispute settlement system as perceived by governments could be undermined.


\textsuperscript{126} Koskenniemi, \textit{supra} note 122, at 12. Although resolving conflicts among different international law rules may be problematic, the interaction between specialized institutions enriches the activities of these institutions. Fischer-Lescano & Teubner, \textit{supra} note 125, at 1017–45. However, such interaction should not lead to the assimilation of specialized institutions. In the context of the WTO, the integrity and security of the trading system should not be lost for the sake of the unity of international law. See generally NIKLAS LUSMANN, SOCIAL SYSTEMS (John Jr. Bednarz & Dirk Baecker trans., 1995). Moreover, even if panels and the Appellate Body resolve conflicts between the WTO Agreement and non-WTO international law rules, they do not necessarily resolve the fragmentation of international law in general. An international law rule may have different meanings depending on the context, and the application of an international law rule by a trade tribunal may have only limited relevance in nontrade tribunals. See Prosecutor v. Delalic, Case No. IT–96–21–A, Judgment, ¶¶ 21–24 (Feb. 20, 2001) (“Although the Appeals Chamber will necessarily take into consideration other decisions of international courts, it may, after careful consideration, come to a different conclusion.”). Some suggest that the International Court of Justice should coordinate the conflicting rules of international law. See, e.g., Gilbert Guillaume, \textit{The Future of International Judicial Institutions}, 44 INT’L & COMP. L.Q. 848, 862 (1995) (proposing that an international tribunal with a narrow mandate should refer cases to the International Court of Justice upon encountering a difficult question related to public international law). However, this proposal is unlikely to be realized. See, e.g., Jonathan I. Charney, \textit{Is International Law Threatened by Multiple International Tribunals?}, 271 RECUEIL DES COURS 101, 128–29 (1998).

\textsuperscript{127} Guzman, \textit{supra} note 8, at 307.
Second, the application of conflicting non-WTO international law rules may disrupt the balance between effectiveness and subjective legitimacy on the part of governments.\(^{128}\) Using both trade and non-WTO rules to resolve disputes enables panels to consider all legal aspects of a dispute and resolve it effectively, which is the primary objective of the dispute settlement system. Dispute resolution through such a comprehensive review prevents a losing party from seeking additional recourse in a tribunal outside the WTO dispute settlement system.\(^{129}\) However, the increased effectiveness of the dispute settlement system reduces governments’ control over disputes, and therefore undermines their perceptions of the system’s legitimacy. In this regard, it is noteworthy that other international agreements often have individual compliance systems with different degrees of effectiveness. For example, while the WTO created the dispute settlement system specifically to enforce compliance with the WTO Agreement,\(^ {130}\) international environmental and human rights agreements prefer a different approach to compliance. These agreements use a managerial approach that encourages and facilitates, rather than enforces, compliance with their rules.\(^ {131}\) When governments agree to sign an environmental or human rights treaty, they expect that compliance with the agreement will be secured by relatively “soft” secondary

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\(^{128}\) As discussed earlier, the negative consensus approach and other Uruguay Round improvements changed the balance of the dispute settlement system’s sources of legitimacy. See supra note 63 and accompanying text.

\(^{129}\) Assuming that panels and the Appellate Body apply only the WTO rules, res judicata does not apply to other tribunals applying non-WTO rules to the same dispute. Panel Report, Argentina—Definitive Anti-Dumping Duties on Poultry from Brazil, WT/DS241/R (May 19, 2003) (examining the complaining party’s claims, despite the party’s preceding recourse to another tribunal, and reaching a different conclusion). However, if the panels and the Appellate Body applied both the WTO rules and non-WTO rules to a certain dispute between parties, the res judicata effects of their findings might prevent other tribunals from adjudicating the same dispute between the same parties in accordance with the same non-WTO rules. See, e.g., Yuval Shany, The Competing Jurisdictions of International Courts and Tribunals 245–47 (2003); Yuka Fukunaga, Trade Remedies in East Asian Regional Trade Agreements, in The WTO Trade Remedy System: East Asian Perspectives 287, 304–07 (Mitsuo Matsushita, Dukgeun Ahn & Tain-Jy Chen eds., 2006); Vaughan Lowe, Overlapping Jurisdictions in International Tribunals, 20 Austl. Y.B. Int’l L. 191 (1999).

\(^{130}\) Fukunaga, Participation, supra note 90, at 384–85.

\(^{131}\) Fukunaga, Compliance, supra note 122, at 383, 385–88. See also Abram Chayes & Antonia Handler Chayes, The New Sovereignty: Compliance with International Regulatory Agreements (1995). “Enforcement” of non-WTO rules not only means the imposition of obligations or the finding of violations under these rules, but also includes the exercise of the rights under the rules. See, e.g., DSU, supra note 32, arts. 1–3, 6.
rules such as advising and monitoring. Similarly, governments decide whether they will enter into an agreement based in part on the relative hardness or softness of its approach to compliance. If the dispute settlement system applies its enforcement power to nontrade rules, governments may view this action as illegitimate, as they did not anticipate the stronger enforcement of these rules. Although referencing and applying non-WTO rules can have positive effects on civil society’s perceptions of the dispute settlement system’s legitimacy, adopting such an approach is likely to impair the overall legitimacy of the system if the panels and the Appellate Body apply non-WTO rules that conflict with the WTO Agreement.

(b) Nontrade Values not Embodied in the Rules of International Law

Some argue that nontrade values not embodied in rules of international law should be reflected in the trade tribunals’ interpretations of the WTO Agreement. It is clear that the interpretation of the WTO Agreement


134. An exception to the above analysis may exist when preemptory rules of international law are involved. When a non-WTO rule has acquired preemptory status in international law, the panels and the Appellate Body may be required to modify the WTO rules by applying the preemptory rule. Robert Howse & Makau Mutua, Protecting Human Rights in a Global Economy: Challenges for the World Trade Organization (2000), http://www.ichrdd.ca/english/commdoc/publications/globalization/wtoRightsGlob.html. However, a question remains as to whether the panels and the Appellate Body are able and eligible to decide whether a certain rule has preemptory status. See Pierre-Marie Dupuy, The Danger of Fragmentation or Unification of the International Legal System and the International Court of Justice, 31 N.Y.U. J. INT’L L. & POL. 791, 801–07 (1999) (arguing that the International Court of Justice’s role is to recognize the existence of preemptory rules, which are to be respected in every area of international law).

should reflect the object and purpose of the WTO, which includes addressing not only trade interests, but also non-trade interests and values such as the preservation of the environment.\footnote{136} However, the integration of non-law, non-trade values into the dispute settlement system’s decisions could have detrimental effects on the system’s legitimacy if the panels and the Appellate Body go beyond what is provided in the WTO Agreement. First, such integration could create an imbalance among the different sources of subjective legitimacy. Governments, businesses, and citizens each perceive the dispute settlement system’s legitimacy differently and only share values to a limited extent.\footnote{137} The sections of the


international law is moving towards its ‘constitutionalization’—by which term these observers denote a development turning the traditional, ‘horizontal,’ minimalist international law governing more or less exclusively relations among sovereign states in strictly bilateral ways, into something more ‘vertical,’ as it were—more densely institutionalized, more mature, community-oriented, value-laden, peremptory and hierarchical, according to some even quasi-federalist.


\textit{136.} For example, the preamble to the Marrakesh Agreement states that the parties to the WTO Agreement recognize the importance of “allowing for the optimal use of the world’s resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with their respective needs and concerns at different levels of economic development.” WTO Agreement, \textit{supra} note 4, pmbl.

\textit{137.} For example, the attempt to incorporate labor issues into the WTO has met with strong opposition from developing countries. \textit{See, e.g.}, Kevin Kolben, \textit{Integrative Linkage: Combining Public and Private Regulatory Approaches in the Design of Trade and Labor Regimes}, 48 HARV. INT’L L.J. 203, 210–13 (2007); Jose M. Salazar-Xirinachs, \textit{The
international community that are adversely affected by, or that disagree with, the protection of a particular non-law, non-trade value would perceive the trade tribunal’s decision as illegitimate. Concerning the system’s objective legitimacy, it is quite questionable whether the panels and the Appellate Body have the ability to identify and prioritize the shared values of the international community. As a result, if the tribunals attempted to do so and assessed non-trade values not provided in the WTO Agreement, their reasoning could lose persuasiveness and authority.

IV. ALTERNATIVES TO THE CRITICS’ PROPOSALS

The dispute settlement system is not the only forum that can reflect civil society’s interests and values vis-à-vis trade. In other fora, different balances of legitimacy sources are struck, and the perceptions of civil society may be given higher importance. The dispute settlement system’s weak subjective legitimacy on the part of civil society can, and should, be supplemented in other venues—including the nonjudicial organs of the WTO, other international institutions, as well as regional, national, and local bodies.

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The legitimacy of the dispute settlement system should be augmented either less directly or from outside the system. First, panels and the Appellate Body should endeavor to accommodate the diversity of citizens’ nontrade interests and values, instead of attempting to consider and reflect these interests directly within the dispute settlement system.\textsuperscript{141} This accommodation does not imply that the panels and the Appellate Body should refrain from making any violation findings or recommendations in complete deference to the policies of WTO members. Instead, it implies that the panels and the Appellate Body should choose an appropriate standard of review depending on the nature of the disputes, in order not to interfere with the autonomous preferences of citizens, businesses, and member governments.\textsuperscript{142} In particular, they should apply a more deferential standard of review in adjudicating disputes involving non-trade policies, namely, environmental, human rights, and health policies, which are deliberatively left to the discretion of WTO members.\textsuperscript{143} In addition, the procedures that ensure the implementation of DSB recommendations leave room for the responding party to defend the critical interests and values of its constituents despite its obligation to comply with the recommendations.\textsuperscript{144}


\textsuperscript{143} Matthias Oesch, \textit{Standards of Review in WTO Dispute Resolution} 28–33 (2003) (“[T]he standards of review subtly balance the delicate conflict over legal and political authority between panels and national authorities in trade and trade-related matters governed by the WTO agreements.”); Steven P. Croley & John H. Jackson, \textit{WTO Dispute Procedures, Standard of Review, and Deference to National Governments}, 90 Am. J. INT’L L. 193, 194, 205–06, 211–13 (1996) (“The standard-of-review question implicates an “allocation of power between national governments and international institutions on matters of vital concern to many governments, as well as the domestic constituencies of some of those governments.”); David Winickoff et. al., \textit{Adjudicating the GM Food Wars: Science, Risk, and Democracy in World Trade Law}, 30 Yale J. INT’L L. 81, 106–11 (2005). Further study, though, is necessary to reveal how the standards of review should be chosen and applied in order to balance the need to enhance compliance with the WTO Agreement and the need to accommodate the diverse interests and values of civil society.

\textsuperscript{144} See Fukunaga, \textit{Compliance, supra} note 122, at 399–426 (providing a detailed analysis on mechanisms that ensure the implementation of DSB recommendations). Dispute settlement rulings do not have direct applicability in the domestic legal orders of
Second, citizens should build a domestic partnership with their governments and thereby influence trade policy. For example, governments can be encouraged to hold public hearings or to take nontrade concerns into account when crafting dispute settlement strategies. Conflicts of interests and values among citizens can be better coordinated within the domestic sphere. And the full representation of citizens’ concerns in the domestic sphere would render redundant their direct reflection in the dispute settlement system.

Finally, interaction between the WTO’s nonjudicial organs and other international institutions can address the dispute settlement system’s lack of legitimacy as perceived by civil society. While the interaction of the dispute settlement system with other international institutions may raise questions of independency, the WTO’s nonjudicial organs are major WTO members, and in this sense, members retain discretion regarding whether and how to internalize the rulings. See, e.g., Anupam Chander, Globalization and Distrust, 114 Yale L.J. 1193, 1215–16 (2005); Thomas Cottier & Krista Nadakavukaren Schefer, The Relationship Between World Trade Organization Law, National and Regional Law, 1 J. Int’l Econ. L. 83, 102–10 (1998); Krisch, supra note 80, at 259–60, 267–69; Joel P. Trachtman, Bananas, Direct Effect and Compliance, 10 Eur. J. Int’l L. 655 (1999).

See Armin von Bogdandy, Constitutionalism in International Law: Comment on a Proposal from Germany, 47 Harv. Int’l L.J. 223, 235–36 (2006) (asserting that one fundamental difference between the international community and national communities is that in national communities “the foremost source of governmental legitimacy” is “the people”). See also John H. Jackson, Sovereignty-Modern: A New Approach to an Outdated Concept, 97 Am. J. Int’l L. 782, 792 (2003); Nichols, Standing, supra note 52, at 686.

See, e.g., Trade Act of 1974, 19 U.S.C.A. § 2414(b)(1)(A) (West 2008) (The United States Trade Representative “shall provide an opportunity . . . for the presentation of views by interested persons, including a public hearing if requested by any interested person” before taking any action under Section 301.).

See, e.g., Council Regulation (EC) No. 3286/94 of 22 Dec. 1994, art. 8.1, 1994 O.J. (L 349) 71 (The European Commission may take action under the Trade Barriers Regulation only if it is “in the interest of the Community.”).


The nonjudicial organs of the WTO include the political organs, such as the Ministerial Conference, the General Council, and other councils and committees, including the Trade Negotiations Committee and its subsidiary bodies, as well as the WTO Secretariat. See Broude, supra note 8, at 23–24.

See supra Part I.A. This does not deny the value of the interaction between the dispute settlement system and other international institutions. In fact, panels occasionally
not as constrained in this respect and may actively cooperate with other international bodies. For example, the interaction between the WTO’s negotiating bodies and international human rights institutions would allow the former to draft WTO rules that are more consistent with human rights standards.

CONCLUSION

Today, a number of international institutions with narrow mandates are inextricably intertwined with domestic legal orders. It is under these circumstances that citizens raise criticisms against the legitimacy of the dispute settlement system and demand that it reflect their interests and values. This Article has argued that fulfilling this demand may be problematic, as the perceptions of civil society are merely one of several sources of the dispute settlement system’s legitimacy. There are necessary tradeoffs between sources of legitimacy, and these tradeoffs should be carefully considered if the overall legitimacy of the system is not to be compromised.

obtain information from other international institutions, and this is expected to add authority to their rulings. See, e.g., Panel Report, European Communities—Protection of Trademarks and Geographical Indications for Agricultural Products and Foodstuffs, ¶¶ 2.16–18, 7.234, WT/DS290/R (Mar. 15, 2005) (requesting the International Bureau of the World Intellectual Property Organization to provide any factual information relevant to the interpretation of certain provisions of the Paris Convention for the Protection of Industrial Property); Panel Report, Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes, ¶¶ 1.8, 7.138–154, WT/DS302/R (Nov. 26, 2004) (requesting the International Monetary Fund to provide certain information pursuant to the agreement between it and the WTO).

152. ALAN BOYLE & CHRISTINE CHINKIN, THE MAKING OF INTERNATIONAL LAW 24–28, 99–103, 137–41 (2007). The author does not exclude the possibility of interaction between the nonjudicial organs of the WTO and civil society. While the participation of citizens in the formal political processes of the WTO could be harmful to the legitimacy of the WTO, cooperation with civil society in informal settings might contribute to enhancing its legitimacy. In fact, the General Council has adopted guidelines for the participation of nongovernmental organizations in the WTO processes. World Trade Organization General Council, Guidelines for Arrangements on Relations with Non-Governmental Organizations, WT/L/162 (July 23, 1996).
INTRODUCTION

The international legal system encompasses a variety of legal norms, but the perceived increase in “fragmentation” of these norms has recently been seen as a problem for the system as a whole. A few notable cases have highlighted the difficulties of a variety of tribunals reaching contradictory results. One example is the direct conflict between the decision of the International Court of Justice (“ICJ”) in the Nicaragua case and the decision of the International Criminal Tribunal for the Former Yugoslavia (“ICTY”) in the Tadić case. In Tadić, the ICTY took the position that the “effective control” test, as formulated by the ICJ for determining whether a foreign State is responsible for an internal civil war, was too demanding. Instead, the ICTY held that the foreign State need only have had “a role in organizing, coordinating, or planning the military actions of the military group.” Interestingly, the ICTY did not suggest that this test is lex specialis for international individual criminal responsibility, but, rather, that the ICJ’s “effective control” test should be displaced entirely.

This conflict between the ICJ and the ICTY is hardly isolated. There is a perception that “courts in various countries are increasingly dissatis-
fied with traditional rules [for resolving conflicts of jurisdiction and
norms, considering them to be] inadequate in a modern, globalizing
world. Consequently, many writers have suggested forms of increased
comity among international tribunals in order to combat the problems
associated with fragmentation; indeed, locating harmonies among in-
ternational legal regimes within a coherent international legal system
appears to be the dominant trend. The proposals of Joost Pauwelyn and
Yuval Shany, as well as to some degree the work of the International
Law Commission (“ILC”) on fragmentation, are characteristic of the
comity solution. Yet these perspectives dismiss, or at the very least,
largely overlook, the benefits of competition among international tribu-

L. Rev. 573, 574–75 (2005) (arguing that fragmentation is caused by treaty conflicts and
that a new approach should be established to resolve these conflicts).

Coming Conflict*, 30 Yale J. Int’l L. 211, 216 (2005) (“The most promising ap-
proach is to establish a set of common principles meant to harmonize the procedural
means by which national courts adjudicate grave human rights violations.”).

after Pauwelyn, Bridging]; Joost Pauwelyn, *Going Global, Regional, or Both?: Dispute Settlement in the Southern African Development Community (SADC) and Overlaps with the WTO and Other Jurisdictions*, 13 Minn. J. Global Tr. 231 (2004) [hereinafter Pauwelyn, Going Global].


after ILC, July 18 Rep.]; Int’l Law Comm’n, Report of the Study Group, *Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of In-
domestic legal system, even if it were possible to do so. If we accept con-
tradictions and disparities in different tribunals’ conclusions as inherent in
and perhaps even beneficial to international law, then conflicts related to
fragmentation are not so objectionable. Competition among tribunals
can itself serve as the coherence of the international legal system, albeit
not in the unitary, constitutional form of harmonized norms that some
may desire.

The argument that international tribunals should consider embracing
competition among themselves proceeds in three stages. Part I discusses
comity as a solution to conflicts emerging from fragmentation, in par-
ticular, the work of Joost Pauwelyn, Yuval Shany, and the ILC. Part II
observes the reality of competition among tribunals, specifically discuss-
ing the viewpoints of Anne-Marie Slaughter, Yves Dezalay, and Bryant
Garth. Part III assesses the drawbacks and benefits of competition, con-
cluding that competition among tribunals can result in constructive
diversity, rather than destructive fragmentation. International justice can
be realized best not by developing new forms of comity or attempting to
politically replace one regime with another, but, rather, by accepting the
diversity of norms and tribunals in the system and allowing them to be
subject to a kind of natural selection.

I. COMITY AS A SOLUTION

In weighing the benefits of increased comity and competition, the first
inquiry is: what is meant by “comity”? As one scholar has noted,
“[D]espite ubiquitous invocation of the doctrine of comity, its meaning is
surprisingly elusive.”13 Comity can mean anything from the foundation
of international law to mere courtesy, from rules of jurisdiction to the
discretion to decline a case.14

An example of comity serving as a rule of respect for the sovereignty
and competence of another legal actor can be found in the MOX Plant
cases.15 In these cases, the tribunal formed under the U.N. Convention on
the Law of the Sea suspended its proceedings to provide the European
Court of Justice (“ECJ”) an opportunity to reach a decision on a pending
application concerning issues similar to those the tribunal was confront-
ing. The tribunal reasoned that that ECJ might be better suited to answer
the questions at hand.16 There was no immediate threat of reaching a con-
flicting decision, just an initial conflict of jurisdiction. The tribunal

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15. PCA Mox Plant Case No. 3, supra note 7, ¶ 28.
16. Id. ¶ 29.
explained that the stay was required by the “mutual respect and comity that should [exist] between judicial institutions” deciding on rights and obligations as between States, and entrusted with the function of assisting States in the peaceful settlement of disputes between them.\textsuperscript{17}

A distinction can be made between a deferral under comity out of respect for another judicial body and a deferral under comity out of respect for a State generally.\textsuperscript{18} Some legal systems, however, have denied that comity is practiced out of international respect for another sovereign, instead explaining that it arises from a demand for substantive justice,\textsuperscript{19} which may encompass the principles of diplomatic or sovereign immunity,\textsuperscript{20} or the recognition of foreign court judgments.\textsuperscript{21} For the purposes of this Article, the important distinction is whether the discretion exercised is one of legal principle or courtesy.

Comity is known in both common law and civil law countries.\textsuperscript{22} In general, common law systems practice comity as discretion,\textsuperscript{23} whereas civil law systems are inclined to refute that comity is discretionary, arguing that exercising discretion would be an abuse of judicial power.\textsuperscript{24} While civil law courts may reach similar results as their common law counterparts, they do so under legally binding principles, rather than by mere courtesy.\textsuperscript{25} These principles of comity in civil law countries generally tend to be seen as principles of binding public international law,\textsuperscript{26} a notion common law countries generally reject.\textsuperscript{27} Common law countries, however, have historically maintained that the distinction between public and private comity is false.\textsuperscript{28} Hersch Lauterpacht, for example, has de-

\textsuperscript{17} Id. ¶ 28.
\textsuperscript{18} See Upendra Baxi, Geographies of Injustice, in Torture as Tort: Comparative Perspectives on the Development of Transnational Human Rights Litigation 197, 205 (Scott Craig ed., 2001).
\textsuperscript{19} See Paul, supra note 13, at 44–54.
\textsuperscript{20} See id.
\textsuperscript{21} See id. at 2 (citing Mark Janis, An Introduction to International Law 250 (1988)).
\textsuperscript{22} See id. at 44–54.
\textsuperscript{24} See Paul, supra note 13, at 33. See also Case C-281/02, Owusu v. Jackson, 2005 E.C.R. I-1383 (criticizing the forum non conveniens principle as incompatible with European regulation).
\textsuperscript{26} See Paul, supra note 13, at 28.
\textsuperscript{27} See Maier, supra note 23.
\textsuperscript{28} See Paul, supra note 9, at 25–26 (discussing how leading European scholars in the nineteenth century did not see a distinction between the private and the public and “ar-
nied comity to be a binding principle of public international law, and instead argued it to be a matter of respect among sovereigns.29

Thus, it is clear that there is no simple definition for comity and that because of these differences between legal cultures, the criteria for invoking comity vary widely among national jurisdictions. Some believe a tribunal must examine the interests of the forum while keeping in mind its role as a facilitator of interfora questions and resolver of conflicts within the international legal system.30 Others criticize considering interstate political relations and demand that a tribunal simply apply its law without regard to these issues.31

Despite the difficulty of defining comity, it appears to be a way for injecting international politics directly into a tribunal’s considerations that is separate from the “mechanical” act of legal interpretation.32 Given the flexible and broad notion of comity, it might best be described “[as] a bridge . . . meant to expand the role of public policy, public law, and international politics in [the judiciary].”33 The results of applying comity or quasi-comity principles of law can be similar, notwithstanding various interpretations; a court uses these principles to defer to another sovereign regarding certain issues, but not others, based on a balance struck between competing policies.34 As a result, any use or advocacy of comity must be an assertion of some extralegal policy choices.

31. See Maier, supra note 23, at 288.
32. See Paul, supra note 13, at 54–56.
33. Id. at 7.
34. See id. at 2 (“Comity is a ready explanation for much of what courts do in public and private international law. In the name of comity, U.S. courts often recognize and enforce foreign judgments or limit domestic jurisdiction to hear claims or apply law, even where foreign law is contrary to U.S. law or policy. Guided by notions of comity, courts consider competing foreign and domestic interests.”).
Regardless of its nature, comity is often conceived as part of a coherent field of international law. One’s perspective on the nature of the international legal system informs not only how comity is applied, but also how it is best applied. If one sees the international legal system as a coherent whole (or a system with the objective of forming a coherent whole), then one’s policy choice is to place emphasis on the integrity of the system. After all, comity is a way for one legal actor to defer to another. However, if one does not see a coherent whole, but rather, independent, competing legal actors, a system “mostly of erratic blocks and elements as well as different partial systems,” what kind of comity should be exercised?

A. Joost Pauwelyn’s View

Joost Pauwelyn has made an effort to bring together public international legal rules while still recognizing the differences among nations and their respective freedom to refuse to defer to others’ rules. He draws general conclusions for international tribunals from the World Trade Organization (“WTO”). Finding that the WTO must contemplate the entire corpus of international law, he creates the metaphor of “inter-connected islands”: legal orders, of which the WTO is one, that are self-contained to some degree, but also regard each other through their connections in general international law. With this expression, he describes a fairly coherent international legal system respected by tribunals, regardless of their specialty; although they may conflict over jurisdiction, they do not seek to impose differing legal norms.

Pauwelyn defines conflict more broadly than two situations demanding two distinct outcomes. For him, certainly, the notion of a conflict includes situations in which one outcome demands a violation of the

35. But see id. at 8–9 (“[T]he peculiar strain [of comity] that developed in the classical doctrine of comity in the United States resulted in part from the incoherence of the doctrine itself. This incoherence is both traceable to, and well represented by, the Supreme Court’s opinion in Hilton v. Guyot, which is the most commonly cited statement of comity in U.S. law.”).

36. Westbrook, supra note 8, at 579.


38. Pauwelyn, Conflict, supra note 10, at 440 (“The thrust of [this] book [is] to portray WTO law as part of the wider corpus of public international law.”).


40. See id.
other, but his definition also includes situations involving a conflict between an obligation and a right, which is not a particularly narrow reading of the meaning of conflict. He also finds it important to distinguish between a direct, facial conflict of norms and a conflict of norms that arises only from the interpretive and implementation process.

Having identified the kinds of conflicts he will address, Pauwelyn then proposes rules for resolving conflicts of jurisdiction and norms by referring to already existing rules of public international law. For example, he looks to explicit conflicts clauses, lex posterior and lex specialis rules, and the laws on state responsibility. In other work, he discusses forum non conveniens, res judicata, abuse of process, and lis alibi pendens as additional existing methods in international law to resolve conflicts of jurisdiction. Some conflicts result in the invalidity of one of the norms; others result in the priority of one norm over the other. A tribunal may only find a true conflict if the usual methods of international law for dealing with conflicts fail.

One argument against such an approach—namely, using the WTO as a guideline for other tribunals—is that the WTO Dispute Settlement Understanding (“DSU”) specifically accepts general international law as an interpretive tool, whereas other bodies may not. In particular, ad hoc arbitral tribunals, or national courts hearing disputes with an international character, do not necessarily accept the entire corpus of general international law. Although one could argue that the DSU’s endorsement of

41. Pauwelyn, Conflict, supra note 10, at 175–76 (“Essentially, two norms are, therefore, in a relationship of conflict if one constitutes, has led to, or may lead to, a breach of the other.”).
42. Id. at 171–72, 178–88.
43. Id. at 176.
44. Id. at 327–43.
45. See Pauwelyn, Going Global, supra note 10.
48. For a discussion on ad hoc tribunals, see, for example, Alan Redfern & Martin Hunter, Law and Practice of International Commercial Arbitration 127 (4th ed., 2004). “The reference to ‘such rules of international law as may be applicable’ (as, for example, in the Washington Convention), or to ‘the relevant principles of international law’ (as in the Channel Tunnel Treaty) [helps] remind us that it is not the whole corpus of law, but only certain specific rules of law that are likely to be relevant in any given
general international law as an interpretive guideline suggests that the rules of the Vienna Convention on the Law of Treaties (“Vienna Convention”) would not apply without it, the contrary argument could also be made: the DSU codifies what should have been understood before its formation. In fact, the WTO Panel in Korea—Measures Affecting Government Procurement stated that the purpose of the DSU provision was to resolve the issues stemming from the pre-WTO era when adjudicators under the General Agreement on Tariffs and Trade (“GATT”) failed to follow the customary rules of treaty interpretation properly.

Moreover, the WTO’s acceptance of general international law is phrased in terms of using the law to guide the interpretation of the WTO Agreements, not to impose additional obligations independent from, or superior to, the Agreements. It is clear from the terms of the DSU itself that general international law is a valid interpretive tool, but the DSU does not indicate that non-WTO obligations may be transported into the WTO context. There is no support in the text of the WTO Agreements for applying a non-WTO defense against a WTO obligation. If Pauwelyn finds that such defenses may be entertained, there would appear to be no similar prohibition against a WTO tribunal hearing the merits of a non-WTO claim as well. Furthermore, as Bruno Simma has observed, “[T]he exclusion or modification through a ‘self-contained regime’ or ‘normal’ secondary rules which leads to a ‘softening’ of the legal consequences of wrongful acts should not easily be presumed.” Accordingly, Pauwelyn’s conclusion that the WTO should be a model for international tribunals generally may be unwarranted.

An additional critique of Pauwelyn’s perspective is that integrating WTO law into substantive nontrade international law may go against the intent of the parties to the WTO and may be counterproductive to achieving the human rights and environmental objectives that Pauwelyn appears to endorse. The parties to the WTO presumably negotiated the Agreements with the intent of establishing a self-contained regime, allowing the terms of the Agreements to be interpreted in the light of dispute.” Id. For a discussion on national courts, see, for example, Medellin v. Texas, 128 S.Ct. 1346, 1361–62 (2008) (holding that the Vienna Convention on Consular Relations, though it was adopted as a treaty, was not incorporated into U.S. law by implementing legislation, which would provide a mechanism for direct enforcement).

49. See DSU, supra note 47, art. 3.2, at 1227.


51. DSU, supra note 47, art. 3.2, at 1227.

52. Id. art. 1(1), at 1227.

general international law, while refusing to grant competence to hear non-WTO law matters, as defenses or otherwise. 54 The political trade-offs of such negotiation should not be dismissed lightly: “by establishing ‘self-contained regimes,’ States contract out of the general rules on the consequences of treaty violations on the expectation that these regimes will work to their mutual benefit.” 55 The parties may have specifically intended certain outcomes, either by limiting the competence of the organization or even by making the organization entirely ineffective. 56 This perspective does not imply that nontrade goals are irrelevant for the development of WTO law, since the negotiators of the WTO Agreements could have intended trade liberalization as one vehicle for reducing poverty and otherwise improving global welfare 57 (even though it might impact the environment adversely). Moreover, Pauwelyn’s proposal risks undermining the WTO regime. If decisions are based on agreements outside the WTO’s specific competence, they may be less likely to be complied with, as Member Parties may view those decisions as less legitimate and may bring their claims to the WTO less frequently.

One of the fundamental points Pauwelyn makes is the right to “contract out” of existing norms while still maintaining respect for international law already in force, even if a negotiated treaty does not. 58 This deference includes the obligation to apply pre-existing norms in a forum, but within the limits of the tribunal’s competence. For example, the WTO must apply other norms as defenses, although it is not competent to enforce the norms themselves. 59 A possible illustration of the WTO applying this kind of rule might be Ernst-Ulrich Petersmann’s proposal for the WTO to acknowledge its members’ human rights obligations. 60


55. Simma, supra note 53, at 136.

56. See Martinez, supra note 30, at 469.


58. PAUWELYN, CONFLICT, supra note 10, at 37–40, 212–18.

59. See id. at 228–36.

Interestingly, Pauwelyn’s conclusion is that, in a conflict, many international legal norms may result in the nonapplication of WTO law. Essentially, he believes that since all international legal norms apply (unless contracted out), there really is no conflict. The difficulty with this argument is that, while States may “contract out,” it is not entirely clear that the WTO Agreements establishing the rules of trade liberalization “contracted out” of the rules otherwise governing the interactions of States. While it is assumed that the rules of general international law apply before all tribunals unless specifically exempted from application, just the opposite could be argued: the WTO is a tribunal whose competence is deliberately limited to the WTO Agreements.

This argument is based on Pauwelyn’s interpretation of the WTO obligations as “reciprocal,” rather than “integral,” as might be expected in a multilateral treaty. In contrast, though, Pauwelyn interprets other international obligations as truly “integral” and thus owed erga omnes. Conveniently, “reciprocal” obligations may be modified between the parties, regardless of other multilateral partners’ opinions, whereas “integral” obligations may not. The happy result is that “integral” treaties concluded before the WTO Agreements, such as some human rights treaties, remain in force and are not modified by the WTO Agreements. However, “integral” treaties concluded after the WTO Agreements can modify those obligations. This is problematic because although the WTO tribunals may issue decisions aimed at the withdrawal of the offending provisions, they do not have the authority to order their withdrawal; instead, compensation may be awarded if a State chooses to continue main-

61. Pauwelyn, Conflict, supra note 10, at 490–92. See also Pauwelyn, Bridging, supra note 10, at 911.

62. Pauwelyn, Bridging, supra note 10, at 915–16 (“Especially before a particular court or tribunal, it is important to include all international law binding between the parties as part of the applicable law, even if the jurisdiction of the adjudicator is limited to a given treaty (say, WTO covered agreements). If all courts and tribunals follow this approach, it would mean that, although they may have jurisdiction to examine different claims, in doing so they would apply the same law. Hence, in theory, no conflicts should arise.”).

63. See, e.g., European Communities—Measures Affecting the Importation of Certain Poultry Products, ¶ 79, WT/DS69/AB/R (July 13, 1998) (adopted July 23, 1998) (holding that a separate bilateral agreement between the parties was not a WTO agreement within the WTO’s competence).

64. See Pauwelyn, Conflict, supra note 10, at 69–88. For an overview of the distinction between “reciprocal” and “integral,” see id. at 52–88.

65. See, e.g., id. at 74–75 (characterizing the Genocide Convention and European Communities’ treaties as “integral”).

66. See id. at 53.
taining those measures.67 Such possibility demonstrates that States have some freedom to violate the WTO Agreements, albeit in violation of a moral obligation to comply.68 This interpretation is also troublesome because conflicts between tribunals’ jurisdiction and jurisprudence might be subject to a classification of the conflict, regardless of whether the obligation in question is “integral” or “reciprocal,” or whether it is a prohibition or a right. Although Pauwelyn observes that the interpretation of treaties evolves,69 he does not acknowledge that the classification of norms might similarly evolve.

An even larger problem with Pauwelyn’s view is his assumption that existing rules of public international law (which provide options for managing conflicts) apply to certain kinds of conflicts. As previously discussed, even this concept is plagued with a variety of interpretations. In cases of “inherent normative conflicts,”70 there may not be agreement on the normative force of explicit conflicts clauses, and on lex posterior and specialis rules, among other conflict resolution techniques. Curiously, Pauwelyn also acknowledges the general benefit of decentralized competition, noting that “multiple proceedings may actually be helpful as long as each tribunal stays within the limits of its jurisdiction and defers to the other tribunal when it comes to deciding matters falling within that tribunal’s jurisdiction,”71 as “different conclusions based on the same law . . . may even have positive side effects: [t]hrough competition the best interpretation is likely to surface.”72 However, his general approach is not one of true competition among tribunals, but of promoting a constitutionalizing process.

In sum, Pauwelyn’s version of comity appears to be a legal one in the civil law tradition, not an overtly discretionary pursuit of policy objectives. In reality, however, Pauwelyn is advocating for the primacy of human rights obligations over WTO law as a political end in itself, not as the result of the objective application of rules of interpretation. He proposes a rather radical restructuring of the relationships among international tribunals, as well as a radical restructuring of their competence.

67. DSU, supra note 47, art. 22(2), at 1239.
68. This moral obligation is articulated in the Vienna Convention, which notes that under pacta sunt servanda “[e]very treaty in force is binding upon the parties to it and must be performed by them in good faith.” Vienna Convention on the Law of Treaties art. 26, May 23, 1969, 1155 U.N.T.S. 331.
69. Pauwelyn, Bridging, supra note 10, at 907.
71. Pauwelyn, Going Global, supra note 10, at 295.
72. Pauwelyn, Bridging, supra note 10, at 916.
although he relies on existing rules of international law, selecting certain legal objectives such as effectiveness, and techniques such as *lex posterior*. By selecting objectives and techniques that do not appear to reflect policy choices, he brings extra-WTO issues into the fold and constitutionalizes the WTO within the international legal system.

**B. Yuval Shany’s View**

Yuval Shany also recommends a form of comity to increase the effectiveness of international dispute settlement.\(^{73}\) He suggests mechanisms for resolving conflicts of jurisdiction, not conflicts of obligations. These mechanisms include increased comity (i.e., the conservative exercise of jurisdiction based on respect) and the harmonization of conflict rules.\(^{74}\) Whereas Pauwelyn offers pre-existing rules of public international law to resolve normative conflicts, Shany transports private international law’s jurisdictional conflict rules into the sphere of public international law. These jurisdictional conflict rules embrace concepts such as *forum non conveniens*, *res judicata*, and *lis alibi pendens*.\(^{75}\) In later work, Shany also proposes *abus de droit* to prevent parties from taking advantage of alternate fora in bad faith, by forum shopping or otherwise.\(^{76}\) Although Shany acknowledges that various legal actors are independent of one another, he, like Pauwelyn, views international law as a coherent system whose dangerous conflicts need only be “solved” by clear rules.

One problem with Shany’s analysis is that aspects of comity, especially the concepts of *forum non conveniens* and bad faith, are highly discretionary.\(^{77}\) Thus, they are a rather unpredictable tool for constructing an international legal system that is supposed to be able to resolve conflicts predictably. Shany identifies where consistent practice can be found for discretionary policy, such as with *lis alibi pendens* and *res judicata*, but also notes where it cannot.\(^{78}\) Although he concedes that competition among fora may develop better, more harmonious policies (just as Pauwelyn appears to do), his definition of competing fora is narrow. Shany

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73. See generally Shany, supra note 11.
74. Id. at 266, 271.
75. See id. at 269–70.
76. See Shany, supra note 11, at 849.
77. See Andrea K. Bjorklund, Private Rights and Public International Law: Why Competition Among International Economic Law Tribunals is Not Working, 59 Hastings L.J. 241 (2007). See also Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 507–08 (1947) (“The principle of forum non conveniens is simply that a court may resist imposition upon its jurisdiction even when jurisdiction is authorized by the letter of a general venue statute. . . . [T]he doctrine leaves much to the discretion of the court to which plaintiff resorts.”).
78. Shany, supra note 11, at 269–71.
argues that tribunals are only in competition if they are likely to produce similar results on the same issue. Yet, the “lis alibi pendens rule [and the res judicata requirement] . . . [do] not apply to courts of different national, regional, and worldwide legal systems unless such a prohibition has been explicitly provided.”

Despite Shany’s examples, increasing the degree of discretion for tribunals is an unlikely political goal. For example, as José Alvarez has observed:

At least some of the [North American Free Trade Agreement] parties appear to be having second thoughts about the scope of discretion that they have handed over to [International Convention on the Settlement of Investment Disputes] arbitrators and appear to be turning to interpretative statements “to take the power of decision away.”

Judge Guillaume might add that in order to apply norms drawn from national courts, including lis alibi pendens and res judicata, the international legal system might also need to adopt rules of court hierarchy, as national court systems have done. Shany acknowledges that until more harmonized rules are developed, his conflict resolution policies appear very political. Many commentators have observed that tribunals are often very conscious of the appearance that they create law. It seems strange for Shany to propose the development of rules by tribunals for the sake of legitimacy and effectiveness while worrying that the rules he proposes might appear to have been politically developed.

In contrast to Pauwelyn, Shany’s version of comity is more discretionary and more overtly policy laden, but, like Pauwelyn, his proposal is actually more radical than it might appear at first glance. Shany avoids being too controversial by limiting his scope to jurisdiction. Furthermore, although tribunals might not be directly contemplating the substance of other self-contained regimes, they might reach the same outcomes by

79. Id. at 24–28.
80. Petersmann, supra note 30, at 365.
83. See, e.g., Alvarez, supra note 81, at 418 (“The possibility of political backlash is one reason that judges, and not merely international ones, are reluctant to admit that they are engaging in judicial lawmaking even though this is precisely what they are doing.”).
84. See SHANY, supra note 11, at 269–70.
simply sending cases away to competing regimes in a less regulated, discretionary atmosphere.

C. The View of the International Law Commission

The work of the ILC on the subject of fragmentation also lends some insight to this discussion of comity as a solution to the perceived problems with fragmentation. In the preliminary report on the matter, Martti Koskenniemi states: “[t]here is no single legislative will behind international law. Treaties and custom come about as a result of conflicting motives and objectives—they are ‘bargains’ and ‘package-deals’ and often result from spontaneous reactions to events in the environment.” Nonetheless, he concludes, “International law is a legal system . . . . There are meaningful relationships between [norms] . . . [and i]t is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations.”

However, Koskenniemi argues elsewhere that any attempt to provide for a coherent international law system is largely a struggle of competing international law perspectives seeking to gain dominance over international law as a whole. In light of this, it must be emphasized that the ILC’s use of the word “system” means only “that the various decisions, rules and principles of which the law consists do not appear not randomly related to each other . . . [and that] there is seldom disagreement that it is one of the tasks of legal reasoning to establish [relationships between them].”

Other authors also acknowledge this problem of competing legal perspectives, but simply argue for the particular values that their preferred regime offers. The ILC itself recognizes this concern to some degree, mainly by questioning whether coherence in the international legal system is necessary for its own sake. While the ILC sees value in predicta-

85. ILC, Apr. 13 Rep., supra note 12, ¶ 34.
86. ILC, July 18 Rep., supra note 12, ¶ 14.
89. See Jan H. Dalhuisen, Legal Orders and Their Manifestations: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria, 24 BERKELEY J. INT’L L. 129, 170–73 (2006) (arguing that it is important that “recognition standards [themselves be] of a higher, more universal nature to be truly meaningful, and not to reduce the recognition process merely to the will or sufferance of states,” but then admitting that “[n]aturally, it is only to be expected that in the recognition process there may be a preference for legal orders that recognize similar values, notions, and ideas as those prevailing in the recognizing legal order”).
bility, legal security, and equality, it does admit, “Coherence is . . . a formal and abstract virtue. For a legal system that is regarded in some respects as unjust or unworkable, no added value is brought by the fact of its being coherently so.”

One of the important insights in the ILC’s work is its interpretation of conflict, which distinguishes between “conflicts within a regime” and “conflicts across regimes.” The Vienna Convention sees conflicts as subject-matter issues, but the ILC disagrees with this approach. For the ILC, conflict cannot merely be a matter of classifying subject matter, since no accepted classification scheme exists. The ILC favors Pauwelyn’s broad definition of conflict, which encompasses frustration of purpose, over the narrow definition of two norms demanding incompatible results. In addition, the ILC supports Pauwelyn’s perspective that “[w]hile the [DSU] limits the jurisdiction to claims which arise under the WTO covered agreements only, there is no explicit provision identifying the scope of applicable law.”

Significantly, the ILC concludes that fragmentation is not a threat to the international system, because whether conflicts reflect fragmentation or diversity “lie[s] in the eye of the beholder.” Any complications that ensue are not “legal-technical ‘mistakes,’” but rather, a natural consequence of the way the legal order works in a pluralistic system that accommodates a variety of values. Admittedly, the ILC’s work only discusses substantive conflicts, not the institutional conflicts that fragmentation also poses. As a result, the ILC looks to the Vienna Convention, other rules of general international law such as lex specialis, lex posterior, and jus cogens, and the notion that international obligations may develop to resolve conflicts. These techniques position various legal values against one another using a language that all lawyers can agree on and understand, thereby bringing legal closure to disputes. Perhaps such closure is what V.S. Mani contemplated when he wrote that international adjudication “endeavors to resolve the dispute—or at least

90. ILC, Apr. 13 Rep., supra note 12, ¶ 491.
91. See id. app. § 2.
92. See id. ¶ 22 (citing Vienna Convention on the Law of Treaties, supra note 68, art. 30).
93. See id. ¶ 22.
94. See id. ¶¶ 24–25 (citing PAUWELYN, CONFLICT, supra note 10).
95. Id. ¶ 45.
96. Id. ¶ 20.
97. See id. ¶ 16.
98. See id. ¶ 489.
99. See id. ¶ 18.
disposes it off from the juridical plane,"100 or what Sir Robert Jennings meant when he distinguished between a dispute generally and the legal or justiciable aspects of the dispute.101 Thus, whether we call the dynamics of the international legal system “fragmentation” or “diversity” does not mean that lawyers cannot talk to each other and reach closure on the legal aspects of a dispute.

The ILC’s work primarily focuses, like that of Pauwelyn, on existing rules to resolve conflicts. However, where Pauwelyn might propose a supposedly mechanical technique for definitively establishing superior norms without regard for the morality of the norms (although conveniently human rights norms do triumph), the ILC finds that the nature of the dispute resolution process in the international legal system is not so apolitical102 and that the perspective of each regime must be to regard its own norms as lex specialis.103 While Pauwelyn might argue that there could be solutions to conflicts that a tribunal may discover, the ILC might argue that a solution does not exist prior to the dispute, but, rather, is formed through the process of assessing differing values and seeking closure.104 In any event, neither party generally finds conflicts to be a threat to a system of international law perceived as integrated.

102. See ILC, Apr. 13 Rep., supra note 12, ¶ 35 (“Legal interpretation, and thus legal reasoning, builds systemic relationships between rules and principles by envisaging them as parts of some human effort or purpose. . . . [S]ystemic thinking penetrates all legal reasoning . . . [and] may also be rationalized in terms of a political obligation on law-appliers to make their decisions cohere with the preferences and expectations of the community whose law they administer.”). See also David Kennedy, The Nuclear Weapons Case, in International Law: The International Court of Justice and Nuclear Weapons 462, 466 (Laurence Boisson de Chazournes & Philippe Sands eds., 1999) (finding an apparent contradiction in “judges who flaunt their fealty to positive law and an apolitical judiciary while remaining proud of their [political] engagement with the humanist issues of the day, of their national or cultural patriotism, even their participation in internationalist advocacy institutions of one or another stripe”).
103. See ILC, Apr. 13 Rep., ¶ 410 (“Whether a rule’s speciality or generality should be decisive, or whether priority should be given to the earlier or to the later rule depended on such aspects as the will of the parties, the nature of the instruments and their object and purpose as well as what would be a reasonable way to apply them with minimal disturbance to the operation of the legal system.”).
104. See id. ¶ 20.
II. COMPETITION AS AN ALTERNATIVE TO COMITY

Competition is, of course, not the polar opposite of comity. Rather, it is a trend that can pull in the opposite direction, but not necessarily so. We might even consider competition as one kind of comity, that is, one kind of relationship among legal actors. If the international legal system is composed of independent legal actors, then fostering their independence may support the system. With each of these actors operating independently and in competition with each other, the problems associated with fragmentation can be effectively resolved.

Jan Dalhuisen has noted that

[i]n situations where the conflicting interests are such that there is competition between the international commercial and financial order and a state legal order, state courts in the countries most directly concerned will be mindful of their state’s position, but even international arbitrators or state courts in other states may not be indifferent to this competition, although the outcome may not be the same.105

John Dugard has observed that the ICJ was less frequently seized of disputes after its decision in the early South West Africa case, which emphasized more formalistic interpretive techniques, and then it successfully attracted disputants back to its facilities after shifting to a more purposive analysis in the Namibia case.106

Pemmaraju Sreenivasa Rao has added:

Another stated reason for the formation of new tribunals is disenchantment with the decisions of the ICJ, but this explanation too is not a significant factor. After all, disenchantment with outcomes is not confined to the ICJ or to judicial tribunals in general; it is a feature common to most permanent institutional bodies.107

In addition, the ICJ apparently sought to accommodate the United States and Canada in the Gulf of Maine case by constituting a special

105. Dalhuisen, supra note 89, at 170.
chamber of specific judges, due to the threat of the parties leaving the court for an *ad hoc* tribunal.\(^{108}\)

This reality of competition should not be overstated, since parties are not entirely free to choose any judicial or quasi-judicial forum for dispute resolution. However, this does not diminish the pressures of competition on tribunals of all stripes, and not just pressure from other judicial bodies. It has even been observed that an institution such as the International Criminal Court (“ICC”) “will need to compete, in highly charged political environments, to fill its docket.”\(^{109}\) The apparent reluctance of the U.N. Security Council, Secretary General, and Member States to enforce the arrest warrants issued for certain indicted Sudanese individuals could suggest that the ICC is losing political influence as international actors seek alternate methods to resolve the dispute within the Sudan.\(^{110}\)

In selecting a dispute resolution forum, there may be structural limitations (i.e., treaty language), a lack of personal or subject matter jurisdiction, or a lack of competence that limits the options for a particular forum. Nonetheless, parties, as sovereign entities, may always seek to resolve their differences through mediation, *ad hoc* arbitration, or one of the many alternative methods, for example, simple negotiation.\(^{111}\) And, States often prefer judicial tribunals to nonjudicial, including preferring domestic processes to international.\(^{112}\) Accordingly, the existence of Al-

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109. Alvarez, supra note 81, at 420–21 (“Political pressures may force that Court to build bridges to, not supplant, the more ‘biased’ national venues for judging perpetrators of mass atrocities that many ICC advocates disparage. . . . [T]he ICC . . . will continue to depend . . . on the political will of states.”).


111. See, e.g., U.N. Charter, art. 33(1) (“The parties to any dispute, the continuance of which is likely to endanger the maintenance of international peace and security, shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of their own choice.”).

112. See Alvarez, supra note 81, at 416–19.
ternate Dispute Resolution ("ADR") generally is enough to bring about competition among tribunals.

In addition to negotiation and other ADR methods, the structure and political nature of tribunals exerts competitive pressure. Observers have noted that the WTO, the North American Free Trade Agreement, and the ICJ are subject to intense political pressures such as the selection of favorable judges, bringing political cases to tribunals, and compliance with judgments: "[p]olitics does not stop once a court is established and adjudication begins." Thus, the pressures of competition can arise not only from direct conflicts of norms and jurisdiction, but also from the constitutive nature of tribunals and even the personal career objectives of the individual judges concerned. It must be recognized and accepted that various tribunals do compete with each other for legal authority, and that any effort to constitutionalize the international system, or otherwise establish norms for resolving conflicts, has a political result: the favoring of certain tribunals.

A. Anne-Marie Slaughter’s View

Anne-Marie Slaughter agrees that there is competition among courts, but her perspective is friendly. She denies a constitutional coherence to the international legal order, and presents instead a system of "fellow professionals in an endeavor that transcends national borders." For Slaughter, competition is constructive: "[j]udges who are beginning to think of one another as participants in the same dispute resolution system are often less willing to defer to one another out of the comity of nations. . . . The result, paradoxically, is more dialogue and less deference." However, she posits that through this sort of competition, "a distinct doctrine of ‘judicial comity’ will emerge: a set of principles designed to guide courts in giving deference." It is somewhat unclear if her version of comity is discretionary or more rule-based, since she elsewhere argues in favor of "constrained independence" where tribunals are limited only by "structural, political, and discursive mechanisms," which she poses

113. See id.
114. Id. at 415.
117. Slaughter, supra note 115, at 194.
118. Id.
in opposition to the theory that “the only effective international tribunals are ‘dependent’ [less ideological] tribunals.” Slaughter’s perspective suggests that her vision of comity is quite different from Pauwelyn’s.

Slaughter presumes that through friendly competition, some kind of international law of comity (or similar constitutionalizing solution to address conflicts) will emerge. Slaughter’s theory assumes that conflicts are destructive and that, at some point, international law may be able to rid itself of conflicts. The reality is that conflicts are more likely to be a permanent fixture, but may serve a constructive purpose in themselves.

B. Yves Dezalay and Bryant Garth’s View

Yves Dezalay and Bryant Garth extensively discuss tribunal competition in connection with ADR’s propensity to attract business and the diffusion of law into new jurisdictions. They are particularly interested in how certain laws compete with others to govern legal outcomes and the spread of American norms, which have competed with and pushed aside European norms. In fact, the competition they see goes so far as to offer competing definitions of arbitration/mediation. Dezalay and Garth have also noted that the competitive atmosphere in international law has intensified, transporting considerations of the market into the law, and that in terms of maintaining legitimacy and social relevance, this might be a healthy updating of the law and legal dispute resolution.

Dezalay and Garth’s observations seem accurate. Like Slaughter, they acknowledge the reality of competition and acknowledge that it has nor-

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120. Id. (citing Eric A. Posner & John C. Yoo, Judicial Independence in International Tribunals, 93 CALIF. L. REV. 1, 8, 27 (2005)).
122. Yves Dezalay & Bryant Garth, The Internationalization of Palace Wars: Lawyers, Economists, and the Contest to Transform Latin American States (2002).
123. See id.
125. See Dezalay & Garth, supra note 121, at 292.
126. Id. See also Mauricio Garcia-Villegas, Comparative Sociology of the Law, 31 L. & SOC. INQUIRY 343 (2006).
127. See Dezalay & Garth, supra note 121, at 308–10.
mative effects. Also like Slaughter, their observations are stated as fact (though not without a hint of sadness for the passing of the old order) and are emblematic of the new normative system supplanting the old. ADR has been, as a field, historically dominated by Europeans, and it is now becoming increasingly dominated by Americans. As such, Americans will bring their own norms with them, pushing out the older, European ones. Competition continuously produces newer, and possibly more relevant and fair, norms.

III. THE DRAWBACKS AND BENEFITS OF COMPETITION

A. Drawbacks of Competition

Competition among tribunals has led some to criticize tribunals or individual judges for making themselves attractive as decision makers, and highlight the drawbacks posed to the international legal system. Forum shopping is almost always identified as one of the more serious threats, criticized for providing parties opportunities to select a tribunal based on “access to the court, the procedure followed, the court’s composition, . . . its power to make certain types of order[,] . . . [or] the case-law . . . [that] happens to be more favourable to certain doctrines, concepts[,] or interests.” More specifically, “[t]he particular procedures involved may . . . influence the application of substantive domestic or foreign law and the outcome of disputes.” Also cited as drawbacks are parallel litigation (often linked to litigation costs), the development of a more litigious international environment, and a “risk of conflicting judgments,” especially by courts with differing expertise and competence. Even more grave, the fragmentation of the law could accelerate

128. See Dezalay & Garth, supra note 124; Guillaume, supra note 82.
129. Guillaume, supra note 82, ¶ 13.
130. Petersmann, supra note 30, at 282.
131. Id. at 358 (“As the very broad scope of WTO law overlaps with numerous other international and regional agreements, cooperation among international and national courts becomes ever more important for maintaining the rule of law and reducing transaction costs, particularly in international relations among producers, investors, traders, and consumers.”).
132. See Shany, supra note 11, at 77–78.
133. Guillaume, supra note 82, ¶ 15 (“Systems of national law have for long had to deal with [the problems associated with contradictory decisions]. They have solved them by two methods: on the one hand, the development of a clear hierarchy among courts, on the other, the formulation of rules on litispendency and res judicata.”).
134. Id. ¶ 16–17, 23.
and increase destabilizing forces, threatening the international rule of law\textsuperscript{135} and thereby endangering legal certainty itself.\textsuperscript{136}

B. Benefits of Competition

These criticisms, leaning on a theory of a coherent international legal system, presuppose that competition has only drawbacks: they do not give due regard to potential benefits. What is problematic about a party forum shopping, especially a sovereign State that has constructed the very tribunal it now wishes to seize, even if it affects the kind of justice reached? As Ernst-Ulrich Petersmann observes, “Forum shopping and multiple litigations have become frequent in the legally and institutionally fragmented international law of human rights.”\textsuperscript{137} Petersmann continues by noting that

[wh]ereas forum shopping in private international commercial law may seriously inconvenience private parties attacked against their will in distant fora applying foreign law, respondent parties in intergovernmental litigation usually have the resources to defend themselves in international courts whose jurisdiction they have voluntarily accepted.\textsuperscript{138}

In fact, we might argue that forum shopping is, in essence, what States have always done when they have created new arbitral tribunals or claims commissions for disputes. Not content with the decisions or perhaps even the kind of justice they might receive at one tribunal, States create others, ones they perceive to be more fair, often referring to them as possessing “better expertise” or as being “more specialized.”\textsuperscript{139} It cannot be forgotten that in international law, as opposed to domestic legal systems, a tribunal only has jurisdiction by state consent.\textsuperscript{140} If forum shopping is considered a problem, then the solution would be to prohibit

\begin{thebibliography}{9}
\item [135] Id. \S 27.
\item [136] See ILC, Apr. 13 Rep., supra note 12, \S 52.
\item [137] Petersmann, supra note 30, at 283.
\item [138] Id. at 360.
\item [140] See Chitharanjan F. Amerasinghe, Jurisdiction of International Tribunals 69 (2003) (“If agreement or consent is permitted to be the basis of jurisdiction of a [domestic] tribunal, such as an arbitral tribunal, related to the legal system, it is because it is expressly and exceptionally permitted to be so by the law of the land. In any case such a tribunal is ultimately controlled in one way or another by a national tribunal whose jurisdiction is not based on consent of the parties to the dispute but on the legitimate law of the land.”).
\end{thebibliography}
States from creating any new tribunals, perhaps even ones on a bilateral or regional basis. This is not only a conceptually difficult task, but also practically impossible to accomplish.

As for multiple litigations, Pauwelyn interestingly comments:

[The burden of] adjudicating the same dispute before two different tribunals does not necessarily amount to wasteful duplication. In case each of the two tribunals deals with clearly distinct matters—such as a WTO or [South African Development Community] panel dealing with trade-related claims and [International Tribunal for the Law of the Sea] with matters related to the law of the sea or conservation—multiple proceedings may actually be helpful as long as each tribunal stays within the limits of its jurisdiction and defers to the other tribunal when it comes to deciding matters falling within that tribunal’s jurisdiction.141

Accordingly, even if the pressures on a party to defend multiple suits were a valid concern, others have observed that it is already acceptable for persons to be subjected to parallel or conflicting laws as an inherent aspect of globalization.142

Competition among tribunals might lead to better decisions. A court may not be required to follow another’s jurisprudence, but the risk of another forum reaching a contrary result and potentially embarrassing the tribunal might encourage a more careful weighing of issues. A tribunal may not be seized of a similar dispute again, and thus may not have the opportunity to refine its jurisprudence on a given issue; judges might also lose opportunities for career-advancing positions if their decisions come into disrepute. In addition, a State faced with truly conflicting decisions from two or more tribunals, that is, decisions requiring an act that breaches another obligation, must make a choice and violate one regime in order to follow the other. It is doubtful that any tribunal would want to be seen as imposing less important decisions that are less likely to be followed, and therefore, a tribunal may tailor its judgments to avoid forcing a State to make such a decision.

In the recent Kadi and Yusuf cases before the Court of First Instance of the European Communities (“Court of First Instance”), although no jurecognitum concerns were held to be at issue, the court suggested that some form of conflict with the decisions of the U.N. Security Council might be possible over jurecognitum issues, and that it could not defer to the Security Council in such a case.143 Since the issues did not rise to the level of jurecognitum...
cogens, one might wonder why the Court of First Instance bothered to devote analysis to a potential conflict with the Security Council, and whether it was merely the court’s political assertion of the primacy of human rights norms. While on appeal to the ECJ, the Advocate General suggested that the ECJ could not defer to the Security Council’s command—a command that would demand a violation of human rights law—and the ECJ subsequently agreed with that opinion. 144 Human rights campaigners might applaud the ECJ for remaining within its competence and not giving decisive weight to Security Council decisions, but they might also decry the WTO for failing to step outside its competence to consider human rights obligations. Forcing a State to choose between honoring its obligations to the European Communities or to the Security Council may lead both the ECJ and the Security Council to reach more considered judgments in the future.

The improvement of tribunals through competition need not be so confrontational. For example, some observers have noted that a kind of comity through competition, perhaps just what Slaughter hopes for, has developed between the ECJ and European Court of Human Rights (“ECHR”), which “has markedly increased the quality of Luxembourg’s jurisprudence, in that the latter cites and examines Strasbourg case-law explicitly, rather than making elliptical assertions of fundamental rights compliance.”145 Furthermore, the methods of analysis used by one tribunal might embolden another to improve its approach, particularly if those two tribunals compete with one another. It has been observed that the WTO Dispute Settlement Body applies more aggressive and “stricter standards of judicial review compared to the more deferential ‘margin of appreciation’ doctrine applied by human rights courts [and that


competing jurisdictions among courts . . . may contribute to improving the quality and overall consistency of judicial reasoning.”146

Indeed, Upendra Baxi has written about the failure of arbitration panels to consider human rights issues in reaching decisions,147 but this criticism could be an argument in favor of more competition among tribunals. The argument would proceed as follows: if a matter were settled by an arbitration panel that ignored human rights issues, that settlement should not preclude another competing court from pronouncing a judgment on the human rights aspects of the same matter. This lack of preclusion might discourage parties from excluding human rights matters from the arbitration panel’s competence, since those matters might be dealt with by another court in the future anyway. Thus, the decision itself would consider the entirety of the legal issues at stake and might present a better chance of compliance.

Competition might also make for better courts in and of themselves. Increased comity, as a solution, may sacrifice the benefits of self-contained regimes to realize a kind of unobtainable desired coherence in international law. However, courts do a better job of improvement when they themselves are the agents of change. Many have noted that “most international judicial bodies operate in ‘splendid isolation,’ . . . with little, if any, regard for the jurisprudence of other international tribunals.”148 Judge Guillaume has observed, though, that “[e]very judicial body tends—whether or not consciously—to assess its value by reference to the frequency with which it is seised.”149 David Kennedy has also remarked that “the Court is one cultural and political institution among others, crafting its decision to enhance its legitimacy and pull towards compliance.”150 Accordingly, losing work to competing tribunals might suggest to a tribunal that it should improve. Although strictly writing about international commercial arbitration, Yves Dezalay and Bryant Garth’s observation has relevance here:

“Competition among key actors and groups . . . serves to construct legal legitimacy[;] . . . the competitive battles that take place within it are . . .

146. Petersmann, supra note 30, at 366 (citing MATTHIAS OESCH, STANDARDS OF REVIEW IN WTO DISPUTE RESOLUTION (2003) (exploring the alternate standards of review in WTO dispute resolutions)).
147. See Baxi, supra note 18, at 198–99.
148. Petersmann, supra note 30, at 283.
149. See Guillaume, supra note 82, ¶ 14.
150. Kennedy, supra note 102, at 464. See also id. at 466 (“And the sophisticated commentators were quick to see the wisdom of the Court’s manoeuvre—for the Court also manoeuvres, worries about its legitimacy, its allies and enemies in the game of mutual political regard.”).
fought in symbolic terms among moral entrepreneurs. Battles fought . . . build careers and markets for those who are successful in this competition, and they build the legitimacy and credibility of international legal practices and international institutions. 151

In support of this observation, Dezalay and Garth cite as an example the waning of the dispute market presence that the International Chamber of Commerce once offered to new arbitral institutions seeking to attract disputants as clients. 152 It has also been mentioned that the continuing Doha reassessment by the Member States—that is, their reassessment of the effectiveness of the WTO DSU—is likely to strengthen the tribunal. 153

Turning to the diversity of tribunals, this diversity permits parties to select the tribunal most likely to produce a certain outcome because of the application of certain norms. This diversity is also beneficial in that it permits parties to select a tribunal more insulated from undesirable politics or corruption. 154 Accordingly, the fairness of tribunals is oft-cited as a reason that some States prefer ADR. 155

In a similar manner, another benefit of competition might be increased transparency. 156 Competition provides an incentive to produce decisions that will be followed, 157 and thus, gives courts an incentive to be perceived as fair. It is frequently noted that the ICJ decision in Nicaragua may have been mostly to blame for the U.S. backlash against the court. 158

151. Dezalay & Garth, supra note 124, at 33.
152. Id. at 44 (“This rapid expansion of the market of arbitration naturally awakened new appetites. The ICC thus found itself more and more in competition with new arbitral institutions aiming at such or such segment of this very diverse market.”).
153. See Petersmann, supra note 30.
154. See id. at 359 (“The rule-oriented WTO dispute settlement system clearly mitigates power disparities in international relations and helps governments limit power politics inside their countries[, for example], by limiting protectionist abuses of trade policy discretion in favor of rent-seeking interest groups by requiring independent judicial remedies inside countries like China that did not have such legal institutions prior to WTO membership.”) (internal parentheses omitted).
156. Dezalay & Garth, supra note at 124, at 49 (“[I]t is partly a matter of introducing competition in a market that was strongly cartelized. . . . But it is even more essential and also more difficult to introduce a minimum of transparency in a community of specialists characterized by personal relations so complex and so entangled that the interdict access to this market by nonspecialists.”).
158. See Alvarez, supra note 81, at 417–18.
Since state compliance is still dependent on state cooperation,\textsuperscript{159} States may be more inclined to comply with judgments that are reached by courts perceived as fair. Similarly, in the context of arbitration, Christopher Drahozal has argued that “[c]ompetition to be selected by parties gives arbitrators a stronger incentive than public court judges to enforce the provisions of the parties’ contract, including the parties’ contractual choice of law.”\textsuperscript{160} Drahozal suggests that such reasoning might also be applicable to courts.\textsuperscript{161} Accordingly, competition, transparency, and the need for decisions that spur compliance with the law might motivate tribunals to develop in a fair and noncorrupt way. International constitutionalization and the comity proposals of Pauwelyn and Shany may not offer this benefit.

In fact, attempting to constitutionalize international courts might ignite an even more combative fragmentation among tribunals. For example, Kalypso Nicolaïdis and Joyce Tong argue that the Westphalian project was essentially one aimed at destroying hierarchies and establishing horizontal equality.\textsuperscript{162} Indeed, managing legal tensions with conflict rules that require comity might place certain tribunals or their norms in a more vertical position; this position might actually increase intertribunal hostility,\textsuperscript{163} and any friendliness that Slaughter sees among horizontal tribunals might be lost. States exercising their sovereign prerogatives might gravitate to more \textit{ad hoc}, bilateral tribunals that apply alternative equitable solutions rather than solutions drawn from the strict corpus of international law, all of which will generate even more conflicting international norms. Failure to embrace decentralized norm building might exacerbate the fragmentation of international law, which frustrates advocates of a constitutionalized, international legal system.

In addition to better tribunals and better decisions, increased competition could make for better justice. For example, if a particular tribunal becomes more popular, is this not an endorsement by the parties that they regard the court as achieving justice? Judge Guillaume finds the increased competition among courts as a risk that “[could lead c]ertain courts . . . to tailor their decisions so as to encourage a growth in their caseload, to the detriment of a more objective approach to justice. Such a

\begin{footnotes}
\footnote{159. \textit{See id.}}
\footnote{162. Nicolaïdis & Tong, \textit{supra} note 70, at 1371–72.}
\footnote{163. \textit{See id.}}
\end{footnotes}
development would be profoundly damaging to international justice.”

Bruno Simma has also noted that “the exclusion or modification through a ‘self-contained regime’ of ‘normal’ secondary rules [could lead] to a ‘softening’ of the legal consequences of wrongful acts.” But if competition may produce more carefully crafted decisions—decisions largely perceived as fair and more accurately reflective of the law made by States for States—then is this development not in pursuit of justice?

CONCLUSION

In short, the fears of fragmentation may be overstated. First, there are forces opposing fragmentation such as interjudicial dialogue, common legal traditions, and harmonization, as well the application of many of the same rules of general international law. Second, any threat to legal certainty posed by fragmentation does not appear particularly graver in the modern era than any preceding time period. These kinds of conflicts are simply part of the nature of the international legal system. That being said, competition may, in fact, produce better norms. Drahozal has stated that “[t]he more choices of national law available to parties, the more likely they can find a national law that they prefer. Indeed, . . . contractual choice of law facilitates interjurisdictional competition, thereby further enhancing the choices available to the parties.” Fragmenting norms could provide opportunities for better norms, particularly since differing legal traditions bring differing norms to adjudication, all of which may have their relative strengths. In support of this, Nicolaïdis and Tong cite to the competition between the United States and EU countries to export their legal models, as well as the diversity in the legal

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164. Guillaume, supra note 82, ¶ 14.
165. Simma, supra note 53, at 135.
167. ILC, Apr. 13 Rep., supra note 12, ¶ 492 (“One principal conclusion of this report has been that the emergence of special treaty-regimes (which should not be called ‘self-contained’) has not seriously undermined legal security, predictability or the equality of legal subjects.”)
169. See Trevor C. Hartley, The European Union and the Systematic Dismantling of the Common Law of Conflict of Laws, 54 INT’L & COMP. L.Q. 813, 814 (2005); Michaels, supra note 25, at 1008 (“American law relies on broad standards of ‘fairness’ and ‘reasonableness’ that are applied in each individual case. This enables the judge to focus on achieving justice in individual cases even if it hampers predictability for the parties. European law, by contrast, uses hard and fast rules that are easier to apply and therefore more predictable but may lead to unjust results in individual cases.”).
models in Europe, which instills a normative power in these models. 170 This continual updating of law and legal dispute resolution is healthy for the law to maintain legitimacy while keeping up with social change. 171 How popular courts weigh the need for equality, the right to a hearing, and so on might suggest a balance among principles that is the most just approach. Other tribunals may look to the decisions of more popular fora as examples of justice, and reform themselves and their image appropriately.

Changes in the substance of the law brought about by conflicts of norms and jurisdiction can be beneficial. Some academics have written about the evolution of certain rules due to competition for business, such as the role of party autonomy. 172 Others have discussed the criticism made in regards to tribunals’ applications of comity rules designed to resolve conflicts. 173 In addition, according to Petersmann, “The rule-oriented WTO dispute settlement system [has been cited as mitigating] power disparities in international relations.” 174

Thus, increased competition may increase the diversity of legal norms and the legitimacy of the norms applied. As William Burke-White has articulated, the interaction of fragmenting and antifragmenting trends produces a pluralist legal order, which is more open to a variety of alternative norms. 175 The attractiveness of this theory is that there is an international legal system that is legitimate and effective because it strikes a balance between diversity and universality. 176 This diversity of legal norms “can be a source of normative power.” 177 As the ILC has observed, “Even as international law’s diversification may threaten its coherence, it does this by increasing its responsiveness to the regulatory context.” 178

Any objection to the beneficial role of fragmentation is based on one’s conception of justice and whether justice can be a democratic and com-

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170. Nicolaïdis & Tong, supra note 70, at 1374–75.
171. See Dezalay & Garth, supra note 121, at 310.
173. See Westbrook, supra note 8, at 567.
174. See Petersmann, supra note 30, at 359.
175. Burke-White, supra note 37, at 978.
176. See id.
177. Nicolaïdis & Tong, supra note 70, at 1374 (noting the success of the EU political and legal model around the world, based partly on its underlying diversity in contrast to the American model, which is largely homogenous).
petitive preference. If the South West Africa cases at first lost work for, and then later brought work back to, the ICJ, then the latter decisions in this series can be regarded in one of two ways: merely a play for prestige, or a constructive acknowledgement that the international community thought that its prior decisions were wrong and did not do justice. With the deliberate adoption of the more purposive interpretation method described by Dugard, the ICJ may be seen as reforming itself in order to better execute justice, notwithstanding the critical remarks of South Africa’s ad hoc judge in the final South West Africa case regarding the justice achieved. Prior ICJ decisions had led some developing countries to view the court as a failure, and prefer the establishment of new dispute settlement tribunals, such as the International Tribunal for the Law of the Sea. Perhaps the recent increase in business for the ICJ shows that countries now regard the court as just, striking a balance between, on the one hand, the interests of States in retaining the role of sovereign consent in international law and, on the other hand, the international community’s need to constrain States’ freedom of action.

Of course, the opposite can be easily argued: justice is not popular. However, if international tribunals are created by States in order to do justice among them, then being recognized as the “most attractive” forum is evidence that a particular tribunal may have a better appreciation for justice. Petersmann has argued that “national and international courts do not yet constitute a coherent legal and judicial system,” the word “coherent” being used in the sense of a single, legitimate, norm-producing system without internal inconsistencies. However, is this not a form of coherence if a system allows the best court, norm, or justice to survive? Fragmentation may not be a problem to be solved, but rather, a sign that the international legal system needs to consider a variety of legal norms. As society’s definition of justice evolves, so do many tribunals, not necessarily towards a top-down, constitutionalized, hierarchical system overseeing a coherent, unitary international legal order, or

180. See Dugard, supra note 106, at 33–38.
182. See, e.g., Rao, supra note 107, at 945 n.59.
183. Petersmann, supra note 30, at 360.
184. See ILC, Apr. 13, Rep., supra note 12, ¶ 487 (“Even as the law may not go much further than require a willingness to listen to others, take [others’] points of view into account and . . . find a reasoned resolution at the end.”).
for that matter towards a network of friendly, lending, and borrowing professionals. Instead, they may affirm a bottom-up, vigorous system where different legal actors compete for the best realization of justice.
WHEN IN ROME:
AIDING AND ABETTING IN
WANG XIAONING V. YAHOO

INTRODUCTION

In April 2007, Wang Xiaoning, a Chinese dissident, filed suit against Yahoo! Inc. and certain subsidiaries (“Yahoo”) under the Alien Tort Claims Act (“ATCA”). The suit alleged that Yahoo aided and abetted the Chinese government in the torture, cruel and degrading treatment, arbitrary arrest, and prolonged detention of Wang. Through a Yahoo group that permitted him to post anonymously, Wang posted several articles online criticizing the Chinese government and calling for democratic reform in China. After Yahoo provided information to the Chinese government on the Yahoo account used to publish the articles, the government was able to identify Wang as the author of the postings. Wang was subsequently sentenced to ten years in prison for inciting subversion, and he claims that he has since been repeatedly beaten and tortured in the labor camp where he is currently held. Wang sued Yahoo for damages and an injunction to prevent Yahoo from providing identifying information in the future on accounts being used to call for democratic reform in China. When questioned, spokespersons for Yahoo maintained that as a condition of doing business, it is bound to comply with the local laws where it operates. In November 2007, however, Yahoo settled with Wang for an undisclosed amount.

This Note examines the ATCA claims filed against Yahoo and evaluates Wang’s likelihood of success had the case proceeded to trial, in light of several standards the federal courts have articulated to determine aiding and abetting liability for multinational corporations. In particular, federal courts have taken notice of the international criminal aiding and

5. Eunjung Cha & Diaz, supra note 4.
7. Id.
abetting standard articulated by international military tribunals during the war crimes trials at Nuremberg. These trials may provide the courts with guidance on how to analyze ATCA aiding and abetting claims.

Part I of this Note provides background on Yahoo’s involvement in China, the U.S. government’s response to the involvement of Internet companies in China, and Wang Xiaoning’s suit against Yahoo. Part II briefly outlines the development of ATCA claims in general and against multinational corporations in particular, with a focus on civil aiding and abetting claims. Part III discusses the aiding and abetting criminal liability standard that was prominently established during the trials at Nuremberg and further developed by the tribunals in the former Yugoslavia and Rwanda. Part IV evaluates Wang’s likelihood of success had the case gone to trial. Part V concludes that a court would have found Yahoo liable for aiding and abetting if the court applied the Nuremberg standard for criminal liability for aiding and abetting as it has developed over the last twenty years, and Wang could have proven that Yahoo turned over the identifying details on Wang’s account knowing the government was looking to prosecute a dissident.

I. BACKGROUND

A. Yahoo

It is not difficult to understand why multinational Internet corporations are anxious to establish business operations in China. The China Internet Network Information Center estimates that there are 253 million Internet users in China, recently surpassing the United States. Several major corporations involved in providing services related to the Internet are already doing business in China, among them Google, Cisco, Microsoft, and Yahoo. But the Chinese government imposes a number of condi-

9. See, e.g., Khulumani v. Barclay Nat'l Bank Ltd, 504 F.3d 254, 271 (2d Cir. 2007) (per curium), aff’d due to lack of a quorum sub. nom, Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008) (recognizing that the principles established by the International Military Tribunal are significant due to their “broad acceptance” and because they “were viewed as reflecting and crystallizing preexisting customary international law”).

10. See, e.g., Doe I v. Unocal, 395 F.3d 932, 950 (9th Cir. 2002), reh’g en banc granted, 395 F.3d 978 (9th Cir. 2003), appeal dismissed, 403 F.3d 708 (9th Cir. 2005) (finding the ICTY and the ICTR “especially helpful” in considering the standard to use for civil aiding and abetting liability).


12. Nicholas D. Kristof, Op-Ed., China’s Cyberdissidents and the Yahoos at Yahoo, N.Y. TIMES, Feb. 19, 2006, at D13. Unlike Yahoo and Microsoft, which both provide email and blogging accounts, Google decided that it would only offer a search engine to
tions on these companies before it will allow them to establish business in the country. By agreement, corporations are required to censor content that “damages the honor or interests of the state” or “disturbs the public order or destroys public stability.” The government, however, does not provide a list of what must be censored and intentionally leaves the wording of this agreement unclear so that the corporations themselves are required to interpret what must be censored.

In 1999, Yahoo was the first multinational Internet corporation to enter the market in China when it established a Beijing office and started the Chinese equivalent of its search engine. Yahoo voluntarily signed a “self-discipline” pledge in 2002, promising to follow the vague censorship laws in China. The pledge requires its signatories to “refrain[] from producing, posting, or disseminating pernicious information that may jeopardize state security and disrupt social stability, contravene laws and regulations and spread superstition and obscenity.” In a letter in response to inquiries from Human Rights Watch, an international human rights group, Yahoo stated, “The pledge involved all major Internet companies in China and was a reiteration of what was already the case—all Internet companies in China are subject to Chinese law, including with respect to filtering and information disclosure.” Human Rights Watch noted that while this statement was accurate at the time Yahoo was asked to sign, neither Microsoft nor Google has since signed the pledge.

Chinese residents when it entered the market, precisely because it did not want to be put in a position where it might have to censor its bloggers’ writings or turn over identifying information to the Chinese police that could lead to their imprisonment. Google also notifies users when certain results have been omitted due to Chinese law, so that they are at least made aware that the censorship has occurred. See Clive Thompson, Google’s China Problem (and China’s Google Problem), N.Y. TIMES, Apr. 23, 2006, § 6 (Magazine), at 64.

13. Thompson, supra note 12.
14. Id.
15. Id.
18. RACE TO THE BOTTOM, supra note 16, at 125.
19. Id. at 31.
B. Response of the U.S. Government

Concern about the consequences of suppression of speech in China roused both the U.S. Congress and the executive branch to gather information about the business of multinational Internet corporations with operations in China and headquarters in the United States. In February 2006, the State Department announced the establishment of the Global Internet Freedom Task Force.\(^{20}\) The purpose of the Task Force is to “maximize freedom of expression and the free flow of information and ideas, to minimize the success of repressive regimes in censoring and silencing legitimate debate, and to promote access to information and ideas over the Internet.”\(^{21}\)

Congress has also held several hearings on the matter. On February 15, 2006, representatives of Google, Microsoft, Cisco, and Yahoo appeared before the House Subcommittee on Africa, Global Human Rights and International Operations.\(^{22}\) The House Subcommittee was particularly concerned about the plight of journalist Shi Tao,\(^{23}\) who was imprisoned for sending notice overseas that the Chinese government warned journalists against any coverage of the anniversary of the Tiananmen Square massacre.\(^{24}\) Yahoo provided the Chinese government with information showing that Shi had used his email account at his place of business to

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\(^{22}\) Tom Zeller Jr., Online Firms Facing Questions about Censoring Internet Searches in China, N.Y. TIMES, Feb. 15, 2006, at C3.

\(^{23}\) In May 2007, Shi Tao joined Wang Xiaoning’s suit against Yahoo as a plaintiff. Nate Anderson, Second Chinese Dissident Joins Lawsuit Against Yahoo, ARS TECHNICA, May 30, 2007, http://arstechnica.com/news.ars/post/20070530-second-chinese-dissident-joins-lawsuit-against-yahoo.html. While this Note does not review the specific facts surrounding his online advocacy for democratic reform and subsequent imprisonment, his case is substantially similar to Wang Xiaoning’s, in that he was a journalist who criticized the Chinese government and was later imprisoned after Yahoo provided information tying him to an anonymous email sent overseas. For further details on the imprisonment of Shi Tao, see Complaint, supra note 2, paras. 52–68.

notify others of the warning. Representative Chris Smith, the Chairman of the Subcommittee, began the hearing by referencing the Holocaust, where multinational corporations offered technology to the Third Reich that enabled human rights abuses. Representative Tom Lantos, himself a Holocaust survivor, demanded to know whether the companies were “ashamed” of their contributions to censorship and, in Yahoo’s case, to the imprisonment of Chinese dissidents. The companies generally responded by noting that while they were “deeply concerned” by the strictures in China, the country has become a “more open society” since it has gained access to the Internet. Additionally, they emphasized that China would become more tightly controlled if non-Chinese companies were forced to leave. Finally, they pointed out that the censorship filters do not always block all the content that the Chinese government does not want its citizens to see.

Following the House Subcommittee hearing, Representative Smith introduced a bill called the Global Online Freedom Act of 2006, the pur-

28. Hearing, supra note 24, at 60 (testimony of Jack Krumholtz, Managing Director of Federal Government Affairs and Associate General Counsel, Microsoft Corp.).
29. Id. at 56 (testimony of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc.). Advocates for multinational Internet corporations are not the only ones to argue that regardless of the efforts it makes to stifle dissent, the Chinese government will be unable to slow the forces of democratic change now that the Internet is readily available to its citizens. Even when it shuts down the blog of one prominent dissident, there are now so many citizens using the Web to post their writings that the Internet in China has become a “censor’s nightmare.” Howard W. French, Despite Web Crackdown, Prevailing Winds are Free, N.Y. TIMES, Feb. 9, 2006, at A4. Of course, this argument ignores the consequences of imprisonment and torture for those individuals unfortunate enough to be identified and prosecuted by the government for voicing their dissent. Also, the idea that China has become freer through the investment of foreign corporations is not a given: “[b]ecause China is too lucrative a market to resist, American and European businessmen have ended up endorsing the party line through their silence—or worse. They are not molding China; China is molding them.” Tina Rosenberg, Editorial, Building the Great Firewall of China, with Foreign Help, N.Y. TIMES, Sept. 15, 2005, at D11.
30. Hearing, supra note 24, at 78 (testimony of Mark Chandler, Vice President and General Counsel, Cisco Systems, Inc.).
31. Id. at 63 (prepared statement of Jack Krumholtz, Managing Director of Federal Government Affairs and Associate General Counsel, Microsoft Corporation).
pose of which was to “promote freedom of expression on the Internet” and “protect [U.S.] businesses from coercion to participate in repression by authoritarian foreign governments.” The bill did not move beyond the Subcommittee vote before the 109th Session of Congress ended, and Representative Smith reintroduced the bill as the Global Online Freedom Act of 2007 in the 110th Session of Congress. In October 2007, the House’s Committee on Foreign Affairs recommended that the entire House consider the bill, but the Energy and Commerce Committee must still consider the bill. The bill is unlikely to gain enough support to pass given the significance of China to U.S. trade.

In August 2007, Representative Lantos, Chairman of the House Committee on Foreign Affairs, announced that he would conduct an investigation to find out whether Yahoo misled Congress when it testified before Congress in February 2006. Yahoo had testified that it had no information about the reason for the investigation of journalist Shi Tao when it was asked to provide identifying information on his Yahoo account. But the Dui Hua Foundation, which advocates for Chinese detainees in the United States and Hong Kong, uncovered a document establishing that the Chinese government provided Yahoo with a request for evidence in a case against Shi for “illegally providing state secrets to foreign enti-

33. Press Release, Representative Christopher H. Smith, House of Representatives, Smith Reintroduces the Global Online Freedom Act (Jan. 8, 2007). In the press release, Representative Smith stated, “American companies should not be working hand-in-glove with dictators. By blocking access to information and providing secret police with the technology to monitor dissidents, American IT companies are knowingly—and willingly—enabling the oppression of millions of people.” Id.
37. “Congress could certainly pass a law forbidding technology companies from doing business in China just as it once prohibited trade with South Africa, and still ban commerce with countries like Cuba and Burma. But it won’t. Ever since the Nixon administration, the government has consistently believed that engaging with China was better than not . . . .” Nocera, supra note 27.
39. Hearing, supra note 24, at 56 (testimony of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc.).
ties.” 40 Yahoo’s Chief Executive Officer Jerry Yang and Senior Vice President and General Counsel Michael Callahan were requested to testify at a hearing on November 6, 2007. 41 At the hearing, Callahan admitted that, while he was unaware of it at the time of his initial testimony, the order for information about Shi Tao did contain a reference to an investigation for disclosure of “state secrets.” 42 “State secrets” is a term commonly understood to refer to investigations of political dissidents. 43 Meanwhile, multinational Internet companies continue to press the U.S. government to pursue legislative and diplomatic solutions that encourage freedom of expression on the Internet worldwide. At yet another hearing before Congress, Michael Samway, the Vice President and Deputy General Counsel of Yahoo, noted that Yahoo has requested that the government use its “trade relationships, bilateral and multilateral forums, and other diplomatic means” among repressive regimes to discourage censorship on the Internet and otherwise. 44 But the Internet

40. Congressional Committee to Investigate Disparity Between Documents and Hearing Testimony by Yahoo, supra note 38.
42. Yahoo’s Provision of False Information to Congress: Hearing Before the Comm. on Foreign Affairs, 110th Cong. 26 (2007) (prepared statement of Michael J. Callahan, General Counsel, Yahoo! Inc.) [hereinafter Yahoo Hearing]. Wang Xiaoning and Shi Tao settled their suit against Yahoo only one week after this Congressional hearing. Morton Sklar, the executive director of World Organization for Human Rights USA and lawyer for Wang and Shi in the lawsuit against Yahoo, stated, “The pressures by Congress on [Yahoo chief executive officer] Jerry Yang were of tremendous importance to making this settlement happen.” Rampell, supra note 8. For further description of the Shi Tao case, see supra note 23.
44. Global Internet Freedom: Corporate Responsibility & the Rule of Law: Hearing Before the Subcomm. on Human Rights & the Law, 110th Cong. (2008) (opening statement of Michael Samway, Vice President & Deputy General Counsel, Yahoo! Inc.). Samway noted that Yahoo CEO Jerry Yang met with State Department officials and wrote a letter to Secretary of State Condoleeza Rice, urging diplomatic efforts to encourage the release of Chinese political prisoners. Id. At the same hearing, Google Inc. Deputy General Counsel Nicole Wong laid out several suggestions to “promote online freedom of expression.” Id. (testimony of Nicole Wong, Deputy General Counsel, Google Inc.). Among other things, Google suggested that the U.S. government “renew diplomatic efforts to encourage [approximately thirty countries] to ratify the [International Covenant on Civil and Political Rights]”; “[s]trengthen and enhance the State Department’s Global Internet Freedom Taskforce”; “[s]trengthen individuals’ ability to file complaints under the International Covenant”; and “[p]romote free expression as part of foreign aid.” Id. For a historical view that the self-interest of corporations in the marketplace may pave the way to the creation of enforceable human rights legal standards, see Ralph G. Steinhardt,
companies have also begun to respond at least in part to the criticism that has been directed towards them for doing business with the Chinese government. In October 2008, companies, including Yahoo, Microsoft, and Google, several human rights organizations, scholars, and socially responsible investors reached an agreement on a voluntary code of conduct for use in countries like China to protect user privacy and encourage freedom of expression. 45

Due to its secrecy, it is difficult to get a true sense of the number of Chinese citizens significantly affected by the Chinese government’s actions in cases like Wang’s and Shi’s. The government shows no signs of abating its suppression of dissent. In fall 2007, it announced that it would continue to attack vigorously what it called “false news reports, unauthorized publications and bogus journalists,” and it promised to punish journalists and media organizations that were “intentionally fabricating news” and “tarnishing the nation’s image.” 46 Human Rights Watch reported that in August 2007, the government ordered all search sites in the country, including the Chinese versions of the Google and Yahoo search sites, to take down any “illegal and unhealthy content” within a week, without providing substance on what this phrase might mean and without providing the consequences of failure to comply. 47

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45. Miguel Helft & John Markoff, *Big Tech Companies Back Global Plan to Shield Online Speech*, N.Y. TIMES, Oct. 28, 2008, at B8. According to the final draft of documents obtained by the Times, the companies promise to “avoid or minimize the impact of government restrictions on freedom of expression.” Id.

46. Keith Bradsher, *China Cracks Down on News Media as Party Congress Nears*, N.Y. TIMES, Aug. 16, 2007, at A3. This “crackdown” coincided with growing worldwide concern about the quality controls around consumer products made in China as well as the nearing of the Chinese Community Party Congress, when the new party leadership was announced. See, e.g., David Barboza & Louise Story, *Mattel Issues New Recall of Toys Made in China*, N.Y. TIMES, Aug. 14, 2007, at C2. The message from the government did not concern dissent journalism directly, but due to the Chinese government’s increased focus on the image of the country around the world, journalists arguing for democratic reform are likely to feel the trickle-down effects of the ever-tightening controls around what journalists may publish.

47. Press Release, Human Rights Watch, *China: Media Freedom Attacks Continue Despite Pledges* (Sept. 7, 2007). And despite the government’s assurances to the contrary, international media arriving in Beijing for the Olympics found that several websites were censored by the country’s firewall. After organizers of the Olympics met with senior members of the International Olympic Committee, some of the bans were lifted. Andrew Jacobs, *Restrictions on Net Access in China Seem Relaxed*, N.Y. TIMES, Aug. 1, 2008, at A7.
C. Wang Xiaoning

According to his complaint, Wang was the editor of and occasional contributor to two online journals that advocated for democratic reform in China.\(^48\) In 2000 and 2001, Wang posted his writings to a Yahoo Group, where users who subscribed could receive emails sent by other members of the group.\(^49\) After administrators came across the forbidden content in Wang’s writings, his ability to send new posts to the group was revoked; however, Wang continued to send his journal entries anonymously to particular email addresses.\(^50\)

In September 2002, Chinese police allegedly arbitrarily detained Wang without informing him of the charges against him and seized evidence of his writings, including his computer and his notes.\(^51\) A year later, the Beijing Municipal First Intermediary People’s Court convicted Wang of “‘incitement to subvert state power,’ advocating the establishment of an alternative political party, and communicating with an overseas organization the Chinese government considers ‘hostile.’”\(^52\) The government sentenced him to ten years in prison.\(^53\) According to the complaint, the court stated that it was able to connect Wang to his writings due to the essential information that Yahoo Hong Kong provided to the Chinese police.\(^54\) Specifically, Yahoo Hong Kong told the police that an email address based in China had been used to set up the Yahoo Group, and that the postings sent to the Yahoo Group were from an account in China that was owned by Wang Xiaoning.\(^55\) The court also included some of Wang’s statements from his Internet postings. In one posting, Wang

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\(^48\) Complaint, supra note 2, para. 32.
\(^49\) Id. para. 33.
\(^50\) Id. paras. 34–35. The complaint does not identify whether the administrators who revoked Wang’s posting privileges were members of the Chinese government or employees of Yahoo. Id.
\(^51\) Id. para. 37.
\(^52\) Id. para. 40.
\(^53\) Id. para. 41.
\(^54\) Id. para. 42. Yahoo would have probably contested this point. In his prepared statement, Michael Callahan, General Counsel of Yahoo, emphatically denied that Yahoo Hong Kong had provided any information to the Chinese police about Shi Tao, another imprisoned Chinese dissident, and that Yahoo China alone would respond to a request from a law enforcement agency. Hearing, supra note 24, at 59 (prepared statement of Michael Callahan, Senior Vice President and General Counsel, Yahoo! Inc.). Also, Yahoo has been anxious to clarify that in October 2005, Yahoo China merged with Alibaba.com (a Chinese company), and Alibaba.com now owns the Yahoo China business. While Yahoo holds one of the four board seats on Alibaba.com and is a “large equity investor,” it does not maintain control over the day-to-day operations of Yahoo China. Id. at 58.
\(^55\) Complaint, supra note 2, para. 42.
stated, “Without the multi-party system, free elections and separation of powers, all types of political reform will come to nothing.” In another, he wrote, “We should never forget that China is still a totalitarian and despotic country.” Wang appealed the judgment, but the Supreme People’s Court rejected the application for appeal in December 2004 and again in July 2006.

Wang has been held at the Detention Center of Beijing State Security Bureau as well as Beijing Prison No. 2. His complaint alleged that he has been subject to severe beatings and psychological torture to provoke him to confess to engaging in activities against the State, and that at times he has been malnourished and denied regular exercise and sunlight for weeks or months on end. He is allowed to see his wife for one half-hour every month, and prison administration monitors his written communications directed outside the prison.

In April 2007, Wang Xiaoning filed suit against Yahoo! Inc. and Yahoo! Hong Kong, Ltd. under the ATCA, among other laws and treaties. The specific violations of the law of nations alleged include knowingly aiding and abetting acts of torture; cruel, inhuman, or degrading punishment or treatment; and arbitrary arrest and prolonged detention. The lawyer for the plaintiffs, Morton Sklar, is the executive director of World Organization for Human Rights USA. Had Wang’s suit not settled, it would have been considered a test case, because the Supreme Court has not yet directly ruled on the applicability of the ATCA to multinational corporations for aiding and abetting violations of international law.

56. Id. para. 43.
57. Id.
58. Id. para. 44.
59. Id. paras. 39, 44.
60. Id. para. 39.
61. Id. para. 45.
62. Id.
63. The suit also alleged violations of the Torture Victim Protection Act; Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment; International Covenant on Civil and Political Rights; Universal Declaration of Human Rights; Charter of the United Nations; International Labor Organization Convention No. 29 Concerning Forced or Compulsory Labor; the Electronic Communications Privacy Act; and certain statutes and common law of the state of California. See id. para. 69.
64. Id. para. 74.
65. Id. para. 81.
66. Id. para. 88.
67. Helft, supra note 3.
68. In a discussion on how to judge whether a norm is “sufficiently definite” to be considered a violation of international law, Justice Souter, in the only Supreme Court
II. CLAIMS UNDER THE ATCA

A. Introduction

The ATCA was enacted as part of the Judiciary Act of 1789. There is intense disagreement over its original purpose and current appropriate application, in part due to the scant record left by Congress when the statute was drafted. In Tel-Oren v. Libyan Arab Republic, Judge Bork contended that the drafters of the ATCA had in mind only the violations of the law of nations existing at that time, including such torts as the violation of safe conduct, infringement of the rights of ambassadors, and piracy. Bork concluded that the judiciary should not legislate from the bench on the meaning of the ATCA when Congressional intent is so unclear:

[W]e have, at the moment, no evidence what the intention of Congress was. When courts lack such evidence, to ‘construe’ is to legislate, to act in the dark, and hence to do many things that, it is virtually certain, Congress did not intend. Any correspondence between the will of Congress in 1789 and the decisions of the courts in 1984 can then be only accidental. Section 1350 can probably be adequately understood only in the context of the premises and assumptions of a legal culture that no longer exists.

Others argue that the ATCA should receive a broad interpretation. The ATCA was drafted amidst Congressional concern that the U.S. government, still in its very early stages, had no national law with which to enforce the country’s obligations under international law, such as the obli-
gation to protect ambassadors.73 When the first Congress enacted the Judiciary Act in 1789, it modeled the drafting on a 1781 resolution by the Continental Congress that was never passed.74 The 1781 resolution exhorted states to pass laws that would punish the “most obvious” violations of the law of nations, which Judge Bork referenced in Tel-Oren.75 But it also asked states to grant courts jurisdiction “to decide on offenses against the law of nations, not . . . enumerated” and resolved that tort suits be authorized “for damages by the party injured.”76 Those who argue for a broad interpretation of the ATCA note that the drafters specifically chose to grant jurisdiction to all district courts as opposed to the Supreme Court alone, and that jurisdiction was granted for “all causes” rather than limited to specific violations of international law, such as infringement of the rights of ambassadors.77

Filartiga v. Pena-Irala,78 a Second Circuit decision, brought the ATCA back to life after lying near dormant for close to two hundred years.79 This decision has been called the Brown v. Board of Education for transnational public law litigants.80 Filartiga held that the ATCA provides jurisdiction for violations of “universally accepted norms of the international law of human rights, regardless of the nationality of the par-

73. Beth Stephens, Individuals Enforcing International Law: The Comparative and Historical Context, 52 DePaul L. Rev. 433, 443–44 (2003) [hereinafter Stephens, Historical Context]. Stephens further argues that the First Congress, in enacting laws enabling both criminal and civil liability for violations of international law, allowed for a “mixed approach” that provided for “criminal prosecution of the perpetrator and compensation to those injured through a civil suit.” Id. at 444.

74. William R. Casto, The Federal Courts’ Protective Jurisdiction over Torts Committed in Violation of the Law of Nations, in THE ALIEN TORT CLAIMS ACT: AN ANALYTICAL ANTHOLOGY 119, 142 (Ralph G. Steinhardt & Anthony D’Amato eds., 1999). The First Congress drafted legislation on the issue of the violation of the law of nations some time after an infamous incident in 1784 involving an assault by a Frenchman, de Longchamps, upon the Secretary of the French Legion on American soil. Since states alone held the lawmaking power at the time, the Continental Congress had no power that would allow for a federal remedy. Thus, the delegates at the Constitutional Convention and subsequently the First Congress were well aware of the need to provide legislation around violations of international law. Id. at 139–40.

75. Id. at 138 (citing 21 J. Cont. Cong. 1137 (1781)).

76. Id.

77. Id. at 146 (citing Judiciary Act § 9).

78. 630 F.2d 876 (2d Cir. 1980).


ties.” As long as there is “[1] an action by an alien, [2] for a tort only, [3] committed in violation of the law of nations,” a suit may be properly brought in district court. The Second Circuit further explained that the courts must carefully define the law of nations. If they failed to do so, “the courts of one nation might feel free to impose idiosyncratic legal rules upon others, in the name of applying international law.”

Since Filartiga, suits under the ATCA generally follow one of two routes: they are filed against either a State recognized by the United States (or persons acting in an official capacity for the State) or, as is more recently the case, persons acting in an individual capacity. Because courts had generally only applied international law to States, it was not clear that, when faced with the issue, courts would find private actors liable as well under the ATCA. Kadic v. Karadzic, decided in 1995, was one of the first cases to address whether a person acting in an individual capacity, not as a functionary of the State, could be held responsible for violations of the law of nations. Here, the Second Circuit found that the ATCA is applicable to private actors. Karadzic argued that only States and persons acting under color of law could be held liable for violations of international law, and that because he was a private individual, not a

81. Filartiga, 630 F.2d at 878.
82. Id. at 887 (explaining the elements for making out a tort violation under the ATCA).
83. Id. at 881.
84. Under the language of the statute, States are not exempt from suits under the ATCA. But generally, they have not been successfully named as defendants as a result of States’ general sovereign immunity to suits. See Beth Stephens, Judicial Deference and the Unreasonable Views of the Executive Branch, 33 BROOK. J. INT’L L. 773, 812 (2008) [hereinafter Stephens, Unreasonable Views]. Under the Foreign Sovereign Immunities Act of 1976, 28 U.S.C. §§ 1602–11 (2006), States and their instrumentalities are, subject to certain exceptions, immune from the jurisdiction of the court. And even when States are not immune to the court’s jurisdiction under the exceptions enumerated in the Foreign Sovereign Immunities Act, the act of state doctrine may cause the court to decline to review the legality of the State’s actions due to concerns about encroaching on the executive branch’s ability to set foreign policy. See, e.g., Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964). Indeed, in a footnote in Sosa v. Alvarez-Machain, the court remarked that there was a “strong argument that federal courts should give serious weight to the [e]xecutive [b]ranch’s view of the case’s impact on foreign policy.” 542 U.S. 692, 733 n.21 (2004). Another prudential doctrine that courts have indicated may limit their ability to adjudicate claims is when they are presented with a nonjusticiable political question. See, e.g., Baker v. Carr, 369 U.S. 186 (1962).
86. Olah, supra note 79, at 775.
state actor, he could not be sued under the ATCA. The court rejected this argument, asserting that “certain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” That is, there are certain universal norms that bind all entities, regardless of whether they are private individuals or state actors. For support, the court cited both the Restatement (Third) of the Foreign Relations Law of the United States, which provides for private actor liability for violations of certain universal norms, as well as offered historical examples of private actions that were considered violations of international law, such as piracy, the slave trade, and certain war crimes.

In 2004, the Supreme Court finally spoke on the ATCA in Sosa v. Alvarez-Machain. One of the issues before the Court was whether the ATCA was a jurisdictional statute only and thus “stillborn.” If it were solely jurisdictional, the statute would only enable litigants to bring claims once Congress provided a further private right of action through additional legislation, such as the Torture Victim Protection Act. The Sosa decision, however, did not interpret the statute to require further legislation. The Court recognized a private right of action for ATCA claims, but it defined the types of claims that can be brought under the ATCA relatively narrowly. First, the violation must be “definite” and “accept[ed] among civilized nations.” The Court cited to a concurring opinion in Tel-Oren v. Libyan Arab Republic, in which Judge Edwards found that the ATCA only reaches “a handful of heinous actions—each of which violates definable, universal and obligatory norms.” And when laws or treaties do not clearly define a “violation of international law,” the Court stated that we should “look[] to those sources we have long, albeit cautiously, recognized,” including:

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88. Id. at 239.
89. Id.
90. See, e.g., RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES pt. II, introductory note (1987) (“Individuals may be held liable for offenses against international law, such as piracy, war crimes, or genocide.”); id. § 404 (“A state has jurisdiction to define and prescribe punishment for certain offenses recognized by the community of nations as of universal concern . . . .”).
91. Karadzic, 70 F.3d at 239.
93. Sosa, 542 U.S. at 714.
95. Sosa, 542 U.S. at 732.
96. Id.
97. Id. at 733.
customs and usages of civilized nations; and, as evidence of these, to the works of jurists and commentators . . . . Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is.98

As to claims against multinational corporations, Sosa was almost silent. In a footnote that left many wondering in what direction the Court would turn if faced with another ATCA claim, Justice Souter, writing for the majority, stated, “A related consideration 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.”99 He went on to cite disagreement amongst the circuits: in Tel-Oren v. Libyan Arab Republic, the D.C. Circuit found that there was “insufficient consensus” in 1984 that private individuals could commit violations of international law; in Kadic v. Karadzic, the Second Circuit found that “sufficient consensus” existed in 1995.100 The Court took a misstep in not indicating at least in dicta whether ATCA claims against corporations are actionable, especially since this is one of the issues that has brought the most attention to the use of the ATCA in district courts.101

By 2004, the decisions of most courts reflected a belief that, just like States, individuals and corporations could be held liable for grave violations of international law.102 Certainly the high profile of the International Criminal Tribunal for Rwanda (“ICTR”) and the International Tribunal for the Former Yugoslavia (“ICTY”) contributed to this view, but holding individuals responsible for violations of international law is not an innovation of the last twenty years. Under Article I, Section 8, of the Constitution, Congress is granted the power “[t]o define and punish Piracies and Felonies committed on the high Seas, and Offenses against the Law of Nations.”103 Later, the trials at Nuremberg provided strong justi-
fication for applying international law to private actors as well as States. The United States Military Tribunal at Nuremberg convicted forty-three individual German citizens for crimes against humanity, including forced labor and enslavement in the individuals’ factories and mines. 104

While Sosa did not exactly throw the gates open for litigation under the ATCA, it certainly did not deny the power of the ATCA to permit plaintiffs an opportunity to be heard in instances of grave violations of international law. And because it did not speak one way or another to the relatively straightforward question of whether individuals and multinational corporations can be held accountable for these violations, ATCA suits against multinational corporations proceed.

B. Claims Against Multinational Corporations

Courts have generally identified three ways that multinational corporations may be found liable under the ATCA. 105 First, a corporation’s action may be deemed “state action” if the corporation is working so closely with a government that its actions in certain areas are indistinguishable from the actions of the government, or if the corporation assumes roles traditionally associated with government. 106 Second, even if a corporation does not have an established relationship with a State, it may still be liable under the ATCA for violations of universally accepted norms. 107 For example, a private corporation that commits acts of genocide would be held directly liable for genocide because genocide is universally con-

104. These individuals were specifically found to have acted independently of the German government. Steinhardt, supra note 103, at 9.

105. There are important policy reasons for holding corporations liable for violations of international law. When a corporation knowingly supplies assistance to a State that permits the State to commit violations of international law it would not have otherwise been able to commit, the corporation is culpable. It significantly assisted the State in its perpetration of the harms. Also, because the work of a corporation often involves the decisions of many individuals, it can be much simpler to apportion blame to a corporation than a group of individuals. Anita Ramasatry, Corporate Complicity: From Nuremberg to Rangoon, 20 BERKELEY J. INT’L L. 91, 97, 105 (2002). However, some would argue that a corporation should not be expected to play the role of policymaker by encouraging States to comply with universal human rights standards, and that placing this expectation upon corporations may chill foreign investment. See, e.g., Lucien J. Dhooge, A Modest Proposal to Amend the Alien Tort Statute to Provide Guidance to Transnational Corporations, 13 U.C. DAVIS J. INT’L L. & POL’Y 119, 134 (2007).

106. See infra notes 111–13 and accompanying text.

107. See infra notes 114–18 and accompanying text.
sidered an international crime. Finally, and most controversially, some courts have based third-party liability for private actors on differing understandings of civil liability for aiding and abetting violations of international law.108

Many of the ATCA suits against corporations can be traced back to the 1997 case, Doe I v. Unocal, where for the first time a district court found that a corporation could be held liable under the ATCA, both for certain violations of international law such as torture and forced labor, and for working in concert or as a joint venturer with the State.109 Since that decision, fifty-two suits have been filed in federal courts against corporate defendants as of spring 2008; three were settled, thirty-three dismissed, and fifteen were pending.110

A corporation will be considered a de facto state actor, and thus liable under the ATCA for violations of international law, when it takes action in areas typically performed only by a State.111 Additionally, even when the corporation has not taken over functions traditionally acted on by the State, it can be liable when it holds such a close relationship with the state that it is acting under color of law.112 Generally, a corporation can be said to be acting under “color of law” when it “maintain[s] an interdependent or symbiotic relationship with the public party; when the state requires, encourages, or is significantly involved in nominally private conduct; when the private party exercises functions traditionally performed by the state; or when the private parties conspire with state officials.”113

108. See infra note 125.
110. Stephens, Unreasonable Views, supra note 84, at 814.
112. See, e.g., Sarei v. Rio Tinto PLC, 221 F. Supp. 2d 1116, 1148 (C.D. Cal. 2002), aff’d in part, vacated in part, rev’d in part, 456 F.3d 1069 (9th Cir. 2006), opinion withdrawn and superseded in part on reh’g, 487 F.3d 1193 (9th Cir. 2006), reh’g en banc granted 499 F.3d 923 (9th Cir. 2007) (holding that the actions of the State of Papua New Guinea were “fairly attributable” to Rio Tinto given their joint action).
113. BETH STEPHENS & MICHAEL RATNER, INTERNATIONAL HUMAN RIGHTS LITIGATION IN U.S. COURTS 97–98 (1996). An understanding of the term “color of law” in U.S. courts as applied to private actors comes from the courts’ interpretation of the U.S. civil rights statute, 42 U.S.C. § 1983 (2000). See Stephens, Historical Context, supra note 73, at 437 (stating that courts that applied the principles of violations under color of law to U.S. civil rights statutes “paved the way for litigation against corporations”). The Supreme Court has applied this definition of action under color of law to determine when a private entity can be considered a state actor and thus liable under § 1983. See Tzeutschler, supra
Corporations have also been found liable under the ATCA for certain specific violations of international law. There is a set of carefully defined universal norms that bind both States and private actors. As the court in Karadzic noted, “[C]ertain forms of conduct violate the law of nations whether undertaken by those acting under the auspices of a state or only as private individuals.” Under treaties and customary international law, these norms are considered of such importance that to violate them is to violate international law, regardless of the identity of the transgressor. Blackstone defines the law of nations as “a system of rules, deducible by natural reason, and established by universal consent among the civilized inhabitants of the world.” These norms may not be imprecise or vague. An often-cited definition provides that the laws are “universal, definable, and obligatory international norms.”

This is not to say that it is a simple task to determine what these norms are at any particular time. The Sosa Court provided that we should look to the works of jurists and commentators for evidence. The composition of these norms is not static. Laws that reach international consensus, and views among experts and legal commentators on these laws shift and develop over time. By the end of the nineteenth century and up until the twentieth, violations of international law included piracy, slave trading, and slavery. Today the list has significantly expanded. The Restate-

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114 See supra notes 95–98 and accompanying text.
115 Kadid v. Karadzic, 70 F.3d 232, 239 (2d Cir. 1995).
116 Steinhardt, supra note 103, at 8.
117 Stephens, Historical Context, supra note 73, at 446 (citing 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *67 (Wayne Morrison ed., 2001) (1753)).
120 Tzeutschler, supra note 111, at 393.
121 For a discussion of which torts constitute violations of international law, see, for example, Joel Slawotsky, Doing Business Around the World: Corporate Liability under the Alien Tort Claims Act, 2005 MICH. ST. L. REV. 1065, 1088–98 (2005) (concluding that violations actionable under the ATCA include crimes against humanity, racial discrimination, slave/forced labor, torture, war crimes, and possibly cruel, inhuman, and/or degrading conduct, and extrajudicial killing). Slawotsky states that Sosa rejected arbitrary detention as a basis for an ATCA suit. Id. at 1088. This conclusion is questionable given that the Sosa Court was insistent that the particular facts presented did not prove a case of arbitrary detention: “[i]t is enough to hold that a single illegal detention of less than a day, followed by the transfer of custody to lawful authorities and a prompt arraignment, violates no norm of customary international law so well defined as to support the creation of a federal remedy.” Sosa, 542 U.S. at 738. For a different understanding of what torts are actionable under the ATCA, see Lucien J. Dhooge, Lohengrin Revealed: The Implica-
ment (Third) of Foreign Relations Law sets forth a list of violations of international law by states\textsuperscript{122} to include, among other violations, “torture or other cruel, inhuman and degrading treatment” and “prolonged arbitrary detention.”\textsuperscript{123}

The final and most controversial mode for finding corporations liable for violations of international law is through third-party aiding and abetting liability. Given that most corporations do not intentionally violate international norms, for example, by directly committing acts of genocide, and that generally corporations are unlikely to have such in-


\textsuperscript{122} The Restatement makes clear that in addition to States, individuals and corporations may be held liable for certain violations of international law:

122. The Restatement makes clear that in addition to States, individuals and corporations may be held liable for certain violations of international law:

\begin{quote}
[I]ndividuals and private juridical entities can have any status, capacity, rights, or duties given them by international law or agreement, and increasingly individuals and private entities have been accorded such aspects of personality in varying measures. For example, international law and numerous international agreements now recognize human rights of individuals and sometimes give individuals remedies before international bodies . . . . Individuals may be held liable for offenses against international law, such as piracy, war crimes, or genocide.
\end{quote}


\textsuperscript{123} Id. § 702. In full, § 702 asserts:

\begin{quote}
A state violates international law if, as a matter of state policy, it practices, encourages, or condones
\begin{itemize}
  \item[(a)] genocide,
  \item[(b)] slavery or slave trade,
  \item[(c)] the murder or causing the disappearance of individuals,
  \item[(d)] torture or other cruel, inhuman, or degrading treatment or punishment,
  \item[(e)] prolonged arbitrary detention,
  \item[(f)] systematic racial discrimination, or
  \item[(g)] a consistent pattern of gross violations of internationally recognized human rights.
\end{itemize}
\end{quote}

Comment (a) to § 702 notes, “The list is not necessarily complete, and is not closed: human rights not listed in this section may have achieved the status of customary law, and some rights might achieve that status in the future.” It is also noteworthy that this list was considered current as of 1987; certainly additional agreed-upon norms might have arisen in the last twenty years.
tertwined relationships with state governments as to be found acting under color of law, aiding and abetting liability has received the most attention, both by legal commentators and the general business community. Liability for aiding and abetting under the ATCA is still a relatively new concept in the courts. Because Sosa declined to speak to whether individuals and corporations can be liable under the ATCA, the courts have been left to decide, as a threshold matter, whether aiding and abetting liability under the ATCA exists at all and, if so, to select the standard by which to analyze aiding and abetting liability.

Those arguing against corporate aiding and abetting liability are likely to point to the Supreme Court decision in Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., in which the Court found, “[W]hen Congress enacts a statute under which a person may sue and recover damages from a private defendant for the defendant’s violation of some statutory norm, there is no general presumption that the plaintiff may also sue aiders and abettors.” However, in Khulumani v. Barclay National Bank, Judge Katzmann stated in a concurring opinion that the holding in Central Bank is “inapposite” to ATCA claims, because the “relevant norm is provided not by domestic statute but by the law of

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124. See supra notes 99–100 and accompanying text.

125. Post-Sosa, most courts appear to accept the notion that aiding and abetting liability exists for individuals and corporations under the ATCA. William Paul Simmons, Liability of Secondary Actors Under the Alien Tort Statute, 10 YALE HUM. RTS. & DEV. L.J. 88, 111 (2007). See, e.g., Cabello v. Fernandez-Larios, 402 F.3d 1148, 1157 (11th Cir. 2005); In re “Agent Orange” Prod. Lihb. Litig., 373 F. Supp. 2d 7, 51–54 (E.D.N.Y. 2005), aff’d, 517 F.3d 104 (2d Cir. 2008). For examples of decisions in which the courts have declined to find aiding and abetting liability under the ATCA, see In re S. Afr. Apartheid Litig., 346 F. Supp. 2d 538, 550 (S.D.N.Y. 2004), aff’d in part & vacated in part sub nom., Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254 (2d Cir. 2007) (per curiam) (vacating the district court’s decision, aff’d due to lack of a quorum sub nom., Am. Isuzu Motors, Inc. v. Ntsebeza, 128 S. Ct. 2424 (2008). The district court’s decision in In re S. Afr. Apartheid Litig. to disallow ATCA claims under a theory of aiding and abetting liability was vacated by the Second Circuit in 2007. For the reasons described in In re S. Afr. Apartheid Litig., the court in Doe v. Exxon Mobil Corp. declined to find aiding and abetting liability under the ATCA. 393 F. Supp. 2d 20, 24 (D.D.C. 2005), aff’d, 473 F.3d 345 (D.C. Cir. 2007). Now that the Second Circuit has overturned this ruling, the D.C. District Court decision may have less value as precedent.


127. 511 U.S. 164, 182 (1994). The Court continued that the doctrine of civil aiding and abetting liability has been “at best uncertain in application.” Id. at 181. For an interesting analysis on how the aiding and abetting standard might be evaluated in light of Central Bank, see Simmons, supra note 125, at 111–14.
nations, and that law extends responsibility for violations of its norms to aiders and abettors.\(^{128}\)

In *In re “Agent Orange” Product Liability Litigation*, Judge Weinstein also rejected reliance on *Central Bank* in determining whether aiding and abetting liability exists.\(^{129}\) Judge Weinstein referenced an amicus brief at length that included a cite to a 1795 opinion from the Attorney General stating that individuals would be liable under the ATCA for “committing, aiding, or abetting” violations of the laws of war.\(^{130}\) The brief also cited *Talbot v. Jansen*,\(^{131}\) a 1795 case in which Talbot, a French citizen, was found liable for the unlawful capture of a ship in violation of international law, due to his actions in “aiding Ballard[, a U.S. citizen,] to arm and outfit” the ship and in “cooperating with him on the high seas.”\(^{132}\) Since aiding and abetting liability for violations of international law was proved to be in existence for over two hundred years, Judge Weinstein had no trouble dismissing the *Central Bank* argument.

A majority of courts have found that aiding and abetting liability does exist under the ATCA, although the courts do not agree on the applicable legal standard.\(^{133}\) Both the federal district court and the Ninth Circuit in *Doe I v. Unocal*\(^{134}\) as well as the Second Circuit in *Khulumani v. Barclay National Bank*\(^{135}\) have articulated the standards applied by various courts.
in ATCA cases. In particular, courts have alternatively employed the international criminal aiding and abetting liability standards as applied at Nuremberg—more recently as developed in the ICTY and the ICTR—and, perhaps more infrequently, looked to federal common law tort principles.

The district court in Doe I v. Unocal used what has been called an “active participation” standard to judge aiding and abetting liability. The court examined several U.S. Military Tribunal decisions at Nuremberg and found that because Unocal had not actively participated in forced labor, it could not be held liable, regardless of the fact that it was aware of and benefited from the military’s use of forced labor. According to the district court, “[L]iability requires participation or cooperation in the forced labor practices.”

The Ninth Circuit agreed with the district court that international law should be applied as set forth in international tribunal cases such as those at Nuremberg; however, it rejected the “active participation” standard. The court’s decision to apply international law rather than domestic law or the law of the country where the underlying claim took place was based on several factors. First, because the violation in question was a jus cogens violation, the law of every state regarding the jus cogens violation must be identical to the international law standard anyway, or it is per se invalid. Second, the Restatement (Second) of Conflict of Laws states that if there is no statute in the jurisdiction that governs what law to apply, the court should take into account “the needs of the interstate and international systems,” “certainty, predictability and uniformity of re-

136. See infra notes 138–49 and accompanying text.
137. See infra notes 150–53 and accompanying text.
138. Simmons, supra note 125, at 108.
139. See Unocal, 110 F. Supp. 2d at 1309–10. For further discussion of several U.S. Military Tribunal cases against German industrialists, see infra Part III.
140. Unocal, 110 F. Supp. 2d at 1310.
141. Id. The court continued, “The Tribunal’s guilty verdict rested not on the defendants’ knowledge and acceptance of benefits of the forced labor, but on their active participation in the unlawful conduct.” Id. The district court characterized the plaintiff’s position as arguing that “knowledge and approval of acts is sufficient for a finding of liability.” Id. at 1309. In retrospect, it was probably a mistake for the plaintiffs to argue for such a broad rule, given that ATCA litigation in the area of holding multinational corporations liable for aiding and abetting was so new to the courts at the time.
142. The Ninth Circuit majority states that the “active participation” standard was only employed in the Nuremberg trials in order to rebut the “necessity defense” invoked by the defendants. The court goes on to say that the necessity defense is inapplicable in Unocal, so the active participation standard is also inapplicable. Doe I v. Unocal, 395 F.3d 932, 947–48 (9th Cir. 2002).
143. Id. at 948.
the underlying policy goal of the statute—“provid[ing] tort remedies for violations of international law”\textsuperscript{145}—is served.

Interestingly, the court did not find it problematic to apply international criminal law standards to international civil law claims, in part because international human rights law “has been developed largely in the context of criminal prosecutions rather than civil proceedings,”\textsuperscript{146} thus making criminal law standards the most applicable in ATCA cases. The court also noted that a separation of criminal and tort claims is often artificial:

\begin{quote}
\textquoteleft\textquoteleft What is a crime in one jurisdiction is often a tort in another jurisdiction, and this distinction is therefore of little help in ascertaining the standards of international human rights law. Moreover, . . . the standard for aiding and abetting in international criminal law is similar to the standard for aiding and abetting in domestic tort law, making the distinction between criminal and tort law less crucial in this context. Accordingly, District Courts are increasingly turning to the decisions by
\end{quote}

\begin{footnotes}
\item[144.] \textit{Restatement (Second) of Conflict of Laws} § 6 (1971). \textit{See also Unocal}, 395 F.3d at 948. It is not necessarily true, however, that applying international law to aiding and abetting civil claims will lead to certainty and predictability. As this section demonstrates, there is no settled standard for international aiding and abetting claims. Bradley, Goldsmith, and Moore point out that the Rome Statute of the International Criminal Court may have set forth a “more demanding” standard than the ICTY. \textit{See} Bradley, Goldsmith, & Moore, \textit{supra} note 126, at 927. While the ICTY developed a standard of “knowingly providing practical assistance, encouragement or moral support that has a substantial effect on the commission of the crime,” \textit{see infra} note 148, the Rome Statute’s General Principles state that “a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person . . . [for the purpose of facilitating the commission of such a crime], aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission . . . .” Rome Statute of the International Criminal Court art. 25(3)(c), July 17, 1999, 2187 U.N.T.S. 90 (emphasis added). Some support for using the Rome Statute to define aiding and abetting liability may be emerging. In his concurrence in \textit{Khulumani}, Judge Katzmann points to the Rome Statute as “particularly significant,” because it “articulates the \textit{mens rea} required for aiding and abetting liability.” \textit{Khulumani} v. Barclay Nat’l Bank Ltd., 504 F.3d 254, 275 (2d Cir. 2007) (Katzmann, J., concurring). But some scholars reject using the Rome Statute as a useful source for the definition because it “fails to incorporate any requirements for finding causation” and fails to “reflect[, or] declare[ ] customary international law.” Anthony J. Sebok, \textit{Taking Tort Law Seriously in the Alien Tort Statute}, 33 \textit{Brook. J. Int’l L.} 871, 884–85 (2008).

\item[145.] \textit{Unocal}, 395 F.3d at 949. The court, however, does not make clear why providing a tort remedy for violations of international law by applying domestic law would not serve the policy goals of the ATCA. \textit{Id.}

\item[146.] \textit{Id.}
\end{footnotes}
international criminal tribunals for instructions regarding the standards of international human rights law under our civil ATCA.\textsuperscript{147}

Analyzing ICTR and ICTY cases, the court found that the correct standard to apply is one of “knowing practical assistance or encouragement that has a substantial effect on the perpetration of the crime.”\textsuperscript{148} The actus reus requires showing “practical assistance or encouragement which has a substantial effect on the perpetration of the crime”; the mens rea requires showing “actual or constructive (i.e., reasonable) knowledge that the accomplice’s actions will assist the perpetrator in the commission of the crime.”\textsuperscript{149}

In his concurring opinion in \textit{Unocal}, Judge Reinhardt suggested instead that “federal common law tort principles, such as agency, joint venture, or reckless disregard” should be applied.\textsuperscript{150} He rejected applying international law standards out of hand, stating that they are “recently-promulgated”\textsuperscript{151} and “permit[] imposition of liability for the lending of

\begin{itemize}
\item\textsuperscript{147} \textit{Id.} (citations omitted). \textit{See also} Sosa v. Alvarez-Machain, 542 U.S. 692, 762–63 (2004) (Breyer, J., concurring) (stating that there is no reason to fail to extend adjudication to a particular nation’s court of a claim concerning alien civil conduct in violation of international law, given the fact that there is universal consensus to allow any nation’s court to adjudicate alien criminal conduct that violates international law).
\item\textsuperscript{148} \textit{Unocal}, 395 F.3d at 947, 950–51. The Human Rights Council, tasked with setting forth human rights standards of corporate responsibility and accountability, incorporated essentially the same standard used by the majority in the Ninth Circuit decision, with the exception that the Council also included “moral support,” which the majority in \textit{Unocal} did not address. \textit{See infra} note 152. Citing two cases from the ICTY, the Council stated, “The international tribunals have developed a fairly clear standard for individual criminal aiding and abetting liability: knowingly providing practical assistance, encouragement or moral support that has a substantial effect on the commission of the crime.” Human Rights Council, \textit{Report of the Special Representative of the Secretary-General on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises}, para. 31, U.N. Doc. A/HRC/4/035 (Feb. 19, 2007). The Council noted, however, that it is “unknown” whether the International Criminal Court will adopt the same standard. \textit{Id.} para. 31 n.28.
\item\textsuperscript{149} \textit{Unocal}, 395 F.3d at 952–53.
\item\textsuperscript{150} \textit{Id.} at 963 (Reinhardt, J., concurring).
\item\textsuperscript{151} \textit{Id.} Certainly the decisions of the ICTY and the ICTR occurred relatively recently, but the tribunals’ conclusions about the standard for aiding and abetting liability came from what the majority called an “exhaustive analysis of international case law and international instruments,” primarily from those that arose after World War II. \textit{See id.} at 950 n.26. And as explained above, aiding and abetting liability for violations of international law dates back to the adoption of the ATCA. \textit{See supra} notes 130–31 and accompanying text. This “new” standard, then, is actually a synthesis of courts’ understanding of criminal aiding and abetting developed over many years.
\end{itemize}
moral support.”152 Similarly, in Khulumani, Judge Hall declared that the courts should review federal common law when examining a claim of accessory liability.153 But this view has not captured the support of a majority in the federal courts, perhaps in part because the Supreme Court may have implied that applying international law is appropriate in these cases.154

III. AIDING AND ABETTING LIABILITY AT NUREMBERG

A. Introduction

While no one definitive standard of aiding and abetting liability under the ATCA has arisen in the courts, courts and commentators in the United States have been moving toward applying an international standard of civil liability rather than a federal common law standard.155 Because aiding and abetting liability for violations of international law is not governed by treaty, it is especially important to examine the rule of law as developed in international legal decisions.156 In particular, the aiding and abetting standard developed in the trials at Nuremberg is worthy of notice.

The war crimes trials at Nuremberg were an early and important attempt by an international body to hold individuals responsible for complicity in breaches of international law. The United Nations validated this effort when the General Assembly endorsed the establishment of the International Military Tribunal and generally affirmed the principles of international law as recognized in the Charter of the Nuremberg Tribunal.157

152. *Unocal*, 395 F.3d at 963 (Reinhardt, J., concurring). As the majority points out, the “moral support” element from the ICTY aiding and abetting standard is not incorporated in the standard the Ninth Circuit adopts. See id. at 949 n.24. Nor was it necessary to even determine whether “moral support” is settled international law or if it has parallels in domestic law, since it was found that Unocal could be liable for having knowingly provided practical assistance and encouragement to the Myanmar military. Id. at 951.

153. Khulumani v. Barclay Nat’l Bank Ltd., 504 F.3d 254, 284 (2d Cir. 2007) (Hall, J., concurring). Specifically, Judge Hall looked to § 876(b) of the Restatement (Second) of Torts. Id. at 287.


155. “[The Supreme Court’s decision in Sosa] . . . seem[s] to suggest that whatever liability standard is appropriate for a given norm should be derived from international law rather than domestic law.” Olah, supra note 79, at 771. See also Khulumani, 504 F.3d at 269 (Katzmann, J., concurring) (“We have repeatedly emphasized that the scope of the ATCA’s jurisdictional grant should be determined by reference to international law.”).

156. See supra note 98.

The Nuremberg Charter authorized the Tribunal to prosecute not only individuals, but also legal persons, so corporations could be found criminally liable. Under the Charter, the Tribunal could declare that groups and organizations were “criminal organizations” at trial.

After the Allied Powers defeated Germany, the United States, Great Britain, France, and the U.S.S.R. formed a Control Council to institute uniform procedures for the trials of war criminals. The crimes to be prosecuted were set forth in Article 6 of the Nuremberg Charter and included crimes against peace, war crimes, and crimes against humanity. The Control Council passed Law No. 10, which specifically provided:


159. “At the trial of any individual member of any group or organization the Tribunal may declare (in connection with any act of which the individual may be convicted) that the group or organization of which the individual was a member was a criminal organization.” Charter of the International Military Tribunal art. 9, Aug. 8, 1945, 82 U.N.T.S. 280 [hereinafter IMT Charter].

160. Ramasastry, supra note 105, at 105. Tribunals held by the other Allied Powers also demonstrate the existence of aiding and abetting liability for violations of international law. See, e.g., In re Tesch, “The Zyklon B Case,” 1 LAW REPORTS OF TRIALS OF WAR CRIMINALS 93 (Brit. Mil. Ct. 1946) (finding business owner and second-in-command guilty for knowingly supplying poison gas to the Nazis for use in the concentration camps).

161. “Crimes against peace” were defined as “planning, preparation, initiation or waging of a war of aggression, or a war in violation of international treaties, agreements or assurances, or participation in a Common Plan or Conspiracy for the accomplishment of any of the foregoing.” IMT Charter, supra note 159, art. 6. “War crimes” were defined as “violations of the laws or customs of war.” Id.

Such violations [of the laws or customs of war] shall include, but not be limited to, murder, ill-treatment or deportation to slave labor or for any other purpose of civilian population of or in occupied territory, murder or ill-treatment of prisoners of war or persons on the seas, killing of hostages, plunder of public or private property, wanton destruction of cities, towns, or villages, or devastation not justified by military necessity.

Id. Finally, “crimes against humanity” were defined as:

[M]urder, extermination, enslavement, deportation, and other inhumane acts committed against any civilian population, before or during the war, or persecutions on political, racial, or religious grounds in execution of or in connection with any crime within the jurisdiction of the Tribunal, whether or not in violation of domestic law of the country where perpetrated.
Any person without regard to nationality or the capacity in which he acted, is deemed to have committed a crime . . . if he was (a) a principal or (b) was an accessory to the commission of any such crime or ordered or abetted the same or (c) took a consenting part therein or (d) was connected with plans or enterprises involving its commission . . . .

Thus, the law unambiguously provided for liability for third-party actors. The United States itself set up six military tribunals to try these crimes.

Trials of certain German industrialists under these U.S. Military Tribunals demonstrate how this aiding and abetting standard was applied to individuals whose businesses profited from gross violations of international law. Businesses could not avert prosecution solely because a dictator conceived of the plan to violate international law and the businesses played no role in the initial planning:

Hitler could not make aggressive war by himself. He had to have the co-operation of statesmen, military leaders, diplomats, and businessmen. When they, with knowledge of his aims, gave him their cooperation, they made themselves parties to the plan he had initiated. They are not to be deemed innocent because Hitler made use of them, if they knew what they were doing.

These trials at Nuremberg shed light on how courts today might apply an aiding and abetting standard of liability to multinational corporations.

B. The Flick Case

Frederick Flick, a prominent businessman in the coal and steel industry in Germany, and five of his business associates were each charged with participation in the Nazi slave labor program. Neither Flick nor his associates arranged or organized the slave labor used in his plants. As the tribunal noted, “[T]he slave-labor program had its origin in Reich governmental circles and was a governmental program, and . . . the defendants had no part in creating or launching the program. . . . [T]he defendants had no actual control of the administration of such program even

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163. Ramasastry, supra note 160, at 105.
when it affected their own plants.” The businessmen argued the affirmative defense of necessity to the charge. The court accepted this defense for four of the six defendants. The defendants were “conscious of the fact that it was both futile and dangerous to object” to the use of slave labor. However, because Bernhard Weiss, one of the defendants, had taken “active steps” to procure further slave labor for production with the “knowledge and approval” of Flick, both Flick and Weiss were found guilty.

C. The Krupp Case

The defendants in the Krupp case were businessmen in the coal and steel industry as well; their company, Fried. Krupp, A.G., produced large amounts of artillery and naval units for the Nazi regime. Like the defendants in the Flick case, they were accused of employing slave labor, and they also pled the defense of necessity. The court rejected this defense, because it found that the company “manifested not only its willingness but its ardent desire to employ forced labor.” As evidence, the court cited numerous pieces of correspondence in which Fried. Krupp, A.G. expressed its desire for new slave laborers. This result is not necessarily incompatible with the result in the Flick case, because the court presented the proactive steps taken by the company to procure slave labor rather than what seems to be characterized in the Flick case as a passive acceptance of the labor.

166. Id. at 1196.
167. The court described “necessity” as “a defense when it is shown that the act charged was done to avoid an evil both serious and irreparable; that there was no other adequate means of escape; and that the remedy was not disproportioned to the evil.” Id. at 1200 (citing 1 WHARTON’S CRIMINAL LAW para. 126).
168. Id. at 1197.
169. Id. at 1202.
171. Id. at 1435.
172. Id. at 1440. See also United States v. Carl Krauch, “The Farben Case,” 8 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10, at 1179 (1952) (finding certain members of I.G. Farben, a chemical and pharmaceutical company, guilty for using slave labor and rejecting their defense of necessity because they were “to a very substantial degree, responsible for broadening the scope of that reprehensible system”).
173. The Krupp Case, supra note 170, at 1439–42.
174. The tribunal in Krupp, however, did not look at whether each individual defendant had taken proactive steps to procure slave labor. The tribunal in Flick, on the other hand, examined whether each individual defendant had taken steps to procure slave labor,
D. The Einsatzgruppe Case

Waldemar Klingelhoefer was accused of various war crimes and crimes against humanity. He maintained that his only role within the “Einsatzgruppe,” or special task force, was limited to interpreting. The court stated that even if this were true, “it would not exonerate him from guilt . . . .” During trial, Klingelhoefer admitted to turning over lists of Communists to his department, and to knowing that, by turning over the lists, those persons would be executed. “In this function,” said the court, “he served as an accessory to the crime.” Klingelhoefer, then, could not escape criminal responsibility for having played a substantial role in the deaths of these individuals, even if he did not participate or was not present as a witness when they were killed.

E. Conclusion

The standard emerging for aiding and abetting liability in both civil ATCA trials and criminal international tribunal cases is derived directly from Nuremberg. The trials at Nuremberg established that an individual is liable when he or she provides assistance that substantially affects the perpetration of the violation of international law, and knows that such assistance will assist in the violation. This “knowledge and substantial assistance” standard does not require that the aider and abettor desired or wanted the particular crime or breach of international law to occur (though an individual may be excused if under compulsion or coercion). At Nuremberg, being a willing participant in a violation of international law was enough for liability. The steel, coal, chemical, and armament companies may have regarded the assistance they provided as simply a business opportunity, and they may or may not have looked upon what the Nazis did with horror and distaste, but because they provided significant assistance to the Nazis in carrying out their enslavement plans, and they had knowledge of the enslavement, they deserved punishment.

as Weiss had, or supervised and approved the actions of those who procured the labor, as Flick had. See The Flick Case, supra note 165, at 1197–202.
176. Id. at 569.
177. Id.
178. Id.
179. Nuremberg was the first international effort to delineate jus cogens norms. See Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 715 (9th Cir. 1992).
The Nuremberg standard of aiding and abetting liability continues to be developed in courts today, most notably in the international tribunals in the former Yugoslavia and Rwanda. By finding aiding and abetting liability, the Nuremberg tribunals, the ICTR and the ICTY, and many federal courts have implicitly rejected assertions such as the following, which was made by a corporate executive and cited by the Ninth Circuit in *Doe I v. Unocal*:

> By stating that I could not guarantee that the army is not using forced labour, I certainly imply that they might, (and they might) but I am saying that we do not have to monitor army’s behavior: we have our responsibilities; they have their responsibilities; and we refuse to be pushed into assuming more than what we can really guarantee. About forced labour used by the troops assigned to provide security on our pipeline project, let us admit between Unocal and [its subcontractor corporation] Total that we might be in a grey zone.

When a corporation knows that a serious violation of international law is occurring, and it provides practical assistance that substantially affects that violation, the corporation should be held liable under the ATCA.

IV. **Wang’s Likelihood of Success**

Wang accused Yahoo of aiding and abetting torture, cruel, inhuman, and degrading treatment, and prolonged arbitrary detention, certainly in

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181. *Unocal*, 395 F.3d at 942. Certainly Unocal could not direct the military’s actions in employing forced labor, but the company knew that grave human rights violations were occurring in Myanmar and was eventually informed that these violations were also occurring in connection with the Unocal project. See id. at 939–42. The Nuremberg standard would impose liability where the company is aware of the serious violations and provides substantive assistance for their accomplishment.

182. The principles of law set forth by the Nuremberg tribunals are “significant not only because they have garnered broad acceptance, but also because they were viewed as reflecting and crystallizing preexisting customary international law.” *Khulumani v. Barclay Nat’l Bank Ltd.*, 504 F.3d 254, 271 (2d Cir. 2007) (Katzmann, J., concurring).
part because by international consensus these violations are considered so serious that they apply to individuals and corporations as well as States. 183 If the court had applied the same aiding and abetting standard established at Nuremberg and developed by the ICTY and the ICTR, 184 Wang would have needed to show first that Yahoo provided practical assistance or encouragement to the Chinese government that substantially affected the torture, cruel treatment, and arbitrary detention Wang experienced at the hands of the government. Wang would have also needed to show that Yahoo had actual or reasonable knowledge that its actions would assist the Chinese government in committing these violations.

The practical assistance prong of the aiding and abetting analysis would have been less difficult to demonstrate for Wang; unless Yahoo could have shown that the government retrieved or could have retrieved the information on Wang’s identity elsewhere, it is likely that Yahoo’s provision of such information on request would have been considered practical assistance with a substantial effect on the violations of international law. Imputing knowledge to Yahoo might have proven more difficult. In *Doe I v. Unocal*, the Ninth Circuit provided a useful list of the types of evidence that could have been used to impute actual or reasonable knowledge to Yahoo: a risk assessment provided by an outside consulting group to the corporation, evaluating the practices of the government in connection with the company’s project; a statement from a corporate executive that the government might go outside the boundaries of international law; warnings and confirmations from human rights groups that the government was violating international law in connection with the corporation’s business in the country; information received from a consultant confirming the “egregious” violations; and receipt of documents generally circulated from the State Department on the country’s violations of international law. 185

Yahoo would have probably argued that the *Unocal* case was distinguishable from Wang’s. International human rights groups and even the consultants it had hired told Unocal that the Myanmar military was making use of forced labor on Unocal’s project while the project was still ongoing. 186 Yahoo, on the other hand, was not made aware that turning over Wang’s name would result in Wang’s imprisonment, torture, and humiliating treatment. Yahoo also might have argued that businesses

183. See supra notes 121–23 and accompanying text.
185. *Unocal*, 395 F.3d at 940–42.
186. Id. at 941–42.
cannot control the actions of a repressive government. Some courts may be sympathetic to an argument that a chilling effect on business investments outside the United States could occur if a claim like this is allowed to proceed\(^\text{187}\); however, courts would probably not be sympathetic to an argument that Yahoo’s only motive in doing business in China was profit, and that it had no malevolent intent. The Nuremberg tribunals found such motive no excuse.\(^\text{188}\)

The liability of Yahoo would have most likely turned on how narrowly the court defined the “knowledge” prong of the aiding and abetting analysis. If knowledge could have been imputed from information known to the general public, for example, that China’s government represses dissidents, and that in doing business in China, Yahoo might have been required to turn over some information on its customers (for known or unknown purposes), then Yahoo would have certainly been liable. However, if the court had required Yahoo to know specifically that by turning over Wang’s identifying information, he would be jailed, tortured, and subjected to cruel and degrading treatment, Yahoo’s liability would have been unlikely. A middle-of-the-road “knowledge” standard would require Yahoo to know specifically that it had turned over Wang’s account information due to his dissemination of “state secrets,” but not that giving the information would result in Wang’s torture and imprisonment.

CONCLUSION AND A PROPOSAL FOR THE AIDING AND ABETTING CIVIL LIABILITY STANDARD FOR MULTINATIONAL CORPORATIONS

If the court had employed this middle standard, it is likely that the court would have ruled in Wang’s favor. Critically, the General Counsel of Yahoo informed Congress that the request for Wang’s identification from the Chinese government contained reference to “state secrets,” a term widely known to mean a search for information on dissidents. Yahoo apparently complied without a second thought. Additionally, the fact that

\[^{187}\] Indeed, the Bush administration has argued in amicus briefs filed in ten different ATCA cases that ATCA litigation interferes with foreign policy. See Stephens, Unreasonable Views, supra note 84, at 773–74. The Bush administration has strenuously objected to the existence of aiding and abetting liability under the ATCA and argues that if aiding and abetting liability were to be found, investments by both U.S. and non-U.S. businesses in developing countries would decrease, undermining political and economical stability in those countries, with harm resulting to the United States. Id. at 792–93. Stephens argues that the administration’s position should be rejected because it fails to prove a correlation between the acts at issue in the lawsuit and the “dangers predicted.” Id. at 800–01. Stephens continues that the arguments upon which the administration relies are “patently absurd.” Id. at 802.

\[^{188}\] See, e.g., The Flick Case, supra note 165.
the suit was filed in a district court in California, where appeals eventually go to the same circuit court that decided *Unocal*, might have made a decision in Wang’s favor more likely. But *Unocal* was decided before the *Sosa* decision, so whether the court would have applied a different aiding and abetting standard is unclear, given that *Sosa* did not address the aiding and abetting issue specifically. Finally, for a corporation as large and sophisticated as Yahoo, it is likely that the discovery process would have revealed that Yahoo understood the implications its actions posed for one similarly situated to Wang. Yahoo likely employed many consultants to assess the risks before venturing into business in China. It is hard to imagine that Yahoo would not have been aware that it might be required to turn over identifying information to the Chinese government as a condition of doing business there.189 Prominent human rights organizations have also been active in putting companies and States on notice about the practices of the Chinese government that violate established standards of international law.190

While liability for Yahoo would not have been clear-cut, and it is not even necessarily clear that the court would have used the internationally developed standard for criminal aiding and abetting, it was probably wise that Yahoo settled, given the negative attention from Congress, the media, and human rights groups. It will be interesting to find out how the settlement of the case informs how Yahoo decides to handle requests from the Chinese government in the future. Yahoo without question now has knowledge of what could happen to its customers when the company turns over information on individuals accused of disseminating “state secrets.”

Since *Karadzic* and *Unocal* were decided, most courts facing the issue have found that corporations may be held liable under the ATCA for aiding and abetting. It might be fair to say that for a majority of courts and commentators, the question is no longer *whether* corporations should be held liable for aiding and abetting. Rather, the question is *when* should corporations be held liable for aiding and abetting. The practical consequences of the resolution of this question are far-reaching, so it is important that, in setting the standard, courts consider not only the relevance of international law—after all, international law is a part of the federal common law—but also that corporations should not be held accountable

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189. Indeed, Google was so concerned about this possibility that it declined to provide email services when commencing business in China. See Thompson, supra note 12.

for the sins of their business partners in every instance in which the part-
ners breach established standards of international law. Repressive gov-
ernments are not necessarily predictable, much less stable, and corpora-
tions that want to do business globally should not be expected to forecast
suppression of dissent by means that are illegal under international
norms. A “knowledge” standard for aiding and abetting, then, should not
be so narrowly defined that it would impute knowledge to a corporation
for merely knowing, without more, that a government with whom it
works has repressive tendencies. But if a corporation provides substantial
assistance to a State that allows the State to more easily carry out oppres-
sion against its citizens in breach of international law, with knowledge
that this oppression would likely follow from its assistance, that corpora-
tion should be on notice that it may be held liable in U.S. courts for vi-
olations under the ATCA. Finding corporations responsible for substan-
tial assistance to governments that seriously violate international law
upholds the legacy of the war crimes trials at Nuremberg.

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I would like to thank my parents Patrick and Patricia Byrne for their support and encour-
agement.
NOT ALL WHO WANDER SHOULD BE LOST:
THE RIGHTS OF INDIGENOUS BEDOUINS IN
THE MODERN STATE OF ISRAEL

INTRODUCTION
The past two centuries can perhaps best be described as the age of nationalism. Colonialism, the touchstone of the late eighteenth through the early twentieth centuries, began to wane, and indigenous peoples all across the globe began to take responsibility for the determination of their own social and political futures. Among the weakest, poorest, and least-represented members of developing societies, indigenous peoples are often disregarded, at best, and discriminated against, at worst, within the legal and social frameworks of the countries in which they reside. In order to remedy past inequities, it is therefore necessary to explore the various mechanisms of international law as they relate to both indigenous peoples of the world and the governments that are their de facto rulers. Nowhere is this more apparent than in the modern State of Israel’s relations with its Bedouin Arab inhabitants.

Since its inception in 1948, Israel has dealt with the issues of the Bedouin minority within its borders in various ways, ranging from the discriminatory to the seemingly beneficial. This Note argues that Israel, as a democracy and as a signatory to various international treaties and conventions on human rights, has an affirmative duty to redress past inequities in the treatment of its Bedouin population as well as an incumbent responsibility to safeguard the rights of all its citizens. Part I of this Note describes the factual and legal history of the treatment of Bedouin Arabs in the State of Israel. Part II looks at the domestic legal framework within

2. See generally S. JAMES ANAYA, INDIGENOUS PEOPLES IN INTERNATIONAL LAW (2004).
3. Id.
5. For a general discussion of Israel’s discriminatory policies towards its Bedouin citizens, specifically in the sphere of housing rights, see Tawfiq Rangwala, Inadequate Housing, Israel and the Bedouin of the Negev, 42 OSGOODE HALL L.J. 415 (2004).
6. For discussion of a recent Israeli Supreme Court decision mandating the implementation of affirmative action in the assignment of counselors for Bedouin schools to remedy high dropout rates, see Adalah, Newsletter Vol. 9 (Jan. 2005), http://www.adalah.org/newsletter/eng/jan05/1.php.
7. See infra notes 88–89.
which Israeli conduct towards the Bedouin minority can be judged. Part III examines the international legal obligations Israel has to its citizens and discusses various sources of law that shed light on the responsibilities Israel must fulfill. Part IV surveys the obligations owed to the “stranger” in what can arguably be called one of the earliest systems of “international law”—Jewish law—and explores how these obligations instruct the conduct of the Jewish State. Finally, Part V looks at the current situation of Bedouins in Israel and the impact of recent legal developments. Ultimately, this Note calls for Israeli leaders and academics to unequivocally support proactive changes in how Israeli law and society treat Bedouin Arabs as a precursor and prerequisite to any lasting peace between Israel and its Arab neighbors.

I. NOMADS NO MORE: A BRIEF HISTORY OF BEDOUIN ARABS IN ISRAEL

The term “Bedouin” has varied meanings and connotations. The terminology used to describe Israel’s Arab citizens is in itself “highly politicized” and infuses the legal inquiry with biases and preconceptions. Regardless of the connotations, it is clear that the Bedouins in present-

8. Long utilized as a synonym for the term “Arab” in what is now known as the Middle East, the name “Bedouin” comes from the Arabic *badawiyin*, meaning people who hail from open areas such as the desert. “Bedouin” often has the further connotation of a “raider.” All of the nomadic tribes in the region were “Arabs” (“wanderers”), but some received the additional classification of “raiders.” THOMAS KIERNAN, THE ARABS 70 (1975).

9. See MADRELL, supra note 4, at 20 (“To Europeans the word ‘beduin’ evokes a strong and generally positive image. . . . [B]eduin are less romantic in Israeli eyes than in British. Where Englishmen see noble simplicity and the exhilaration of desert horizons, the Israeli thinks of smuggled hashish, trachoma and illiterate children.”).

10. Zama Coursen-Neff, Discrimination Against Palestinian Arab Children in the Israeli Educational System, 36 N.Y.U. J. INT’L. L. & POL. 749, 749–50 n.2 (2003) (choosing not to use the term Bedouin, instead calling them “Palestinian Arabs,” which the author concedes is not necessarily used by the Bedouins in describing themselves). For the purposes of this Note, when “Bedouin Israelis” or “Bedouins” are mentioned, the terms refer particularly to the Negev (Southern Israeli) Bedouin as opposed to their Northern Israeli counterparts. Having similar customs in general, the two are distinguishable most notably due to the fact that Bedouin of the Negev are much less integrated into Israeli society, in part due to their remote location in the Negev desert. See MADRELL, supra note 4, at 4.
day Israel are still considered the “nomadic other” both within Israeli society and by many of their fellow Arabs. From their beginnings, the Bedouins were nomadic, desert-dwelling tribesmen who made a living as shepherds of camels and sheep. When the United Nations partitioned British Palestine in 1947, approximately 90,000 Bedouins were already living in the area that was to ultimately become modern-day Israel. As opposed to other Bedouin tribes in Middle Eastern and North African countries, Israeli Bedouin are an ethnic minority “with a distinct character and unique customs.” One logical side effect of the continued growth of the State of Israel in the 1950s was the need for more land for the agricultural development of the nascent Jewish State and the settlement of its people. This need was often fulfilled through executive policies of land expropriation designed to

12. MADRELL, supra note 4, at 3 (“[The Bedouin] are looked down upon by Jewish Israelis and other Palestinians alike as primitive . . . . The Bedouin of the Negev are truly a minority twice over.”).
16. Madrell posits that, prior to the 1947 partition, there were anywhere from 65,000 to 95,000 Bedouin in the Negev, with that number falling to fewer than 13,000 by 1951. MADRELL, supra note 4, at 6.
17. ROSEN-ZVI, supra note 13, at 76.
18. See Rangwala, supra note 5, at 438 (“The Negev represents a great mass of land available for future settlement and is prized for that reason above all others.”). See also MADRELL, supra note 4, at 7 (discussing the harsh rule under military government, probably due to the fact that “Israeli authorities were especially anxious to populate the Negev with Jews”).
19. See Shamir, supra note 11, at 236 (discussing the Israeli government policies that emphasized the Negev as empty and the Bedouin nomads as “part of nature,” resulting in the official narratives that the Negev is “an empty space that awaits Jewish liberation” and the Bedouins are a “nomadic culture that awaits civilization”).
urge the Bedouins into urban settlements, effectively altering the very bases of their economy and leaving them ostensibly dependent on the administrative state for subsistence. Approximately 87% of the land expropriated, and thereafter regarded as state owned, was located in the Negev desert where Bedouins are still largely concentrated.

Over the first few decades of its existence, as Israel developed into a modern industrialized nation, the institutional discrimination against Israeli Arabs, and in particular Bedouins, continued virtually unabated in areas ranging from education, health care, water, and land rights to

21. See Shamir, supra note 11, at 231. Shamir quotes the Minister of Agriculture, Moshe Dayan, as saying, “We should transform the Bedouins into an urban proletariat . . . . Without coercion but with government direction . . . . this phenomenon of the Bedouins will disappear.” Id.

22. For a discussion of the changing socioeconomic conditions of the Bedouins in the developing State of Israel, see Avinoam Meir, As Nomadism Ends: The Israeli Bedouin of the Negev 18 (1998). See also Madrell, supra note 4, at 20 (discussing the remarkable change in the sources of livelihood for Arab Bedouins in Israel “from an almost entirely agricultural and pastoral community” in the 1940s and 1950s to “one overwhelmingly dependent on mainly unskilled wage labour” in the 1980s and beyond).


24. “By 1959 the State had expropriated 250,000 dunams [approximately 63,000 acres] from Bedouin Arabs in the Negev.” Madrell, supra note 4, at 8.

25. Hussein & McKay, supra note 20, at 39 (using the term “Naqab” desert, which is the Arabic word for “Negev”).

26. See Madrell, supra note 4, at 3.

27. See David Kretzmer, The Legal Status of the Arabs in Israel 117 (1990) (discussing three interconnected modes of institutional discrimination often practiced under the guise of discretionary administrative power: budgetary discrimination, resource allocation, and implementation of laws).

28. “Schools in the government-planned settlements for beduin . . . . still lag far behind the standard of Jewish-Israeli education and have smaller budgets.” Madrell, supra note 4 at 16.

29. See id. at 17 (citing an independent Israeli survey conducted in 1983 that concluded the Negev Bedouin receive medical care “below the minimum standard to which every citizen is entitled”). See also Rangwala, supra note 5, at 422–23 (discussing higher infant mortality rates among Bedouin and positing that “both the accessibility of health care services and the quality of care available to Bedouin living in both the towns and unrecognized villages remains grossly inadequate”).

30. See Madrell, supra note 4, at 12–13 (“Except the few who got some irrigated land as compensation after 1980, beduin farmers do not get water allocations.”).

31. See Kedar, supra note 20, at 924 (discussing the Israeli legal system, “which by transforming land possession rules in ways that undermined the possibilities of Arab landholders to maintain their possession, brought about the transference and registration of ownership of this land to the Jewish State”). See also Madrell, supra note 4, at 12 (“The Jewish settlements can lease land for up to [forty-nine] years . . . . Each year [the Bedouin farmers] must reapply and are likely to receive different lands or even no lands at all.”).
herding and grazing rights. The Bedouin tribes were pressured to resettle within a military enclosure area in townships separated from Jewish Israeli settlements and cities, but still close enough for Bedouins to work in the areas from which they were residentially segregated. The rest of the Negev Bedouin population (i.e., those who did not move to the government townships) lived in numerous villages unrecognized by the State. These unrecognized villages provide even starker examples of Israel’s disparate treatment of its Bedouin citizens, as “[t]he villages are characterized by a lack of basic services, such as running water, electricity, telephone lines, paved roads, schools, and other public institutions.” Furthermore, since it is impossible for Bedouins in these villages to obtain building permits, many Bedouins continue to be indicted every year for “illegal” construction activity, and the Israeli government has slated innumerable houses for demolition. These legal obstacles cast the Bedouin as interlopers in their own homes. Additionally, in order to put a positive legal veneer on its policy of land acquisition, the Israeli legislature passed a series of laws that, in both practice and effect, serve to legitimize the resettlement of the Negev Bedouin population.

This policy of state-sponsored sedentarization has resulted in modern-day Bedouins becoming “the most socially, politically and economically disadvantaged segment of the [Arab] Minority in Israel.” In crafting a

32. See id. at 13. See also Rangwala, supra note 5, at 442–43 (discussing the Plant Protection Law of 1950 that required “Bedouin shepherds to get a permit from the ministry of agriculture to graze their goats” on certain lands and noting the consequential dwindling of Bedouin flocks).

33. The enclosure area consisted of roughly ten percent of the land that was previously inhabited exclusively by the Bedouin community. Rangwala, supra note 5, at 420.

34. Ar’ara, Houra, Kuseifā, Laqiah, Rahat, Segev-Shalom, and Tel-Sheva. ROSEN-ZVI, supra note 13, at 46.

35. Id.

36. For a general discussion of these so-called “unrecognized villages,” see HUSSEIN & McKAY, supra note 20, at 255–81.

37. Rangwala, supra note 5, at 421.

38. See Shamir, supra note 11, at 246–47.

39. See Rangwala, supra note 5, at 435.

40. Two laws in particular enabled the Israeli government to redefine the nature of property ownership in the area and utilize land newly defined as “abandoned” for predominantly Jewish settlement interests. Land Acquisition (Validation of Acts & Compensation) Law, 5713-1953, 7 LSI 43 (1952–1953) (Isr.); Absentees’ Property Law, 5710-1950, 4 LSI 68 (1949–1950) (Isr.). For an in-depth discussion of the Absentees’ Property Law and its repercussions on Israel’s Arab population in general, see Bisharat, supra note 20, at 512–14. For a more detailed look at both of these laws, as well as others on point, and their effects on the Bedouin population of the Negev in particular, see Rangwala, supra note 5, at 439–49.

41. Rangwala, supra note 5, at 416–17.
possible future solution to this past and present-day inequity, it is imperative, therefore, to survey domestic Israeli legislation that has enabled this unfairness to occur in the past as well as Israel’s international legal commitments that should prevent it from continuing in the future.

II. SEPARATE AND UNEQUAL: DOMESTIC ISRAELI LEGAL SOURCES FOR BEDOUIN RIGHTS

In order to elucidate the responsibilities Israel has to its citizens, one must first have a basic understanding of the complex structure of Israeli law. Israel has no written constitution, so the domestic rights granted its citizens must be gleaned from other sources, specifically the Declaration of the Establishment of the State of Israel and the Law of Return, the judicial case law of the Israeli Supreme Court, and the Basic Laws promulgated by the Knesset, Israel’s parliament.

A. The Declaration and the Law of Return

The Declaration of the Establishment of the State of Israel provides: “The State of Israel ... will be based on freedom, justice and peace ... [and] it will ensure complete equality of social and political rights to all its inhabitants irrespective of religion, race or sex.” At first glance, it seems rather clear that the drafters of the Declaration intended complete equality to mean just that. Soon after the creation of the State, however, the Knesset passed a law that seemingly contradicts this idea of complete equality. In 1950, the Knesset promulgated the Law of Return, which gives every Jew born in or immigrating to Israel the right to Israeli citizenship.43 This law was not merely a public relations campaign for Jewish immigration in the 1950s. It was, and remains to this day, the legislative embodiment of the very idea of a Jewish State, acknowledging the most basic principle of Zionist ideology—the inextricable link between the Jewish Diaspora and the Jewish State.45 Still, this raises questions of how this law, which clearly grants preferential treatment to Jews as op-
posed to citizens of any other religion, can coexist with the principle of complete equality that the Declaration mentions.

While equality is clearly an important principle at the heart of Israeli law, it is not without limitation. First, the term itself is hard to define, as it signifies a dynamic idea that depends on unique factors in a given society. As societal values and attitudes change, so too must the conception of what equality entails. Second, like any principle of Israeli constitutional law, equality is “subordinate to the supremacy of [Knesset] legislation.” Hence, if a conflict arises between the principle of equality from the Declaration and the plain meaning of a Knesset statute, the statute is dispositive.

B. Judicial Law

The Israeli judiciary has identified equality as an important, albeit unwritten, constitutional principle. Additionally, the Israeli Supreme Court reasoned that the principle of equality should be given special status due to the unique historical experience of the Jewish people:

When we were exiled from our country and removed from our land we became victims of the nations of the world among whom we lived, and

46. See Hussein & McKay, supra note 20, at 281 (discussing the weak status of equality in Israeli law in regard to competing policy considerations). See also Kretzmer, supra note 27, at 11 (discussing the principle of equality in Israeli law as a “soft legal principle” that cannot overcome “contrary provisions in primary legislation”).

47. As an anecdotal example from American history, although equality is an integral concept in both the Declaration of Independence and the U.S. Constitution, it took almost 200 years for that equality to be implemented for African Americans.

48. The term “constitutional law” is purposefully not capitalized here and throughout this Note, as it does not relate to laws of a particular constitution, rather the body of laws that constitute the general legal apparatus of the State of Israel.

49. Kretzmer, supra note 27, at 77.

50. Id. at 8. (citing HCJ 10/48 Zeev v. Gubernik, [1948] IsrSC 85(1) 89 (holding that the Declaration is not a “Constitutional law which determines the validity or invalidity of ordinances and statutes”).

51. See Hussein & McKay, supra note 20, at 281 (citing HC 953/87 Poraz v. Mayor of Tel Aviv, [1988] IsrSC 42(2) 309. The High Court held that public authorities must give “reasonable weight” to the principle of equality and seek to find alternative ways, congruent with the principle of equality, to achieve the ends of the particular policy sought. The court reasoned further that the test for whether a public authority had in fact acted in a discriminatory fashion was comprised of three elements: (1) the authority must present evidence that it considered the infringement upon the principle of equality; (2) the authority must show that it evaluated the competing considerations and gave “reasonable weight” to equality; and (3) after balancing the competing considerations, the authority had come to the conclusion that there was no other way to effect the particular policy choice. Id.
throughout the generations we tasted the bitterness of persecution, oppression and discrimination merely because we were Jews. . . . Given this sorrowful experience, which deeply affected our national and human consciousness, it is to be expected that we will not adopt these aberrant ways of the nations of the world, and now that our independence has been renewed in the State of Israel we must be careful to prevent any hint of discrimination towards any law-abiding non-Jew among us who wishes to live with us in his own way, according to his religion and belief. . . . We must exhibit a human and tolerant attitude . . . and maintain the great rule of equality in rights and obligations between all persons.52

The court draws a direct connection between the historical sufferings of the Jewish people and an affirmative duty to treat all inhabitants of the modern State of Israel with the humanity and dignity that the founders of the State sought for themselves.53 Accordingly, the Israeli Supreme Court has asserted that “discrimination on grounds of religion or race will be regarded as improper use of administrative discretion, even if that discretion is absolute,”54 and that the construction of statutory language must further the principle of equality under the law.55

In the spring of 2000, the Israeli Supreme Court decided a case called Qa’adan v. Israeli Lands Administration, where it held that the State is forbidden from utilizing national institutions to carry out actions on its behalf that have discriminatory purpose or effect.56 In this case, a Bedouin family challenged the administration’s refusal to allow them to purchase a home in Katzir on the grounds that Katzir only accepted Jewish residents.57 The court found that state discrimination based on nationality, overt or otherwise, was illegal and that the State could not circumvent this prohibition by delegating land allocation authority to institutions that then allocate the land in a discriminatory fashion.58 That same year, in a landmark decision on equality rights vis-à-vis Israeli Arab minorities, the court clearly stated that “[t]he resources of the State . . . belong to all citizens and all citizens are entitled to enjoy them ac-

53. Id.
54. Id. (citing CA 16/61 Registrar of Companies v. Kardosh [1961] IsrSC 16(1) 1209, 1224).
57. Id.
58. Id.
According to the principle of equality, without discrimination, based on religion, race, sex or other prohibited consideration. 59

C. Basic Laws

Instead of delineating certain fundamental rights and liberties in a constitution, the founders of Israel decided to empower the Knesset to enact a series of “Basic Laws” 60 that would form, along with regular substantive Knesset legislation and decisions of the judicial courts, the foundation and backbone of modern Israeli law. 61 In 1992, paralleling the reasoning of its judicial counterparts, the Knesset passed two Basic Laws that signified a “first step towards entrenching certain fundamental rights and freedoms in Israel.” 62 Prior to the promulgation of these Basic Laws, the Israeli High Court of Justice did recognize certain rights as fundamental. 63 The court also ruled that the Basic Laws have constitutional significance giving greater force to their various provisions. 64 The practical significance of this ruling, in light of the lack of a single constitutional document guaranteeing fundamental rights, is that the Basic Laws

59. Id. at 427 n.69 (citing HCJ 1113/99 Adalah v. Minister of Religious Affairs [2000] IsrSC 54(2) 164, 165). Adalah, the Legal Center for Arab Minority Rights in Israel, challenged the legality of two budget provisions that allocated funding exclusively for Jewish cemeteries. Ruling in favor of the petitioners, the court specifically noted the Ministry’s failure to point to any reasonable justification for the budget discrepancy. For more information on this case in particular, as well as other cases on point, see Adalah, http://www.adalah.org/eng/legaladvocacyreligious.php (last visited Oct. 28, 2007).


61. For a general discussion on the makeup of Israeli law, see KRETZMER, supra note 27.

62. HUSSEIN & MCKAY, supra note 20, at 23.


64. CA 6821/93 United Mizrahi Bank, Ltd. v. Migdal Coop. Village [1993] IsrSC 49(4) 221.
have become the bedrock of civil and human rights in the modern Israeli legal structure.65

The tension between the Law of Return—“the sole Israeli Law that explicitly discriminates on the basis of ethnicity or national origin”66—and the guarantees of equality in the Declaration and Basic Laws is evident.67 Civil liberties and civil rights, though perhaps not as ingrained and protected as in the American system, do play an important role in the Israeli legal structure.68 Still, the existential conundrum persists: when the continued Jewish nature of the State is in direct conflict with principles of equality, what is the outcome? This tension was illustrated vividly in a case dealing with election candidates whose platform included advocating for the destruction of the State of Israel and denial of its sovereignty.69 The Israeli Supreme Court ruled that, short of clear legislative action to the contrary, it could not bar them from running for office, with one justice adding in dicta that the Jewish character of the State is a “fundamental constitutional fact.”70 The Knesset responded by amending the Basic Law: the Knesset precluded from being considered eligible for elections candidates who tried to negate “the existence of the State of

65. HUSSEIN & MCKAY, supra note 20, at 146 (discussing the Basic Laws, in comparison to other streams of Israeli law, as “the most entrenched kind possible in the Israeli constitutional system”).

66. Bisharat, supra note 20, at 509 n.209.

67. See Concluding Observations of the Committee on Economic, Social, and Cultural Rights: Israel, 16, U.N. Doc. E/C.12/1/Add.90 (May 23, 2003) (“The Committee reiterates its concern that the excessive emphasis upon the State as a ‘Jewish State’ encourages discrimination and accords a second-class status to its non-Jewish citizens.”). See also ROSEN-ZVI, supra note 13, at 2 (discussing an offshoot of the Law of Return that prohibits the State from extraditing Jewish citizens, ostensibly “collapsing the distinction between the notions of citizenship and ethnicity”).

68. KRETZMER, supra note 27, at 8 (discussing a line of Israeli Supreme Court cases that held that basic civil rights, though largely not codified, exist as legal principles in Israeli jurisprudence). This is further evidenced by the fact that the Constitution, Law and Justice Committee of the Knesset has been working for years on drafting Israel’s written constitution and plans to include such rights in the eventual draft: “[t]he proposed constitution will reiterate the state’s commitment to equal rights for all, including minorities. The constitution will emphasize universal human rights, and forbid state discrimination among its citizens on the basis of race, religion, or ethnicity.” Knesset Committee Debates on the Constitution for Israel, http://www.cfisrael.org/a134.html?rsID=89 (last visited Oct. 28, 2007).


70. Id. at 24–25.
Israel as the State of the Jewish people”71 or those who wished to incite racism.72

Although Israel’s legal system is formally committed to equality, the historical encroachments upon equality “reflect the ambiguity in the notion of Israeli nationhood”73 and cast existential uncertainty on the true nature of Israel’s identity. On the one hand, Israel is a democratic State belonging equally to all of its citizens, regardless of religion, race, or sex.74 On the other hand—as the eponymous ancestor of the Jews—Israel the people may lay claim to Israel the State as theirs and theirs alone.75 The coexistence of these two conceptions of statehood is of particular significance to Bedouin Israelis76 as full-fledged citizens of a state that technically belongs to someone else.77

In 1992, the Knesset promulgated the Basic Law: Human Dignity and Liberty, which guarantees rights to dignity, life, freedom, privacy, and property.78 Interestingly, missing from this Basic Law is any mention of equality.79 This was remedied, in part, two years later when the Knesset amended it to include “fundamental human rights . . . in the spirit of the

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72. This part of the Amendment was utilized to preclude controversial Rabbi Meir Kahane, known in Israel and the United States for his anti-Arab and racist viewpoints, from running for Knesset elections. For a more detailed discussion of the case and its ramifications, see KRETZMER, supra note 27, at 26–31.

73. Id. at 176.

74. Declaration of the Establishment of the State of Israel, 5708-1948, 1 LSI 3, (1948) (Isr.)

75. See Rangwala, supra note 5, at 425–26 (The language of the Declaration itself “defines the national character of the state as privileging one group, namely the Jewish people . . . . Thus[,] as quickly as the principle of equality became an element of the Israeli state via its founding Declaration, it simultaneously became neutralized by its Jewish characterization.”).

76. See id. at 430 (referring to the “system of unequal citizenship” experienced by the Negev Bedouin).

77. See MADRELL, supra note 4, at 21 (“Many in the beduin community feel this anguish . . . and the consequent sense that as a community they are fully acceptable neither to the nation they feel part of nor to the state they are citizens of.”).


79. For a discussion on the Basic Law: Human Dignity and Liberty and its shortcomings in granting complete equality, and even more interestingly, its usage in opposition to its stated purpose, see HUSSEIN & MCKAY, supra note 20, at 23–24 (discussing Section 8 of the Basic Law: Human Dignity and Liberty, which allows certain laws that may be facially discriminatory if they serve a “proper purpose” and “will be used to legitimize laws that discriminate in favour of Jews,” preserving the character of Israel as a Jewish State even at the expense of fundamental civil rights).
principles set forth in the Declaration of the Establishment of the State of Israel.\textsuperscript{80} Although the inclusion of equality in Israel’s Basic Law: Human Dignity and Liberty is, at best, indirect, it “is no substitute for a direct provision, and the question must be asked why this principle [of equality], which the Israeli high Court has said on a number of occasions is a fundamental principle of Israeli law, was omitted.”\textsuperscript{81} The unanswered question of Israel’s domestic legal commitment to true equality among its citizens leads one to look to other sources of substantive law, specifically international law, to see whether Israel has more concrete obligations to its Bedouin citizens.

III. GLOBAL PERSPECTIVES, LOCAL RESPONSIBILITY: ISRAEL’S INTERNATIONAL LEGAL OBLIGATIONS

International law often provides a much sturdier basis than domestic law for protecting the rights of indigenous peoples.\textsuperscript{82} In its infancy in the seventeenth and eighteenth centuries, international law was understood predominantly as a device for governing relations between nation states.\textsuperscript{83} The role of individuals,\textsuperscript{84} unless acting as state representatives, was relatively nonexistent under this rudimentary conception of international law.\textsuperscript{85} Perhaps the seminal moment in the development of modern international law came in the aftermath of World War II with the establishment of the United Nations.\textsuperscript{86} The statute of the International Court of Justice, which the Member States adopted along with the U.N. Charter (“Charter”), discusses in the notes the sources of international law: treaty,


\textsuperscript{81} Hussein & McKay, supra note 20, at 25.

\textsuperscript{82} Id. at 33.

\textsuperscript{83} See Anaya, supra note 2, at vii (discussing international law specifically in regard to human rights, “which has moved international law away from an exclusively state-centered orientation”).

\textsuperscript{84} See Eric S. Kobrick, The Ex Post Facto Prohibition and the Exercise of Universal Jurisdiction over International Crimes, 87 Colum. L. Rev. 1515, 1520–21 (1987) (citing Hill, International Affairs: The Individual in International Organization, 28 Am. Pol. Sci. Rev. 276 (1934) (describing the shift from state-centered international law and the emergence of the view that individuals are subject to international law)).


\textsuperscript{86} See generally Anaya, supra note 2 (discussing the development of international law through the lens of indigenous rights and the United Nations).
custom, and general principles.\textsuperscript{87} Applied to Israel, each of these international law sources sheds light on the obligations Israel has to its Bedouin minority, and together they instruct how Israel must act more fairly towards them in the future.

As a member of the United Nations, Israel has bound itself to numerous international treaties, including the Charter as well as the International Covenant on Civil and Political Rights ("ICCPR")\textsuperscript{88} and the International Covenant on Economic, Social and Cultural Rights ("ICESCR").\textsuperscript{89} The protection of human rights and fundamental freedoms is one of the main reasons behind the conception of the United Nations in the aftermath of World War II, as evidenced by Article 1 of the Charter, which, \textit{inter alia}, states that the purposes of the United Nations are

\begin{quote}
[t]o develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace; [t]o achieve international co-operation in solving international problems of an economic, social, cultural, or humanitarian character, and in promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion.\textsuperscript{90}
\end{quote}

Moreover, in Article 55, the Charter reiterates that one of its primary functions is the promotion of “universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to

\begin{footnotesize}
\begin{enumerate}
\item Statute of the International Court of Justice art. 38, June 26, 1945, 59 Stat. 1055, 33 U.N.T.S. 993. The Restatement (Third) of Foreign Relations Law of the United States provides a more concise definition of international law:
\begin{quote}(1) A rule of international law is one that has been accepted as such by the international community of states (a) in the form of customary law; (b) by international agreement; or (c) by derivation from general principles common to the major legal systems of the world. (2) Customary international law results from a general and consistent practice of states followed by them from a sense of legal obligation. (3) International agreements create law for the states parties thereto and may lead to the creation of customary international law when such agreements are intended for adherence by states generally and are in fact widely accepted. (4) General principles common to the major legal systems, even if not incorporated or reflected in customary law or international agreement, may be invoked as supplementary rules of international law where appropriate.
\end{quote}
\item U.N. Charter art. 1, paras. 2–3.
\end{enumerate}
\end{footnotesize}
race, sex, language, or religion." This function is imputed to the Member States in that “[a]ll Members pledge themselves to take joint and separate action . . . for the achievement of the purposes set forth in Article 55.”

Israel ratified the ICCPR and ICESCR on October 3, 1991. The ICCPR includes numerous provisions that hold direct relevance to Israel’s continued mistreatment of its Bedouin minority:

In no case may a people be deprived of its own means of subsistence.

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant.

Everyone lawfully within the territory of a State shall, within that territory, have the right to liberty of movement and freedom to choose his residence.

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

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91. Id. art. 55(c).
92. Id. art. 56.
95. ICCPR, supra note 88, art. 1(2).
96. Id. art. 2(2)–(3).
97. Id. art. 12(1).
98. Id. art. 26.
Within this broad framework it is absolutely clear that Israel’s policy of resettlement for the Bedouin of the Negev after 1948 and its continued governmental actions in perpetuating this initial policy violate the principles set forth in the ICCPR. While it could be argued that Israeli Supreme Court decisions, discussed supra, fulfill the obligation to “take the necessary steps . . . to adopt such laws . . . as may be necessary to give effect to the rights recognized” within the ICCPR, it is evident that the effects of past discriminatory policies still weigh heavily on the civil and political rights of the Bedouin Arab minority and, therefore, much more needs to be done in order for Israel to fulfill its obligations under the ICCPR.

The ICESCR also provides rights that elucidate the international legal obligations that Israel must abide by in its dealings with its Bedouin Arab population. First, Article 11(1) states:

The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties will take appropriate steps to ensure the realization of this right, recognizing to this effect the essential importance of international co-operation based on free consent.

Two issues arise out of this language, first, the right to adequate housing and, second, the idea of free consent in the realization of this right. As discussed above, the idea of free consent can hardly be reconciled with Israel’s post-1948 policy of Bedouin resettlement in townships within the enclosed military zone. In terms of adequate housing, besides the fact that Bedouin settlements are clearly substandard in compar-

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99. See supra notes 27–32 and accompanying text (discussing the various discriminatory effects of Israeli policy toward its Bedouin minority).
100. In resettling the Negev Bedouin population in townships that lack adequate infrastructure, irrigation, and basic services, the Bedouin population is in effect “deprived of its own means of subsistence,” and is deprived of its “right to liberty of movement and freedom to choose [its] residence,” as set forth in the ICCPR. ICCPR, supra note 88, arts. 1(2), 12(1).
101. ICCPR, supra note 88, art. 2(2).
102. See generally HUSSEIN & MCKAY, supra note 20.
103. See generally MADRELL, supra note 4.
104. See Rangwala, supra note 5, at 454 (“As a party to the ICESCR, Israel is bound by its terms, and obligations under it should be reflected in Israel’s domestic policy.”).
105. ICESCR, supra note 89, art. 11(1).
106. For a general discussion of the adequacy of housing for the Negev Bedouin, see Rangwala, supra note 5.
107. See supra notes 33–35.
ison to Jewish settlements of similar size and location, there is also a more disturbing undercurrent at play since the lack of adequate housing can substantially diminish the realization of other fundamental rights (including those set forth in the ICCPR). Israel has also not fulfilled its obligations under Article 12 of the ICESCR to reconcile discrepancies in providing proper health care to Negev Bedouin communities. Given that Israel is a signatory to these treaties, it is abundantly clear that it has an international legal responsibility, not just a moral or ethical imperative, to actively remedy its treatment of the Negev Bedouin.

Customary international law also imposes international legal obligations upon Israel regarding its conduct toward Bedouin Arabs. The strongest such evidence is found in the U.N. Universal Declaration on Human Rights (“Universal Declaration”). The Universal Declaration is commonly considered a reliable expression of customary international law and has been deemed so by Israeli courts. Article 7 secures the right to equal protection under the law, and Article 8 grants the right to an “effective remedy” for the violations of the fundamental rights that the Universal Declaration guarantees.

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108. See generally MADRELL, supra note 4
109. See Rangwala, supra note 5, at 454 (“For example, it may be impossible to maintain the right to security of person, public assembly, or education where the right to adequate housing is compromised.”).
110. ICESCR, supra note 89, art. 12 (“The State Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health. The steps to be taken by the States Parties to the present Covenant to achieve the full realization of this right shall include those necessary for: (a) The provision for the reduction of the stillbirth-rate and of infant mortality and for the healthy development of the child.”).
111. See MADRELL, supra note 4, at 17 (“Bedouin children in the Negev have a higher rate of hospitalization than their Jewish counterparts. A third of Negev Bedouin children are hospitalized at least once in their first year . . . [and many] infants also suffer malnutrition and consequently stunted growth.”).
113. HUSSEIN & MCKAY, supra note 20, at 34.
114. Id.
115. Universal Declaration, supra note 112, art. 7 (“All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.”).
116. Id. art. 8 (“Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law.”).
treatment of Bedouin Arabs\textsuperscript{117} at best disregards and at worst defies the substantive guarantees of Articles 7 and 8 of the Universal Declaration. Furthermore, Article 17(2) states that “[n]o one shall be arbitrarily deprived of his property.”\textsuperscript{118} Israel’s policies of land expropriation\textsuperscript{119} after the establishment of the State in 1948, as well as its continued demolition of Bedouin houses,\textsuperscript{120} can certainly be viewed as arbitrary deprivation of property in stark violation of the Universal Declaration. Article 22\textsuperscript{121} “articulates an overarching emphasis on the right to human development, and integrates all branches of human rights (civil, political economic, social, cultural) within the rubric of greater human development.”\textsuperscript{122} Accordingly, Israel must consider how its treatment of the Bedouin Arab minority fits within this framework, and must not only redress specific incidents of human rights abuses, but also align its legislative, judicial, and executive policies with the goal of “greater human development.”\textsuperscript{123}

In addition, Israel’s legal obligations under customary international law can be inferred from the text of the Wye River Memorandum (“Memorandum”),\textsuperscript{124} which delineates responsibilities for Israel and the Palestine Liberation Organization in their ongoing peace talks. Although the Memorandum is just a small link in the seemingly unending chain of back-and-forth “peace agreements,”\textsuperscript{125} one of its provisions is especially relevant to the rights of Bedouin Arabs. As a requisite condition for Israel’s agreeing to transfer nature reserve land to the Palestinians in Gaza, the Palestinian side agreed not to change “the status of these areas, without prejudice to the rights of the existing inhabitants in these areas, including Bedouins.”\textsuperscript{126} It is ironically telling that in its negotiations with an entity that has been its enemy for decades, Israel made a point of including the protection of Bedouin rights. Although anecdotal, it can be inferred from

\begin{itemize}
  \item \textsuperscript{117} See supra Part II.B.
  \item \textsuperscript{118} Universal Declaration, supra note 112, art. 17.
  \item \textsuperscript{119} See supra notes 19–20 and accompanying text.
  \item \textsuperscript{120} See, e.g., infra note 140.
  \item \textsuperscript{121} Supra note 112, art. 22 (“Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.”).
  \item \textsuperscript{122} Rangwala, supra note 5, at 452–53.
  \item \textsuperscript{123} Id.
  \item \textsuperscript{124} Wye River Memorandum, Oct. 23, 1998, 37 I.L.M. 1251.
  \item \textsuperscript{125} For evidence of the constant cycle of peace talks, one need only look at any daily newspaper on any given day, and the odds are strong that there will be some talk of the never-ending struggle for “peace in the Middle East.”
  \item \textsuperscript{126} See supra note 124.
\end{itemize}
this Memorandum that Israel sees the rights of Bedouin Arabs as worthy of protection, notwithstanding its own failure to do so over the last sixty years.\(^\text{127}\) If Israel expects its enemies to treat Bedouin Arabs responsibly, it should follow both logically and ethically that it bears the same responsibility to its own Bedouin citizens.

**IV. STRANGERS IN A STRANGE LAND: RESPONSIBILITIES TO “OTHERS” IN JEWISH LAW** \(^\text{128}\)

Beyond the classical examples of international law discussed above, Israel’s legal obligations can also be inferred from what perhaps can be described as one of the first systems of “international law”—Jewish law.\(^\text{129}\) If, in fact, Israel is to be considered a Jewish State\(^\text{130}\) as opposed to a completely egalitarian democracy, its conduct should, at the very least, be in line with the tenets and teachings of Jewish law.

The legal status of the “other” in Israel is founded in the Bible “upon the special protection and love of the God of Israel for the stranger.”\(^\text{131}\) This special status is embodied by the divine command to “befriend the stranger, for you too were strangers in the land of Egypt.”\(^\text{132}\) Beyond general pronouncements, the Torah\(^\text{133}\) further lays down specific rules regarding the treatment of strangers by the people of Israel, illustrating “the degree to which Judaism has been willing to include the non-Jew within the framework of a Jewish society governed by universally applicable rules of ethical conduct.”\(^\text{134}\) Understandably, not all of Jewish law was applied to those who were not followers of the religion, but still “the Torah nevertheless took care to grant them special protection and to

\(^{127}\) See supra note 117.

\(^{128}\) Special thanks to Rabbi Aaron Brusso for his help in researching and conceptualizing the arguments for this section of the Note.

\(^{129}\) See Joseph Levi, *Stranger, in CONTEMPORARY JEWISH RELIGIOUS THOUGHT: ORIGINAL ESSAYS ON CRITICAL CONCEPTS, MOVEMENTS, AND BELIEFS* 917, 919 (Arthur A. Cohen & Paul Mendes-Flohr eds., 1987) (discussing Judaism’s conception of its own laws as having a “universal mission”). Furthermore, it can be argued that Jewish law is international in scope, since it has been followed by its adherents over thousands of years wherever in the world they may happen to reside.


\(^{131}\) Levi, *supra* note 129, at 918.

\(^{132}\) *Deuteronomy* 10:19.

\(^{133}\) This is the Hebrew word for the Jewish bible.

\(^{134}\) Levi, *supra* note 129, at 918.
equalize their legal status with that of the Jewish majority.” Specifically, the Torah seeks to ensure that the stranger is not oppressed and prohibits the perversion of justice where the rights of the stranger are concerned. This protection of the stranger’s rights in Jewish law is also evidenced by modern thinkers who discern “a similar message of civil egalitarianism in the attitude of the laws of the Torah regarding the [stranger].”

While one could certainly argue that the rules of religious law have no relevance to the conduct of modern Israel towards its Bedouin minority, what is clear from the development of Jewish law throughout the ages is that it is “no longer theological principles that are central, but rather social and legal principles, such as equality before the law, which are drawn from humanistic philosophy and whose precursors are now seen in the ancient laws of the Bible.” Accordingly, Israel has a clear legal and ethical obligation, rooted in the traditions of the Bible and developed by subsequent social, philosophical, and legal thought, to treat the “strangers” in its land with the same decency and respect it presently reserves exclusively for its Jewish citizens. Moreover, this makes the existential question of Israel’s continued viability—is it a Jewish State or a true democracy?—inapposite in the context of Bedouin rights, for no matter which principles govern (i.e., religious or democratic) the outcome should be the same.

V. ALMOST HOME: THE PRESENT AND FUTURE OF BEDOUIN RIGHTS IN MODERN ISRAEL

Unfortunately, the maltreatment of Bedouin Arabs in Israel continues to this day. The Israeli government continues its policy of forced evacuations and home demolitions in Bedouin villages in order to pave the way for more Jewish settlements in the Negev region. Perhaps even more disturbing is the fact that the domestic legal remedies for Israel’s violation of Bedouin rights seem, at best, hard to come by and, at worst,
unenforceable. Even if the Bedouins could appeal to the highest international legal bodies and raise causes of actions relating to Israel’s obligations under the various treaties and conventions to which it is a signatory, it is unclear what effect, if any, such appeals would have on Israeli conduct. Although organizations like Adalah exist for the purpose of protecting and defending the rights of Arab minorities in Israel, the fight for equality will clearly continue to be one fraught with ineffectiveness and frustration.

But there is hope, albeit somewhat dim. As discussed above, the Constitution, Law and Justice Committee of the Knesset is continuing to negotiate a draft of Israel’s written constitution and has said that it intends to “reiterate the state’s commitment to equal rights for all, including minorities.” Contrary to this claim, however, the head of the Constitution, Law and Justice Committee, Menahem Ben-Sasson, recently admitted that the constitution now taking shape in the committee is likely to weaken, not strengthen, the rights of Israeli minority groups, including the Bedouins. If this were the case, it would fly in the face of what is arguably the “primary role of a constitution in a democratic state—protecting minority rights by anchoring them in the constitution” so that the executive, legislative, and administrative branches of government cannot infringe upon these rights. Furthermore, the president of the Israeli Bar Association recently remarked that the requisite function of a

142. See id. (“Despite court orders to freeze the home demolitions requested by Adalah, the Israel Lands Administration demolished some houses in June 2007 leaving many families homeless.”).
143. See supra notes 88–89.
144. There are many examples of U.N. Resolutions that have tried to change the state of affairs in the region, with little or no success (too many to list here). Also, if Israeli court orders are not followed by the administrative bodies performing the evacuations and the demolitions, it would be highly unlikely that an outside tribunal’s decision would carry much weight either.
146. See supra note 140 (“Adalah is . . . representing village residents in lawsuits challenging all these [demolition and evacuation] orders, and is demanding an investigation and disciplinary proceedings against those responsible for the illegal demolitions.”).
147. Id. (discussing continued evacuations, segregation, and other quasi-legal mechanisms that only further entrench Bedouin inequality).
148. See Knesset Committee Debates on the Constitution for Israel, supra note 68.
149. Id.
151. Id.
constitution is “to protect weak sectors of the population” and that the price of a constitution “cannot be paid at the expense of minority groups within the population.”

As is so often the case in the region, as soon as one has reason to hope for progress (i.e., a constitution granting unalienable minority rights) something happens to dampen that hope (i.e., the head of the committee admitting minority rights are not the paramount consideration in the drafting process and may not even factor in at all in the final document). In order to begin to find a solution to the inherent inequality of Bedouin Arabs in Israel, the first step is for Israel to cease requiring recognition of Israel as a Jewish State as a precondition for peace talks. This prerequisite, which may seem elementary to its proponents, speaks to the heart of the problem faced by the Bedouins in modern Israel: they are second-class citizens in a democratic state that should grant them full and equal rights, but chooses not to. The second step is to finish the drafting of a truly democratic and egalitarian constitution that guarantees, explicitly and unequivocally, the unalienable right to equality of all Israel’s inhabitants. The final step is to recognize the shortcomings of the past and recommit to making positive and proactive institutional changes so that Israel will be a home for all its citizens, regardless of classifications such as Jew, Palestinian, or Bedouin.

CONCLUSION

Israel has numerous obligations under international law to treat all of its citizens with the same amount of decency and respect that it affords to its Jewish citizens. Moreover, the treaties and conventions to which it has committed place an affirmative duty upon the government of Israel to remedy its historical maltreatment of its Bedouin minorities and safeguard their rights in the years to come. Moreover, even Jewish law requires better treatment of Bedouin minorities than what they experience at present. If Israeli leaders, as they are constantly claiming in the media, are truly interested in forging a lasting peace in the region, it is incumbent upon them to clean up their own house, before extending the olive branch to their neighbors. The political, intellectual, and academic elite in Israel must actively make their voices heard and declare that “not all who wandered should be lost,” in calling for Israel to fulfill its international legal obligations in granting full economic, social, and political

152. Id.
153. See Ravid, supra note 130.
154. See supra note 1 and accompanying text.
rights to all Israeli citizens—then, and only then, will Bedouin Israelis truly be nomads no more.

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* B.A., Philosophy and B.A., Judaic Studies, Binghamton University (2000), J.D. Brooklyn Law School (expected 2009). I am profoundly grateful to my Ima and Abba, Jack and Sandy Gruenberg, who instilled within me early on that life is not about being good, but about doing good. Thank you to my siblings, Hana, Josh, and Hillel who are my biggest supporters and best friends, and without whom I would be lost. Thank you to Aaron and Elissa for bringing joy into my life, in the form of Sari, Zoe, Ilan, Sam, and Kayla. I am very thankful and fortunate to have Orlee in my life—her patience and positivity are constant examples of how love can truly overcome any and all obstacles. This Note is dedicated to two men whose names I share: Uncle Jules, who bequeathed to me his fervent love of Israel, and ‘Uda, the Bedouin father from Ein Gedi who welcomed me into his tent, shared his story with me and with whom I share not only a name, but also a hope for a brighter future.
INTRODUCTION

The decision in *Roe v. Bridgestone Corp.*¹ has signaled that transnational corporations² (‘TNCs’) that have sufficient minimum contacts with the United States³ may be subject to liability in U.S. courts for international child labor violations committed abroad. This liability may arise under the Alien Tort Statute⁴ (‘ATS’), which allows aliens to bring claims in U.S. courts for torts in violation of an international treaty or the law of nations.⁵ In *Bridgestone*, Liberian workers alleged⁶ that their corporate employer⁷ at the Firestone rubber plantation near Harbel, Liberia⁸ encouraged or even required them to put their children to work in order to meet extremely high production quotas.⁹ At the plantation, children as young as six years old allegedly tapped raw latex from rubber trees, ap-

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³. See *WorldWide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980) (holding that the forum state may not exercise in personam jurisdiction over a defendant that did not establish minimum contacts with the state).
⁵. *Id.*
⁶. The plaintiffs asserted claims under the ATS, Thirteenth Amendment, California law, and 18 U.S.C. § 1595 (a federal statute authorizing civil actions for criminal forced labor violations), but these claims were dismissed. *Bridgestone Corp.*, 492 F.Supp. 2d at 1024.
⁷. Bridgestone Corporation is headquartered in Japan and, along with its consolidated subsidiaries, is the world’s largest manufacturer of tires and rubber products. *BRIDGESTONE GROUP*, 2007 ANNUAL REPORT 1, 79 (2008).
⁸. Harbel, Margibi County is situated about thirty-seven miles from Monrovia, the capital of Liberia. U.N. MISSION IN LIBERIA, HUMAN RIGHTS IN LIBERIA’S RUBBER PLANTATIONS: TAPPING INTO THE FUTURE 20, 72–73 (2006).
⁹. According to the pleadings, workers at the Firestone plantation cut rubber trees with a machete to allow the raw latex to drip into cups mounted on the trees, collected the latex from the cups into buckets, and brought the latex to the collection location carrying two, seventy-five-pound buckets at a time. To earn a daily wage equivalent to $3.19, a worker must collect latex from 1125 trees. *Bridgestone Corp.*, 492 F.Supp. 2d at 991, 994.
plied pesticides to the trees without any protective equipment, and performed other “back-breaking” work. The employer moved to dismiss for failure to state a claim, but the court denied the motion and concluded that these allegations, if proven, may give rise to a violation of international law. As the Bridgestone litigation continues, TNCs are confronted with the need to identify international child labor standards so as to avoid liability.

In addition to the risk of liability, failure of TNCs or TNCs’ suppliers to comply with international child labor standards may pose reputational risks. An incident involving Gap Inc., an international apparel, accessories, and personal care products retailer, illustrates this point. In October of 2007, in an article entitled “Child Sweatshop Shame Threatens Gap’s Ethical Image,” the U.K. newspaper, The Observer, reported that Gap Inc. had received merchandise from a factory in India where children as young as ten years old worked sixteen hours a day without pay. In response, Gap Inc. issued a press release stating that Gap Inc. discontinued the work order placed with that factory. The press release, however, was silent on the future fate of child laborers and whether they in fact continued working at that factory after Gap Inc. discovered the violations. This raises the question of how TNCs should respond to child labor incidents to assure compliance with international law.

This Note analyzes the treaty law pertaining to the child labor issues involved in the Bridgestone litigation and the Gap Inc. incident. To be clear, long before Bridgestone, businesses that conducted activities in a foreign jurisdiction could be subject to liability under that jurisdiction’s domestic laws. This Note examines child labor standards imposed by

10. *Id.* at 988, 991, 994, 1019, 1021.
11. *Id.* at 1021.
15. *See id.*
international law, which historically has been shaped by treaties, customary international law, and the general principles of law. In recent years, “a mushrooming of international norms and institutions” has embraced other categories, such as peremptory norms and “soft law.” While various sources of international law may relate to the problem of international child labor, this Note focuses on treaties and conventions,


19. Customary international law is “evidence of a general practice accepted as law.” ICJ Statute, supra note 18, art. 38(1)(b). See also ANTONIO CASSESE, INTERNATIONAL LAW 153, 156 (2d ed. 2005) (discussing customary international law).


22. A jus cogens, or a peremptory, norm is “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.” Vienna Convention, supra note 18, art. 53. The prohibition on genocide is an example of a jus cogens norm. CASSESE, supra note 19, at 155, 199–212; THEODOR MERON, THE HUMANIZATION OF INTERNATIONAL LAW 392–98 (2006).

23. The term “soft law” refers to sources of law other than treaties and custom, for example, instruments generated by international bodies, nongovernmental organizations, and TNCs. Jan Klabbers, The Undesirability of Soft Law, 67 NORDIC J. INT’L L. 381, 385 (1998); Levit, supra note 21, at 413–12.

which, at least until recently, have represented the strongest form of international legal obligations.25

This Note argues that child labor, as a problem of social and economic development, requires TNCs to act proactively. Often, after exposure in the media for its association with a supplier that uses child labor, a U.S. or other Western company will impulsively discontinue its relationship with the supplier or require that child laborers be dismissed from the supplier’s production.26 This reactive approach does not squarely address the issues that child labor raises and may be inconsistent with the principles of children’s human rights. Where a TNC detects incidents of child labor, the TNC should focus on creating meaningful alternatives for children dismissed from work.

This Note proceeds in five parts. Part I examines the phenomenon of child labor and the role of domestic and international law in child labor regulation. Part II analyzes the child labor standards adopted by the International Labour Organization (“ILO”),27 including the Worst Forms of Child Labor Convention.28 Part III discusses the human rights of economically active children, as codified in the Convention on the Rights of the Child.29 Part IV addresses the significance of child labor standards set forth in U.S. free trade agreements (“FTAs”). Part V concludes the analysis and provides recommendations and planning considerations for the implementation of international child labor standards in TNCs’ corporate compliance programs.

I. CHILD LABOR AS AN INTERNATIONAL CONCERN

Today one in seven children in the world works.30 The term “child” generally refers to a person under the age of eighteen,31 and the “eco-

25. JAMES AVERY JOYCE, WORLD LABOUR RIGHTS AND THEIR PROTECTION 21 (1980).
27. The ILO is a specialized agency of the United Nations responsible for social and labor issues, such as the right to work and social security. JOYCE, supra note 25, at 29; N. VALTICOS, INTERNATIONAL LABOUR LAW 19 (1979).
30. Seven out of ten working children harvest crops and tend livestock in agriculture. Twenty-two percent of working children are in the services sector, where some of them...
nomic activities” of children are understood to encompass various productive functions, paid and unpaid, formal and informal, legal and illegal. In this context, as the Bridgestone court has pointed out, “national and international norms accommodate a host of different situations” where children’s work is acceptable. This raises the issue of defining prohibited activities encompassed by the term “child labor.”

A. Defining “Child Labor”

Children’s economic activities exist within a continuum. On one end of the continuum are various exploitative forms of labor, such as the bonded labor allegedly involved in the Gap Inc. incident. Bonded labor, common in South Asia, arises when an indebted family puts their children to work to pay off the debt. As bonded children work for nominal wages and the creditor typically retains the major part of the wages as interest, which may be as high as sixty percent, the bondage status may pass to the next generation. On the other end of the continuum are activities of children who were fortunate to become apprentices in trades, which is


31. Worst Forms of Child Labor Convention, supra note 28, art. 2; Convention on the Rights of the Child, supra note 29, art. 1 (providing that “a child means every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier”).


34. McDougall, supra note 13.


37. Rassam, supra note 35, at 821.
sometimes the only realistic way to learn vocational skills in some countries.\textsuperscript{38} In India, for example, children in families of artisans, craftsmen, and farmers traditionally join their family trade and learn while working alongside the family members.\textsuperscript{39} The question then becomes what factors can distinguish “child labor” from other economic activities of children.

In order to answer this question, it is helpful to identify the concerns that child labor raises and the policies underlying the child labor prohibition. One concern is the children’s health and well-being. For example, in Bangladesh alone, fifty child laborers are injured by machinery daily, and three of those fifty become permanently disabled.\textsuperscript{40} Another concern is the exploitation of children, as in Guatemala and El Salvador, where tens of thousands of domestic servants as young as eight years of age work ninety-hour weeks.\textsuperscript{41} Working children are also often deprived of educational opportunities, for example, in rural areas in Mexicali Valley, Mexico, where child labor is common and school attendance during the harvesting season drops significantly.\textsuperscript{42} Entering the workforce too early reduces the children’s future earnings by thirteen to twenty percent\textsuperscript{43} and hardly benefits the domestic economy because children are generally less productive than adults.\textsuperscript{44} Ultimately, the child labor prohibition aims to

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\item[40.] ILO, \textit{World Day Against Child Labour}, supra note 30. In developing countries, the rate of injury and illness of working children ranges from twelve percent (for boys in agriculture) to thirty-five percent (for girls in construction). ILO, \textit{Child Labour in Africa} (2005), available at http://digitalcommons.ilr.cornell.edu/cgi/viewcontent.cgi?article=1009\&context=child.
\item[41.] \textsc{Child Domestics}, supra note 30.
\item[42.] David Bacon, \textit{The Children of NAFTA: Labor Wars on the U.S./Mexico Border} 33 (2004).
\item[43.] ILO, \textit{The End of Child Labour}, supra note 32, at 24.
\item[44.] Employers in certain industries attempt to justify child labor under the “nimble fingers” theory, which holds that children are more productive than adults in carrying out certain tasks, such as manual tasks that require dexterity. This theory, however, would not be defensible “were it not for the fact that child labor is much cheaper, more subservient, and therefore better exploited by employers.” M. Neil Browne et al., \textit{Universal Moral Principles and the Law: The Failure of One-Size-Fits-All Child Labor Laws}, 27 \textsc{Hous. J. Int’l L.} 1, 28–29 (2004). See also Savitri Goonesekere, \textit{The Best Interests of the Child: A South Asian Perspective}, in \textsc{The Best Interests of the Child: Reconciling Culture and Human Rights} 117, 143 (Philip Alston ed., 1994) (discussing \textit{Mehta v. State of Tamil Nadu}, a 1990 decision of the Supreme Court of India, which held that the need for children’s work in the matches industry in Sivakasi outweighed the concern for
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eliminate practices that impede children’s development and education.45 As a matter of social policy, the child labor prohibition ensures the development of human capital and, consequently, long-term social and economic growth.46

The prohibition of child labor, however, does not discourage children from contributing to the family’s budget, learning vocational skills and participating in communal life through their economic activities.47 Daily, some 30,000 children worldwide die as a result of extreme poverty,48 and thus, children’s economic activities may be essential to their survival. A factory in Kutsia, Bangladesh, for instance, dismissed orphans who were too young to work.49 These children eventually attempted to return to the factory by bribing the supervisors or by staying on after bringing lunch to their elder siblings because it was the children’s only opportunity to earn a living.50 In addition, through their productive activities, children integrate into the community, as in Africa, where children as young as ten years old begin imitating their family members in the household and farm tasks, and then move to other tasks, including serving the elders in their community.51 As such, notions about the appropriateness of children’s economic activities vary among countries.
B. The Role of Domestic Law in Regulating Child Labor

Child labor laws originally developed in domestic legal systems and reflected domestic ideology, economy, and culture. In the United States, for example, the 1938 Fair Labor Standards Act was adopted after the Lochner era of free labor ideology and left the entire agricultural sector unregulated. Today, this federal statute outlaws only "oppressive" child labor and, generally, sets fourteen as the minimum age for nonagricultural work, but exempts from regulation children’s work at family-owned businesses and farms, as performers and babysitters, and in certain other settings. In India, in turn, where child labor is common, the 1986 Child Labour (Prohibition and Regulation) Act restricts employment of children under fourteen only in specific occupations and

52. Rajani Kanta Das, Child Labour in India I, 28 INT’L LAB. REV. 796, 811, 814 (1933).

[A] condition of employment under which (1) any employee under the age of sixteen years is employed by an employer (other than a parent or a person standing in place of a parent employing his own child or a child in his custody under the age of sixteen years in an occupation other than manufacturing or mining or an occupation found by the Secretary of Labor to be particularly hazardous for the employment of children between the ages of sixteen and eighteen years or detrimental to their health or well-being) in any occupation, or (2) any employee between the ages of sixteen and eighteen years is employed by an employer in any occupation which the Secretary of Labor shall find and by order declare to be particularly hazardous for the employment of children between such ages or detrimental to their health or well-being; but oppressive child labor shall not be deemed to exist by virtue of the employment in any occupation of any person with respect to whom the employer shall have on file an unexpired certificate issued and held pursuant to regulations of the Secretary of Labor certifying that such person is above the oppressive child-labor age.

58. Id. §§ 203, 212, 213(c)–(d), 214.
processes, including tasks characteristic of the South Asian economy such as the making of beedi (hand-rolled local cigarettes), carpet-weaving, and, as of 2006, working in dhabas (road-side eateries) and tea-shops. These examples demonstrate that individual governments can tailor their domestic child labor laws to fit into their specific economic and social policies.

Domestic child labor regulation may also respond to unique changes occurring in a particular jurisdiction. In Russia, for instance, the 1990s jump from a centrally planned economy to the free-market “gangster capitalism” has led to a demographic crisis, which has resulted in a 750,000–800,000 annual population drop and the emergence of “street children”—homeless and orphaned children living in the streets. The 2001 Russian Labor Code addresses this crisis by prohibiting employment of children under sixteen and affirmatively guarantying thirty-one

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61. Child Labour (Prohibition and Regulation) Act, Act No. 61 (1986) (India), available at http://labour.gov.in/cwl/ChildLabour.htm (click on the “Child Labour (Prohibition & Regulation) Act” hyperlink). The Constitution of India provides that “no child below the age of fourteen years shall be employed to work in any factory or mine or engaged in any other hazardous employment.” INDIA CONST. art. 24. See also Dasgupta, supra note 39, at 1304–07 (examining the laws of India pertaining to child labor).


64. This decrease is a result of a misbalance between the population birth and death rates. This problem is sometimes referred to as the “lost generation of the 1990s.” A.G. Gliskov et al., PRAVA I OBJAZANNOSTI NESOVERŠENNOLETNIH (KOMMENTARI K ZAKONODATELSKIM STVOM) [RIGHTS AND DUTIES OF MINORS (COMMENTARY ON THE LEGISLATURE ON THE RIGHTS OF MINORS AND PROTECTION THEREOF)] 8–9 (2007).


66. Three exceptions to this rule are (1) employment of a child fifteen years or older who has graduated from or left in accordance with the federal law a basic general (secondary) educational establishment, (2) light work of a fourteen-year-old, not harmful to the child’s health and education process, with the consent of one parent (guardian or custodian) and the patronage body, outside of school hours, and (3) participation in the creation and/or performance of art works, without any harm to the child’s health and moral development, in movie, theatre, concert and circus organizations, with the consent of one parent (guardian or custodian) and the patronage body. Trudovoi Kodeks [TK] [Labor Code] art. 63 (Russ.), available at http://www.ilo.org/dyn/natlex/docs/WEBTEXT/60535/
days of paid vacation to workers under eighteen\textsuperscript{67} and an annual medical examination at the employer’s expense.\textsuperscript{68} The City of Moscow responded on the local government level by mandating employers with more than a hundred employees to set a four percent minimum quota for orphans under twenty-three, adolescents under eighteen, and the disabled.\textsuperscript{69} As individual States and local governments may seem better positioned in designing specific policies with respect to child labor, it is important to address why child labor is also regulated internationally.

C. Regulating Child Labor on the International Level

Parallel with the development of domestic child labor laws, the idea of international regulation of child labor emerged, and it was supported by regulatory, economic, and humanitarian arguments.\textsuperscript{70} Less labor regulation in one country may be a factor in attracting employers from other parts of the world,\textsuperscript{71} which, consequently, disadvantages workers in countries with tougher labor laws, such as developed countries.\textsuperscript{72} Labor regulation on the international level curbs such attempts to gain a competitive edge by sacrificing labor protections.\textsuperscript{73} As for the economic aspect of international child labor regulation, poverty is a significant cause


\textsuperscript{68} Trudovoi Kodeks [TK] [Labor Code], supra note 66, art. 267 (“Employees under [eighteen] years old are granted an annual paid leave of [thirty-one] calendar days at any time convenient to them.”).


\textsuperscript{70} Valticos, \textit{supra} note 27, at 17–18.


\textsuperscript{73} Doumbia-Henry & Gravel, \textit{supra} note 72, at 189; Kolben, \textit{supra} note 71, at 206–07.
and, at the same time, a consequence of child labor. In developing countries, where child labor is prevalent, this creates a vicious cycle, and so international regulation of child labor may help to break this cycle. Moreover, labor rights (which in the United States are often referred to as “workers’ rights”) involve human rights, such as the right to be free from exploitation. These arguments have prompted the gradual development of international child labor regulation, as reflected in the conventions of the ILO.

II. CHILD LABOR STANDARDS IN THE ILO CONVENTIONS

The ILO is an international body that develops labor standards through adoption of conventions and recommendations and engages govern-

74. Browne et al., supra note 44, at 26–27. See also Worst Forms of Child Labor Convention, supra note 28, pmbl. (stating that “child labor is to a great extent caused by poverty”).

75. Agarwal, supra note 45, at 665. Sub-Saharan Africa has the highest percentage of economically active children (twenty-six percent), followed by the Asian-Pacific region (less than twenty percent), and Latin America and the Caribbean (five percent). ILO, Facts on Child Labour 2006, supra note 30.


79. Universal Declaration of Human Rights, supra note 78, at 72.

80. The ILO conventions have the force of treaties and bind the States that ratify such conventions. The ILO recommendations are nonbinding policy guidelines. Joyce, supra note 25, at 26; TSOGAS, supra note 63, at 43–44.
ments, employers, and workers in the standard-setting process in a model known as the “tripartite structure.” Prior to 1973, the ILO generated standards for individual economic sectors, such as industry or agriculture, and focused on “child welfare” rather than child labor abolition. The 1973 Minimum Age Convention No. 138, which is currently in force, was the first “umbrella” convention that covered all economic sectors and identified the goal of child labor abolition. The United States has not ratified this Convention. The Convention, however, provides a framework for analyzing the 1999 Worst Forms of Child Labor Convention, which the United States has ratified.


82. See, e.g., ILO Convention (No. 59) Fixing the Minimum Age for Admission of Children to Industrial Employment, June 22, 1937, 40 U.N.T.S. 217; ILO Convention (No. 10) Concerning the Age for Admission of Children to Employment in Agriculture, Nov. 16, 1921, 38 U.N.T.S. 143; ILO Convention (No. 6) Concerning the Night Work of Young Persons Employed in Industry, Nov. 28, 1919, 38 U.N.T.S. 93; ILO Convention (No. 5) Fixing the Minimum Age for Admission of Children to Industrial Employment, Nov. 28, 1919, 38 L.N.T.S. 81.


87. Minimum Age Convention, supra note 84, pmbl., art. 1.

88. Id. pmbl., art. 10.

89. ILOLEX Database of Int’l Labour Standards, supra note 85.

A. The Framework of the Minimum Age Convention No. 138

The 1973 Minimum Age Convention No. 138 distinguishes child labor from other economic activities of children based on the child’s age and the work setting. Children under eighteen years old generally may not engage in work “which by its nature or the circumstances in which it is carried out is likely to jeopardize the health, safety or morals of young persons.” As Recommendation No. 146 accompanying the Convention provides, the determination regarding the types of work to which this limitation will apply should take into consideration relevant international standards, such as those pertaining to the use of dangerous substances and processes. In contrast, States may permit adolescents between thirteen and fifteen years of age to perform “light work” defined as work that is “not likely to be harmful to their health or development” and does not prejudice children’s education or vocational training. This correlation between the child’s age and the type of work created a new framework for defining child labor across economic sectors.

Despite this progress in defining child labor, the Convention failed to attract a sufficient number of ratifications at the time of its adoption, especially among the States where child labor was common, such as India, Indonesia, and Pakistan. Developing countries, contending with “ex-

91. Under the Minimum Age Convention, States may, however, upon consultation with the concerned organizations of employers and workers, authorize employment or work of persons from the age of sixteen, “on condition that the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity.” Minimum Age Convention, supra note 84, art. 3(3).
92. Id. art. 3(1).
94. Minimum Age Convention, supra note 84, art. 7(1).
95. Id. art. 7(1)(a).
96. Id. art. 7(1)(b).
plosive population growth, endemic poverty, and lack of adequate infrastructure,"\textsuperscript{98} found the Convention insufficiently flexible, despite its “flexibility clauses,”\textsuperscript{99} because the Convention failed to identify the immediate priorities and a methodology for achieving the goal of child labor abolition.\textsuperscript{100} As for developed countries, the Convention’s presumption that the work of children under thirteen is impermissible under any circumstances contradicted the preference of such countries to leave the part-time work of youth, such as morning newspaper delivery by a twelve-year-old, in the realm of parental control and public opinion rather than regulation by law.\textsuperscript{101} Thus, the Minimum Age Convention No. 138 provided a new framework for analyzing child labor, but failed to achieve international consensus on the issue.

\textbf{B. The Worst Forms of Child Labor Convention: Reaching a Consensus}

In the 1990s, the ILO undertook a “strategic shift”\textsuperscript{102} in its policy on child labor and identified the elimination of the worst forms of child labor as a priority. The ILO moved from traditional labor issues, such as the regulation of work conditions, to criminal law areas, such as child trafficking and the economic exploitation of children through prostitution and military recruitment.\textsuperscript{103} This approach culminated in the 1999 Worst Forms of Child Labor Convention, a product of the realization that immediate steps needed to be taken to abolish intolerable forms of child labor.\textsuperscript{104} One hundred and sixty-five countries, including the United States, have ratified this Convention.\textsuperscript{105}

\textsuperscript{98} Creighton, supra note 47, at 388.
\textsuperscript{99} Id. at 391. Under the Minimum Age Convention, in certain circumstances, States may exclude limited categories of work from the application of the Convention, and developing countries, in particular, may set the minimum age at fourteen years. In addition, the Convention does not apply to certain types of work performed as part of children’s education or training. Minimum Age Convention, supra note 84, art. 2(4), 4, 5(3), 6.
\textsuperscript{100} Creighton, supra note 47, at 390–92.
\textsuperscript{101} Id. 386–88.
\textsuperscript{102} Smolin, supra note 97, at 942.
\textsuperscript{103} See Worst Forms of Child Labor Convention, supra note 28, pmbl., art. 3(a)–(c) (recognizing “the need to adopt new instruments for the prohibition and elimination of the worst forms of child labour,” such as trafficking and forced or compulsory military recruitment of children).
\textsuperscript{105} ILOLEX Database of Int’l Labour Standards, supra note 85.
The Convention applies to all persons under eighteen years of age and focuses on the abolition of two categories of child labor: the “unconditional worst forms of child labor” and “hazardous work.” The unconditional worst forms of child labor include “all forms of slavery or practices similar to slavery,” debt bondage, and the use of children in various illicit activities. These forms of labor are prohibited unconditionally because improving their conditions would not justify such practices. Similarly to the Minimum Age Convention No. 138, hazardous work encompasses “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.” The Worst Forms of Child Labor Convention refers to a list of considerations for identifying “hazardous work” as set forth in ILO Recommendation No. 190. These considerations include, without limitation, exposure to dangerous machinery and substances damaging to health. Because of its focus on the intolerable forms of child labor, the

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106. Worst Forms of Child Labor Convention, supra note 28, art. 2.
107. The ILO Worst Forms of Child Labour Recommendation refers to the forms of child labor prohibited under Article 3(d) of the Convention as “hazardous work.” ILO Worst Forms of Child Labour Recommendation (No. 190) art. 3, June 17, 1999, available at http://www.unhcr.org/home/RSDLEGAL/3ddb6ef34.pdf. Commentators use the term “unconditional forms worst forms of child labor” to refer to the practices identified in Article 3(a)–(c) of the Convention. See, e.g., Noguchi, supra note 104, at 358.
108. The unconditional forms of child labor comprise the following:

(a) all forms of slavery or practices similar to slavery, such as the sale and trafficking of children, debt bondage and servitude and forced or compulsory labour, including forced or compulsory recruitment of children for use in armed conflict; (b) the use, procuring or offering of a child for prostitution, for the production of pornography or for pornographic performances; (c) the use, procuring or offering of a child for illicit activities, in particular for the production and trafficking of drugs as defined in the relevant international treaties.

Worst Forms of Child Labor Convention, supra note 28, art. 3(a)–(c).
110. The Worst Forms of Child Labor Convention replaced the word “jeopardize” in the definition of “hazardous work” in the Minimum Age Convention with the word “harm”: “work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children.” Compare Worst Forms of Child Labor Convention, supra note 28, art. 3(d) (emphasis added), with Minimum Age Convention, supra note 84, art. 3(1).
111. Worst Forms of Child Labor Convention, supra note 28, art. 4(1).
112. ILO Worst Forms of Child Labour Recommendation (No. 190), supra note 110, art. 3.
113. Other relevant considerations are “work which exposes children to physical, psychological or sexual abuse”; “work underground, under water, at dangerous heights or in confined spaces”; “work with dangerous machinery, equipment and tools, or which involves the manual handling or transport of heavy loads”; “work in an unhealthy environ-
Convention has limited its scope, but achieved greater acceptance than the Minimum Age Convention No. 138.114

Unlike its predecessor, the Worst Forms of Child Labor Convention provides guidance on achieving its goals and mandates a proactive approach to the child labor problem.115 The Convention stresses the need to “reach out to children at special risk”116 and prevent children from engaging in the worst forms of child labor.117 With respect to children removed from work, the Convention emphasizes the importance of measures for “rehabilitation and social integration”118 and access to free basic education and vocational training.119 Thus, the Convention makes it clear that not only should children be protected from certain categories of work, children should also be protected from the need to work.

Empirical data supports this approach and shows that child labor abolition requires proactive measures that address the root causes of child labor. For example, the *bolsa escola* program in Brazil provides a monthly minimum salary to poor families whose children stay in school.120 This eliminates the need for the children to join the workforce too early and prevents them from dropping out of school, which has made the program a success.121 Remedial and educational programs such as *bolsa escola* show that the solution to the child labor problem lies in “capacity building”122 measures—steps aimed at enhancing the economy, educational system, and civic participation in a community.123
III. HUMAN RIGHTS OF ECONOMICALLY ACTIVE CHILDREN

The Convention on the Rights of the Child, which memorializes the principles of children’s human rights, identifies two aspects of children’s economic activities. On the one hand, children have the right to be free from exploitation and involvement in hazardous work, as well as to enjoy rest and leisure. On the other hand, children have the rights to survival and an adequate standard of living, which are implicated in situations where children work in order to support themselves and their families.

The interaction between these two aspects of children’s economic activities can be illustrated by the public debate that surrounded the 1992 Child Labor Deterrence Act proposed in the U.S. Congress. This bill sought to introduce sanctions with respect to imported products made with child labor and, thus, advance children’s right to be free from exploitation. In response to this bill, Bangladeshi local activists asserted that dismissing children from the garment industry would mean throwing them into the streets without means of subsistence and effectively forcing


126. The Convention on the Rights of the Child provides that States “recognize the right of the child to be protected from economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child’s education, or to be harmful to the child’s health or physical, mental, spiritual, moral or social development.” Convention on the Rights of the Child, supra note 29, art. 32.

127. Id. art. 31.

128. Id. art. 6(2).

129. Id. art. 27.


131. Id. § 5.
the children into more hazardous occupations, which would jeopardize the children’s rights to survival and an adequate standard of living. In fact, between 1992 and 1995, Bangladeshi manufacturers dismissed tens of thousands of children who subsequently became rickshaw pullers, brick carriers, rag-pickers, and prostitutes. Some 40,000 children dismissed from the factories were never seen again. This example demonstrates that children’s right to be free from exploitation and their right to survival should be balanced.

As the right to survival is a necessary condition for the enjoyment of other rights, one may suggest that the right to survival should trump other rights. But this logic fails in situations involving hazardous work, for example, deep sea fishing. In the Philippines, a country of seven thousand islands, children work in pa-aling, or deep sea fishing, where, carrying hoses attached to a surface air compressor, children dive approximately thirty to fifty feet without protective gear and chase fish into the nets. This exposes children to ear injuries, shark attacks, and drowning. The example of deep-sea fishing shows that the very economic opportunity that enables a child to earn a living and survive may, at the same time, expose the child to occupational hazards, and thus, threaten the child’s survival. The difficulty in balancing the two rights may be paralyzing for the employer: regardless of whether the employer dismisses the child from work or allows the child to work, the employer would in effect take away the child’s rights.

The “best interests” principle helps to resolve this tension. This principle, as codified in the Convention on the Rights of the Child, provides that, in all actions involving the child, the “best interests of the child shall be a primary consideration.” The drafters’ use of the indefinite article in the term “a primary consideration” shows that the child’s inter-

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133. SEABROOK, supra note 49, 64–65; WORLD VISION UK, supra note 36, at 7.
134. Hertel, supra note 132, at 270. See also WORLD VISION UK, supra note 36, at 7 (discussing the consequences of dismissing children from work).
136. Id.
ests are not an overriding factor, but the choice of the word “consideration” (as opposed to “element” or “factor”) demonstrates that the child’s interests “must actually be considered.” As such, this principle accommodates various ideological, social, and cultural approaches in a universal norm and demands the consideration of the child’s unique circumstances.

The concept of children’s participatory rights may aid in ascertaining such circumstances. The Convention on the Rights of the Child provides for a bundle of participatory rights, namely, the freedom of expression, conscience, and assembly. In essence, the concept of participatory rights or “participation” requires that, depending on the child’s maturity, the child should participate in decisions about his or her life and have the opportunity to be “present or consulted.” As children have been “the most photographed and the least listened to members of society,” the Convention’s codification of this broad range of participatory rights is a step forward in the fulfillment of children’s rights.

Participation empowers the child by including the child in the decision-making process concerning his or her life, which the following examples illustrate. A nongovernmental organization (“NGO”), Save the Children UK, which conducted evaluation missions in Honduras, Bangladesh, and Burkina Faso, engaged children in data collection and found that children-interviewers can be “particularly effective as children may relate to

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139. Id. at 13.
140. Id. at 16.
142. Convention on the Rights of the Child, supra note 29, art. 12 (providing for the right of the child “who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child”).
each other in a more open way.” Another NGO, Undugu Society, organized group meetings for street children in Mathare Valley, a slum in Nairobi, Kenya, who supported themselves by collecting plastic, scrap metal, and paper bags around the city. In the course of these meetings, children learned how to read a weighing scale and calculate the price of what they were selling in order to avoid being cheated by the street buyers. The children ultimately decided to sell scrap metal directly to the factory where the price would be fixed, making cheating less likely. These examples demonstrate that working children find ways to subsist in a dangerous world on a daily basis, and therefore, they can help in identifying realistic solutions to the child labor problem.

IV. CHILD LABOR STANDARDS IN FREE TRADE AGREEMENTS

In addition to the ILO conventions and the Convention on the Rights of the Child, several U.S. FTAs set forth child labor standards. Generally, parties entering into an FTA agree to eliminate tariffs and other barriers to trade in goods among themselves, facilitating easier access to each other’s markets. This integration of regional trade regimes may reveal inequalities in labor conditions in such regimes, which some FTAs address by imposing labor standards, also referred to as “social clauses.” Alternatively, signatories to an FTA may choose to enter into a side agreement with respect to labor standards, such as the North American Agreement on Labor Cooperation (“NAALC”). NAALC was the first labor accord to supplement an FTA, namely, the 1992 North American Free Trade Agreement between Canada, Mexico, and the United States (“NAFTA”).

147. HART, supra note 144, at 25.
148. Id.
149. Id.
151. TSOGAS, supra note 63, at 19–20. See also Doumbia-Henry & Gravel, supra note 72, at 186, 189 (discussing enforcement of labor standards through trade agreements).
153. LESLIE ALAN GLICK, UNDERSTANDING THE NORTH AMERICAN FREE TRADE AGREEMENT 121 (2d ed. 1994).
The inclusion of labor standards in FTAs opens the possibility of using trade sanctions as a mechanism for enforcing these standards—an avenue unavailable under the ILO conventions. Under the ILO Constitution, the ILO may recommend “such action as it may deem wise and expedient to secure compliance,” but the ILO has never imposed and, under the current version of the ILO Constitution, does not have express authority to impose, economic sanctions. Currently, the United States is a party to over a dozen bilateral and regional FTAs. These FTAs differ in their approaches to the use of trade sanctions in enforcing child labor standards, as NAALC, the 2000 U.S.-Jordan FTA, and the 2004 Central American-Dominican Republic-U.S. FTA (“CAFTA-DR”) illustrate.

A. NAALC: The First Labor Accord to Accompany an FTA

NAALC was intended to address the concern of U.S. labor unions about the potential accelerated migration of U.S. jobs to Mexico, where the relatively high existing labor standards were inadequately enforced. This accord, however, does not establish new standards, and its

155. See Andrew T. Guzman, Trade Labor, Legitimacy, 91 CAL. L. REV. 885, 886–87 (2003) (observing that “trade sanctions may be the only effective way of establishing core labor standards”).
156. Constitution of the International Labour Organisation, supra note 81, art. 33.
effect in terms of improvement in the labor conditions has been limited.  

NAALC neither incorporates international child labor standards nor introduces minimum standards for the signatories’ domestic laws. Instead, the accord affirms the parties’ rights to establish their own labor laws: each party has to “ensure” that such laws provide for “high standards” and “strive to improve” them. NAALC identifies eleven “guiding principles” that the signatories agree to promote, including “labor protections for children and young persons.” This principle requires “the establishment of restrictions on the employment of children and young persons that may vary taking into consideration relevant factors likely to jeopardize the full physical, mental and moral development of young persons, including schooling and safety requirements.” Neither in this pronouncement nor elsewhere in the agreement does NAALC set child labor abolition as a goal or specify the minimum age for employment of children.

The enforcement mechanisms for these relatively weak standards are toothless. NAALC expressly denies any party’s rights to “undertake law enforcement activities” on another party’s territory and any right to private actions in domestic legal systems. The NAALC signatories agree to advance the guiding principles through collaboration, cooperation, and information exchange. For these purposes, NAALC creates several procedures and bodies for dispute resolution through consultations and arbitration, including the Commission for Labor Cooperation. Under these procedures, however, it may take a dispute over three

164. See NAALC, supra note 152; Hagen, supra note 162, at 925; Manley & Lauredo, supra note 163, at 104; Smith, supra note 162, at 79, 86.
165. NAALC, supra note 152, art. 2.
166. Id.
167. Id. annex 1, pmbl.
168. Id. annex 1, para. 5.
169. Id.
170. See NAALC, supra note 152.
171. Hagen, supra note 162, at 927–30; Manley & Lauredo, supra note 163, at 105; Spracker & Brown, supra note 162, at 365–66.
172. NAALC, supra note 152, art. 42.
173. Id. art. 43.
174. GLICK, supra note 153, at 121.
175. NAALC, supra note 152, arts. 27–41.
176. Id. art. 8.
years to reach the stage where sanctions may be considered, and even in that case, remedies in the form of monetary penalties and suspension of trade benefits under NAFTA are limited to “persistent patterns” of non-enforcement.

Meanwhile, child labor in Mexico continues to be a problem. Between 1999 and 2005, sixteen percent of children ages five to fourteen in Mexico were engaged in child labor. The majority of these children worked for small companies, in agriculture and construction, where labor enforcement is inadequate. A recent incident involving nine-year-old David Salgado Aranda, as reported by the U.N. Children’s Fund, supports this contention. David migrated with his parents to Sinaloa, northern Mexico, looking for seasonal work, similar to some 300,000 other migrant workers’ children ages six and older. While David was working picking tomatoes, he was run over by a tractor and killed. David was too young to have been working on a commercial plantation. As these reports and statistics illustrate, NAALC did not have the anticipated positive effect on labor conditions in Mexico. This instrument, however, raised the issue of the protection of working children, which was a step toward solving the child labor problem.

B. The High Watermark of Child Labor Standards: The U.S.-Jordan FTA

The subsequently concluded U.S.-Jordan FTA provides more stringent labor protections than NAALC. The U.S.-Jordan FTA reaffirms the signatories’ obligations as ILO members, incorporates internationally recognized minimum age standards, and contains a “no relaxation
clause,” under which the parties may not weaken existing domestic labor standards. The agreement enforces compliance with labor provisions through trade sanctions. Due to its high standards and direct enforcement through trade sanctions, the U.S.-Jordan FTA has been characterized as the high watermark in FTA labor protections. The U.N. Committee on the Rights of the Child has praised the measures for eliminating child labor in Jordan, including the enhancement of domestic child labor laws in Jordan and establishment of a national database on child labor. This FTA indicates that where the ILO, lacking the ability to impose economic sanctions, fails to enforce international labor standards, trade agreements could potentially take on this role.

C. CAFTA-DR as a “Missed Opportunity” to Improve Labor Conditions

CAFTA-DR stands out among U.S. FTAs because it has created the second-largest free trade area for U.S. exports in Latin America. In terms of labor protections, CAFTA-DR is similar to NAALC in that it only addresses the parties’ enforcement of their own “labor laws,” which CAFTA-DR defines to include the parties’ laws “directly related” to the international minimum age requirements and the elimination of the worst forms of child labor. CAFTA-DR subjects labor claims to dispute resolution procedures separate from those for commercial disputes.
and does not authorize trade sanctions for labor violations.\textsuperscript{198} Instead, CAFTA-DR contains a provision for “monetary assessment” payable to a fund that CAFTA-DR creates,\textsuperscript{199} which means that such assessment is not payable to the aggrieved party.\textsuperscript{200} Additionally, CAFTA-DR caps such monetary assessment at fifteen million U.S. dollars per year.\textsuperscript{201} For its failure to establish and strictly enforce labor standards, this FTA has been criticized in the United States as inadequate.\textsuperscript{202}

A representative of the National Labor Committee, a U.S. NGO whose mission is to help “defend the human rights of workers in the global economy,”\textsuperscript{203} recently visited the Legumex factory in Guatemala, a signatory to CAFTA-DR.\textsuperscript{204} The Legumex factory processes fruits and vegetables for export to the United States.\textsuperscript{205} Through reports of the National Labor Committee, the international community learned that at the factory, thirteen-year-old children were working twelve-hour shifts, wearing only t-shirts in an area surrounded by food freezers.\textsuperscript{206} A child worker cutting vegetables for the U.S. consumer has to cut every head of broccoli into ninety-seven pieces in sixty-four seconds, thus, making one cut every seven-tenths of a second throughout the shift.\textsuperscript{207} For the duration of their twelve-hour shifts, children cutting watermelons stand in an inch of watermelon juice dripping from the cutting tables, children’s wrists swollen and their feet cracked and bleeding.\textsuperscript{208} These findings support the contention that CAFTA-DR was “a missed opportunity”\textsuperscript{209} in improving labor conditions in CAFTA-DR countries.
To conclude, U.S. FTAs that contain provisions concerning working children generally do not set new child labor standards. These agreements, however, encourage the signatories to comply with existing standards and raise awareness regarding child labor issues. Some FTAs also enforce child labor standards through trade sanctions.

V. CORPORATE COMPLIANCE WITH INTERNATIONAL CHILD LABOR STANDARDS

As international child labor standards are evolving, TNCs seeking to manage their litigation and reputational risks should incorporate these standards into their compliance programs. The purpose of a compliance program is to ensure that individual and collective behavior within the corporation follows applicable laws. In a compliance program, the focus is on development of specific business processes and internal mechanisms that proactively prevent and avoid violations of law.

Compliance programs should be distinguished from codes of conduct and other ethical business initiatives. Numerous TNCs, including Bridgestone Corporation and Gap Inc., have adopted codes of conduct—"statements of company policy"—announcing the company’s commitment to ethical business conduct. Similarly to codes of conduct, various “labeling” initiatives certify manufacturers and producers that comply with child labor standards. For example, the international NGO RugMark Foundation certifies child-labor compliant carpet manufacturers in South Asia. These ethical business initiatives contribute to the goal of child labor abolition, but differ from compliance programs in that ethical business initiatives are voluntary and primarily designed as a marketing tool.

211. Id. at 47–48, 79–81, 104.
tool. In contrast, compliance programs focus on internal policies and procedures guiding TNCs’ employees and suppliers and reflecting specific legal standards.

To create a compliance program, TNCs first need to identify the applicable child labor standards and establish measures implementing these standards in TNCs’ practices and supplier reviews. As the Gap Inc. incident demonstrates, TNCs also need to develop procedures governing their response to child labor incidents.

A. Identifying and Implementing Applicable Standards

As the analysis of treaties and conventions pertaining to child labor shows, three categories of child labor violate international law: the unconditional worst forms of child labor, “hazardous work,” and employment of children under a minimum age (which may be set between fifteen and twelve, depending on the States’ international obligations and domestic regulation). Based on the definitions of these categories, the bonded child labor allegedly involved in the Gap Inc. incident should fall under the realm of the unconditional worst forms of child labor. The engagement of children in the application of pesticides and fertilizers without protective equipment, as alleged in Bridgestone, may violate international law as a practice exposing children to hazardous substances. This shows that despite the fact that international child labor standards set the outer limits of permissible labor practices involving youth, TNCs may confront situations where the international standards are violated.

To comply with these standards, TNCs should implement more stringent screening and monitoring measures. The initial supplier screening should extend beyond the inspection of the suppliers’ records and premises. Record review or a single visit to the supplier’s factory would not reveal, for instance, that children at the factory use their relatives’ employee numbers to appear on the books as adult workers or that the sup-

217. See TSOGAS, supra note 63, at 11 (“[T]he ‘ethical consumer,’ sensitized to human rights and environmental issues, sees shopping as a complement to (or substitute for) other forms of direct social activity.”).

218. McDougall, supra note 13.


220. Worst Forms of Child Labor Convention, supra note 28, art. 3.

221. Id. art. 3(d); Minimum Age Convention, supra note 84, art. 3; ILO Worst Forms of Child Labour Recommendation (No. 190), supra note 110; ILO Minimum Age Recommendation (No. 146), supra note 95.

222. Minimum Age Convention, supra note 84, arts. 2(3), 4(2), 5(1), 7. See also ILC, A Future Without Child Labor, supra note 86, at 9–10.

plier may keep a second set of records, which easily “bamboozle” TNCs. To avoid this, TNCs can use accounting and social monitoring firms experienced in evaluating supply-chain risk and compliance with child labor standards. The contract with the supplier should address this concern and include the supplier’s ongoing certification of compliance with international and local child labor laws and a provision giving TNCs’ representatives, such as social monitoring firms, the right to inspect the supplier’s premises and records at any time without prior notice to the supplier.

TNCs or their representatives should conduct follow-up visits to the supplier’s factory. To that end, TNCs should maintain a current list of all production sites of its suppliers. For instance, the policy of IKEA, an international furniture and home products franchise, requires suppliers to disclose the locations of all production sites. This policy should extend to the suppliers’ subcontractors as well. In order to ensure the accuracy of information on child labor compliance that the suppliers provide to the TNCs’ headquarters, TNCs may engage local unions in the monitoring process. TNCs may arrange training sessions for the suppliers’ workers to increase their awareness with respect to child labor issues. To improve incident reporting, TNCs may establish a hotline or other anonymous reporting system, such as an independent worker survey. These measures will ensure that the TNC’s management is aware of the TNC’s and its suppliers’ labor practices and can timely respond to any potential violations.

225. See, e.g., Cal Safety Compliance Corporation, http://www.cscc-online.com (last visited Nov. 10, 2008) (providing that “CSCC is dedicated to helping our clients build secure and socially responsible relationships with their supply chain partners”).
226. See HUMAN RIGHTS WATCH, SMALL CHANGE: BONDED CHILD LABOR IN INDIA’S SILK INDUSTRY (2003), http://www.hrw.org/reports/2003/india/ (providing recommendations to the international community with respect to child labor policies).
228. IKEA SERVICES AB, IKEA’S POSITION ON CHILD LABOR (2003), 1, http://www.ikea.com/ms/en_AU/about_ikea_new/about_read_our_materials/ikea_position_child_labor.pdf (“The supplier must agree to provide lists of all places of production.”).
B. Responding to Child Labor Incidents

When a TNC discovers child labor incidents in its own or its suppliers’ labor practices, the TNC’s remedial and follow-up measures should take into consideration children’s rights, such as the right to be free from exploitation\textsuperscript{231} and the right to survival and an adequate standard of living.\textsuperscript{232} To balance these rights, the TNC should engage the affected children in a discussion about possible solutions to the problem\textsuperscript{233} and assure that the best interests of the child are given a primary consideration.\textsuperscript{234} Following this approach, TNCs may find that an instant severing of ties with a noncompliant supplier or immediate dismissal of children from the workplace without creation of any alternatives to work may not, on balance, benefit the children.

While under certain circumstances, withdrawal and dismissal may be a justified measure, it may not constitute a sound policy if applied alone and without a case-by-case determination. Admittedly, withdrawal from a relationship with a noncompliant supplier or removal of children from work may be perceived as mitigating the TNC’s potential liability and deterring future noncompliance on the part of other suppliers. According to Gap Inc., for example, in 2006, it severed ties with twenty-three noncompliant factories.\textsuperscript{235} TNCs, however, are increasingly recognizing the limitations of this approach.

The solution to the child labor problem should take into consideration the best interests of the child and focus on creating meaningful alternatives for children dismissed from work. The apparel and accessories retailer H\&M Hennes & Mauritz AB (“H\&M”),\textsuperscript{236} for instance, reports that when it discovers “underage workers” at its supplier’s site, H\&M, in cooperation with the supplier, contacts the family of the affected child and seeks a solution in the child’s best interests.\textsuperscript{237} One such solution has been allowing the child to continue education and paying wages to the child’s family during the study period until the child reaches the appro-

\textsuperscript{231}. Convention on the Rights of the Child, \textit{supra} note 29, art. 19.
\textsuperscript{232}. \textit{Id.} art. 6(2).
\textsuperscript{233}. \textit{See supra} note 141 and accompanying text.
\textsuperscript{234}. \textit{See supra} note 142 and accompanying text.
priate age. Similarly, to address the child labor issue at its suppliers’ plants, Levi Strauss & Co., a multinational apparel company, made a decision to pay for the children’s education and school supplies until they reach a minimum age when they would be offered a job at the plant. These capacity-building measures, providing resources and creating opportunities for the implementation of child labor standards in the local communities, serve the goals of child labor abolition more effectively than mere dismissal of child laborers from work.

Development of capacity-building measures presents a fertile ground for creative solutions. In rural areas in developing countries, for instance, children often have to walk long distances to get to school, and simply providing basic transportation may increase the chances that these children will continue attending school, as opposed to joining the workforce too early. In identifying these solutions, TNCs may partner up with NGOs that have experience in capacity building. Starbucks Corporation, an international coffee retailer and coffee-house chain, for example, partnered with Save the Children USA, an international relief and development organization, in bringing bilingual education to Mayan communities in Guatemala, which will expand the employment prospects for children in these communities.

Although these measures increase the TNCs’ immediate cost of doing business, such cost is unlikely to be prohibitive. Generally, compliance programs incur costs, but are necessary for the business in order to avoid litigation, regulatory, and reputational risks. Additionally, by operating or otherwise doing business in jurisdictions with cheaper labor (where incidents of child labor are more likely) TNCs already reduce their labor costs and reap other benefits of globalization, a process that “has generated vast fortunes” for TNCs. The cost-benefit analysis of the measures addressing the child labor problem should take into account this relative reduction in overall costs, as well as other factors related to economic disparities between developed and developing countries such as the relative cost of living. The National Labor Committee estimates that an extra payment of twenty-five cents per garment paid by U.S. retailers to Ban-

238. *Id.*
gladeshi vendors would provide the Bangladeshi economy with assistance eight times exceeding the current U.S. aid, and thus, create new economic opportunities. In return, capacity-building measures will have a positive long-term effect on these communities, which will benefit the TNCs by developing the future workforce.

CONCLUSION

TNCs are increasingly becoming aware of the litigation and reputational risks posed by the use of child labor in TNCs’ and their suppliers’ international operations. There are hardly any “quick fixes” in this area because child labor issues are rooted in social and economic problems such as the lack of resources and opportunities. In developing countries, children have to work to support themselves and their families, and thus, child labor is a problem of development rather than merely an issue of corporate misfeasance. This understanding is important for instilling the need for TNCs to take measures that anticipate and address potential child labor incidents. Using the guidance provided in treaties pertaining to working youth, TNCs should approach child labor proactively, resist distanci

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WAIVERS OF INDIVIDUAL CLAIMS VIA TREATY: CHINESE SLAVE LABORERS, JAPANESE JURISPRUDENCE, AND THE SOLUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS

INTRODUCTION

With controversial and limited exceptions, international law provides sovereign governments with the ability to waive the claims of their citizens that arise out of war or international conflict. Nations often dispense with individual claims for war reparations or compensation by means of peace treaties with other nations, which establish the presumption of settling all outstanding issues relating to a war. The reasons for this are logical and imposing: governments require the flexibility to establish peace and rebuild societies following eras of warfare and turmoil, and the relinquishment of all war claims is often essential to the attainment of such goals. If war-torn and dismantled postwar

1. Iwanowa v. Ford Motor Co., 67 F. Supp. 2d 424, 468 (D. N.J. 1999) (“It is well-established that countries can waive the war-related claims of their citizens.”); ARNOLD DUNCAN MCNAIR, LEGAL EFFECTS OF WAR 391 (3d ed. 1948) (“[I]t appears that international law treats a state as being invested for international purposes with complete power to affect by treaty the private rights of its nationals, whether by disposing of their property, surrendering their claims, changing their nationality, or otherwise.”).

2. Id. See also Ware v. Hylton, 3 U.S. 199, 230 (1796) (“I apprehend that the treaty of peace abolishes the subject of the war, and that after peace is concluded, neither the matter in dispute, nor the conduct of either party, during the war, can ever be revived, or brought into contest again. All violations, injuries, or damages sustained by the government, or people of either, during the war, are buried in oblivion; and all those things are implied by the very treaty of peace; and therefore not necessary to be expressed.”).

3. See Dames & Moore v. Regan, 453 U.S. 654, 679 (1981) (“Not infrequently in affairs between nations, outstanding claims by nationals of one country against the government of another country are ‘sources of friction’ between the two sovereigns. To resolve these difficulties, nations have often entered into agreements settling the claims of their respective nationals. As one treatise writer puts it, international agreements settling claims by nationals of one state against the government of another ‘are established international practice reflecting traditional international theory.’”). See also Andrea Gattini, To What Extent are State Immunity and Non-Justiciability Major Hurdles to Individuals’ Claims for War Damages, 1 J. Int’l. CRIM. JUST. 348, 365 (2003) (“[T]aking into account the main objective of [peace treaties] which is to re-establish a state of peace and, if possible, friendly relations between states in the interest of their communities, it seems inconceivable that any individual could disturb or even disrupt the whole process of peacemaking for pecuniary satisfaction of a purported right, whose foundation in interna-
nations expend their limited resources and are substantially occupied with defending themselves from numerous lawsuits, it would be very difficult for such nations to ever reestablish social, economic, and political security, much less attain a state wherein they could flourish. However, with the increasing emphasis on human rights in international law, scholars and jurists are beginning to rethink the premise behind allowing governments to waive these individual claims, and serious concerns have been expressed as to the premise’s legality and fairness, especially in cases of grave human rights violations or breaches of *jus cogens* norms. In balancing the legitimate concerns of governments in waiving claims against an individual’s right to bring suit for harms suffered, the question remains as to whether a sovereign nation’s ability to waive such claims may be infringed, particularly when the underlying harm to a plaintiff is an egregious breach of a *jus cogens* norm.

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4. See *supra* note 3 and accompanying text.
5. Regarding the rise of human rights in international law, Lord Millett explains:

   The fundamental human rights of individuals, deriving from the inherent dignity of the human person, ha[ve] become a commonplace of international law. Article 55 of the Charter of the United Nations [i]s taken to impose an obligation on all states to promote universal respect for and observance of human rights and fundamental freedoms. The trend [i]s clear. War crimes ha[ve] been replaced by crimes against humanity. The way in which a state treat[s] its own citizens within its own borders ha[s] become a matter of legitimate concern to the international community.

   *Regina v. Bow St. Metro. Stipendiary Mag., Ex Parte Pinochet Ugarte, 1 A.C. 147, 275 (1999).*

6. See Gattini, *supra* note 3, at 349 (“[I]t is necessary to somehow restrict [a government’s ability to waive its citizens’ claims], in particular through the qualification that the state’s renunciation is invalid, should it be made with regard to injury caused by a grave violation of peremptory norms.”). See also Panditaratne, *supra* note 3, at 327 (“[J]udges should articulate the varied policy considerations at stake and, in particular, remain mindful of upholding their responsibility to protect individual human rights to the extent possible. Judges should protect rights in a manner reconcilable with the text of the waiver clause, while adopting an approach consistent with judicial precedent.”).

In 2001, the European Court of Human Rights ("ECHR") struggled with the issue of whether to invalidate a peace treaty claim waiver in the case Prince Hans-Adam II of Liechtenstein v. Germany ("Liechtenstein"), in which the plaintiff, a monarch of Liechtenstein, attempted to reclaim property confiscated by the Czech Republic (part of the former Czechoslovakia) in the period following World War II ("WWII"). 8 The ECHR echoed several previous local German courts’ decisions that barred the prince’s claim based on a 1952 treaty between three of the Allied Powers and Germany9 in which Germany relinquished all claims relating to property or assets appropriated by other nations following the war.10 In determining whether the 1952 agreement had legitimately waived the plaintiff’s claims, the ECHR utilized a test, which provides that any limitation on a plaintiff’s claim—in this case, the treaty waiver—must not "restrict or reduce the access left to the individual in such a way or to such an extent that the very essence of the right [to bring the claim] is impaired."11 Furthermore, the test requires that the limitation a government imposes on a plaintiff’s claim must "pursue a legitimate aim and . . . [have] a reasonable relationship of proportionality between the means employed and the aim sought to be achieved."12 Thus, restated simply, the ECHR’s “legitimate aim” test consists of the following three elements, which, if not met by the waiving nation, require a court to deem its treaty waiver invalid: (1) the waiver must seek a legitimate aim; (2) the waiver must be reasonably proportional to that legitimate aim; and (3) the “very essence” of the claim must not be impaired by the waiver.13

On the other side of the world, this issue is deeply felt, as many WWII-era Chinese slave labor victims have been bringing claims in Japanese

807, 826 (2006) ("Legal scholars contest the legal limits of a state’s right to waive claims on the basis of treaty.").


12. Id.

13. See id. Andrea Gattini restates the elements of the ECHR’s “legitimate aim” test as follows: “[R]estrictions on access to justice are [lawful], where (a) they pursue a legitimate aim; (b) they are proportionate to the aim pursued; and (c) they do not restrict the right to the point of extinguishing it.” Andrea Gattini, A Trojan Horse for Sudeten Claims? On Some Implications of the Prince of Liechtenstein v. Germany, 13 EUR. J. INT’L L. 513, 530 (2002).
courts against the Japanese government and certain Japanese corporations since the 1990s, all in the face of a waiver of claims by the Chinese government. Defendants in these slave labor lawsuits have often succeeded in having the plaintiffs’ claims dismissed based on the Chinese government’s renunciation of war reparations expressed in a 1972 Joint Communiqué and ratified in the 1978 Treaty of Peace and Friendship between Japan and the People’s Republic of China. Courts have frequently determined that, despite the treaty waiver’s ambiguity with regard to individual claims, it nevertheless precludes them. For more than a decade, the Supreme Court of Japan failed to comment on the issue of


15. Like Timothy Webster, see supra note 14, this Note chooses to use the terminology “slave labor” as opposed to the euphemistic phrase “forced labor” (“kyōsei rōdō”) often utilized by Japanese courts when describing the activity suffered by the Chinese plaintiffs during WWII. See, e.g., Chinese Victims of Forced Labor v. Mitsui Mining, 1809 HANREI JIH Ō 111 (Fukuoka Dist. Ct., Apr. 26, 2002). The opening caption to the case reads: “[t]his case admits claims based in tort for damages by Chinese individuals forcibly taken to Japan during the Pacific War [WWII] and made to perform forced labor in coal mines (and other venues) against the coal mining firms [under which they worked during the war].” Id. at 111 (emphasis added) (author’s translation).

16. See Shin Hae Bong, The Right of War Crime Victim to Compensation Before National Court: Compensation for Victims of Wartime Atrocities: Recent Developments in Japan’s Case Law, 3 J. INT’L CRIM. JUST. 187, 190 (2005) (“In many cases, the government of Japan has successfully invoked [China’s waiver of war reparations] to insist that the matter of war reparations had already been resolved between [China and Japan] and that inter-governmental agreements preclude individuals’ claims for compensation.”).


19. See William Gao, Note, Overdue Redress: Surveying and Explaining the Shifting Japanese Jurisprudence on Victims’ Compensation Claims, 45 COLUM. J. TRANSNAT’L L. 529, 536 (2007) (“Japanese courts most commonly dismiss [war] compensation suits based on bilateral agreements between Japan and the plaintiff’s nation of origin. The rationale is that such bilateral agreements effectively resolve questions of compensation between the two nations and preclude individual claims.”).
war reparations for victims of Japanese slave labor and the treaty waiver of 1972.\footnote{William Gao notes that currently there are increasing limitations on appellate review within the Japanese legal system, which make it even more difficult for lower court decisions to obtain supreme court review. \textit{Id.} at 545–46.} However, in the landmark decision of \textit{Lü Zhigang v. Nishimatsu Construction} ("Nishimatsu") in April 2007, the Court dismissed the claims of Chinese slave laborers, reversing the decision of the Hiroshima High Court in the plaintiffs’ favor, and concluding that Chinese WWII victims are estopped from bringing claims owing to the waiver, despite its ambiguity.\footnote{\textit{Lü Zhigang v. Nishimatsu Constr.,} 1969 \textit{HANREI JIHŌ} 31 (Sup. Ct., Apr. 27, 2007), available at http://www.courts.go.jp/hanrei/pdf/20070427134258.pdf.}

Following this Introduction, Part I of this Note reviews the traditional interpretation of treaty waivers in international law and an important potential exception to the rule that continues to gain influence as international law develops and human rights become a more paramount concern. Part II discusses the Liechtenstein case and the ECHR’s legitimate aim test. Part III provides background on the Japanese slave labor situation and reviews several key Japanese decisions that have interpreted the Chinese treaty waiver, culminating with an assessment of the \textit{Nishimatsu} Japanese Supreme Court case. Part IV uses the Japanese slave labor situation as a test case for the ECHR’s legitimate aim analysis, concluding that the test tends to favor the Chinese plaintiffs and allows them to override their government’s treaty waiver. In conclusion, this Note argues that when a treaty waiver is ambiguous and its scope undefined,\footnote{\textit{Cf. Gattini, supra note 3, at 366 ("[I]t is usual for states to be extremely careful to specify the exact purport of their will, i.e. whether they intend to dispose only of their claims; of all possible claims of their citizens under domestic law; to bar access to domestic courts without disposing of the substantive right; or to waive only the exercise of diplomatic protection. The admissibility of civil actions before a domestic court must then be judged in light of the specific compact."). As Gattini suggests, clarity is essential in the adjudication of claims relating to treaty waivers, and governments are indeed cognizant of the fact, using highly specific language to express their will. Since governments require predictable rules to follow when establishing peace, this Note limits the application of the legitimate aim test only to situations where the treaty waiver is ambiguous. Thus, if the threshold question of ambiguity in a waiver provision is not met, this Note would argue that, for efficiency reasons, the test should not be applied at all. This requirement of provision clarity encourages governments to be explicitly clear as to what exactly is being waived, and allows them a framework for drafting these waivers with the confidence that the floodgates of litigation involving individual claims will not be unleashed following a war.} the legitimate aim test can serve as a viable method for courts to balance the
traditional governmental ability to waive claims against an individual’s right to bring claims.23

I. TREATY WAIVERS IN INTERNATIONAL LAW

A. General Principles of Treaty Interpretation

The 1969 Vienna Convention on the Law of Treaties (“Vienna Convention”) is generally acknowledged as the “codification of the customary international law governing treaties” and serves as binding international law even for nations that are nonsignatories.24 It provides that treaties are to be “interpreted in good faith in accordance with the ordinary meaning to be given to the terms . . . in their context and in the light of [their] object and purpose.”25 The U.S. Supreme Court reiterated this principle by affirming that, when interpreting the terms of a treaty, “clear import . . . controls” unless applying the plain meaning of the language would be incongruous with the “intent or expectations” of the parties.26 It follows that generally, like all contracts, unless the context and intent of the parties clearly dictate otherwise, the “ordinary meaning” and “clear import” of treaty provisions are to be strictly observed.27 In instances where a plain reading of the language fails to yield conclusive answers, deference should be given to the interpretations of the sovereign governments that are parties to the treaty,28 especially when both parties agree to the same interpretation.29

23. The question of whether victims of war crimes have the initial right to bring claims under international law, either under a treaty provision such as Article 3 of the Hague Convention, or under customary international law, is outside of the scope of this Note. The issues entertained herein assume that the plaintiffs discussed already have such a right; the essential question is whether a treaty waiver barring such a right may be overcome.


29. Id. at 185. Interestingly, in order to determine parties’ intent, the United States has shown more of an inclination than other countries to look outside of the plain language of treaty provisions and interpret them within the larger context of their drafting. See BYERS, supra note 24, at 46. In fact, the U.S. delegation to the Vienna Convention urged the other countries at the convention to codify this method of interpretation, but the overwhelming majority of the participants rejected it, and instead, agreed upon the “ordi-
B. Claim Waivers via Treaty

Under traditional principles of international law, sovereign nations have the power to relinquish the claims of their citizens through effecting peace treaties. The policy justifications for this are obvious: governments require the ability to efficiently orchestrate and reestablish beneficial economic and collegial relationships with other nations through mutual negotiation and compromise, particularly following an era of warfare, in order to establish overall peace, cooperation, and international concord. Accordingly, the goals of a sovereign nation are often furthered by relinquishing certain rights, including the individual rights of its citizens, in exchange for benefits that help establish the welfare of its people and security in the international community. A prime example of the traditional international rule is expressed in *Ware v. Hylton*, the first U.S. Supreme Court case pertaining to the issue. In *Ware*, which involved a British subject’s claims against an American citizen for damages that arose out of the War of Independence, Justice Chase held: “All . . . injuries or damages sustained by the government, or people of either, during the war, are buried in oblivion; and all those things are implied by the very treaty of peace, and therefore not necessary to be expressed.” *Ware* therefore illustrates that, traditionally, international law considers individual claims resulting from war-time activity to be automatically dissolved by a government’s signing of a peace treaty, there ultimately being no need for a sovereign nation to waive such claims expressly.

30. See supra notes 1–2 and accompanying text.
31. See supra note 3 and accompanying text.
32. See Dames & Moore v. Regan, 453 U.S. 654, 679 (1981) (discussing the benefits for governments in waiving the individual claims of their citizens as a means of resolving postwar discord between nations).
34. Id. at 230 (emphasis added).
35. Andrea Gattini argues that the primary concern of courts when dealing with claims waived through international settlement is that they are perceived as inherently nonjusticiable, even if the judges deciding the cases do not expressly enunciate this view. She states, “Even if the [nonjusticiability] argument is not always clearly articulated, domestic courts are aware that the complex issues of post war settlements exceed the scope of their jurisdiction and should therefore be left to governments, which are in a better position to reach overall satisfactory and internationally binding settlements.” Gattini, supra note 3, at 384.
Undoubtedly, international law has developed since Ware, but its essential principle—that through enacting treaties, governments have control over the war-related claims of their citizens—is still the prevailing view. In fact, Ware was recently cited in *Hwang Geum Joo v. Japan*, a 2006 decision of the Court of Appeals for the District of Columbia involving claims against Japan by WWII-era “military comfort women” from various East Asian countries (including China). The court explained: “[c]ontrary to [the Ware rule], the [“military comfort women”] insist the treaties between Japan and [their nations] preserved the claims of individuals by failing to mention them.” The D.C. Circuit was unsympathetic to their argument, however, refusing to interpret the respective treaty provisions, and dismissing their claims as involving nonjusticiable political questions.

In contrast with the traditional rule allowing governments complete jurisdiction over their citizens’ claims, a noted scholar of international law has remarked: “[t]he right of states to dispose of claims is increasingly being challenged.” This results in part from an increasing worldwide...
sensitivity regarding human rights issues, as codified in international agreements,\textsuperscript{42} and the perception that individuals possess complete ownership of their own right to bring compensation claims for wrongs they have suffered.\textsuperscript{43} Although there is little evidence to indicate that courts are following this ideological shift, and no clear indication of the restrictions, if any, imposed upon a government’s ability to waive individual claims via treaty,\textsuperscript{44} one compelling theory of limitation on the traditional rule is the \textit{jus cogens} exception.\textsuperscript{45}

\textbf{C. The Jus Cogens Exception}

Perhaps the most persuasive potential limitation on governmental waivers of claims is the proposition that individual claims for breaches of \textit{jus cogens} norms cannot be waived.\textsuperscript{46} \textit{Jus cogens} norms, also commonly referred to as “peremptory norms,” are a body of the most supreme human rights protections considered common to and binding upon all na-

\textit{Id.}


\textsuperscript{43} Jon M. Van Dyke, \textit{The Fundamental Human Right to Prosecution and Compensation}, 29 DENV. J. INT’L L. & POL’Y 77, 86 (2001) (“[C]laims based on violations of law are a form of property that cannot be cavalierly waived by a nation . . . .”).

\textsuperscript{44} Winn, \textit{supra} note 7, at 826, 829.

\textsuperscript{45} See \textit{id.} at 829. Winn mentions an “alternative forum principle” as another possible limitation on a government’s ability to waive claims:

[An] alternative forum principle . . . requires a state to offer an alternative forum such as a special tribunal [in exchange for waiving claims]. . . . An alternative forum serves a middle ground. . . . While the individual retains at least some right to bring a claim, the waiving state serves its interests in judicial efficiency and minimization of potentially aggravating claims by raising the burden of proof or by offering less stringent procedural protections to the claimant.

\textit{Id.} at 827–28. In \textit{Dames & Moore v. Regan}, 453 U.S. 654 (1981), the U.S. Supreme Court seemed to apply a version of this principle when it held that the executive branch of the U.S. government had legally waived the claims of its citizens taken hostage in Iran by creating a separate arbitration “claims tribunal” where the aggrieved could bring their claims. \textit{id.} at 686–87 (“Our conclusion [that the president legitimately waived the plaintiffs’ claims against Iran] is buttressed by the fact that the means chosen by the President to settle the claims of American nationals provided an alternative forum, the Claims Tribunal, which is capable of providing meaningful relief.”). However, Winn contends that this rule is probably limited to claims of foreign individuals waived by executive order, and that war compensation claims waived by treaty are not within its scope. See Winn, \textit{supra} note 7, at 828.

\textsuperscript{46} See Van Dyke, \textit{supra} note 43, at 86 (“Treaties and amnesty agreements purporting to waive claims [for violations of basic norms of human decency] or exonerate human rights abusers . . . have no . . . validity . . . .”).
Generally accepted *jus cogens* norms include prohibitions against military aggression, genocide, racial discrimination, torture, and slavery.\(^{47}\) Even before the nomenclature came into popular usage, the concept underlying *jus cogens* norms carried weight among judges, who began to characterize certain rights as “fundamental,” “inherent,” or “inalienable.”\(^{49}\) The Vienna Convention codifies the concept and defines a *jus cogens* norm as “a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.”\(^{50}\) The Vienna Convention further states that any treaty conflicting with a *jus cogens* norm is per se invalid.\(^{51}\) Therefore, though creatures of customary international law, *jus cogens* norms are such significant human rights safeguards that they override any conflicting treaty provision, even trumping the “clear import” interpretation rule of treaties.\(^{52}\) As an example, two bordering nations cannot contract through treaty to jointly massacre an unwelcome ethnic minority population common to both nations; the *jus cogens* norm against genocide would render their treaty null and void under international law.\(^{53}\)

Despite the significance and weight of *jus cogens* norms in international law, it remains unclear whether claim waivers for their violation can or should be invalidated.\(^{54}\) Notwithstanding this lack of clarity, there is considerable support for the proposition that courts should not allow governments to waive *jus cogens* claims, the most influential of which is the


\(^{48}\) See id. at 488–89; *Restatement (Third) of Foreign Relations Law* § 702, cmt. n (1987) (“Not all human rights norms are peremptory norms (*jus cogens*), but those in clauses (a) to (f) of this section [including clause (b), ‘slavery or slave trade,’] are, and an international agreement that violates them is void.”); International Law Commission, Articles on Responsibility of States for International Wrongful Acts (2001), art. 40, cmts. 4–5, available at [http://untreaty.un.org/lc/texts/instruments/english/commentaries/9_6_2001.pdf](http://untreaty.un.org/lc/texts/instruments/english/commentaries/9_6_2001.pdf) [hereinafter Articles on Responsibility of States]. Among a number of generally accepted peremptory norms, the Commission lists prohibitions against “slavery and the slave trade, genocide, and racial discrimination and apartheid.” *Id.* art. 40, cmt. 4.

\(^{49}\) See Brownlie, *supra* note 47, at 488.

\(^{50}\) Vienna Convention, *supra* note 25, art. 53.

\(^{51}\) *Id.* (“A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law.”).


\(^{53}\) See Brownlie, *supra* note 47, at 489.

\(^{54}\) See Winn, *supra* note 7, at 829.
work of the International Law Commission ("ILC"). In 2001, in its efforts to restate the international law regarding wrongful acts committed by sovereign nations, the ILC adopted the Articles on Responsibility of States for International Wrongful Acts ("Articles on Responsibility of States"). Article 40 of this work deals with state liability for breaches of \textit{jus cogens} norms. Article 41 provides that “[n]o state shall recognize as lawful a situation created by a serious breach within Article 40, nor render aid or assistance in maintaining that situation." The ILC’s commentary to Article 41 illuminates the Article’s intent by interpreting it to mean that not only are breaches of \textit{jus cogens} norms unlawful, but even a State’s ratification, whether explicit or implicit, of a previous breach is unacceptable, as it offends international principles and sentiments. Comment 9 to Article 41 specifies that an injured state cannot sanction harm sustained from another nation’s breach of a \textit{jus cogens} norm, “since the breach by definition concerns the international community as a whole [and] waiver or recognition induced from the injured State by the responsible State cannot preclude the international community interest in ensuring a just and appropriate settlement.” Therefore, according to the ILC’s rationale, claims for grave violations of human rights cannot be waived, as each and every violation is an international concern, not only a matter among several states, and the conscience of the international community would only be offended by neglecting to remedy, or at least entertain the claim for, such a breach.

Certain courts and judges have echoed the ILC’s sentiments in limiting a nation’s ability to escape accountability for breaches of \textit{jus cogens} norms. For example, in \textit{Regina v. Bow Street Metropolitan}, a case of the British House of Lords dealing with torture claims against a former Cuban head of state, the court rejected the defendant’s argument that he was exempt from liability under the doctrine of sovereign immunity. Lord

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55. In order to actualize Article 13 of the U.N. Charter, which delegates to the General Assembly the obligation to “initiate studies and make recommendations” toward international cooperation and international law’s development and codification, U.N. Charter art. 13, para. 1, the General Assembly established the International Law Commission in 1947 for the “promotion of the progressive development of international law and its codification.” G.A. Res. 174 (II), U.N. Doc. A/519 (Nov. 21, 1947).
56. \textit{Id.} art. 40.
57. \textit{Id.} art. 41.
58. \textit{Id.} art. 41, cmts. 1–14.
59. \textit{Id.} art. 41, cmt. 9 (emphasis added).
60. \textit{Id.} art. 41, cmt. 9 (emphasis added).
61. \textit{Regina v. Bow St. Metro. Stipendiary Mag., Ex Parte Pinochet Ugarte}, 1 A.C. 147 (1999). Under the traditional doctrine of sovereign immunity, a nation (or one of its official representatives) acting within its “sovereign character” will not be made subject
Phillips stated: as “torture is prohibited by international law and . . . the prohibition against torture has the character of *jus cogens*[,] . . . it is . . . accepted that officially sanctioned torture is forbidden by international law.”

In *Al-Adsani v. United Kingdom*, although the ECHR refused to deny Kuwait’s sovereign immunity defense against a torture claim, eight of the seventeen judges dissented, arguing that as a rule of *jus cogens*, and therefore “hierarchically higher than any other rule of international law,” a torture claim overrides a government’s ability to disregard it and to escape liability by invoking the sovereign immunity defense. Although these European cases deal primarily with the sovereign immunity defense, not treaty waivers, they are emblematic of the trend in international law reflected in the substance of the ILC’s Articles on Responsibility of States. They echo the ILC’s premise that governments should not be allowed to disregard or ratify claims for breaches of *jus cogens* norms. Judging from this trend, a persuasive argument can be made that governments must not be permitted to waive the claims of their citizens when such claims are for breaches of *jus cogens* norms, as international law regards them as supreme—almost sacred—rules with powerful overriding capabilities.

to the jurisdiction of a foreign court without such nation’s consent. See Schooner Exchange v. McFaddon & Others, 11 U.S. 116, 123–25 (1812). However, this doctrine has largely given way in modern times to a more limiting theory of sovereign immunity, where a nation will be unable to invoke the defense for acts arising out of its capacity as a commercial player. E.H. Schopler, Annotation, *Modern Status of the Rules as to Immunity of Foreign Sovereign from Suit in Federal or State Courts*, 25 A.L.R. 3d 322 § 2 (1969) (“Growing concern for individual rights and public morality, coupled with the increasing entry of governments into what had previously been regarded as private pursuits, has led a substantial number of nations to abandon the absolute theory of sovereign immunity in favor of a restrictive theory, under which a foreign sovereign is not granted immunity from suit where the action arises out of its commercial activities, as distinguished from acts done in its sovereign capacity.”).

64. *Id.* at 111–12 (Rozakis, J., Caflisch, J., Wildhaber, J., Costa, J., Cabral Barreto, J., & Vadic, J. dissenting).
65. See Articles on Responsibility of States, *supra* note 47, art. 41, cmt. 9.
66. Andrea Gattini argues that, even if international law does not yet recognize claims for violations of *jus cogens* norms that have been waived by a claimant’s nation, the acknowledgment of such claims could ensure legitimate international settlements:

*[G]overnments . . . are in a [good] position to reach overall satisfactory and internationally binding settlements. It does not, however, follow that states are free to waive any claim and to reach any settlement: they may not reciprocally condone violations of those rules of humanitarian law which belong to *jus co-
II. THE ECHR’S “LEGITIMATE AIM” TEST: PRINCE HANS-ADAM II OF LIECHTENSTEIN V. GERMANY

A. Background of the Prince’s Claims and Chapter 6 of the Convention on the Settlement of Matters Arising Out of the War and the Occupation

Prince Hans-Adam II’s claims arose out of events immediately following WWII. His father, a monarch of the German-speaking state of Liechtenstein, which was a neutral power during the war, owned a castle in the territory of present-day Czech Republic, in which were kept family treasures dating back to at least the eighteenth century, including a cherished family painting, Szene an einem römischen Kalkofen (“the Szene”). In 1945, the Czechoslovak government issued “the Beneš Decrees,” one of which, “Decree no. 12,” allowed for the “confiscation and accelerated allocation” of certain German-owned property remaining within the Czechoslovak territory in order to fulfill war reparations for the harms caused by Germany during the war. Thereafter, the Czechoslovak government confiscated the prince’s family castle, along with its accompanying personal property, including the Szene. In 1951, the prince’s father, in an attempt to reclaim his property, brought suit in the Bratislava Administrative Court, which dismissed his petition, interpreting the monarch as a German national within the meaning of the Beneš Decrees, and therefore subject to the confiscation measures therein.

In 1952, France, Germany, the United Kingdom, and the United States signed the Convention on the Settlement of Matters Arising Out of the War and the Occupation (“Settlement Convention”). Chapter 6 of the Settlement Convention states that Germany shall “in the future raise no objections against the measures which have been, or will be, carried out with regard to German external assets or other property . . . seized . . . by the Three Powers with other Allied countries, neutral countries or former allies of Germany.” Chapter 6 thus waives claims regarding German
property seized outside of its borders in the aftermath of WWII. Furthermore, Chapter 6 affirms that “[n]o claim or action shall be admissible against [...] international organizations, foreign governments or persons . . . ” and is therefore unambiguous and express, clearly denoting that all German claims with regard to confiscated external property, including individual claims, are to be relinquished.74

In 1991, the prince discovered that the City of Brno, Czech Republic, loaned the Szene to the Cologne municipality, and he obtained an interim injunction from the Cologne Regional Court ordering the Szene to be delivered to a temporary bailiff.75 From 1992 to 1998, the prince fiercely litigated through the German courts in an attempt to reclaim his father’s painting.76 However, the German courts consistently found that Chapter 6 of the Settlement Convention waived his claims, agreeing with the 1951 Bratislava Administrative Court decision that interpreted the monarchs as German nationals.77

B. The ECHR Appeal and the “Legitimate Aim” Test

In 1998, the prince filed an appeal with the European Court of Human Rights, claiming, inter alia, that by dismissing his claims on the basis of Chapter 6, the German courts had unfairly restricted his right of access to the courts and thereby violated Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”).78 The ECHR found that under its body of case law, the right of access to the court expressed in Article 6 of the European Convention may be subject to limitations.79 Placing the burden of proof on the waiving nation, the court proposed that in order to validate a limitation on an individual’s right of access to the courts, three elements need to be proved: (1) the limitation needs to pursue a legitimate aim; (2) such legitimate aim and the means employed to secure it must bear a “reasonable relationship of proportionality” to each other; and (3) the limitation must not completely obliterate or impede the “very essence” of the individual’s right of access to the court.80 Therefore, in order to determine

74. Id. ch. 6, art. 3(3) (emphasis added).
76. Id. at 10–15.
77. Id.
78. Id. at 21. Article 6 of the Convention reads in pertinent part: “[i]n the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing . . . .” European Convention for the Protection of Human Rights and Fundamental Freedoms art. 6(1), Nov. 4, 1950, 213 U.N.T.S. 221.
80. Id.
whether the claim waiver expressed in Chapter 6 of the Settlement Convention validly waived the prince’s claims, the ECHR applied this “legitimate aim” test.\footnote{Id. at 25–31.}

With regard to the first prong, the ECHR determined that Germany had a legitimate aim in waiving claims for postwar property confiscation via Chapter 6 of the Settlement Convention.\footnote{Id. at 27.} It found that the Allied Powers’ victory and occupation of Germany immediately following the war stripped the defeated power of its sovereignty and consigned it “under the supreme authority of the [Allied Powers].”\footnote{Id. at 25–26.} Indeed, the Allied Powers retained the ability to exercise broad rights over Germany and maintained military forces therein.\footnote{Id.} Considering this backdrop, Germany at the time of the Settlement Convention could hardly afford to negotiate with the Allies on equal terms and at arm’s length; instead, it was in a highly compromised position, forced to barter for the return of its very sovereignty over its internal and external affairs.\footnote{Id. at 26–27.} Under these circumstances, Germany’s waiver of individual property claims expressed in Chapter 6 was proper in light of the legitimate aim to re-secure its national sovereignty.\footnote{Id. at 27.}

The ECHR also found the second prong, the proportionality requirement, fulfilled as to the legitimate aim of recovering state sovereignty.\footnote{Id. at 29.} In weighing the interests of the prince in bringing his claim against the legitimate aim of the government in achieving sovereignty and unity, the court “attache[d] particular significance to the nature of the applicant’s property claims in respect of the painting . . . .”\footnote{Id. at 28.} It held that an interest in litigating such claims “was not sufficient to outweigh the vital public interest in regaining sovereignty and unifying Germany.”\footnote{Id. at 29.} In consequence, the means of terminating property claims using the Chapter 6 waiver was found proportionate to Germany’s legitimate aim of attaining sovereignty.\footnote{Id.}

As to the third prong of the legitimate aim test, whether the limitation frustrates the “very essence” of the individual’s claim, the ECHR determined that the waiver did not impair the essence of the prince’s right to

\begin{footnotes}
\item[81] Id. at 25–31.
\item[82] Id. at 27.
\item[83] Id. at 25–26.
\item[84] Id.
\item[85] Id. at 26–27.
\item[86] Id. at 27.
\item[87] Id. at 29.
\item[88] Id. at 28.
\item[89] Id. at 29.
\item[90] Id.
\end{footnotes}
bring his claim. Although the court did not provide a clear analysis of this prong, the basis of its determination can be inferred from its suggestion that there was a more proper forum for the prince’s claim—to wit, the Czech or Slovak Republics—and that his father had already brought his claim in Czechoslovakia in 1951. The ECHR appeared to suggest that if there were another forum that the claimant has (or had) access to, the “very essence” of his or her right would not be frustrated. Accordingly, since the prince’s father had already brought the claim before the Bratislava Administrative Court, the ECHR determined that the “very essence” of his right had not been impaired by the waiver. As a result of the court’s findings, the waiver of Chapter 6 was upheld as valid over the prince’s claim.

Although it is questionable whether the ECHR’s legitimate aim test was correctly or fairly applied in the Liechtenstein case, it could still serve as an effective method for balancing the interests of individuals in bringing their war-related claims against the governmental interest in securing policy goals by waiving such claims through peace treaties.

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91. Id.
92. “[The ECHR] reached the conclusion that the [‘very essence’] condition was satisfied, by rather clumsily drawing on the existence of the other two conditions.” Gatti
ni, supra note 13, at 533.
93. Liech., 2001-VIII Eur. Ct. H.R. 1, at 28–29 (“[T]he exclusion of German jurisdiction did not affect the great majority of such cases where property had remained within the territory of the expropriating State. The genuine forum for the settlement disputes in respect of these expropriation measures was, in the past, the courts of the former Cze
choslovakia and, subsequently, the courts of the Czech or Slovak Republics. Indeed, in 1951 the applicant’s father had availed himself of the opportunity of challenging the expropriation in question before the Bratislava Administrative Court.”).
94. Id.
95. Id.
96. Id.
97. See Winn, supra note 7, at 816–17. Winn criticizes the ECHR’s decision and writes that “[the prince’s] situation is Kafkaesque: he is a citizen of a neutral country who, after being deemed German by a court in Bratislava, has been unable to compel the return of a painting confiscated as part of a World War II reparation scheme between Germany and Czechoslovakia.” Id. at 816. Winn continues to describe “three violations of rights guaranteed to the prince under international law” that the ECHR failed to remedy, namely, “(1) confiscation of the prince’s property by a foreign state without compensation; (2) determination of the prince’s citizenship by a foreign state; and (3) imposition on the prince of a treaty not signed by Liechtenstein.” Id. at 816–17.
III. CHINESE WWII SLAVE LABOR LITIGATION IN JAPAN AND CHINA’S WAIVER OF CLAIMS IN ARTICLE 5 OF THE JOINT COMMUNIQUÉ

A. Origins of Slave Labor Litigation in Japan

In order to relieve internal labor shortages during the course of WWII, from 1942 to 1945 the Japanese government orchestrated the abduction and transportation to Japan of approximately 37,500 Chinese slave laborers.\(^8\) After arrival in Japan, the laborers were subjected to extreme hardship, including illness, severe working conditions, malnutrition, and violence.\(^9\) Owing to the harshness of their treatment, about 17.5% of the slave laborers brought to Japan died during the course of the ordeal.\(^10\) After Japan’s defeat and the conclusion of the war, it signed a formal peace treaty with most of the Allied Powers in 1951 in San Francisco (“San Francisco Treaty”).\(^11\) Although Article 14 of the San Francisco Treaty expressly waives all present and future war compensation claims of the Allied Powers and their nationals,\(^12\) China (along with several other nations previously in conflict with Japan) was not a party to the treaty.\(^13\) Recognizing that the San Francisco Treaty was incomplete without the inclusion of all relevant parties, it authorized Japan to enact bilateral peace treaties with nonparticipating nations.\(^14\) In 1972, Japan endeavored to complete one of these bilateral peace treaties by signing a Joint Communiqué with the People’s Republic of China.\(^15\) Article 5 of

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8. Lü Zhigang v. Nishimatsu Constr., 1969 HANREI JIHÖ 31, 32 (Sup. Cl., Apr. 27, 2007). The number of Korean slave laborers transported to Japan during the same period is estimated at approximately 290,000. Id.

9. Id. at 32–33.

10. Id. at 33.


12. Id. ch. V, art. 14(b) (“[T]he Allied Powers waive all reparations claims of the Allied Powers, other claims of the Allied Powers and their nationals arising out of any actions taken by Japan and its nationals in the course of the prosecution of the war, and claims of the Allied Powers for direct military costs of occupation.”).


the Joint Communiqué reads: “[t]he Government of the People’s Republic of China declares that in the interest of the friendship between the Chinese and the Japanese peoples, it renounces its demand for war reparation from Japan.”

There is no further explanation or definition of the term “war reparations” found in the Joint Communiqué, however, leaving the reader unsure as to whether the waiver is meant to include individual compensation claims by victims of war, or simply refers only to governmental claims. A formal peace treaty between the two nations was eventually signed in 1978, in which the terms of the Communiqué were ratified.

B. The Japanese Judiciary’s Treatment of Article 5 of the Joint Communiqué

In 1986, the People’s Republic of China established a law that made it permissible for Chinese nationals to travel outside of their nation’s borders, enabling Chinese WWII victims to bring their claims in Japanese courts. Consequently, following the example of earlier Korean slave labor litigation, a group of Chinese slave labor plaintiffs brought their first suit in Tokyo District Court in 1995 against the copper mining firm under which they were forced to work during the war. In holding that the plaintiffs’ claims were barred under the Civil Code’s statute of limitations for tort claims, the Tokyo District Court avoided addressing the merits of their claims. This case initiated a trend among Japanese judges handling Chinese slave labor cases—that of dismissing war compensation claims by utilizing a handful of defenses before getting to a discussion of their merits.

106. Joint Communiqué, supra note 17, art. 5.
107. Id.
108. Treaty of Peace and Friendship, supra note 18 (“Confirming that . . . the Joint Communiqué constitutes the basis of the relations of peace and friendship between the two countries . . . the principles enunciated in the Joint Communiqué should be strictly observed . . .”).
111. MINPO, art. 724 (“The right to demand compensation for damages which has arisen from an unlawful act shall lapse by prescription if not exercised within three years from the time when the injured party or his/her legal representative became aware of such damage and of the identity of the person who caused it, the same shall apply if twenty years have elapsed from the time when the unlawful act was committed.”).
112. Kajima, 988 HANREI TAIMUZU at 254.
113. See Webster, supra note 14, at 753–54. Webster states that statutes of limitations and government immunity are the two most widely used defenses applied by Japanese courts in the slave labor context. He proceeds to describe these defenses as technical and
Initially favoring Article 5 of the Joint Communiqué as an effective legal defense, Japanese courts were largely successful in disposing of Chinese claims by concluding that, *ipso facto*, any Chinese citizen’s individual claim arising out of WWII had been settled by agreement of both governments and was thus barred.\(^\text{114}\) Despite this trend, as the below cases demonstrate, several district court judges gradually began to refuse to follow their colleagues’ formalist interpretation of Article 5 by scrutinizing the ambiguous language in a larger context of international policy and fairness.

In 2002, analyzing the scope of Article 5’s waiver of claims, the Fukuoka District Court in *Chinese Victims of Forced Labor v. Mitsui Mining* assigned particular significance to a 1995 statement by the Chinese foreign minister in which he expressly denied that the People’s Republic of China had any intention of including individual claims when it negotiated Article 5’s waiver, declaring instead that it was meant to be limited to the government’s war reparation claims.\(^\text{115}\) The Fukuoka court determined that this affirmation clarified the ambiguity in China’s waiver and allowed the Chinese plaintiffs in this case to bring their claims on the merits.\(^\text{116}\)

In *Chinese Victims of Sexual Violence v. Japan*, a case involving WWII Chinese “military comfort women,” the Tokyo District Court examined the ambiguity of the phrase “war reparations” in Article 5 of the Joint Communiqué.\(^\text{117}\) It distinguished “war reparations” from the phrase “compensation for injury,” the former being inherently a state issue and the latter being payment for a claim that only an individual can bring.\(^\text{118}\) Based on this distinction, the Tokyo District Court held that the clear import of the provision illustrates that the waiver in Article 5 applies only to the Chinese government’s “war reparations,” not to individual compensation claims.\(^\text{119}\)

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\(^{115}\) See *Chinese Victims of Forced Labor v. Mitsui Mining*, 1809 HANREI JIHÔ 111, 121 (Fukuoka Dist. Ct., Apr. 26, 2002).

\(^{116}\) *Id.*


\(^{118}\) *Id.*

\(^{119}\) *Id.* (“The Joint Communiqué should be interpreted within the basic framework of international law. Claims against our country as the assailing nation during the Second
In *Zhang Wenbin v. Rinko Co.*, arguably the greatest victory for slave laborer plaintiffs, the Niigata District Court also interpreted China’s waiver in Article 5 to refer only to governmental claims. The court emphasized that the language of the provision explicitly states that the government of the People’s Republic of China renounces all war reparations, but makes no mention that private, individual claims are to be relinquished. In reaching this conclusion (like the Fukuoka District Court in *Mitsui Mining*), the court in *Rinko* gave deference to official representations by Chinese public officials—particularly the 1995 statement of the Chinese foreign minister—in adhering to the interpretation of Article 5 as meaning only a renunciation of governmental claims.

In July 2004, the Hiroshima High Court in *Lü Zhigang v. Nishimatsu Construction* refused to construe Article 5 as barring the claims of Chinese slave labor victims forced to work in coal mines during the war, and reversed a district court decision in favor of the defendant companies. For similar reasons as the above-cited district court cases, it held that the claims China waived in Article 5 definitively stopped at government-specific war reparations, and that since individual claims were not at all mentioned, they should not be barred.
C. The Japanese Supreme Court's Review of Lü Zhigang v. Nishimatsu

In April 2007, the Supreme Court of Japan accepted the Nishimatsu case for review and, for the first time in the course of slave labor litigation in Japan, endeavored to determine the scope of Article 5’s waiver.127 The court admitted that the waiver was ambiguous and its scope undefined.128 Then it unanimously held that Article 5 should be interpreted as barring all Chinese citizens’ individual claims arising out of WWII, based primarily on two reasons: (1) the historical evidence shows that the Joint Communiqué was the product of negotiation and compromise between Japan and China, which were conditioned upon China accepting a conclusion to the war and the resolution of all outstanding issues in exchange for good consideration; and (2) the Joint Communiqué must be interpreted within the framework of the San Francisco Treaty, which had as its main goal the attainment of peace by means of settling all claims—including individual ones—and resolving outstanding issues.129

With regard to the first reason for finding that Article 5 waived individual claims, the supreme court looked at the historical background and negotiations behind the signing of the Joint Communiqué and found that China and Japan had demanded the acceptance of certain basic principles as preconditions to signing.130 The court stated that the Chinese government had three basic requirements: (1) that Japan recognize the communist government of the People’s Republic of China as the sole, legitimate, and lawful representative of China; (2) that Japan recognize Taiwan as the territory solely of the People’s Republic of China; and (3) that the Taipei Treaty between Japan and the Republic of China131 be deemed illegal and without effect.132 In contrast, Japan expected the People’s Republic of China to accept similar terms to those reflected in the Taipei Treaty and officially acknowledge the conclusion of WWII and the complete termination of all war reparation claims and other outstanding is-

128. Id. at 36 (“[I]t is unclear by just looking at [Article 5] whether its substance waives claims in addition to war reparations, and if it does, whether the waiver is meant to include individual claims by Chinese citizens.”) (author’s translation).
129. Id. at 36–37.
130. Id.
131. Taipei Treaty, supra note 105. The obvious reason the People’s Republic of China was so interested in invalidating the Taipei Treaty was because it was signed by its competing, noncommunist, Chinese government, the Republic of China, which it, of course, did not recognize.
sues. The court illustrated that, from these different viewpoints, through much effort and negotiation, both countries acceded to each other’s demands and came to mutual understanding and agreement, the terms of which were memorialized in the Joint Communiqué (albeit imperfectly since it failed to clearly enunciate a waiver of individual claims). From this historical context of negotiation and mutual effort toward postwar stabilization, the court concluded that both nations intended the Joint Communiqué to be a peace treaty of great significance with the force to bring the war, all outstanding issues, and all related claims—including all individual claims—to a definitive end.

In addition, the Court determined that, as a component of the series of events that comprise WWII’s epilogue, the Joint Communiqué should be understood and interpreted only within the framework of the San Francisco Treaty, the primary peace treaty governing postwar matters between Japan and its enemies, and should not deviate from its substance or purport. The court reasoned that the parties to the San Francisco Treaty, understanding that individual claims would obstruct their critical goal of establishing a conclusion to the war and overarching peace, wisely crafted the treaty to cause all parties to specifically waive all claims. Because the claims waiver of Article 5 of the Joint Communiqué should be interpreted only within this framework, the court concluded, it should be construed to include individual claims, as does the San Francisco Treaty. Therefore, the Chinese plaintiffs were found to have no right to

133. Id. In contrast with the ambiguity in Article 5 of the Joint Communiqué, Article 11 of the Taipei Treaty incorporates the San Francisco Treaty, which explicitly waives individual claims; by extension, the Taipei Treaty also waives all individual claims. Taipei Treaty, supra note 105, art. 11 (“Any problem arising between the Republic of China and Japan as a result of the existence of a state of war shall be settled in accordance with the relevant provisions of the San Francisco Treaty.”). The court in Nishimatsu argued that Japan relied on the terms in the Taipei Treaty during the negotiation process that preceded the signing of the Joint Communiqué, despite the fact that the People’s Republic of China was not a party to the Taipei Treaty. 1969 HANREI JIHÔ at 36. It looked at the subjective intent of the Japanese government during the negotiation process and found that, “with regard to the conclusion of war [between Japan and China] and the termination of all war reparation and other claims, the Japanese government could only but rely on the premise that all these matters had already been resolved in the [Taipei Treaty] in a formal manner.” Id. (author’s translation).

134. Id. at 36–37.

135. Id.

136. Id. at 37.

137. Id. at 34–35.

138. Id. at 37.
bring suit; their claims were deemed to be waived, as understood within the overarching framework of WWII’s conclusion.\textsuperscript{139}

The effect of \textit{Nishimatsu} is that it conclusively legitimizes Article 5’s waiver within the Japanese courts and clarifies its ambiguity by determining that it extends to both government war reparation and individual claims.\textsuperscript{140} Since Japan is a civil law country without a firm doctrine of \textit{stare decisis}, the structure of the court system is such that the Supreme Court’s decisions are technically not binding on inferior courts.\textsuperscript{141} However, the decisions are nonetheless tremendously influential and followed almost without exception.\textsuperscript{142} \textit{Nishimatsu} leaves a strong precedent for lower courts to follow, and it is highly unlikely that it would ever be contradicted by a lower court.\textsuperscript{143} It would appear that hereafter, Chinese WWII-era victims have very little chance of having their claims heard in Japan.

IV. THE LEGITIMATE AIM TEST APPLIED TO WWII CHINESE SLAVE LABOR LITIGATION IN JAPAN

This Note proposes that, because of the ambiguity in Article 5 of the Joint Communiqué,\textsuperscript{144} the ECHR’s “legitimate aim” test is appropriate to

\textsuperscript{139} Id.

\textsuperscript{140} See id.

\textsuperscript{141} CHARLES F. GOODMAN, JUSTICE AND CIVIL PROCEDURE IN JAPAN 444 (2004) (“A decision of the [Japanese] Supreme Court, like all other judgments, binds only the parties to the action in front of the court. The civil law does not recognize \textit{stare [sic] decisis} and hence the court’s reasoning is, in theory, not controlling on the lower courts in future cases.”).

\textsuperscript{142} Id. Goodman explains that Japan’s Civil Code strongly encourages uniformity within Japanese case law, which “in essence direct[s] the [lower courts] to follow the Supreme Court’s precedent—as if it were \textit{stare [sic] decisis}.” Id.


\textsuperscript{144} Since the Japanese Supreme Court in \textit{Nishimatsu} found that Article 5’s waiver was ambiguous, see \textit{Nishimatsu}, 1969 HANREI JIHÔ at 36, even while holding that the
apply to the slave labor situation in Japan to determine whether the Chinese government legitimately waived the claims of its citizens, and therefore, whether the conclusion of the Japanese Supreme Court—that Article 5 applies to all Chinese claims—should be overturned. In applying the ECHR’s test, a court would have to determine whether the Chinese government: (1) had a legitimate aim in waiving the claims of individual victims of war; (2) this waiver of claims was a proportional means to that legitimate aim; and (3) the “very essence” of the Chinese litigants’ right to bring their claims was not impaired by the waiver. It becomes clear, when applying the legitimate aim test, that a court would likely determine that the ambiguous waiver does not legitimately annul the claims of the Chinese individual plaintiffs and would allow their claims to proceed on the merits.

A. The Legitimate Aim Element

A court would likely find that the People’s Republic of China had a legitimate aim in waiving its citizens’ war-related claims through Article 5 of the Joint Communiqué. In determining that Germany had a legitimate aim in waiving postwar property claims, the ECHR focused on the fact that Germany was in a highly compromised position, with the pressing need to regain its sovereignty following the war. In contrast, when the People’s Republic of China signed the Joint Communiqué, bloodshed and warfare had ended two decades earlier, and the communist government was securely established, albeit not unanimously recognized by all other world powers. Based on the historical facts enumerated by the Japanese Supreme Court, China’s primary purpose for entering into the Joint Communiqué was to obtain Japan’s legal recognition of its newly established communist government and its complete ownership of the territory of Taiwan. In addition, China had the overarching goal of reestablishing friendly relations and economic intercourse with Japan. These are certainly weighty policy considerations, but clearly the temporal and situational circumstances of China were not nearly as grave as

146. See id. at 25–27.
147. See Nishimatsu, 1969 HANREI JIHÔ at 34.
148. See id. at 36.
149. See generally Joint Communiqué, supra note 17.
they had been for Germany at the time it waived its citizens’ claims, and therefore the purpose in waiving was not as significant.

Though it may be useful for challengers of the waiver to distinguish the goals of the waiving nations by degree of urgency, ultimately, it would probably do little to persuade a court that the People’s Republic of China did not have a legitimate aim under these facts. Certainly, Germany’s situation was extreme, and obviously, it had a legitimate purpose because it had no choice but to waive the claims of its citizens at the time. However, that does not mean a less extreme situation, like China’s at the time of the Joint Communiqué, would not also be legitimate, as long as it was not frivolous or unwarranted. Therefore, since the People’s Republic of China did have significant policy justifications for Article 5’s waiver, though by degree not as compelling as Germany’s, a court would likely find that China had a legitimate aim.

B. The Proportionality Element

A court would probably find that the individual claim waiver of Article 5 did not bear a “reasonable relationship of proportionality” to China’s legitimate goal of attaining legal recognition from and establishing a collegial relationship with Japan. The court in Liechtenstein considered Prince Hans-Adam II’s property claim insufficient to “outweigh the vital public interest in regaining sovereignty and unifying Germany.” It then concluded that Germany’s action of waiving such property claims was reasonably proportionate to its legitimate aim of reestablishing itself. In contrast with property appropriation, however, there appears to be general consensus that the prohibition against slave labor is an accepted jus cogens norm. It is clear that jus cogens norms have increasingly powerful influence in international law, and waivers of jus cogens breaches should be taken particularly seriously. Furthermore, Germany’s situation at the time it waived its citizen’s property claims was much more critical than China’s at the time it signed the Joint Communiqué. Under these circumstances, the balance between a waiver of jus cogens slavery claims against China’s primary aim of legal recognition appears much less proportional, especially when compared with the balance that was drawn between Germany’s grave circumstances and its waiver of

151. See id. at 23 (discussing the proportionality element).
152. Id. at 29.
153. Id.
154. See supra note 48 and accompanying text.
155. See Articles on Responsibility of States, supra note 48, art. 41, cmts. 1–14.
156. See discussion supra Part IV(a).
relatively impotent property claims in the Liechtenstein case. Accordingly, the scales tip in favor of the Chinese litigants owing to the gravity of their *jus cogens* claims, creating a stark imbalance. Therefore, after finding that *jus cogens* claims had been waived for relatively insubstantial reasons, a court would likely find that Article 5 was not proportional to China’s legitimate aim.

C. The “Very Essence” Element

A court would probably find that the “very essence” of the right of Chinese slave labor victims to have their claims heard is impeded by Article 5’s waiver. The court in *Liechtenstein* was impressed by the fact that there was another, more appropriate, forum for the plaintiff’s claims in Czechoslovakia and thereby determined that the very essence of his right had not been impeded by his nation’s waiver. Thus, the court illustrated that the very essence of a claimant’s right to bring a claim is not impeded by a treaty waiver when there exists another forum in which to bring his or her claims. In the case of the Chinese slave labor victims, it would be difficult to imagine a more appropriate forum than Japan. As in Czechoslovakia, all possible defendants reside in the country (in this case, Japan), and it is the locus where the protested activity took place. Indeed, there does not appear to be any other tenable forum for the Chinese plaintiffs. Thus, the litigants would be left without anywhere to bring their claims and be likely to convince a court that the very essence of their right is impaired by Article 5’s waiver.

157. Andrea Gattini remarks on this, suggesting that Prince Hans-Adam II’s claim might have succeeded if the underlying harm he suffered was a *jus cogens* violation, not just a mere appropriation of property:

["U"]nder what conditions could or should a state disregard an obligation it undertook not to allow claims or actions relating to property seized under certain circumstances elsewhere? The answer is, when the seizure was a breach of a peremptory norm of international law. It is difficult to characterize the Benes Decrees in that way...

Gattini, *supra* note 13, at 544.


159. *See id.*

160. In fact, several Chinese and other WWII victims have filed actions against the Japanese government and certain Japanese corporations in the United States, but they have been unsuccessful, as American courts have largely refused to entertain their claims. *See generally* Haberstroh, *supra* note 14 (providing a discussion of WWII slave labor lawsuits in U.S. courts and an accounting of the plaintiffs’ failures therein). Even if American courts decided to entertain such cases, it would be a much more incongruous and inappropriate forum than the Japanese courts.
Therefore, the Chinese government’s waiver in Article 5 would likely fail the ECHR’s legitimate aim test in Liechtenstein and be declared invalid.

CONCLUSION

When applied to slave labor litigation in Japan, the legitimate aim test would likely weigh in favor of the Chinese slave labor plaintiffs, causing the claim waiver in Article 5 of the Joint Communiqué to be invalidated as to individual claims and overturning the Japanese Supreme Court’s decision in Nishimatsu. In waiving the WWII Chinese victims’ individual claims through Article 5, though a court would be likely to find that the People’s Republic of China had a legitimate aim, it would also be likely to find that the waiver, in its termination of jus cogens claims, was not proportionate to that legitimate aim, and that the waiver frustrated the “very essence” of the Chinese victims’ claims because there does not exist any viable alternative forum in which to bring them.

By using the slave labor litigation scenario as a test case, it becomes apparent that the ECHR’s legitimate aim analysis offers a viable method for balancing the powers and interests of governments with the rights of individual victims of war. Since nations require functional and foreseeable rules in order to establish peace following warfare, the legitimate aim test should not apply unless the threshold question of ambiguity in a waiver provision has been answered; that is, for purposes of efficiency and public policy, if a treaty waiver is clear and unambiguous in relinquishing all individual claims, the question should end there, and the waiver should be upheld without any further analysis. However, when faced with an ambiguous treaty waiver, like Article 5 of the Joint Communiqué, the legitimate aim test provides the means to effectively weigh the traditional governmental power to waive all war-related claims through peace treaties against international law’s increasing concern for human rights and the individual’s right to judicial recourse for harms suffered.

From a human rights perspective, the ECHR’s test has great value. It places an emphasis on the “very essence” of the individual’s right to have his or her claim heard by requiring an alternative forum. In addition, it mandates that the government have sound policy reasons for

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161. See supra note 3 and accompanying text.

162. Since it is common for nations to be very specific in waiving claims postwar, see Gattini, supra note 3, at 366, it seems evident that governments would typically be able to avoid the legitimate aim test altogether by relying on the clarity of their well-tailored treaty language to dispel any claim of ambiguity.
waiving such claims,\textsuperscript{163} and thereby ensures that it does not dispense with them for frivolous or self-serving purposes. Finally, the legitimate aim test contains the proportionality requirement, which can serve as a valuable method for balancing the interests at stake and determining overall fairness. Perhaps most importantly, the proportionality requirement, in weighing the interests, allows a court to underscore the increasing international significance of \textit{jus cogens} norms, and to acutely assess instances where they are violated.

\textit{Nicholas S. Richard}\textsuperscript{*}

\textsuperscript{163} In most cases, it appears that governments would not have a difficult time coming up with a “legitimate aim.” Indeed, securing peace following warfare would almost always automatically seem to qualify as a legitimate aim. Therefore, the tension in future cases potentially applying the legitimate aim test would most likely be found in the “proportionality” prong. In this sense, it might be interesting to draw an analogy to U.S. constitutional law and the equal protection clause in regard to gender discrimination, where finding an “important governmental interest” for a gender classification is just the doorway to the more difficult question of whether the classification is “substantially related” to the achievement of governmental aims—in other words, whether the means of gender classification is “substantially related” (compare with “proportional”) to the “important governmental interest” (compare with “legitimate aim”) sought to be achieved. \textit{Cf.} Craig v. Boren, 429 U.S. 190 (1976).

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